No. 22-___

IN THE

Supreme Court of the United States

KEO RATHA, SEM KOSAL, SOPHEA BUN, YEM BAN, NOL NAKRY, PHAN SOPHEA, AND SOK SANG

Petitioners,

v.

PHATTHANA SEAFOOD CO., LTD. AND S.S. FROZEN FOOD CO., LTD.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For purposes of establishing specific personal jurisdiction, this Court has consistently held that defendants can be present in a forum so long as they *either* purposefully avail themselves of the privilege of doing business in that forum *or* purposefully direct their injurious conduct toward that forum.

In this case, the Ninth Circuit construed a federal anti-trafficking statute to incorporate the test for presence from this Court's specific jurisdiction case law—but then held that the statute could not be used to sue respondents in a U.S. court for their alleged role in human trafficking and forced labor. Even though respondents purposefully availed themselves of the privilege of doing business in the United States, the court of appeals held that they were not "present in the United States" because the harm to *petitioners* occurred overseas.

The questions presented are:

1. Whether, in an intentional tort case, purposeful direction is necessary to establish the presence of an out-of-forum defendant, as the Ninth Circuit held in this case, or whether purposeful availment suffices, as the Second, Seventh, Eleventh, and D.C. Circuits have held.

2. Whether, even if purposeful direction is the exclusive test for establishing that respondents were present in the United States, the Ninth Circuit erred by requiring that petitioners' injuries have occurred in the United States.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption on the cover page, two additional parties, Rubicon Resources, LLC and Wales & Co. Universe Ltd., were defendants-appellees below. Because the petition does not challenge the dismissal of the claims against those parties, they are not respondents here.

CORPORATE DISCLOSURE STATEMENT

The petitioners are natural persons to whom S. Ct. R. 29.6 does not apply.

RELATED PROCEEDINGS

Ratha, et al. v. Phatthana Seafood Co., et al., No. CV 16-4271 – JFW (ASx) (C.D. Cal.). Order Granting Phatthana Seafood Co.'s Motion for Summary Judgment Entered on Dec. 21, 2017.

Ratha, et al. v. Phatthana Seafood Co., et al., No. CV 16-4271 – JFW (ASx) (C.D. Cal.). Order Granting S.S. Frozen Food Co.'s Motion for Summary Judgment Entered on Dec. 21, 2017.

Ratha, et al. v. Phatthana Seafood Co., et al., No. 18-55041 (9th Cir.). Order Denying Rehearing En Banc and Amended Opinion Entered on May 31, 2022.

Ratha, et al. v. Phatthana Seafood Co., et al., No. 18-55041 (9th Cir.). Judgment Entered on February 25, 2022.

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INTRODUCTION

Since 2003, federal law has provided an express civil cause of action for victims of human trafficking. The Trafficking Victims Protection Reauthorization Act (TVPRA) authorizes plaintiffs to recover damages from "the perpetrator" of an array of criminal offenses "in an appropriate district court of the United States." 18 U.S.C. § 1595(a). Concerned that existing anti-trafficking remedies didn't reach far enough, Congress amended the TVPRA in 2008 to authorize "extra-territorial jurisdiction" over six predicate offenses—so long as the defendant is a U.S. citizen or lawful permanent resident, *id.* § 1596(a)(1), or "is present in the United States." *Id.* § 1596(a)(2). This formulation was not new; when Congress has elsewhere provided remedies for serious transnational or extraterritorial crimes, it has often conditioned federal jurisdiction on the defendant's nationality or presence. *See, e.g.*, 18 U.S.C. § 2340A(b) (torture).

Petitioners are seven Cambodian nationals who allege that they were trafficked into forced labor at Thai factories to process seafood for the U.S. market. They brought suit under the TVPRA, claiming that respondents engaged in peonage, forced labor, involuntary servitude, and human trafficking—each of which is a qualifying extraterritorial offense under the 2008 amendment to the TVPRA. *See id.* § 1596(a).

The Ninth Circuit rejected petitioners' claims. Tying whether respondents were "present in the United States" to whether they were properly subject to personal jurisdiction in U.S. courts, the panel held that a foreign defendant could be sued in a forum state for intentional torts only if it "(1) committed an intentional act, (2) expressly aimed at the forum state,

(3) causing harm that the defendant knows is likely to be suffered in the forum state." Pet. App. 27a. Thus, even though respondents purposefully availed themselves of the privilege of doing business in the United States (and conceded their amenability to personal jurisdiction), the panel held that they were not "present in the United States" because petitioners were harmed outside of the forum.

The court of appeals' analysis conflicts with both this Court's and other circuits' precedents in two independent ways. First, by conditioning respondents' presence on the purposeful direction test derived from *Calder* v. *Jones*, 465 U.S. 783 (1984), the decision squarely conflicts with rulings from the Second, Seventh, Eleventh, and D.C. Circuits. Each of those courts have held, in analogous circumstances, that presence can be established by showing purposeful availment. *See, e.g.*, *Atchley* v. *AstraZeneca UK Ltd.*, 22 F.4th 204 (D.C. Cir. 2022); *Louis Vuitton Malletier, S.A.* v. *Mosseri*, 736 F.3d 1339 (11th Cir. 2013); *Licci ex rel. Licci* v. *Lebanese Can. Bank, SAL*, 732 F.3d 161 (2d Cir. 2013); *uBID, Inc.* v. *GoDaddy Grp., Inc.*, 623 F.3d 421 (7th Cir. 2010). *See generally Lexington Ins. Co.* v. *Hotai Ins. Co.*, 938 F.3d 874, 878 (7th Cir. 2019) (Barrett, J.) ("[T]he defendant's contacts with the forum state must show that it purposefully availed [itself] of the privilege of conducting business in the forum state *or* purposefully directed [its] activities at the state." (alterations in original; emphasis added; internal quotation marks omitted)).

Second, even if purposeful direction is the only way to establish the presence of an out-of-forum defendant under § 1596(a)(2), the Ninth Circuit's holding that petitioners' injuries had to take place in the forum conflicts with *Calder* itself. The central premise of

Calder's "effects test" is that the defendant's wrongful conduct need not *occur* in the forum; it need only produce *effects* there. As Justice Thomas wrote for the Court in *Walden* v. *Fiore*, 571 U.S. 277 (2014), "[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*. at 290.

