

No. _____

IN THE
Supreme Court of the United States

HANWJH,
Petitioner,

v.

NBA PROPERTIES, INC., MLB ADVANCED
MEDIA, L.P., MAJOR LEAGUE BASEBALL
PROPERTIES, INC., NHL ENTERPRISES, L.P.,
NFL PROPERTIES LLC, COLLEGIATE
LICENSING COMPANY, LLC, and THE REGENTS
OF THE UNIVERSITY OF CALIFORNIA,
Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

Tianyu Ju
Counsel of Record
Glacier Law LLP
41 Madison Avenue, Suite 2529
New York, NY 10010
(332)499-2666
iris.ju@glacier.law
Counsel for Petitioner

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QUESTIONS PRESENTED

The Due Process Clause permits a court to exercise personal jurisdiction over a non-resident defendant only if the defendant has “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457 (1940)).

The questions presented are:

Whether the “minimum contacts” requirement is met to establish specific personal jurisdiction over a non-resident defendant where the non-resident defendant operates an interactive website that is accessible to the forum as well as anywhere else in the planet.

Whether the “minimum contacts” requirement is met to establish specific personal jurisdiction over a non-resident defendant where the single sale of the alleged infringing product sold and delivered to the forum was a purchase made by plaintiff’s investigator.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States Court of Appeals for the Seventh Circuit:

NBA Properties, Inc. v. HANWJH, No. 21-2909 (7th Cir. 2022) (reported at 46 F.4th 614) (affirming, the denial of Petitioner’s motion to dismiss for lack of personal jurisdiction)

United States District Court for the Northern District of Illinois:

NBA Properties, Inc. v. Partnerships & Unincorporated Associations Identified in Schedule “A”, No. 20-cv-07543 (N.D. Ill. July 15, 2021) (reported at 549 F. Supp. 3d 790) (denied Petitioner’s motion to dismiss for lack of personal jurisdiction).

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Seventh Circuit is reported at 46 F.4th 614. That opinion is found in the Appendix to the Petitioner for a Writ of Certiorari (or “Pet. App.”), at pages 1a-26a. The opinion of the District Court of Northern District of Illinois is reported at 549 F. Supp. 3d 790. Pet. App. 127a-140a.

JURISDICTION

The judgment of the Court of Appeals, Seventh Circuit was entered on August 16, 2022. Pet. App. 1a-26a. Petitioner is filing this petition for a writ of certiorari within 90 days, on November 16, 2022. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Illinois long-arm statute 735 ILCS 5/2-209(c) provides:

[a] court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

INTRODUCTION

In the decision below, the Seventh Circuit Court of Appeal allowed the District Court to exercise specific personal jurisdiction over Petitioner even though the only contact between Petitioner and the forum state was Respondents' purchase of the allegedly infringing product from an interactive website operated by Petitioner that is accessible from everywhere in the planet.

The Seventh Circuit's decision allows a plaintiff to manipulate jurisdiction by manufacturing a suit-related contact with a non-resident defendant. In particular, any online retailer could be dragged into any jurisdiction at a plaintiff's wish as long as the good purchased by the plaintiff is related to the plaintiff's claim. This Court should grant review to put a stop to this capacious view of specific personal jurisdiction where a plaintiff would be encouraged to forum

shopping by manipulating a non-resident defendant's important due-process protections.

As this Court has made clear, the Due Process Clause requires both that the defendant “have purposefully availed itself of the privilege of conducting activities within the forum State” *and* that the plaintiff's claim “arise out of or relate to’ the defendant's forum conduct.” *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1785–86 (2017) (internal quotation marks, brackets, and citation omitted). This requirement polices the line between specific and general personal jurisdiction.

Specifically, “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

The Seventh Circuit's decision also deepens an entrenched split among the circuits as it contradicts to a growing number of other circuits of Court of Appeals that have taken the different views. This Court should not leave the question of “virtual contacts” unanswered any longer where the lower courts, as expressly stated by the First Circuit, await this Court to provide guidance on how virtual contacts operate with the “minimum contacts” requirement as this Court expressly reserved in *Walden* to “leave questions about virtual contacts for another day.” *Plixer International, Inc. v. Scrutinizer GmbH*, 905

F.3d 1, 1-8 (1st Cir. 2018), *citing Walden v. Fiore*, 571 U.S. 277, 290 n.9. (2014).

