No. 21-

In The

Supreme Court of the United States

AMA MULTIMEDIA, LLC,

Petitioner,

v.

MARCIN WANAT,

Respondent.

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

Whether a foreign defendant, whose largest business market originates from the United States through website visitors with geotargeted advertising, who has committed tortious conduct against a U.S. citizen or business, has engaged in "express aiming" at the United States for purposes of a United States court asserting personal jurisdiction pursuant to Fed. R. Civ. P. 4(k)(2).

PARTIES TO THE PROCEEDING

Petitioner, AMA Multimedia, LLC, was the plaintiff in the district court and the appellant in the court of appeals.

Respondent, Marcin Wanat, was the defendant in the district court and the appellee in the court of appeals.

RULE 29.6 STATEMENT

Petitioner AMA Multimedia, LLC hereby states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (D. Ariz.):

AMA Multimedia, LLC v. Wanat, No. 2:15-cv-01674-ROS (Dec. 11, 2017) (judgment of dismissal entered)

United States Court of Appeals (9th Cir.):

AMA Multimedia, LLC v. Wanat, No. 18-15051 (Aug. 17, 2020) (panel decision affirming dismissal)

AMA Multimedia, LLC v. Wanat, No. 18-15051 (Nov. 9, 2020) (denial of rehearing *en banc*)

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Petitioner AMA Multimedia, LLC ("AMA") respectfully petitions this Court for a writ of certiorari to review the decision propounded by the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals was selected for publication in the Federal Reporter and can be found at *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201 (9th Cir. 2020). The opinion of the United States District Court for the District of Arizona is unreported but may be located online at *AMA Multimedia, LLC*

v. Wanat, 207 U.S. Dist. LEXIS 228078 (D. Ariz. Sept. 29, 2017).

STATEMENT OF BASIS FOR JURISDICTION

Judgment was entered by the United States Court of Appeals for the Ninth Circuit on August 17, 2020. An order denying a petition for rehearing and for rehearing *en banc* was entered on November 9, 2020. This Court has jurisdiction to review the judgment of the Ninth Circuit pursuant to U.S. Const., Art. III, § 2, cl. 2 and 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED IN THIS CASE

Federal Rule of Civil Procedure 4(k)(2) provides:

> *Federal Claim Outside State-Court Jurisdiction.* For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:
>
> > (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
> >
> > (B) exercising jurisdiction is consistent with the United States Constitution and laws.

U.S. Const., Amdt. 5 provides, in relevant part:

> No person shall … be deprived of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

In a split with the Fourth and Sixth Circuits,[1] the Ninth Circuit's decision below stands for the proposition that an online copyright infringer (or other tortfeasor) whose largest market with 20% of its business coming from the United States, cannot be haled into American courts to answer for its alleged misconduct. The Ninth Circuit's decision ignores and tacitly overturns this Court's holding in *World-Wide Volkswagen*, where it held "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). The Ninth Circuit's decision also imposes a barrier to jurisdiction where it requires "minimum contacts" in excess of what this Court found sufficient in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). Respondent, Marcin Wanat, placed infringing content with targeted advertisements into the stream of commerce with the expectation that they would be consumed by American consumers. This Court should grant *certiorari* to resolve the split and ensure foreign tortfeasors who purposefully direct their activities at and profit from Americans are held accountable in the United States.

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[1] As to a split on express aiming: *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344, 354 (4th Cir. 2020). As to a split on locus of the harm: *Bird v. Parsons*, 289 F.3d 865, 876 (6th Cir. 2002).

A. Jurisdiction in the District Court

The U.S. District Court for the District of Arizona had subject matter jurisdiction over the matter pursuant to 28 U.S.C. §§ 1331 and 1338 as the causes of action arose under the Copyright Act and the Lanham Act. Petitioner asserted that the district court had personal jurisdiction over the defendants pursuant to Fed. R. Civ. P. 4(k)(2).

B. Wanat Operated a Website Targeting the United States

Petitioner AMA is a Nevada limited liability company with its primary place of business in Las Vegas, Nevada. AMA's subscription-based websites issue login IDs and passwords to subscribers. (App. 2a; ER-663, ¶¶8-9.)[2] Subscribers are then able to access the secure areas of AMA's websites to view its copyright-protected works. (*Id.*) AMA owns several online properties and brands protected by federally registered trademarks and common law. (App. 2a; ER-663, ¶11.)

