No.

In the Supreme Court of the United States

SCOTT ROBERTS,

Petitioner,

v.

KAUFFMAN RACING EQUIPMENT, L.L.C.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Calder* v. *Jones*, 465 U.S. 783, 789 (1984), this Court held that the Due Process Clause permitted a State to exercise personal jurisdiction over nonresident defendants in a case involving an alleged intentional tort because the defendants' actions were "expressly aimed at" the forum State. In finding that standard satisfied, the Court observed that the defendants knew that the plaintiff resided in the forum State and that the publication containing the allegedly libelous statements had "its largest circulation" in that State. *Id*. at 790.

The lower courts have divided sharply in applying *Calder* in the context of intentional torts alleged to have been committed over the Internet. Some courts hold that the defendant's knowledge that the plaintiff resides in the forum State is sufficient to satisfy due process, while other courts hold that the plaintiff must adduce other facts—akin to the circulation of the publication in *Calder*—that establish a link between the defendant and the forum State. The question presented is:

Whether the Due Process Clause permits a State to exercise personal jurisdiction over a nonresident defendant based solely on a claim that the defendant committed an intentional tort on the Internet knowing that the plaintiff resided in the forum State.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Scott Roberts respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App., *infra*, 1a-32a) is reported at 126 Ohio St. 3d 81 (Ohio 2010). The opinion of the Court of Appeals of Ohio (App., *infra*, 33a-49a) and the trial court's order (App., *infra*, 50a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 10, 2010. On August 12, 2010, Justice Thomas extended the time for filing a petition for a writ of certiorari to November 7, 2010 (a Sunday). This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> 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.

U.S. Const. amend. XIV, § 1, cl. 2.

STATEMENT

There is a clear, deep, and persistent conflict among the lower courts regarding the due process standard governing the exercise of personal jurisdiction over a nonresident defendant alleged to have committed an intentional tort using the Internet. The issue arises often in both state and federal courts, and Americans' increasing use of the Internet to express their views on products, services, and current events means that courts will be required to confront the question even more frequently. Under the erroneous standard adopted by the court below, moreover, individuals may be forced to appear in distant courts simply because they posted on the Internet a statement alleged to be defamatory, knowing that the plaintiff lived in the forum State. That expansive rule is inconsistent with this Court's precedents—which require more contacts between defendant and forum—and, if permitted to stand, could chill the individual expression that the Internet enables. Review by this Court is clearly warranted.

A. Due Process Limits On Personal Jurisdiction

The Due Process Clause limits a court's exercise of personal jurisdiction over a nonresident defendant to situations in which the defendant has "minimum contacts" with the forum State. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). The minimum contacts requirement "perform[s] two * * * functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States * * * do not reach out beyond the limits imposed on them by their status as coequal sovereigns." *World-Wide Volks-*

wagen Corp. v. *Woodson*, 444 U.S. 286, 291-292 (1980).

The first interest rests on this Court's longstanding injunction that "the maintenance of [a] suit [must] not offend 'traditional notions of fair play.'" *International Shoe*, 326 U.S. at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)). Courts may not "enter judgments affecting * * * nonresident defendants" unless it is "fair" to require those individuals to litigate in the forum. *Kulko* v. *Superior Court of California*, 436 U.S. 84, 91 (1978).

This fairness inquiry generally focuses on the burden on a defendant of having to litigate away from home, see *International Shoe*, 326 U.S. at 317, and the extent of the defendant's participation in the State's market, see *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475-476 (1985). The inquiry also looks to whether the defendant had "fair notice" that he or she would be liable to suit in the forum State. See *id.* at 487.

The "minimum contacts" standard also ensures that no State may exercise unlimited power to reach individuals residing beyond its borders. See, *e.g.*, *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (observing that "the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States").

Questions regarding the due process limits on personal jurisdiction often arise in the context of intentional tort claims. The Court held in *Calder* v. *Jones*, 465 U.S. 783, 789 (1984), that the minimum contacts requirement was satisfied with respect to a

libel claim because the defendants had "expressly aimed" their conduct at the forum State. *Calder* involved a California court's exercise of jurisdiction over a nonresident who had authored a magazine article about a California celebrity. *Id.* at 784-786. This Court relied on three facts in upholding jurisdiction: (1) the defendants knew that the article would harm the plaintiff; (2) the defendants knew that "the brunt of that injury would be felt" in California; and (3) the magazine had its largest circulation in California, see *id.* at 789-790.