This Court has explained that the “minimum contacts” requirement with regard to the defendant and the forum State ensures that a nonresident defendant will not be forced to defend itself from litigation initiated in a foreign jurisdiction as a result of “random, fortuitous, or attenuated contacts” with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). This Court has also explained that “the defendant’s *suit-related conduct* must create a substantial connection with the forum State.” *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (emphasis added).

Most courts have taken the Court at its word. In cases dealing with a non-resident defendant’s virtual contacts, they require substantial and suit-related contacts more than the contacts that (a) merely operating an interactive website that is accessible to the forum as well as anywhere else and (b) are “random, fortuitous, or attenuated.” But the Seventh Circuit decision took a different path.

Even though the Seventh Circuit recognized that the only alleged infringing good shipped, sold and delivered to the forum was resulted from a purchase initiated by Respondents’ agent from Petitioner’s storefront that is accessible from everywhere, it nonetheless held that the required “minimum contacts” were present because Petitioner purposefully availed itself to the forum by establishing “an online store using a third-party retailer, Amazon.com” with the ship-out options listed on the online store includes the

forum state, as well as other states, fulfilling a plaintiff's order and shipping "an [allegedly] infringing product" to the address in the forum as provided by the plaintiff. Pet. App. 19a (emphasis added).

The Seventh Circuit did so out of apparent disagreement with this Court's personal jurisdiction jurisprudence as the "minimum contacts" analysis is aimed at ensuring that a nonresident defendant will not be forced to defend itself from litigation initiated in a foreign jurisdiction as a result of "random, fortuitous, or attenuated contacts" with the forum. *Burger King*, 471 U.S. at 475.

This Court should grant the writ, rule that an online retailer who operates an interactive online store that is accessible from anywhere should not be subject to the specific personal jurisdiction of the forum where the only contact between such online retailer and the forum is fulfilling a suit-related order initiated by a plaintiff, and reserve the decision below.

STATEMENT

Petitioner HANWJH is a China-based online retailer who operates an interactive online store via Amazon.com. Pet. App. 2a.

In December 2020, Respondents filed an action under the Lanham Act against a list of defendants including Petitioner, alleging that Petitioner infringed Respondents' trademarks by selling allegedly infringing products in its online store. *Id.* at 2a-3a.

Petitioner moved to dismiss the complaint for lack of personal jurisdiction. *Id.* Petitioner, a foreign-based online retailer, operates an interactive online store that is accessible from Illinois, as well as anywhere else. *Id.* at 3a. Since the online site could be accessible anywhere in the planet, it did not expressly aim any conduct in Illinois. *Id.* In addition, there was no link between Petitioner and Illinois other than a purchase order manufactured by Respondents. *Id.* at 2a-3a. Further, exercising jurisdiction over Petitioner would offend the traditional notions of fair play and substantial justice because Illinois had very little interest in resolving the matter, the burden on Petitioner for defending the litigation in Illinois would be great, and courts in Illinois lacks efficiencies in resolving this matter. *Id.* at 5a.

The District Court denied Petitioner's motion. Pet. App. 5a. It found the required "minimum contacts" were present because Petitioner "admit[ted] that it both offered to ship and in fact shipped products to Illinois." *Id.* at 6a. (quoting *Illinois v. Hemi Grp. LLC*, 622 F.3d 754, 758 (7th Cir. 2010)).

The Seventh Circuit then affirmed. *Id.* at 26a. The court recognized that the sole question was whether the district court may exercise specific personal jurisdiction over Petitioner regarding Respondents' claims. *Id.* at 10a.

After finding that Petitioner had purposefully availed itself to the forum by establishing "an online store, using a third-party retailer, Amazon.com" and filling "the order, intentionally shipping an infringing

product to the customer’s designated Illinois address,” the Seventh Circuit held that Petitioner “availed itself of the Illinois market in offering and shipping a product to the forum. *Id.* at 19a. Because of this purposeful direction, and because these contacts are related to the suit, it is subject to jurisdiction in Illinois.” *Id.* at 26a.

This petition follows.

REASONS FOR GRANTING THE PETITION

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

There is a conflict among the federal court of appeals in resolving “minimum contacts” questions involving virtual contacts. The circuits are split on whether operating a website that is accessible to the forum constitute “minimum contacts.” The circuits are also split on what contacts are required to meet “minimum contacts” requirement other than a non-resident defendant’s operation of a website that is accessible from the forum. The decision below demonstrates that courts are straying further from this Court’s precedents. This Court’s review is urgently needed.