Marcin Wanat is a resident of Poland and one of the operators of the ePorner website. (App. 3a.) He is the registrant of the <epornergay.com> and <eprncdn.com> domain names. (App. 3a.) Either Wanat or one of the co-operators of ePorner is the registrant of the <eporner.com> domain name. (ER-664, ¶12.) When an internet user types any of these three domain names into a browser, he is taken to ePorner, a website operating as a mega-theater that infringes the intellectual property of AMA and other

[2] References to the Appendix filed herewith are denoted by the abbreviation "App.", and references to the Excerpts of Record submitted by Petitioner in the Court of Appeals for the Ninth Circuit are denoted by the abbreviation "ER".

content producers. (ER-666, ¶24.) The infringed videos in this case loaded from <eprncdn.com>. (ER-37.)

Wanat relies upon infringing content in his operations. He allowed users to upload videos completely anonymously unlike similar sites that allegedly rely upon user uploads. (App. 2a; ER-667, ¶30.) Moreover, Wanat and the other operators uploaded much of the infringing content themselves. (ER-667, ¶31.)

ePorner depends upon posting infringing content on its site, including videos that Wanat stole from AMA. (ER-666, ¶25.) The videos on ePorner, including AMA's videos, contain the watermarks of the intellectual property owner along with ePorner's watermark, leading to confusion by internet users, who believe that AMA sponsors, endorses, or approves of ePorner's use of its content and trademarks. (ER-667, ¶¶26-27.)

C. Proceedings Before the District Court

AMA filed its Complaint with the U.S. District Court for the District of Arizona on August 24, 2015. (ER-711.) Wanat and his partners hid their identities by utilizing privacy services to disguise their registrations of the domains. (ER-697, ER-703, and ER-707.) AMA sued each Wanat and his partners as Doe Defendants and Roe Corporations. (App. 2a-3a.)

Immediately after filing the case, AMA learned Wanat's identity through early discovery and amended its complaint to reflect Wanat as a named defendant. (App. 3a.)

As soon as he learned that he was a defendant in litigation in the U.S., Wanat immediately attempted to obscure his ties to the U.S., including:

- Transferring registration of the <eporner gay.com> and <eprncdn.com> domains from an Arizona-based registrar to a foreign nation. (ER-585-586; ER-599; ER-604.)

- Blocking access to ePorner to residents of Arizona (where the case was pending) and Nevada (where AMA and its counsel were located), obstructing AMA's and the court's ability to view the extensive infringement on the website. (ER-581 at 6; ER-614-615, ¶¶13, 16.)

- Removing language in ePorner's Terms of Use that required ePorner users to comply with U.S. Copyright law and inserting language insinuating that Wanat and ePorner are not bound by U.S. law. (ER-480; ER-120.).

- Changing its DNS provider from one in the U.S. to one in Canada. (ER-38-39; ER-47; ER-53; ER-57; ER-149-150, ¶¶25-27.)

- Changing its privacy policy so that it no longer stated that, in the event that an intellectual property owner alleged infringement by an ePorner user, Wanat would release that user's information to "relevant authorities, including respective copyright owners." (ER-30.)

On November 30, 2015, Wanat filed a Motion to Dismiss for Lack of Personal Jurisdiction. (ER-484.) That motion was fully briefed, and the court heard arguments from counsel on December 15, 2015. (ER-479 and ER-476.) The district court held that there was insufficient evidence to conclusively state

whether the court possessed jurisdiction over Wanat and ordered jurisdictional discovery. (*Id.*)

Wanat refused to cooperate in discovery in good faith and argued that disclosure would subject him to possible criminal and civil liability under Polish privacy, penal, and unfair competition laws.

Pursuant to the district court's instruction, AMA and Wanat met and conferred regarding selection of a Special Master familiar with U.S. and Polish law. (ER-302.) Before the Special Master, on June 7, 2016, AMA filed a Motion to Compel, and Wanat filed a Motion for Protective Order. Both Motions were fully briefed, and the Special Master submitted her corrected version of the Report and Recommendations on August 22, 2016 (ER-245).

While the Special Master held in AMA's favor for the majority of the discovery disputes, her analysis regarding the Polish Data Protection law ("PDP") (insufficiently and incorrectly in Petitioner's view) stated:

> AMA also requests that Wanat redact the data, so the data does not contain information that would identify an individual. According to Polish law, and in particular the PDP, Wanat cannot do so without violating applicable law. Redacting the data is the equivalent of processing it, which Wanat is not authorized to do.

(ER-261.) AMA objected to the Special Master's recommendation (ER-219), but the district judge adopted it because "the Special Master was well-qualified and knowledgeable regarding Polish law." (ER-23.) AMA moved to reconsider the court's

adoption of the recommendation (ER-209), but its motion was denied by court order dated December 21, 2016. (ER-21.) Wanat filed a renewed motion to dismiss (ER-156), which was fully briefed. Because the district court did not require him to produce records, the district judge granted Wanat's renewed motion to dismiss on September 29, 2017 (App. 71a). On December 11, 2017, the court issued its judgment of dismissal in a civil case (ER-1).