Difficult questions remain at the margins of this Court's personal jurisdiction jurisprudence. *See Ford Motor Co.* v. *Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1034–39 (2021) (Gorsuch, J., concurring in the judgment). But this case does not implicate the margins; it implicates the heartland. The Ninth Circuit held that an absent intentional tortfeasor can be "present in" a forum if and only if he purposefully directs his tortious conduct into that forum *and* the tort occurs there. Because that understanding is in direct conflict with this Court's precedents and decisions by multiple other courts of appeals; because it will have jurisprudential effects far beyond the specific context of the TVPRA; and because it was decisive in this case, certiorari should be granted.

OPINIONS BELOW

The Ninth Circuit's decision on denial of rehearing is reported at 35 F.4th 1159 (9th Cir. 2022). Pet. App. 1a. The original panel ruling is reported at 26 F.4th 1029 (9th Cir. 2022). Pet. App. 51a. The district court's grant of summary judgment to respondent Phatthana Seafood Co. is not reported. It is available at 2017 WL 8292922 and reprinted at Pet. App. 99a. The district court's grant of summary judgment to respondent S.S. Frozen Food Co. is not reported. It is available at 2017 WL 8292391 and reprinted at Pet. App. 121a.

JURISDICTION

The Ninth Circuit entered an amended opinion and judgment on denial of petitioners' timely petition for rehearing en banc on May 31, 2022. On August 22, 2022, Justice Kagan extended the time within which to file a petition for certiorari to and including October 28, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 2008 amendment to the TVPRA provides that:

> In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 if—
>
> (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence . . . . ; or
>
> (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.

18 U.S.C. § 1596(a).

The TVPRA's civil-remedy provision, 18 U.S.C. § 1595(a), provides that:

> An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value

> from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

Id. § 1595(a).

STATEMENT OF THE CASE

A. Statutory Background

Human trafficking is, alas, not a new phenomenon. Until 2000, though, U.S. courts could only provide remedies for trafficking and related misconduct through a patchwork of federal statutes that were not specifically directed at trafficking, as such.

Starting with the Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106-386, div. A, 114 Stat. 1464, 1466, Congress has become far more active in providing express and comprehensive criminal *and* civil remedies for human trafficking and related offenses. Indeed, over the past 22 years, Congress has enacted nine different statutes expanding the scope of—and remedies for—trafficking-related offenses. Two post-2000 reforms are especially relevant here.

First, convinced that criminal enforcement of the TVPA's provisions was inadequate, Congress in 2003 provided an express *civil* remedy for victims of three specific trafficking-related criminal offenses. TVPRA, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875, 2878 (codified as amended at 18 U.S.C. § 1595).[1]

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1. The three offenses originally subject to civil enforcement were forced labor, 18 U.S.C. § 1589; trafficking with respect to peonage, slavery, involuntary servitude, or forced labor, *id.*

Second, after years of detailed debate over how to make the 2000 Act still more effective, Congress in 2008 significantly expanded *both* the TVPRA's criminal prohibitions *and* § 1595's corresponding civil remedy. In addition to defining new crimes and amending existing ones, the 2008 reform authorized "extra-territorial jurisdiction" over six of the TVPRA's predicate offenses,[2] so long as the defendant is "a national of the United States or an alien lawfully admitted for permanent residence," or is "present in the United States, irrespective of the nationality of the alleged offender." William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 223(a), 122 Stat. 5044, 5071 (codified at 18 U.S.C. § 1596(a)).[3] In the same statute, Congress also amended § 1595 to authorize civil suits arising out of *any* violation of Chapter 77 of Title 18—and not just the three offenses originally listed in the 2003 statute. *Id.* § 221(2), 122 Stat. at 5067 (codified as amended at 18 U.S.C. § 1595(a)).

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§ 1590; and sex trafficking of children or through force, fraud, or coercion, *id.* § 1591. *See* TVPRA § 4(a)(4)(A), 117 Stat. at 2878.

2. The six extraterritorial offenses are peonage, 18 U.S.C. § 1581; enticement into slavery, *id.* § 1583; sale into involuntary servitude, *id.* § 1584; forced labor, *id.* § 1589; trafficking with respect to peonage, slavery, involuntary servitude, or forced labor, *id.* § 1590; and sex trafficking of children or through force, fraud, or coercion, *id.* § 1591. *See generally id.* § 1596(a) (listing these offenses).

3. Congress authorized limited extraterritorial jurisdiction in 2005—but only for offenses committed by persons employed by or accompanying the federal government outside the United States. *See* Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 103(a), 119 Stat. 3558, 3562 (2006) (codified at 18 U.S.C. §§ 3271–72).

Thus, as Congress continued to amend and expand the TVPRA's list of criminal offenses, it intentionally and expressly expanded the scope of civil liability as well—to authorize damages suits for the exact same conduct that the criminal statutes prohibited—both within the United States and abroad. *See Nestlé USA, Inc.* v. *Doe*, 141 S. Ct. 1931, 1939 (2021) (contrasting Congress's repeated efforts to expand anti-trafficking remedies with the absence of similar reforms of the Alien Tort Statute, 28 U.S.C. § 1350); *see also id.* at 1940 ("Congress settled on the current approach to private remedies against human trafficking only after its 'understanding of the problem evolved' through years of studying 'how to best craft a response.'" (citation omitted)).

B. Legal Background

When it extended the TVPRA to provide criminal and civil remedies for certain extraterritorial conduct, Congress used a common formulation for asserting jurisdiction over offenses committed overseas: Federal courts could entertain such cases if the defendant is a U.S. national, a lawful permanent resident, or is otherwise "present in the United States." 18 U.S.C. § 1596(a); *see also, e.g.*, *id.* § 2332f(b)(2)(C) (bombing public places outside the United States); *id.* § 2339C(b)(2)(B) (financing terrorism outside the United States); *id.* § 2340A(b)(2) (committing torture outside the United States); *id.* § 2442(c)(3) (using child soldiers outside the United States).