A. The Courts Are Split on Whether Operating Website That Is Accessible From The Forum Meets “Minimum Contacts” Requirement.

The Fourth, Fifth, Ninth, and Eleventh Circuits concluded that merely operating a website that is accessible from the forum does not even constitute “purposeful availment” required under the “minimum contacts” requirement. In particular, the Fourth Circuit held that the defendant operates a website that is accessible in a given state does not mean that defendant is targeting its activities at that state, and is insufficient to satisfy the minimum contact requirement. *Fidrych v. Marriott Intl., Inc.*, 952 F.3d 124, 141-42 (4th Cir. 2020). The Fifth Circuit specified that “...the defendant must take the additional step of targeting the forum state in a manner that reflects ‘purposeful availment’ of the opportunity to do business in that state.” *Admar Int’l, Inc. v. Eastrock, L.L.C.*, 18 F.4th 783, 785 (5th Cir. 2021) (citing *Burger King*, 471 U.S. at 475). And the Ninth Circuit held that the website “lack[ed] a forum-specific focus” because the market for the website was global. *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1210 (9th Cir. 2020). The Eleventh Circuit concluded that the nonresident defendant’s mere operation of an interactive website alone does not give rise to purposeful availment *anywhere* the website can be accessed. *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1357 (11th Cir. 2013); citing *Toys “R” Us*, 18 F.3d at 453–54; see also *be2 LLC v. Ivanov*, 642 F.3d 555, 558–59 (7th Cir. 2011) (concluding that there was insufficient evidence that the defendant, operator of a

dating website which made user accounts freely available, purposefully availed himself of doing business in Illinois). The Eleventh Circuit further explained that purposeful availment for due process was shown in *Louis Vuitton Malletier, S.A.* because, in addition to the fully interactive website accessible in the forum state, defendant had other conducts with the forum through selling and distributing infringing goods through his website to the forum state consumers. *Id.* at 1355.

By contrast, the Sixth Circuit concluded that operating a website may constitute the “purposeful availment.” Specifically, the Sixth Circuit held that the operation of a website constitutes the purposeful availment of the privilege of acting in a forum state “if the website is interactive to a degree that reveals specifically intended interaction with residents of the state.” *Brana v. Moravcik*, 2021 WL 4771008, *2 (6th Cir. 2021) citing *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002).

The Tenth Circuit took a more stringent view that “... postings [on the Internet] may give rise to personal jurisdiction if they are directed specifically at a forum state audience or otherwise make the forum state the focal point of the message.” *XMission, L.C. v. Fluent LLC*, 955 F.3d 833, 840 (10th Cir. 2020), quoting *Shrader v. Biddinger*, 633 F.3d 1235, 1244 (10th Cir. 2011). What more rigid is that the district courts in Second Circuit even held that “the offering for sale of even one copy of an allegedly infringing item, even if no sale results, is sufficient to give personal jurisdiction over the alleged infringer...”

Cartier v. Seah LLC, 598 F. Supp. 2d 422, 425 (S.D.N.Y. 2009); *see also Lifeguard Licensing Corp. v. Ann Arbor T-Shirt Co., LLC*, 2016 WL 3748480, at *3 (S.D.N.Y. July 8, 2016) (“A website that does more than provide information about a product and allows customers to purchase goods online, is a ‘highly interactive website,’ which may provide a basis for personal jurisdiction”).

The decision in lower court deepens the conflict as the Seventh Circuit slightly changed its position by holding in this present case that defendant’s operation of an interactive website meets the purposeful availment requirement, where in *Advanced Tactical*, it held that “the operation of an interactive website does not show that the *defendant* has formed a contact with the forum state.” *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802–03 (7th Cir. 2014).

Apparently, there is a conflict among the federal court of appeals over what virtual contacts constitute “minimum contacts” required by due process for a court to exercise specific personal jurisdiction over a non-resident defendant. This case satisfies the criteria for this Court’s review as this conflict is acknowledged, entrenched, and widespread.

B. The Courts Are Split on What Contacts Are Required To Meet “Minimum Contacts” Requirement Other Than A Non-Resident Defendant’s Operation Of A Website That Is Accessible From The Forum.

The Third, Fifth, Sixth, Eighth and Federal Circuits concluded that other than the operation of website, “one” or “two” sale(s) to the forum cannot meet the “minimum contact” requirement as the sale(s) are “fortuitous, random, attenuated contacts” that fail to create “substantial connection.” *Burger King*, 471 U.S. at 475; *Walden*, 571 U.S. at 284.