D. Disposition before the United States Court of Appeals for the Ninth Circuit

After the district court issued its judgment on December 11, 2017, AMA filed its Notice of Appeal on or about January 8, 2018. Thereafter, AMA filed its Opening Brief on June 18, 2018. Marcin Wanat filed his Answering Brief on October 16, 2018, and AMA filed its Reply Brief on January 7, 2019.[3]

Oral argument before the Ninth Circuit occurred on June 11, 2019 before a panel consisting of the Honorable Ronald Gould, the Honorable Sandra Ikuta, and the Honorable Ryan Nelson.[4] On

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[3] On March 31, 2019, the Ninth Circuit filed a Notice of Oral Argument for June 11, 2019. On June 3, 2019, the Ninth Circuit issued an Order requesting that the parties be prepared to provide argument regarding whether the PDP was still in effect. Wanat submitted additional authority on June 10, 2019, informing the court that the PDP had been superseded by the General Data Protection Regulation (EU), 2016/679 of April 27, 2016 ("GDPR").

[4] Following oral argument, AMA submitted additional authority on June 12, 2019 regarding how other U.S. courts have been interpreting the GDPR and the European Data Protection Board's guidelines for how the European Union applied the GDPR. AMA also submitted additional authority on August 8, 2019 regarding the Ninth Circuit's decision in *Hydentra Hlp Int.*

December 20, 2019, the Ninth Circuit requested additional briefing from the parties regarding the European Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 O.J. (L 207), ¶13 (the "Privacy Shield Decision"). AMA submitted its Supplemental Brief on January 21, 2020, which was followed by Wanat's Supplemental Brief on February 20, 2020.

On August 17, 2020, the Ninth Circuit issued its opinion for publication. *See AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201 (9th Cir. 2020). The court's opinion was drafted by Judge Nelson. Judges Nelson and Ikuta additionally submitted concurring opinions. Judge Gould dissented.

The majority opinion concluded that Wanat was not subject to personal jurisdiction in the United States pursuant to Fed. R. Civ. P. 4(k)(2), known as the "federal long-arm statute." Specifically, because Wanat lacked the required minimum contacts necessary for the assertion of jurisdiction, the court held that taking jurisdiction over him would not comport with due process requirements.

Citing *Axiom Foods, Inc. v. Accerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017), the appeals court applied a three-part test to determine whether Wanat had the requisite minimum contacts to warrant exercise of specific jurisdiction: (1) whether the defendant purposefully directed his conduct towards the forum or purposefully availed himself of the privileges of conducting activities in the forum; (2) whether the claim arose out of or related to the

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v. Sagan Ltd., No. 17-16637, 2019 U.S. App. LEXIS 23041 (9th Cir. Aug. 1, 2019), which asserted jurisdiction over a foreign defendant pursuant to Fed. R. Civ. P. 4(k)(2).

defendant's forum-related activities; and (3) whether the assertion of jurisdiction against Wanat was reasonable. The Ninth Circuit concluded that the district court did not abuse its discretion in declining to assert jurisdiction over Wanat.

To determine "purposeful direction," the Ninth Circuit applied the "effects test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984); *see also Mavrix Photo, Inc. v. Brand Techs, Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011) (applying the effects test in a copyright infringement case); *Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316, 1321-22 (9th Cir. 1998). Using that test, the defendant must have (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. *Mavrix*, 647 F.3d at 1228.

The panel concluded that Wanat had engaged in the requisite intentional acts by establishing and maintaining the ePorner website, registering the <eprncdn.com> and <epornergay.com> domain names, and entering into a contract with a U.S. DNS provider. However, the panel concluded (in error, as discussed below) that Wanat did not expressly aim his conduct at the United States. The panel also held that the district court did not abuse its discretion by limiting the scope of jurisdictional discovery for privacy-related reasons.

Although Judge Nelson drafted the opinion of the court, he also submitted a concurring opinion to opine that the district court, in further proceedings, would be permitted to consider intervening law, specifically the GDPR and the Privacy Shield Decision. Judge Ikuta submitted a concurring opinion that, because

there was no personal jurisdiction over Wanat, the district court only had authority to remove the case from its docket.

Judge Gould dissented, finding that it would have been reasonable for the district court to assert jurisdiction over Wanat. Judge Gould found that Wanat had targeted the U.S. under the *Calder* effects test and that AMA's claims arose out of Wanat's forum-related activities. Judge Gould would have overturned the decision of the district court.