In giving content to what it means for a defendant who is not physically present to otherwise be "present in the United States," lower courts interpreting these statutes have typically held that the Due Process Clause of the Fifth Amendment requires at least some

nexus between the proscribed conduct and the United States. *See, e.g.*, *In re Alstom SA*, 406 F. Supp. 2d 346, 398 (S.D.N.Y. 2005) ("The Securities and Exchange Acts allow for personal jurisdiction over foreigners not present in the United States to the extent that the Due Process Clause of the Fifth Amendment permits."); *see also, e.g.*, *United States* v. *Davis*, 905 F.2d 245, 247–49 (9th Cir. 1990) (applying a due process "nexus" test). Courts (like the court of appeals here) have looked to this Court's jurisprudence regarding specific personal jurisdiction over out-of-forum defendants—the familiar "minimum contacts" framework derived from *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny.

Under *International Shoe*, this Court has "upheld the assertion of jurisdiction over defendants who have purposefully 'reach[ed] out beyond' their State and into another by, for example, entering a contractual relationship that 'envisioned continuing and wide-reaching contacts' in the forum State, or by circulating magazines to 'deliberately exploi[t]' a market in the forum State." *Walden*, 571 U.S. at 285 (alterations in original; citations omitted).

"And although physical presence in the forum is not a prerequisite to jurisdiction, physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact." *Id.* (citations omitted). This analysis is often short-handed as "purposeful availment"—the idea that the defendant has taken "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)).

In *Calder*, this Court recognized an *additional* means of demonstrating minimum contacts, holding that specific jurisdiction could be established when a defendant's "intentional, and allegedly tortious, actions were expressly aimed" at the forum asserting jurisdiction. *See* 465 U.S. at 789–90. As this Court explained in *Walden*, under *Calder*, "[a] forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." 571 U.S. at 286. The key was that "the 'effects' caused by the defendants' [tortious activity] connected the defendants' conduct to [the forum], not just to a plaintiff who lived there." *Id.* at 288.

Calder was thus not a new gloss on purposeful availment; it was a distinct means of demonstrating the necessary contacts between the defendant and the forum—for cases in which purposeful availment may not have sufficed to satisfy *International Shoe*. As a result, until the Ninth Circuit's recent departure from these well-settled principles,[4] every court to consider the issue has assumed (and, in some cases, *held*) that minimum contacts can be established through *either* the purposeful availment test *or Calder*'s "purposeful direction" standard. Indeed, the same day as *Calder*, this Court applied the purposeful availment test to uphold New Hampshire's personal jurisdiction over a libel suit brought by a New York resident against a

4. In *Morrill* v. *Scott Fin. Corp.*, 873 F.3d 1136 (9th Cir. 2017), the Ninth Circuit reached a similar conclusion. *See id.* at 1149 ("[T]he claims at issue are premised on alleged tortious conduct by Defendants. Therefore, the purposeful availment test does not apply."). In that case, though, the court of appeals reached purposeful availment in the alternative—holding that it was not satisfied, either. *See id.*

magazine incorporated in Ohio with its principal place of business in California. *See Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 780–81 (1984).

Between them, *Calder* and *Keeton* make clear that, even for intentional torts, *either* purposeful availment *or* purposeful direction suffices to establish personal jurisdiction. The key is that "[a] forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Walden*, 571 U.S. at 286. Properly understood, the upshot is not that the nature of a plaintiff's claims dictates if purposeful availment or purposeful direction applies; it's that the two concepts articulate distinct ways in which a defendant's intent and contacts can be demonstrated for *any* claims.

C. Factual Background

Petitioners worked at respondents' factories in Thailand, producing and packaging shrimp for sale in the United States.[5] Six of the petitioners worked at respondent Phatthana Seafood's factory in Songkhla province, Thailand; the seventh worked next door at respondent S.S. Frozen Food's processing factory. For present purposes, there is no material difference between the petitioners' claims.[6]

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5. The Ninth Circuit affirmed the dismissal of claims against two other defendants—Rubicon Resources, LLC and Wales & Co. Universe Ltd. Those dismissals are not contested here.

6. Petitioners argued below that respondent S.S. Frozen Food is an alter ego of respondent Phatthana Seafood, its corporate affiliate. The Ninth Circuit did not reach that issue. For purposes of this petition, petitioners refer to them (and their Songkhla facilities) collectively.

a. Petitioners' Trafficking

Petitioners were villagers in rural Cambodia when they were recruited to work at respondents' factories in Thailand producing seafood for export to the United States—part of a broader effort by respondents to make up for a shortage of Thai workers. They were promised good jobs at good wages with free accommodation. But when they arrived in Thailand, petitioners were told that their wages would be a fraction of the promised wage; they were charged for unexpected expenses that they had to borrow against future wages to pay; and instead of free accommodations, they were charged hefty fees to sleep on a concrete floor in crowded, leaky rooms shared with other workers.[7]

Respondents even charged petitioners for the equipment required to do their jobs. As just one example, petitioners were charged unexpected additional fees for work permits—an amount they had to borrow from respondents. Respondents informed petitioners that the factory would retain their work permits until they had worked off their debts and that they would be arrested if they left the factory without their work permits.

It is undisputed that petitioners asked to leave repeatedly and asked for their work permits back so

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7. Because this case reaches the Court on petitioners' appeal from the district court's grant of summary judgment to respondents, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [petitioners'] favor." *Tolan* v. *Cotton*, 572 U.S. 650, 651 (2014) (per curiam) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The background of petitioners' claims is adopted from the record and summary judgment briefing in the district court.

that they could obtain other jobs or travel without fear of arrest. Respondents repeatedly refused their requests. In the meantime, the conditions in which petitioners worked were harrowing. Respondents' supervisors yelled at the workers and often beat them. (One petitioner witnessed two Thai supervisors beat a female Cambodian worker into unconsciousness.)