In subsequent decisions, the Court has emphasized the importance of the third factor—the extent of participation in the State's market. See *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 779, 774 (1984) (defendant "chose to enter the New Hampshire market" by circulating "thousands of magazines" there each month); see also *Burger King*, 471 U.S. at 473 (stating the principle that "a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story").

The question in this case is how the "minimum contacts" standard as elucidated in *Calder* and subsequent decisions applies to claims of intentionally tortious conduct involving the Internet.

B. Factual Background

In February 2006, petitioner Scott Roberts, a Virginia resident, purchased an MR-1 Pontiac engine block from respondent Kauffman Racing Equipment, L.L.C., an Ohio-based company that builds automotive equipment and sells it to the public "nationwide." App., *infra*, 2a. Roberts purchased the engine block after viewing it on respondent's website. App.,

infra, 2a. Roberts did not travel to Ohio; indeed, he has never been to that State. App., *infra*, 2a.

Eight months later, Roberts telephoned respondent to complain that the engine block was defective. App., *infra*, 2a. Respondent offered to inspect the block and agreed that, if it was defective, respondent would buy it back at the original transaction price. After inspecting the block, however, respondent found that it had been modified post sale. App., *infra*, 2a-3a. When Roberts acknowledged the modifications, respondent refused to buy back the engine block and instead returned it to Roberts. App., *infra*, 3a.

Over the next month and a half, Roberts expressed his frustration at respondent's actions by posting comments criticizing respondent on several websites related to automotive-racing equipment. App., *infra*, 3a. Roberts stated that the engine block was "useless" as delivered, App., *infra*, 3a (original capitalization omitted); full of "defects," App., *infra*, 4a (original boldface omitted); and that Roberts had done "nothing [to] cause[]" those defects, App., *infra*, 4a. He stated that respondent had claimed that "[the engine block is] the best aftermarket block out there for a Pontiac, but I now know better.* * * Basically this block is junk * * *. Also the service you would get from [respondent] is less than honorable." App., *infra*, 4a-5a.[1]

Roberts stated that his goal in posting the comments was "to help other potential victims" by tell-

[1] The comments were displayed in the public forum sections of automotive-racing websites and, in one instance, in an item description on eBay Motors, an online auction service. App., *infra*, 3a.

ing his "story" and "getting the [facts] out to more people," App., *infra*, 4a-5a. He also stated that "[w]hat I lo[]se in dollars I will make up in entertainment at [respondent's] expen[s]e." App., *infra*, 4a. Roberts emphasized that he "posted facts I can back up 100%." App., *infra*, 5a.

C. Proceedings Below

1. Respondent commenced this action in the Knox County Court of Common Pleas, seeking damages for defamation and intentional interference with contracts and business relationships. App., *infra*, 5a-6a. The trial court granted Roberts's motion to dismiss the complaint for lack of personal jurisdiction. App., *infra*, 6a, 50a.

2. The court of appeals reversed by a divided vote, holding that asserting personal jurisdiction over Roberts did not violate the Due Process Clause. App., *infra*, 33a-49a.[2] The majority stated that a finding of "purposeful availment" is required to permit the assertion of personal jurisdiction; this requirement "ensures a party will only be haled into a jurisdiction where it has either deliberately engaged in significant activities or created continuing obligations between itself and residents of the state." App., *infra*, 41a.

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[2] The court of appeals also held that the exercise of personal jurisdiction over petitioner was permissible under the Ohio long-arm statute. App., *infra*, 37a-40a. The Ohio Supreme Court affirmed that determination (App., *infra*, 1a-13a). The long-arm statute (Ohio Rev. Code Ann. § 2307.382) "is not coterminous with due process;" even though "Ohio's long-arm statute confers personal jurisdiction over Roberts, an Ohio court cannot exercise personal jurisdiction over Roberts if doing so would violate his constitutional right to due process." App., *infra*, 13a.