Agreeing with the analysis provided by Judge Gould, AMA filed a Petition for Rehearing *En Banc* on August 31, 2020. Specifically, Petitioner argued the panel reached the wrong conclusion when answering the question of what constituted express aiming at the United States for purposes of a U.S. court asserting personal jurisdiction under Fed. R. Civ. P. 4(k)(2) over a foreign defendant that has committed tortious conduct over a U.S. citizen or business. Petitioner argued that the Ninth Circuit decision was contrary to the precedent set in *Keeton v. Hustler, Inc.*, 465 U.S. 770 (1984) and *Mavrix Photo, Inc. v. Brand Techs, Inc.*, 647 F.3d 1218 (9th Cir. 2011). Petitioner argued that the panel's decision provides a blueprint for foreign tortfeasors to purposefully direct conduct at the U.S. and cause harm in the U.S. without legal consequence.

On November 9, 2020, the Ninth Circuit denied Petitioner's request for rehearing *en banc*. Judges Ikuta and Nelson voted to deny the petition, while Judge Gould voted to grant it. That denial necessitated the filing of this petition.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision is contrary to this Court's decision in *Keeton v. Hustler, Inc.*, 465 U.S. 770 (1984) and directly conflicts with the Fourth Circuit's decision in *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344, 354 (4th Cir. 2020). The issues in this case are of exceptional importance, necessitating this Court's *certiorari* review.

The United States is Respondent's largest market, accounting for 19.21% of his website's viewers. (App. 4a.) Moreover, the U.S. accounted for much more of Respondent's profits, as ePorner makes its money through advertising revenue, and U.S. advertising rates are some of the highest in the world. (ER-152.) To better service the U.S., Respondent employed name servers in the U.S. to ensure the website's performance, speed, and reliability were optimized for the U.S.-market. (App. 31a.)

Respondent distributed pirated American films, invoked the protections of U.S. copyright law, and formed a contractual relationship with each of its users, including millions of Americans. (ER-152.) Wanat used an American registrar for his domain names and an American company for acceptance of service for notices under the Digital Millennium Copyright Act. (ER-679; ER-159.) Haling a defendant in Respondent's position into U.S. courts comports with due process and "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). To hold otherwise would enable foreign copyright infringers, as well as foreign trademark infringers, distributors of non-consensual adult videos, including child pornography and revenge

pornography,[5] unsafe product manufacturers, and con artists who purposefully direct their activities toward the U.S. to escape American justice.

A. The Ninth Circuit was Correct to Use the *Calder* Framework

Federal Rule of Civil Procedure 4(k)(2), known as the "federal long-arm statute," permits the exercise of personal jurisdiction over a foreign defendant where:

> (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
>
> (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Fed. R. Civ. P. 4(k)(2). The due process clause of the 5th Amendment bars U.S. courts from exercising personal jurisdiction over non-sovereign foreign defendants without an adequate nexus to the United States. *See Livnat v. Palestinian Authority*, 851 F.3d 45, 48-54 (D.C. Cir. 2017), *cert. denied,* 139 S. Ct. 373 (2018). The due process analysis under Rule 4(k)(2) is akin to the traditional personal jurisdiction analysis with the difference that rather than

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[5] The Ninth Circuit's decision will compromise the ability of Americans to enforce existing and prospective legislation of all varieties, such as the proposed, bipartisan *Stop Internet Sexual Exploitation Act,* S. 5054, 11th Cong. (2020). This legislation would ensure operators like Wanat verify identification with confirmed driver's licenses or similar identification prior to a user uploading any material on Wanat's websites to prevent the spread of child pornography, revenge porn, and other non-consensual videos (*e.g.*, those featuring victims of sex trafficking crimes). The Ninth Circuit's decision would allow Wanat to escape compliance with laws like this, even though the U.S. is his largest and most profitable market.

considering contacts between the defendant and the forum state, the courts consider contacts with the nation as a whole. *See* Fed. R. Civ. P. 4 advisory committee's note 1993 Amendments. Thus, "[a]lthough a nonresident's physical presence within the territorial jurisdiction of the court is not required, the nonresident generally must have 'certain minimum contacts such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Walden v. Fiore*, 571 U.S. 277, 283 (2014) quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (cleaned up).

In its decision, the Ninth Circuit performed this analysis under the *Calder* "effects" test to determine whether Respondent personally directed activity at the U.S. Specifically, the appeals court considered whether (1) the defendant committed an "intentional act" (2) "expressly aimed" at the forum state, (3) causing harm that the defendant knew was likely to be suffered in the forum state. *See Calder v. Jones*, 465 U.S. 783 (1984). The panel correctly concluded that Respondent engaged in the requisite "intentional act." *See* App. 11a-12a. It erred on the other two factors, creating splits with its sister circuits.

B. The Ninth Circuit's Decision Conflicts with the Fourth and Sixth Circuit, and Disregards this Court's Precedent

In a decision conflicting with one of the Fourth Circuit, the Ninth Circuit panel erroneously held that Respondent did not expressly aim his activities towards the U.S.