The workers were not provided adequate protective gear. Petitioners Ratha and Sophea developed chronic respiratory issues from working with chlorine without appropriate safety equipment, and they witnessed other workers collapse from chlorine exposure. Respondents would penalize workers for taking bathroom breaks, so they would relieve themselves in the corner of the factory floor or soil themselves at their workstations.[8]

Unfortunately, petitioners' experiences are not aberrational. Under the TVPRA, the Department of Labor is required to maintain a list of goods and their source countries which it has reason to believe are produced by child labor or forced labor in violation of international standards. Thai shrimp has been a mainstay on the list since it was first published in 2009. *See* Dep't of Labor, Bureau of Int'l Labor Affairs, List of Goods Produced by Child or Forced Labor, https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods. After years of criticism, the State Department downgraded Thailand in 2014 to the very

8. Respondents conceded below that triable evidence supported at least four of the petitioners' allegations that they were subject to peonage, forced labor, involuntary servitude, and human trafficking while employed by respondents. Because the Ninth Circuit held that respondents were not present under § 1596(a)(2), it did not reach whether the other three petitioners' claims could survive summary judgment. *See* Pet. App. 15a n.4.

lowest tier in its annual *Trafficking in Persons Report* because Thailand did not meet minimum standards for combatting trafficking in persons and was not making significant efforts to do so. *See* U.S. Dep't of State, *Trafficking in Persons Report 2014*, at 372–73, https://2009-2017.state.gov/documents/organization/226844.pdf; *see also, e.g.*, U.S. Dep't of State, *Trafficking in Persons Report 2013*, at 358–62, https://2009-2017.state.gov/documents/organization/210742.pdf.

Even in its most recent annual report, the State Department wrote that "forced labor was prevalent among migrant workers in Thailand" and that traffickers and employers in the seafood industry continue to "use debt-based coercion, deceptive recruitment practices, retention of identity documents . . . , illegal wage deductions, physical violence, and other means to subject victims to forced labor." U.S. Dep't of State, *Trafficking in Persons Report 2022*, at 542, https://www.state.gov/wp-content/uploads/2022/04/337308-2022-TIP-REPORT-inaccessible.pdf. At the same time, corruption is a widely recognized problem among both Thai and Cambodian law enforcement, particularly with respect to identifying and prosecuting trafficking in the seafood industry.

b. Respondents' Contacts

Respondents processed and packaged shrimp at their Songkhla facilities for the express and specific purpose of selling to U.S. wholesalers and retailers. Rubicon Resources, LLC—a defendant below—was founded by respondents' majority owner and other Thai seafood producers in order to distribute the producers' seafood "within the territory of the United

States of America." Much of the shrimp produced at the Songkhla facilities was packed directly into Walmart-branded packaging—expressly intended for U.S. consumers.[9] And respondents worked closely with Rubicon to ensure that the shrimp they were producing at Songkhla met the specifications required by Rubicon's U.S. customers. Rubicon even arranged for trainings of respondents' workers by Walmart after poor audit results.

It is undisputed that respondents made at least 14 shipments to Rubicon in California of shrimp that were produced at the Songkhla facilities while petitioners worked there, over 200 tons of shrimp. The record also indicates that respondents previously supplied Walmart and Sam's Club with shrimp produced at Songkhla—and that other shipments were sold in the United States.

D. Proceedings Below

Petitioners filed this lawsuit in 2016 in the U.S. District Court for the Central District of California. Petitioners named as defendants the respondents, along with Rubicon (the California-based importer), and another California company that helped import respondents' shrimp. Petitioners alleged that respondents committed peonage, forced labor, involuntary servitude, and human trafficking—all in violation of the TVPRA.

Respondents appeared and filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Respondents did *not* contest whether the district court

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9. Walmart refused to accept the shrimp produced and packed while petitioners worked at respondents' Songkhla facilities because of concerns about forced labor.

had personal jurisdiction—thereby conceding it. *See* Fed. R. Civ. P. 12(h)(1). The district court denied respondents' motion to dismiss petitioners' TVPRA claims.

In 2017, respondents filed separate motions for summary judgment. Respondents both argued that petitioners' TVPRA claims should be dismissed because the U.S. defendants were not their alter egos or agents, nor were they in a joint venture with the U.S. defendants. Thus, respondents argued that they were not "present in the United States" and could not be subject to the court's extraterritorial jurisdiction under § 1596(a)(2). Once again, respondents did not dispute that they were subject to personal jurisdiction in federal district court in California.

In response, petitioners argued that § 1596(a)(2) is coterminous with personal jurisdiction. Thus, even if an alter-ego, agency, or joint-venture theory did not apply, respondents *themselves* were "present in the United States" because, as respondents had conceded, they were subject to personal jurisdiction in California federal court.

The district court granted summary judgment in favor of the respondents, concluding that, to show that respondents were "present in the United States" under § 1596(a)(2), petitioners needed to establish more than the minimum contacts required for personal jurisdiction here. Pet. App. 109a–10a (Phatthana); *id*. at 131a–32a (S.S. Frozen Food).[10] In

10. The district court issued separate rulings granting respondents' motions for summary judgment. Because the analysis in the two rulings is materially identical on the relevant points, subsequent citations are to the ruling respecting respondent Phatthana Seafood's motion.

the district court's view, § 1596(a)(2) required *physical* presence—which respondents lacked. *Id.* at 110a. The district court therefore did not conduct any analysis of whether respondents' contacts with the United States were sufficient to subject them to personal jurisdiction in a U.S. court despite their physical absence. *See id.* at 110a.

On appeal, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of respondents—but on alternative grounds that the district court did not address; that respondents had not raised; and that the parties had never briefed.[11] First, the panel held that whether the TVPRA's civil-remedy provision applies to extraterritorial conduct goes to the merits, not subject-matter jurisdiction. It therefore assumed without deciding that, when the predicate TVPRA offense is expressly extraterritorial, § 1595 authorizes a civil action to enforce it. *Id.* at 17a–19a.

Second, the panel declined to adopt the district court's holding that § 1596(a)(2) requires physical presence in the United States and instead looked to this Court's personal jurisdiction jurisprudence to determine whether the defendant was present in the United States. *Id.* at 24a–25a. The panel nevertheless affirmed because, even though respondents had never challenged their amenability to personal jurisdiction in the district court, their contacts with the United States were, in the panel's view, insufficient to satisfy the "minimum contacts" test. *Id.* at 27a–28a & n.13.