The court of appeals observed that "advances in technology" require courts "to tackle unique situations such as the one presented in the instant action." App., *infra*, 41a. Noting that "[t]he Internet has * * * become accessible at virtually every coffee shop in the world," the majority concluded that a "non-resident defendant who avails himself of the expansive reach of the Internet should not be able to use his non-residency as a shield against defending tortious activity against a plaintiff harmed in a different state." App., *infra*, 43a-44a. Because respondent's injury was suffered in Ohio, Roberts was subject to personal jurisdiction "based upon the 'effects' of his Virginia conduct in Ohio." App., *infra*, 44a.

The dissenting judge observed that "Roberts' posting[s] were accessible around the world and there is no evidence or allegation that Roberts directly targeted, solicited, or interacted with Ohio residents via the [online] bulletin board." App., *infra*, 47a. "Even assuming Roberts knew the postings could be accessible and read by Ohio residents; this is insufficient contact" to constitute the purposeful availment required for personal jurisdiction. App., *infra*, 47a.

3. The Supreme Court of Ohio affirmed by a divided vote. App., *infra*, 1a-32a. The majority pointed to *Calder*'s discussion of the assertion of personal jurisdiction over the author and editor of an allegedly libelous article, quoting this Court's observation that those individuals

> "knew [that the article] would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the

> National Enquirer has its largest circulation."

App., *infra*, 17a (quoting *Calder*, 465 U.S. at 789-790).

Relying principally on this Court's decision in *Calder*, the majority held that because Roberts intended to harm respondent and knew that respondent was located in Ohio, the requirements of due process were satisfied. App., *infra*, 18a-20a, 26a. The court also observed that respondent had shown that five Ohio residents had read Roberts's posts, and that harm therefore had occurred in Ohio. App., *infra*, 22a.

Two justices dissented. App., *infra*, 27a-32a (O'Donnell, J., dissenting). They first pointed out that the majority's reference to "the fact that Roberts could foresee and even intended to cause injury to [respondent], an Ohio company," was insufficient to satisfy due process: "the United States Supreme Court 'has consistently held that this kind of foreseeability is not a "sufficient benchmark" for exercising personal jurisdiction.'" App., *infra*, 27a-28a (quoting *Burger King*, 471 U.S. at 474).

The dissenting justices next explained that the majority's analysis was inconsistent with this Court's decision in *Calder*:

> [T]he court in *Calder* considered the location of the injury and the *pervasive nature of the contact* when assessing whether the defendants had the minimum contacts with the forum state. The court stressed that the newspaper in which the article appeared, the National Enquirer, had its largest circulation, almost twice that in any other state, in Cali-

> fornia, where the plaintiff resided. It was that detail *coupled with* the fact that the person about whom the article was written lived and would suffer injury in California that rendered California the focal point of the publication.

App., *infra*, 29a (emphasis in original).

Here, by contrast, Roberts "posted his comments on * * * websites [with no] specific connection to Ohio," and none of these sites was "more likely to be viewed by a resident of Ohio than by a resident of any other state." App., *infra*, 29a. The fact that five Ohio residents viewed the comments "is not at all comparable" to the National Enquirer's sale of "600,000 copies of the offending article in the forum state." App., *infra*, 30a, 29a.

"While it is evident from Roberts's Internet posts that he sought to discourage others from purchasing [respondent's] products," the justices said, "any individual who posts a negative review of a product or service in a public forum arguably seeks the same objective. Subjecting all individuals to suit in Ohio who post Internet reviews—no matter how scathing—of purchases made from Ohio companies does not comport with the due process notions of 'fair play and substantial justice.'" App., *infra*, 31a. "[T]he practical impact of the majority's holding in this case is to unnecessarily chill the exercise of free speech." App., *infra*, 32a.

REASONS FOR GRANTING THE PETITION

The Due Process Clause requires "minimum contacts" between a defendant and a forum State to justify the forum's exercise of personal jurisdiction. The lower courts disagree regarding the application of

this standard in the frequently-recurring situation in which a defendant is alleged to have committed an intentional tort using the Internet. Intervention by this Court is necessary to resolve this clear conflict and provide guidance to the lower courts with respect to this important issue.[3]

A. The Lower Courts Disagree Sharply Regarding The Due Process Standard For Personal Jurisdiction In Internet Intentional Tort Cases.