While the panel concluded Wanat "may have foreseen that ePorner would attract a substantial number of US viewers," it inconsistently found that

Wanat did not "anticipate, desire, and achieve" a substantial U.S. market, because the site's subject matter did not have a "forum-specific focus," (finding the website had "global" appeal) and that the "United States was not the "focal point" of the website "and of the harm suffered." App. 15a-19a (relying on *Calder*). But, a content-based forum-specific focus is neither required, nor is it sensical. Both *Calder* and *Keeton* were decided by this Court the same day, illustrating the different applications of personal jurisdiction across different fact sets. In *Calder*, the Court held there was jurisdiction where the forum was the "focal point" of the article and the harm suffered; that same Court in *Keeton* held there was jurisdiction in a non-focal forum because there were sufficient minimum contacts through the magazine's "regular circulation of magazines" in New Hampshire. New Hampshire was not the "focal point" of *Hustler* magazine, nor was there a New Hampshire focus to the magazine. *Calder* and *Keeton* represent two different methods of satisfying due process. Even if a "focal point" under *Calder* cannot be found, the distribution level under *Keeton* nevertheless permits a court to exercise personal jurisdiction.

The Ninth Circuit also conflicted with its own precedent in *Mavrix* and determined that Petitioner could not establish that Wanat "continuously and deliberately" exploited the U.S. because it changed the standard of "continuously and deliberately" exploiting the forum market from "selling advertising" to "personal direction and control of forum-targeted ads." *Contrast Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011).

To exploit a forum market simply means to generate revenue or some other financial benefit from that forum audience. In *Keeton*, that meant the circulation and sales of a physical magazine in New Hampshire. In *Mavrix* and *UMG*, that meant whether advertisements were presented to viewers based in the forum leading to advertising revenue. In the decision below, it now means the defendant himself must control and direct forum-targeted ads in order to be deemed to be deliberately exploiting the forum for commercial gain.

As noted by Judge Gould's dissent below, "[t]he majority … unduly restricts the authority of United States courts to hold alleged, foreign tortfeasors to account and incorrectly curtails our established precedents." App. 31a-32a. Judge Gould additionally stated that the panel "seek[s] to distinguish *Mavrix* from the present case [by] throwing up roadblocks that can be found nowhere in our precedents — and that, in some instances, flatly contradict our precedents." App. 37a-38a. Judge Gould finally noted that "the majority's holding today conflicts with [the Court's] precedents and unduly restrains [the Court's] ability to hold foreign tortfeasors accountable for conduct purposefully directed at the United States and causing harm in the United States." App. 44a. The panel's departure from established law warrants this Court's review.

The errors of the Ninth Circuit have had significant consequences to litigants. Even in a dissent in a different case, the decision here was used to stand for the proposition that personal jurisdiction is lacking where "the market for the website was global". *Janus v. Freeman*, No. 19-55199, 2020 U.S. App. LEXIS 40355, at *18 (9th Cir. Dec. 24, 2020)

(Baylson, J., dissenting). District courts have struggled with the decision relative the contrasting propositions that, under *Mavrix*, a "substantial number" of visitors from the forum is sufficient to confer personal jurisdiction, whereas a 20% plurality (here) is not. *Westbrook v. Paulson*, No. 2:20-cv-1606, 2021 U.S. Dist. LEXIS 47751, at *15 (W.D. Wash. Mar. 15, 2021); *see also Ketayi v. Health Enrollment Grp.*, No. 20-cv-1198-GPC-KSC, 2021 U.S. Dist. LEXIS 19594, at *29-31 (S.D. Cal. Feb. 1, 2021); *Yeager v. Airbus Grp. SE,* No. 8:19-cv-01793-JLS-ADS, 2021 U.S. Dist. LEXIS 38313, at *16-18 (C.D. Cal. Jan. 26, 2021); *Handsome Music, LLC v. Etoro USA LLC,* No. LACV 20-08059-VAP (JCx), 2020 U.S. Dist. LEXIS 238942, at *20-28 (C.D. Cal. Dec. 17, 2020); *CrossFit, Inc. v. Fitness Trade sp. z o.o.,* No. 18-CV-2903-CAB-BLM, 2020 U.S. Dist. LEXIS 204853, at *10-12 (S.D. Cal. Nov. 2, 2020); *42 Ventures v. Rend,* No. 20-cv-00228-DKW-WRP, 2020 U.S. Dist. LEXIS 197796, at *7-9 (D. Haw. Oct. 23, 2020). Notably, one court specifically chose to ignore evidence of geolocated targeted advertising because of the decision. *Hb Prods. v. Faizan,* No. 19-00487 JMS-KJM, 2020 U.S. Dist. LEXIS 216281, at *14-15 (D. Haw. Nov. 18, 2020) ("Plaintiff's argument that Defendant's use of geo-located advertising shows that Defendant targeted the United States and/or Hawaii is foreclosed by *Wanat*.") The Court has the opportunity to stop further harm to Americans injured by those abroad by ensuring personal jurisdiction exists where the defendant targets the United States.