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11. The panel filed an amended opinion concurrently with the denial of petitioners' petition for rehearing en banc. References are to that opinion—rather than the original, withdrawn opinion.

Specifically, the panel held that, for intentional torts, specific jurisdiction could be established only by satisfying *Calder*'s purposeful direction test. *Id*. at 27a ("Because the TVPRA's civil remedy provision creates a cause of action that sounds in tort, we employ the purposeful direction test derived from *Calder*." (citations and internal quotation marks omitted)). What's more, the Ninth Circuit's approach to *Calder* requires that the underlying injury occur *in* the forum. *Id*. (citing *Schwarzenegger* v. *Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004)). Because petitioners were trafficked and subjected to forced labor abroad, the panel held that respondents could not be subject to specific jurisdiction in the United States. *Id*. at 28a n.13.

The panel did not analyze respondents' extensive contacts with the United States, or otherwise consider whether respondents had purposefully availed themselves of the benefits of doing business within the United States or purposefully directed their harmful conduct into the United States. *See id*. Instead, its holding that respondents are not "present in the United States" for purposes of § 1596(a)(2) turned—as relevant here—on the fact that the harm to petitioners took place outside the territorial United States.[12]

12. The Ninth Circuit also rejected two alternative arguments for why respondents were "present in the United States"—because they were part of a joint venture with the U.S.-based defendants, or because the U.S. defendants were their alter egos. Pet. App. 29a–34a. Those holdings are not disputed here.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S EXCLUSIVE FOCUS ON PURPOSEFUL DIRECTION CONFLICTS WITH RULINGS OF AT LEAST FOUR OTHER CIRCUITS

There is no serious dispute that "making sense of [this Court's] personal jurisdiction jurisprudence" can sometimes be a "struggle." *Ford Motor Co.*, 141 S. Ct. at 1039 (Gorsuch, J., concurring in the judgment). But one of the clearer principles of that jurisprudence is that there are multiple pathways for establishing that an out-of-forum defendant is nevertheless present in the forum—entirely because there are multiple ways to satisfy due process. *See J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 880 (2011) (plurality opinion) ("A person may submit to a State's authority in a number of ways."). Certiorari is warranted because the decision below disrupts that settled principle—creating an important and intractable conflict with rulings of at least four other courts of appeals.

1. With regard to specific jurisdiction, the standard formulation of the minimum contacts test is the one then-Judge Barrett summarized in 2019: "[T]he defendant's contacts with the forum state must show that it 'purposefully availed [itself] of the privilege of conducting business in the forum state *or* purposefully directed [its] activities at the state.'" *Lexington Ins. Co.*, 938 F.3d at 878 (emphasis added; citation omitted). As noted above, *Calder* itself supports that understanding—identifying an *additional* means of establishing personal jurisdiction in intentional tort cases, not an exclusive one. *See ante* at 9–10. By considering whether respondents had purposefully directed their activities at the United States and no

other basis for specific jurisdiction, the Ninth Circuit ran afoul of this settled understanding.

2. At least four courts of appeals have specifically held that purposeful availment suffices to establish personal jurisdiction over out-of-forum defendants in cases involving intentional torts. In *Mosseri*, for instance, the Eleventh Circuit upheld Florida's exercise of personal jurisdiction over a New York defendant in a suit for trademark counterfeiting and infringement. As the court explained, "[i]n intentional tort cases, there are *two* applicable tests" for establishing minimum contacts—*Calder*'s "effects test," *or* "a traditional purposeful availment analysis." 736 F.3d at 1356 (emphasis added); *see also id.* ("Circuit courts have applied the traditional minimum contacts test for purposeful availment analysis in lieu of, *or in addition to*, the 'effects test' in cases involving trademark-related intentional torts." (emphasis added)).

Ultimately, the Eleventh Circuit sustained personal jurisdiction in *Mosseri* entirely because of its conclusion that the defendant had purposefully availed himself of the benefits of doing business in Florida. Thus, the Ninth Circuit's refusal to consider whether respondents had purposefully availed themselves of the benefits of doing business in the United States is inconsistent with both the Eleventh Circuit's articulation and its application of the test for specific jurisdiction in *Mosseri*.

The Second Circuit's decision in *Licci* similarly conflicts with the Ninth Circuit's decision below. In *Licci*, the court of appeals considered whether a Lebanese bank was subject to personal jurisdiction in New York in a suit claiming that it had knowingly

facilitated acts of international terrorism. Like the Eleventh Circuit, the Second Circuit applied traditional purposeful availment analysis to a foreign defendant sued for intentional torts. "We do not . . . understand the existence of in-state effects sufficient to satisfy the 'effects test' to be a prerequisite to the constitutional exercise of personal jurisdiction over a foreign defendant," the court explained, so long as the claim relates to in-forum activity that "sufficiently reflects the defendant's 'purposeful availment' of the privilege of carrying on its activities here." 732 F.3d at 173.

Applying that analysis, the court of appeals concluded that "the selection and repeated use of New York's banking system, as an instrument for accomplishing the alleged wrongs for which the plaintiffs seek redress, constitutes 'purposeful[] avail[ment] . . . of the privilege of doing business in [New York].'" *Id.* at 171 (alterations and omission in original; citation omitted); *see also Waldman* v. *Palestine Liberation Org.*, 835 F.3d 317, 337–44 (2d Cir. 2016) (analyzing a defendant's minimum contacts under both the purposeful availment and purposeful direction tests).