For instance, the Third Circuit held that defendant’s maintenance of interactive, commercial web sites in Spain and its two sales to New Jersey residents did not establish minimum contacts sufficient to support exercise of personal jurisdiction as “the two documented sales appear to be the kind of ‘fortuitous,’ ‘random,’ and ‘attenuated’ contacts that the Supreme Court has held insufficient to warrant the exercise of jurisdiction.” *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454-55 (3d Cir. 2003); quoting *Burger King Corp.*, 471 U.S. at 475, 105 S. Ct. 2174 (citation omitted). The Fifth Circuit held that “sales to the plaintiff’s attorneys or other agents were improper attempts to manufacture contacts with the state.” *Getagadget, L.L.C. v. Jet Creations Inc.*, No. 19-51019, 2022 WL 964204, at *5 (5th Cir. Mar. 30, 2022). The Sixth Circuit held that [a] single deal with an in-forum resident also does not by itself suffice. *Power Investments, LLC v. SL EC, LLC*, 927 F.3d 914, 918

(6th Cir. 2019); citing *Burger King*, 471 U.S. at 478, 105 S. Ct. 2174. The Sixth Circuit held that a single deal with an in-forum resident also does not by itself suffice. *Power Investments, LLC v. SL EC, LLC*, 927 F.3d 914, 918 (6th Cir. 2019); citing *Burger King*, 471 U.S. at 478, 105 S. Ct. 2174. In addition, the Sixth Circuit specified that nonresident defendant's response to the plaintiff means that the defendant did not initiate the communication in question, which constitute the "unilateral activity of a *plaintiff*" that did not suffice to create personal jurisdiction. *Id.*, quoting *Rice v. Karsch*, 154 F. App'x 454, 462, 464 (6th Cir. 2005), citing *Walden*, 571 U.S. at 286, 134 S. Ct. 1115 (emphasis added) (quotation omitted).

Moreover, the Eight Circuit declined to exercise of specific personal jurisdiction in the forum state over nonresident internet-based defendant, based upon allegation that one consumer from the forum state accessed defendant's nationally available website and purchased one t-shirt bearing plaintiff's logo. *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 953 (8th Cir. 2022). Further, the Federal Circuit held that defendant's website together with its contacts offering a free trial to plaintiff create only an "attenuated affiliation" with the forum as opposed to a "substantial connection" with the forum State as required for specific jurisdiction. *NexLearn, LLC v. Allen Interactions, Inc.*, 859 F.3d 1371, 1378 (Fed. Cir. 2017), quoting *Burger King*, 471 U.S. at 475, 105 S. Ct. 2174.

To the contrary, the Second Circuit held that there was personal jurisdiction over a defendant in a

trademark action based on allegations that the defendant offered bags for sale to New York consumers on a website and sold “at least one counterfeit [] bag” to a New Yorker in the process. *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 171 (2d Cir. 2010). Likewise, the lower court allows the exercise of specific personal jurisdiction when the plaintiff purchased the suit-related alleged infringing product from a non-resident defendant who operates an interactive website that is accessible to Illinois, as well as anywhere in the planet, even if the defendant had never made any other contact with the forum.

The confusion among federal courts of appeals as to this requirement began following its introduction and has only deepened since. This Court has stated in *Burger King Corp.* that “minimum contacts” requirement with regard to the defendant and the forum State ensures that a nonresident defendant will not be forced to defend itself from litigation initiated in a foreign jurisdiction as a result of “random, fortuitous, or attenuated contacts” with the forum. *Burger King*, 471 U.S. at 475. But this Court did not address whether a conduct manufactured by Plaintiff is a result of “random, fortuitous, or attenuated contacts” with the forum.

In the decades since *Burger King Corp.*, this Court explained that “the defendant’s suit-related conduct must create a *substantial connection* with the forum State.” *Walden*, 571 U.S. at 284 (emphasis added). But these splits persist despite this Court’s recent personal jurisdiction precedents. This Court should grant certiorari to resolve the questions.

C. These Splits Lead To Different Results In Identical Cases.

This split has led courts to reach different outcomes in cases materially indistinguishable from this one: where the only connections between the forum and a non-resident defendant were (a) that the non-resident defendant is an online retailer operating an interactive online store that is accessible from all states of the United States, including the forum state, and (b) a purchase manufactured by a plaintiff.