1. The Ninth Circuit's Decision Departs from this Court's Precedent

This Court rejected a forum-specific focus in *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770 (1984). In *Keeton*, the plaintiff filed a libel suit in New Hampshire. The defendant's only contacts with New Hampshire were sales of 10,000 to 15,000 copies of its magazines each month. 465 U.S. at 772. The Court held that the defendant was subject to personal jurisdiction in New Hampshire. *See id.* at 773-74. The Court reasoned that although the defendant's magazine was "aimed at a nationwide audience" (similar to a website aimed at a "global" audience), it "continuously and deliberately exploited the New Hampshire market" by selling magazines in the State. *Id.* at 781. Thus, the Court determined it was fair to require the defendant to "answer for the contents of [its] publication wherever a substantial number of copies are regularly sold and distributed." *Id.*

Here, the Ninth Circuit determined U.S. courts lack personal jurisdiction over Respondent because his website lacked "a [United States] focus" and the "market for adult content is global." App. 14a-15a. This is directly contrary to the *Keeton* holding. *See Keeton*, 465 U.S. at 780; *see also* App. 38a. Respondent's content has no more a U.S.-specific focus than Hustler Magazine's photographs had a New Hampshire focus.[6]

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[6] As the dissent below aptly notes, this Court "need not rely on the subject matter of ePorner.com as evidence from which to infer the site's appeal in the forum; The record *directly shows* that ePorner appeals to a significant U.S. audience and that it

The decision below is a departure from the Ninth Circuit's own precedent. In *Mavrix*, the Ninth Circuit interpreted *Keeton* for the internet-era by analogizing the number of hits a website receives from users in a forum with the units of circulation of a magazine to determine how substantial is the contacts with a forum are when determining personal jurisdiction over a website operator. *See* 647 F.3d at 1229-30. The New Hampshire market in *Keeton* accounted for a much smaller percentage of Hustler's circulation than the U.S. market here. Contrast 465 U.S. at 780; App. 38a. The Ninth Circuit majority attempted to distinguish *Keeton* by stating that Hustler "regularly circulated 'some 10 to 15,000 copies of Hustler Magazine in the forum state each month.' That sort of express aiming is also not present here." App. 19a, n.8. This is incorrect.

Using an estimate of 800,000 global visits to Respondent's website per day and the U.S. being 19.21% of Respondent's traffic, Respondent garnered 4.5 million U.S. hits per month. (ER-152.) This is 300 times the size of Hustler's circulation in *Keeton*. As noted by the dissent, the use of a U.S.-based DNS company leads to the "straightforward conclusion" that "the United States 'audience is an integral component of [Respondent's] business model and its profitability,' and that 'it does not violate due process to hold [Respondent] answerable in a [U.S.] court for the contents of a website whose economic value turns, in significant measure, on its appeal to [U.S. residents].'" App. 37a (*quoting Mavrix*, 647 F.3d at 1230). The Ninth Circuit recognized that Respondent

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contracts with a U.S.-based DNS company which markets itself as providing faster internet speeds to U.S. users." App. 39a (emphasis in original).

foresaw that ePorner "would attract a substantial number of viewers in the United States." App. 15a. It would not, then, offend traditional notions of justice or fair play to hale him into the United States "based on the contents" of his website. *Keeton,* 465 U.S. at 781.

The Ninth Circuit acknowledged that Respondent sold advertising space which ultimately displayed U.S.-targeted ads generating significant profits from the U.S. market, but then the majority inexplicably added an additional requirement to establish whether Wanat was "continuously and deliberately exploiting" the United States viewership. It demanded that Petitioner demonstrate that Respondent personally direct and control the geo-targeting of the advertisements. *See* App. 16a-17a. This directly contradicted the holding of *Mavrix*, which did not require the defendant to personally direct the geo-targeting of the ads and stated that the geo-targeting of ads shows knowledge, actual or constructive, of the "[forum] user base" (inferring that contacts with California must be significant in the absence of statistical data). *Mavrix* held that a defendant who "exploits that base for commercial gain by selling space on its website for advertisements" engages in continuous and deliberate exploitation. 647 F.3d at 1230. Ignoring *Mavrix*, the panel instead misinterpreted *Walden v. Fiore*, 571 U.S. 277, 284 (2014) for the requirement that it be Respondent himself who controls and directs the advertising.[7] *See* App 16a, n.6.