The Seventh Circuit's ruling in *uBID* also conflicts with the Ninth Circuit's analysis here. In that case, a Chicago-based internet auction company brought suit in Illinois against an Arizona corporation under the Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), claiming that the defendant was intentionally registering domain names that were confusingly similar to the plaintiff's trademarks and domain names. In explaining why the defendant was properly subject to specific jurisdiction in Illinois, the court emphasized that, "[b]ecause [defendant's] actual

contacts with Illinois meet the constitutional standard for minimum contacts under *Keeton*, we need not decide whether sufficient contacts should be imputed under the *Calder* 'express aiming' test announced by the Supreme Court on the same day as *Keeton*." 623 F.3d at 427 n.1. In other words, even though plaintiff's federal claim was akin to an intentional tort, the Seventh Circuit held that purposeful availment sufficed to establish specific jurisdiction *without regard* to whether purposeful direction could also be demonstrated. *See id.*

Most recently, the D.C. Circuit in *Atchley* likewise used traditional purposeful availment analysis in holding that foreign pharmaceutical suppliers could be sued in D.C. federal court for knowingly financing terrorist attacks in Iraq. *See* 22 F.4th at 233. Without even considering whether the suppliers had purposefully directed their wrongful conduct into the United States, the court of appeals held it sufficient that they had "reached into the United States to contract with an affiliated U.S. manufacturer to be the manufacturer's exclusive agent in Iraq," "worked in Iraq to secure contracts to sell the U.S. manufacturer's goods there," and "reached into the United States to source goods manufactured here to fulfill the Iraqi contracts." *Id.*[13]

13. The foreign suppliers in *Atchley* have filed a petition for rehearing en banc, which remains pending as of this filing. The *Atchley* petition does not dispute, however, that purposeful availment is a permissible approach for establishing personal jurisdiction. Rather, it disputes the D.C. Circuit panel's conclusion that the foreign suppliers *did* purposefully avail themselves of the benefits of doing business in the United States. *See* Petition of Defendants-Appellees AstraZeneca UK Ltd. et al.

To be sure, these courts are not alone. Rather, the conventional understanding in every court of appeals *except* the Ninth Circuit is that purposeful availment and purposeful direction are *independent* means of satisfying *International Shoe*'s minimum contacts requirement. *See, e.g.*, *Lexington Ins. Co.*, 938 F.3d at 878. Thus, the Ninth Circuit's decision creates an intractable division among the courts of appeals on this issue—a split that only this Court can resolve.

3. The division created by the decision below is not just intractable; it is also critically important. The purposeful availment and purposeful direction standards ask meaningfully *different* questions about the "relationship among the defendant, the forum, and the litigation." *Ford Motor Co.*, 141 S. Ct. at 1028 (quoting *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 (1984)).

This Court's decision in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), helps to illustrate the distinction. In that case, the question was whether Florida courts had personal jurisdiction in a breach-of-contract suit by Burger King (headquartered in Miami) against a Michigan franchisee. This Court upheld Florida's jurisdiction by reference to *both* tests. First, the Court focused on the defendant's entry into a franchise contract with Burger King as evidence of the defendant's "voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters." *Id.* at 480. In that respect, the defendant purposefully availed

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for Rehearing En Banc at 1–3, *Atchley* v. *AstraZeneca UK Ltd.*, No. 20-7077 (D.C. Cir. filed Feb. 3, 2022).

himself of the benefits of doing business in Florida—with the franchisor.

Then, this Court also looked at the "foreseeable injuries" defendant had inflicted *in* Florida through his "refusal to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination." *Id.* Thus, *Calder* supported jurisdiction because the defendant's wrongful conduct was intentionally producing harmful effects in Florida, even though the breach itself was taking place in Michigan. *See id.*

As *Burger King* underscores, not only are purposeful availment and purposeful direction *alternative* means of establishing "minimum contacts"; in some cases, they can also provide *overlapping* means of doing so. *See, e.g.*, Geoffrey C. Hazard, Jr. et al., *Pleading and Procedure: Cases and Materials* 111 (12th ed. 2019) ("'Purposeful availment' and 'purposeful direction,' while distinct concepts, are not water-tight compartments."). This conclusion follows from the fact that the purposeful availment and purposeful direction tests are not ends unto themselves; they are means of answering the core question that the Due Process Clause demands: "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." *Nicastro*, 564 U.S. at 884 (plurality opinion). Thus, although the tests have some features in common, they also diverge from each other in meaningful ways—such that an out-of-forum defendant could have sufficient "minimum contacts" with a forum under one test but not the other.

That understanding is why some courts of appeals have regularly looked to whether personal jurisdiction under *Calder* is available only *after* holding that it is not available under purposeful availment analysis. *See, e.g.*, *IMO Indus., Inc.* v. *Kiekart AG*, 155 F.3d 254, 259–60 (3d Cir. 1998) ("We note initially that specific jurisdiction will not lie here on the basis of Kiekert's alleged contacts with the forum alone, for (as we detail in the margin) they are far too small to comport with the requirements of due process. Since this is an intentional tort case, we must consider whether the application of *Calder* v. *Jones*, *supra*, can change the outcome." (footnote omitted)); *see also Dakota Indus., Inc.* v. *Dakota Sportswear, Inc.*, 946 F.2d 1384, 1390 (8th Cir. 1991) (applying *Calder* only after holding that purposeful availment cases "do not strongly support the assertion of personal jurisdiction over" the defendant); *Chloe* v. *Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 172 (2d Cir. 2010) ("Because we have concluded that [defendant] has purposefully availed himself of the benefits of the New York forum, we need not decide whether [his] act of shipping a counterfeit Chloé bag represented conduct 'expressly aimed at' New York under the *Calder* effects test."). Obviously, the Ninth Circuit's analysis is inconsistent with these approaches, as well.

4. Finally, *had* the Ninth Circuit considered whether respondents purposefully availed themselves of the benefits of doing business in the United States, it would have been difficult to answer that question in the negative. As noted above, respondents' majority owner created a California-based company with the specific purpose of facilitating the distribution and sale of respondents' shrimp to U.S. wholesalers and retailers. Respondents made at least 14 sales of

shrimp produced at their facilities *to* U.S. distributors *while* petitioners worked there—more than 200 tons of shrimp. And the conditions under which petitioners were forced to live and work necessarily facilitated respondents' ability to market and sell their goods in the United States by giving them a competitive pricing advantage over businesses, including U.S. businesses, that did not rely on forced labor. *See ante* at 13–14.[14]

Thus, not only does the decision below create an irreconcilable split among the courts of appeals on an important and recurring question of federal law, but that split makes a dispositive difference here—because petitioners would likely have been able to establish that respondents *were* "present in the United States" had the court of appeals followed the approach taken uniformly by its peers.