Under the decision below, a non-resident defendant who operates an interactive website will be subject to personal jurisdiction in any forum in which a plaintiff purchases an allegedly infringing product. But the Fifth Circuit addresses the issue and has held that specific personal jurisdiction is lacking on these facts. Moreover, the Eighth and Federal Circuits address the issue and have declined to exercise specific personal jurisdiction on similar facts. *Bros. & Sisters in Christ, LLC*, 42 F.4th at 953; *NexLearn, LLC*, 859 F.3d at 1378, quoting *Burger King*, 471 U.S. at 475.

In *Getagadget, L.L.C.*, the Fifth Circuit held that “in order to demonstrate that trademark infringement and unfair competition claims arose out of sales directed at Texas, [plaintiff] was required to show that those sales were to customers who could have been potentially deceived by the alleged infringement, and sales to the plaintiff’s attorneys or other agents were improper attempts to manufacture contacts with the state” *Getagadget, L.L.C. v. Jet*

Creations Inc., No. 19-51019, 2022 WL 964204, at *5 (5th Cir. Mar. 30, 2022).

As this shows, Respondents' complaint would have been dismissed by any court that requires plaintiff to show that those sales were to customers who could have been potentially deceived by the alleged infringement. *Getagadget, L.L.C.*, 2022 WL 964204, at *5. Moreover, Respondents' complaint would have been dismissed by any court that distinguishing the "attenuated affiliation" and requires "substantial connection" with the forum State. *NexLearn, LLC*, 859 F.3d 1371, 1378.

This reality underscores the need for this Court's review: it is the disagreement over the standard – not different facts – that is leading to different outcomes in the lower courts. These different outcomes give plaintiffs every reason to bring suit in the courthouse they believe will be more receptive to their claims. The potential for "[f]orum shopping" is "a substantial reason for granting certiorari." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). This Court should do so here.

II. THE DECISION BELOW MUST BE REVERSED.

This Court has never endorsed that result. Rather, this court has stated that "minimum contacts" requirement with regard to the defendant and the forum State ensures that a nonresident defendant will not be forced to defend itself from litigation initiated in a foreign jurisdiction as a result of "random, fortuitous, or attenuated contacts" with the forum.

Burger King, 471 U.S. at 475. This Court in *Walden* again stated that due process requires that “the defendant’s suit-related conduct create[s] a *substantial connection* with the forum State.” *Walden*, 571 U.S. at 284 (emphasis added).

Here, the district court exercised specific personal jurisdiction over Petitioner where its contact with the forum was a single purchase made by Respondents from the interactive website operated by Petitioner that is accessible from the forum, as well as anywhere else. The district court’s exercise of specific personal jurisdiction does not comply with the Due Process Clause. By allowing the district court to exercise specific personal jurisdiction, the lower court is straying away from this Court’s jurisprudence. Not only the facts in this case do not present a substantial connection between Petitioner’s suite-related conduct and the forum, but the single sale to Respondent’s agent was a result of “random, fortuitous, or attenuated contacts” with the forum. *Burger King*, 471 U.S. at 475. By allowing the district court to exercise specific personal jurisdiction, the lower court essentially endorsed the forum shopping activity of a plaintiff as a plaintiff can drag an online seller defendant to any district simply by purchasing a suit-related good from that district. The lower court’s decision further violates the traditional notion and fair play in that it forced a non-resident defendant to defend itself in a foreign jurisdiction at a plaintiff’s wish. If operating an interactive website that is accessible from anywhere in the plant would be amount to purposeful availment, and a single purchase can drag that nonresident online seller to the

forum, then presumably that an online seller will have zero protection under due process clause. Therefore, the decision below must be reversed.

III. THIS CASE IS AN IDEAL VEHICLE TO PROVIDE A GUIDANCE ABOUT VIRTUAL CONTACTS

The questions presented here raise an issue of fundamental importance, and their correct dispositions are essential to the proper and uniform operation of the due process protection nationwide. Because this case presents an optimal vehicle for providing a guidance and resolving the significant issue about virtual contacts mentioned in *Walden*, the petition should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Tianyu Ju
Counsel of Record
Glacier Law LLP
41 Madison Avenue, Suite 2529
New York, NY 10010
(332)499-2666
iris.ju@glacier.law

Counsel for Petitioner

November 14, 2022