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[7] *Walden* states "Respondents warn that if we decide petitioner lacks minimum contacts in this case, it will bring about

The Court should take this opportunity to clarify *Walden* (which was quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)) to ensure that the courts understand that the "defendant himself" requirement is not so narrow to preclude jurisdiction if actions are taken, with his knowledge, by agents and contractors acting on his behalf, for his intentional, personal benefit, creating a contact with the forum independent of the plaintiff. In discussing *Walden*, the Court just recently acknowledged that it was limited to the context where only the plaintiff had contacts with the forum and the defendant "had never taken any act to 'form a contact' of his own." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017 (2021), quoting *Walden, supra* at 290. Respondent formed his own contacts with the United States.

Respondent had actual knowledge U.S.-targeted ads would be served within the advertising space he created on his website. Here, the "defendant himself" carved out advertising space within the display of his website that he controls, with the knowledge that his United States-based viewers, which comprise his largest and most lucrative market, would be served location-based targeted ads by a third-party to whom he knowingly sold the right to display ads. Wanat is exploiting the U.S. market for commercial gain. To say otherwise would allow defendants to be willfully

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unfairness in cases where intentional torts are committed via the Internet or other electronic means… In any event, this case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State… We leave questions about virtual contacts for another day." 571 U.S. at 290 n.9. That day is today.

blind to how they make money and what advertising appears on their website.

Just weeks prior to *Walden*, the Court's opinion in *Daimler AG v. Bauman*, 571 U.S. 117, 128 n.7 (2014), demonstrated the requirement was not so narrow. The Court in *Daimler* specifically looked to *Keeton, Calder,* and *World-Wide Volkswagen*, to highlight cases where foreign defendants were subject to jurisdiction. As in *Keeton*, Respondent "continuously and deliberately exploited" the U.S. market. 465 U.S. at 780-81. As in *Calder*, Respondent's largest circulation was in the U.S. 465 U.S. at 789-90. As in *World-Wide Volkswagen*, Respondent took "efforts … to serve, directly or indirectly, the market for its product in" the U.S. 444 U.S. at 297. And, as noted in *Daimler*, "specific jurisdiction may lie over a foreign defendant that places a product into the 'stream of commerce" while also 'designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.'" 571 U.S. at 128 n.7, quoting *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty*., 480 U. S. 102, 112 (1987) (opinion of O'Connor, J.). Respondent placed his website, and its infringing content, into the stream of commerce, selling the associated advertising space to a distributor with knowledge it would be targeted to the forum (the U.S.). As with any website, Respondent has access to analytical data on his own website to ensure he knows what his largest market is. Respondent knows what location-based, targeted advertising is being displayed on his website, even if he has contracted

with a third party to provide it. Respondent knows where his revenue and the value from his website comes from. Thus, "there is a strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction." *Ford, supra* at 1017, quoting *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414 (1984). Clarifying the "defendant himself" requirement of *Walden* to include defendants like Respondent, who knowingly aim their products into the forum, but who do so through others, is necessary to ensure injured Americans can obtain justice, and that foreign defendants cannot intentionally evade our laws while exploiting our market.

2. The Decision Created a Circuit Split

On June 26, 2020, the U.S. Court of Appeals for the Fourth Circuit published its decision in *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344 (4th Cir. 2020). In *Kurbanov*, twelve American record companies sued a Russian defendant who operated two "stream-ripping" websites "through which audio tracks may be extracted from videos available on various platforms (e.g., YouTube) and converted into a downloadable format (e.g., mp3)." 963 F.3d at 348.

The Fourth Circuit held that the defendant had "purposefully availed himself of the privilege of conducting business in Virginia and thus had a 'fair warning' that his forum-related activities could 'subject [him] to [Virginia's] jurisdiction." *Kurbanov*, 963 F.3d at 353. In finding personal jurisdiction, Fourth Circuit looked at the number of visitors from Virginia and the geotargeted advertising by advertising brokers, as well as the defendant's assertion of U.S. intellectual property laws, domain

name registration with U.S.-based registrars, and defendant's U.S.-based servers.[8] *See id*. at 353-54.

In holding that the defendant was subject to personal jurisdiction in Virginia, the Fourth Circuit cited *Mavrix* for the proposition that it was immaterial whether it was the defendant or his advertising brokers that were targeting forum residents. *Kurbanov*, 963 F.3d at 354 (citing *Mavrix*, 647 F.3d at 1230).

Respondent's American user base was nearly double the defendant's American userbase in *Kurbanov*. It is immaterial as to whether Respondent had a U.S.-based advertising broker or an overseas advertising broker targeting the U.S. Respondent did not host his website on U.S. servers, but he used a U.S.-based DNS company to optimize his site in the United States. Respondent's website's terms took specific advantage of U.S. copyright laws. The cases are factually similar, but the Ninth and the Fourth Circuits reached opposite conclusions.