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE FORUM-INJURY REQUIREMENT IS INCONSISTENT WITH *CALDER*

Even if—contrary to the holdings of at least four circuits—*Calder*'s purposeful direction test is the exclusive means of establishing that an out-of-forum defendant is subject to specific personal jurisdiction in an intentional tort suit, certiorari is also warranted because the Ninth Circuit wrongly held that in-forum harm *to the plaintiffs* is required to satisfy *Calder*. Neither *Calder* itself, nor any other decision of this Court or any other court of appeals, requires the

14. Because petitioners brought this case in federal court, specific jurisdiction can be established by demonstrating minimum contacts either with California, specifically, *see* Fed. R. Civ. P. 4(k)(1)(A), or, if no state court could exercise personal jurisdiction, with the United States, generally. *See id*. R. 4(k)(2).

plaintiffs' underlying *injury* to take place in the forum to establish specific jurisdiction. And the principles on which *Calder* is based—focusing on the defendants' relationship to the *forum*, not to the plaintiffs—are inconsistent with such a requirement.

1. Taking the Ninth Circuit first, its *Calder* analysis required that the underlying harm at issue must be "harm that the defendant knows is likely to be suffered *in* the forum state." Pet. App. 27a. But the court of appeals took that element one critical step further. After assuming that respondents' "attempt to sell shrimp to Walmart, and some other sales to entities in the United States, constituted intentional acts expressly aimed at the United States," the court concluded that petitioners "have produced no evidence suggesting that those sales caused 'harm that [Phatthana] [knew was] likely to be suffered in the' United States." *Id.* at 28a (quoting *Fred Martin Motor Co.*, 374 F.3d at 805) (alterations in original)).

Critically, though, even if petitioners *could* establish a stronger connection between respondents and the United States, the Ninth Circuit held that "a larger sales footprint in the United States would not change the fact that *the harm caused by Defendants' alleged TVPRA violations was not suffered in the United States*." *Id.* at 28a n.13 (emphasis added). In other words, under the Ninth Circuit's view of *Calder*, purposeful direction could not be established because the *direct* harm arising from respondents' wrongful conduct was incurred outside the United States—even if that conduct produced *indirect* harmful effects here. *See id.*

2. *Calder* itself is inconsistent with this understanding. In *Calder*, a professional entertainer

brought suit in California state court alleging that she had been libeled in a *National Enquirer* article that the defendant journalists had written and published in Florida. The defendants argued against California's jurisdiction, emphasizing that the alleged libel itself had taken place in Florida and that they were not responsible for the circulation of the article in California. *See* 465 U.S. at 789–90.

Writing for a unanimous Court, then-Justice Rehnquist rejected the defendants' arguments. The key, as he explained, was that the defendants' "intentional, and allegedly tortious, actions were expressly aimed at California," so that they "must 'reasonably anticipate being haled into court there' to answer for [their conduct]." *Id*. (quoting *World-Wide Volkswagen Corp*. v. *Woodson*, 444 U.S. 286, 297 (1980)).

The key in *Calder*, as in all minimum contacts analysis, was the *defendants*' contacts with the forum—not where the *plaintiff* suffered harm. *See, e.g.*, *Bristol-Myers Squibb Co.* v. *Super. Ct. of Cal.*, 137 S. Ct. 1773, 1779 (2017) ("The primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State."). It didn't matter that the alleged libel itself had occurred in Florida; all that mattered was that the libel had produced indirect harmful *effects* in California—an "aim" of the out-of-forum harm.

That's why, among other things, this Court has routinely insisted that its "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden*, 571 U.S. at 285. As Justice Thomas put it,

> Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. *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*.

Id. at 290 (emphasis added). Needless to say, the Ninth Circuit's requirement that "the harm caused by defendants' TVPRA violations" take place in the forum, Pet. App. 28a n.13, is inconsistent with that understanding.

The Ninth Circuit's stilted approach to the locus of harm under *Calder* has previously drawn significant criticism from leading scholars. Dean Spencer, for instance, has documented how "the Ninth Circuit's current interpretation of the *Calder* 'effects' test frustrates the intended effects of the *Calder* holding." A. Benjamin Spencer, *Terminating* Calder*: "Effects" Based Jurisdiction in the Ninth Circuit After* Schwarzenegger *v.* Fred Martin Motor Co., 26 WHITTIER L. REV. 197, 222 (2004).

Until now, the Ninth Circuit's misreading of *Calder* has not warranted this Court's intervention. After all, when minimum contacts can be established through purposeful availment *or* purposeful direction, it will be the rare case in which the Ninth Circuit's misreading of *Calder* will be decisive. But where, as here, the court of appeals views *Calder* as the *exclusive* means of establishing specific personal jurisdiction, its forum-injury requirement causes especial—and material—mischief.

3. As with the first question presented, the second question presented is also properly presented here because petitioners likely *could* satisfy a proper application of the *Calder* test. Respondents purposefully directed their activities into the United States through their various efforts to sell and distribute shrimp to U.S. wholesalers and retailers—including the role of their majority owner in creating a California-based distributor to market directly to U.S. wholesalers and retailers.

Indeed, the United States was not just *a* market for respondents' efforts; it was the *target* market. What's more, respondents' allegedly tortious conduct facilitated that purposeful direction—making it possible to offer shrimp at prices that allowed them to compete for U.S. business. *See Walden*, 571 U.S. at 291 ("The proper focus of the 'minimum contacts' inquiry in intentional-tort cases is 'the relationship among the defendant, the forum, and the litigation.' And it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." (quoting *Calder*, 465 U.S. at 788)).

To be sure, the fact that the petitioners' injuries were sustained outside of the United States is a *factual* distinction from *Calder*. The relevant point for present purposes, though, is that it is not a legally material one. *See Dudnikov* v. *Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008) (Gorsuch, J.) ("[W]e do not imagine that *Calder* necessarily describes the only way to satisfy the purposeful direction test."). The question is whether respondents' intentionally tortious conduct created foreseeable, harmful effects *to anyone* in the United States. *See, e.g.*, *uBID*, 623 F.3d at 423 ("[D]ue process is not violated when a defendant is called to account

for the alleged consequences of its deliberate exploitation of the market in the forum state."); *see also Nicastro*, 564 U.S. at 885 (plurality opinion) ("In this case, petitioner directed marketing and sales efforts at the United States. It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts.").