If the Fourth Circuit followed the same erroneous standard in *Kurbanov* as in *AMA v Wanat*, then jurisdiction would have been denied. Popular music from the largest recording studios also appeals to a

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[8] As with Respondent, Kurbanov's Terms specifically created a contract with each user. *See* 963 F.3d at 348. Like Respondent, virtually all of Kurbanov's revenue from the websites came from advertising. *See id*. Like Respondent, rather than hire advertisers, Kurbanov used advertising brokers. *See id*. Like Respondent, Kurbanov had no control over the content of the geotargeted ads but knew they were geotargeted. *See id*. About ten percent of Kurbanov's website traffic originated from the U.S.; half of Respondent. *See id*. at 349. Like Respondent, Kurbanov used a U.S. based registrar and a U.S. based DMCA agent. *See id.*

global market (as do all Hollywood movies, and every other piece of popular content). The Fourth Circuit would have discarded the size of the Virginia market and the level of interactivity the site had with the users in the forum, finding it immaterial once it concluded the content appealed globally. The Fourth Circuit would have found that the defendant there was earning no *direct* revenue from his Virginia user-base and, thus, was not "continuously and deliberately" exploiting the Virginia user-base because he did not *personally* control and direct the advertising . The Fourth Circuit would have required evidence that the defendant there chose his Virginia-based vendors to uniquely appeal to Virginia as opposed to global or nationwide appeals. Using Virginia-based vendors would not be enough.

The Court needs to resolve the circuit split. By requiring personal control of the geo-targeted ads, the Ninth Circuit would allow foreign tortfeasors to avoid American jurisdiction by claiming to be willfully blind to their exploitation of the American market while still generating profits from their U.S. audience. This is specifically a situation the Ninth Circuit previously sought to avoid in *Mavrix*. This "theory of jurisdiction would allow corporations whose websites exploit a [global] market to defeat jurisdiction in [countries] where those websites generate substantial profits from local consumers." *Mavrix*, 647 F.3d at 1231 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74 (1985)). The Ninth Circuit's decision runs against the general principle that a defendant is subject to personal jurisdiction for the forum-related activities of its agent. *See, e.g., Gelfand v. Tanner Motor Tours, Ltd.,* 385 F.2d 116 (2d Cir. 1967), *cert. denied* 390 U.S. 996 (1967). Foreign website owners

can now avoid jurisdiction for an English-language website, a plurality of whose users are Americans, generating substantial revenue from advertising to Americans, and optimizing their website for use in America, if they wink at a compatriot and let them control the geo-targeting of the advertisements.

Additionally, the Ninth Circuit created a circuit split when it determined, without any analysis, that the U.S. was not the "focal point … of the harm suffered" by Petitioner. App. 19a (quoting *Walden, supra* at 287). This determination directly conflicts with the Ninth Circuit's own prior ruling in matters of intellectual property infringement. *See Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (finding that the "brunt" of the harm suffered by plaintiff due to infringement occurred at plaintiff's principal place of business). In *Panavision,* the Ninth Circuit had analogized to the Seventh Circuit's decision in *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410 (7th Cir. 1994). The Seventh Circuit determined that because the Indianapolis Colts used their trademarks in Indiana, infringement of those marks would create an injury felt mainly in Indiana. 34 F.3d at 411. Similarly, the Ninth Circuit's decision below creates a split with the Sixth Circuit, which held that "a plaintiff whose trademark has been violated potentially suffers economic harm as a result of the defendant's actions, the injury occurs both in places where the plaintiff does business and in the state where its primary office is located." *Bird v. Parsons*, 289 F.3d 865, 876 (6th Cir. 2002). The Ninth Circuit erred; Respondent knew Petitioner would likely suffer harm in the U.S. because it is an American company, with a principal place of business in America, where

a significant portion of the market it located. Thus, as in *Panavision,* the Ninth Circuit should have found the "effects test" satisfied and this Court should resolve the newly-created circuit split.

Future courts will cite to *AMA* and misapply *Walden* to find virtual contacts to be meaningless. Foreign website operators can do significant business by acquiring and exploiting U.S. markets to an unlimited size with impunity so long as they select third parties to target the forum on their behalf. They can avoid compliance with existing and pending legislation even where the United States is their largest market.

To establish jurisdiction, courts will look mainly to the selection of physical vendors, but even that will not be enough, as a plaintiff will have to prove that the defendant selected the vendor specifically to appeal to one forum. Plaintiffs will not be given the benefit of inference, nor will disputed facts be interpreted in a light most favorable to the non-moving party. The Ninth Circuit's decision cannot stand.

CONCLUSION

In light of the foregoing, Petitioner respectfully requests this Court grant *certiorari*.

Respectfully submitted,

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