If the focus of the *Calder* analysis is, as it should be, on how respondents' purposeful activities directed foreseeable harm into the United States in general, that test is easily satisfied. Respondents marketed and sold shrimp in the United States that was produced through forced labor and human trafficking. Those purposeful activities harm U.S. competitors that do not rely on forced labor; harm shoppers who may unwittingly purchase products produced in violation of their ethical standards; undermine consumer confidence that their purchasing decisions will not support human trafficking; and frustrate the compelling (and longstanding) policy interests of the federal government in eliminating domestic markets for goods produced through trafficked and forced labor. Tellingly, the Ninth Circuit's brief analysis failed to consider *any* of these harms in holding that petitioners had not satisfied *Calder*. *See* Pet. App. 27a–28a & n.13.

Simply put, because petitioners have adduced sufficient evidence to establish that respondents engaged in human trafficking as part of their efforts to facilitate sales of shrimp into the United States, and because respondents' intentional efforts produced harmful effects in the United States, respondents are subject to specific jurisdiction in the United States even under *Calder*—and the Ninth Circuit's erroneous

focus on whether the TVPRA violations themselves occurred in the United States warrants this Court's plenary review.

III. THIS CASE IS A COMPELLING VEHICLE TO RESOLVE THE QUESTIONS PRESENTED

As noted above, the Ninth Circuit's exclusive focus on purposeful direction creates a circuit split with the Second, Seventh, Eleventh, and D.C. Circuits; and its holding that plaintiffs must sustain an in-forum injury to satisfy the purposeful direction test can't be squared with *Calder* itself—or this Court's specific jurisdiction jurisprudence more generally. Both of these holdings easily satisfy this Court's criteria for certiorari. *See* S. Ct. R. 10(c). And certiorari is warranted in this case, specifically, because petitioners would have prevailed if the Ninth Circuit had *either* applied purposeful availment analysis *or* properly applied *Calder*'s purposeful direction test.

Nor is the Ninth Circuit's analysis limited to the TVPRA. Although the district court interpreted § 1596(a)(2) to require a unique "physical presence" requirement, the Ninth Circuit declined to adopt that reading—opting instead to read the statute *in pari materia* with this Court's personal jurisdiction jurisprudence more generally. Thus, the fact that the Ninth Circuit's flawed conclusions were not limited to the meaning of "present in the United States" under the TVPRA underscores both the existence and importance of the conflicts its decision created.

This Court has granted certiorari and conducted plenary review of numerous disputes in recent years in which lower courts have divided on important principles of personal jurisdiction. *See, e.g.*, *Mallory* v. *Norfolk S. Ry. Co.*, 142 S. Ct. 2646 (2022) (mem.); *Ford*

Motor Co., 141 S. Ct. 1017; *Bristol-Myers Squibb*, 137 S. Ct. 1773; *BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549 (2017); *Walden*, 571 U.S. 277; *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014); *Nicastro*, 564 U.S. 873; *Goodyear Dunlop Tires Ops., S.A.* v. *Brown*, 564 U.S. 915 (2011). The division here is no less important. If anything, the need for this Court's intervention here is that much more crucial because, unlike in each of those other cases, the Ninth Circuit's ruling runs afoul of settled principles of minimum contacts analysis.

In addition to the confusion the decision below introduces into how courts should approach specific jurisdiction in intentional tort cases, it also implicates the federal government's ability to prosecute an array of extraterritorial criminal offenses including, but not limited to, those proscribed by the TVPRA. As noted above, Congress regularly utilizes the "present in the United States" formulation as a basis for asserting criminal jurisdiction over non-citizens who commit serious crimes outside the territorial United States. *See ante* at 7. From torture to war crimes to terrorism financing to the use of child soldiers, the assumption undergirding these statutes has been that, so long as Congress has the constitutional authority to regulate the underlying conduct, the only limit on the jurisdiction of U.S. federal courts is the Due Process Clause of the Fifth Amendment. *See, e.g.*, *United States* v. *Baston*, 818 F.3d 651, 666–71 (11th Cir. 2016).

But if a non-citizen defendant who is not physically in the United States will only be "present in the United States" if the offense produces direct harms in the United States, that would effectively defeat the purpose of even *having* such jurisdiction. After all, many of these offenses apply *exclusively* to conduct

outside the territorial United States. *E.g.*, 18 U.S.C. § 2340A(a) ("Whoever *outside the United States* commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both . . . ." (emphasis added)). At the very least, if the TVPRA is to be constrained so narrowly, it ought to be based upon a specific conclusion that that's what the statute's text requires—rather than because of a misreading of this Court's more broadly applicable specific jurisdiction jurisprudence.[15]

Beyond these existing federal criminal statutes, the decision below also has onerous implications for *future* legislation in which Congress may seek to authorize—or expand—civil or criminal remedies for extraterritorial misconduct. After all, the Ninth Circuit has necessarily interpreted the Due Process Clause of the Fifth Amendment in a way that constrains Congress's power to so provide.

And because the court of appeals' analysis is not limited to *foreign* defendants, it would also impair the ability of individual states to regulate (or adjudicate claims arising out of) forum-aimed cross-border conduct by U.S. defendants in *other* states. Although the Fifth Amendment may require *less* to establish personal jurisdiction than the Fourteenth Amendment, this Court has never suggested that it ever requires *more*. *See, e.g.*, *Omni Capital Int'l, Ltd.* v. *Rudolff Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987).

Finally, although respondents raised a number of arguments in the Ninth Circuit in support of the

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15. Given the federal government's obvious interest in the answers to the questions presented, the Court may wish to call for the views of the Solicitor General.

district court's grants of summary judgment, the court of appeals went out of its way to rest its decision squarely and solely on its conclusion that respondents were not "present in the United States" under § 1596(a)(2). If this Court agrees that the questions presented merit plenary consideration, the decision below squarely and properly presents both of them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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