The lower courts have adopted conflicting standards for analyzing whether a defendant who committed an intentional tort using the Internet may, consistent with due process, be subject to personal jurisdiction in the State in which the plaintiff is located.

The court below and two other courts apply a "knowledge" test, requiring the plaintiff to show only that the defendant engaged in an intentional tort involving the Internet knowing the plaintiff's State of residence.

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[3] The decision below satisfies the finality requirement applicable to review by this Court of the judgments of state courts. *E.g.*, *Calder*, 465 U.S. at 788 n.8 (holding with respect to a due process challenge to personal jurisdiction in the same posture as the present case that "[a]lthough there has not yet been a trial on the merits in this case, the judgment of the California appellate court 'is plainly final on the federal issue and is not subject to further review in the state courts.' Accordingly, as in several past cases presenting jurisdictional issues in this posture, 'we conclude that the judgment below is final within the meaning of [28 U.S.C.] § 1257.'") (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 195-196, n.12, (1977)) (citing *Rush* v. *Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp.*, *supra*; *Kulko* v. *Superior Court*, *supra*)).

Five courts require a plaintiff to satisfy a "knowledge-plus" standard. Proof that the defendant was aware of the plaintiff's residence when posting allegedly intentionally tortious material on the Internet is not sufficient; the plaintiff must establish additional facts connecting the defendant to the forum. Typically, courts look for facts showing that the website on which the defendant posted his or her comments is one that specifically targeted the forum State.

The majority and dissenting opinions of the court below mirror the two sides of this deep and long-standing conflict among the lower courts. This case accordingly presents an especially appropriate vehicle for resolving the conflict.

1. Five Lower Courts Apply A "Knowledge-Plus" Standard.

The Third, Fourth, Fifth, and Eighth Circuits, as well as the Minnesota Supreme Court, apply a "knowledge-plus" standard in determining whether due process permits the exercise of personal jurisdiction over a defendant alleged to have committed an intentional tort via the Internet.

The Eighth Circuit held in *Johnson* v. *Arden*, 614 F.3d 785 (8th Cir. 2010), that personal jurisdiction is permissible only upon proof that the defendant had knowledge of the plaintiff's forum state residence *together with* additional facts demonstrating that the defendant "intentionally targeted the forum state." *Id.* at 796. A defendant's mere "[p]osting on the internet from Colorado an allegedly defamatory statement including the name 'Missouri' in its factual assertion does not create the type of substantial connection between [the defendant] and Missouri neces-

sary to confer specific personal jurisdiction." *Id.* at 797.

Johnson involved a defamation claim arising out of the defendants' Internet posting of the statement that the plaintiffs had "operated from Unionville, Missouri, where they killed cats, sold infected cats and kittens, brutally killed and tortured unwanted cats and operated a 'kitten mill' in Unionville, Missouri." *Id.* at 796 (internal quotation marks omitted). Because there was no evidence other than the statement's reference to the plaintiffs' residence "that the * * * website specifically targets Missouri, or that the content of [defendant's] alleged postings specifically target[ed] Missouri," the exercise of personal jurisdiction violated due process. *Ibid*.

The Fourth Circuit reached the same conclusion in *Young* v. *New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). That case concerned defamation suits brought by the warden of a Virginia prison against two Connecticut newspapers that had posted on the Internet articles discussing the prison and the warden. There was no question that the defendants knew of the plaintiff's Virginia residence, but the Fourth Circuit held that due process required more: "The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia *readers*," *id.* at 263 (emphasis added)—by, for example, utilizing a website targeting Virginia—before Virginia could assert jurisdiction over the Connecticut newspapers, see *ibid.*

The Third Circuit also requires more than proof of knowledge of the plaintiff's residence. See, *e.g.*, *IMO Indus.* v. *Kierkert*, 155 F.3d 254, 265 (3d Cir. 1998) ("Simply asserting that the defendant knew that the plaintiff's principal place of business was lo-

cated in the forum would be insufficient in itself to meet [*Calder*].”). Even if “web sites * * * bring about an injury to [the plaintiff] in [the forum State],” the plaintiff still must show that the defendant “engaged in intentionally tortious conduct *expressly aimed at*” the forum State. *Toys “R” Us, Inc.* v. *Step Two, S.A.*, 318 F.3d 446, 455 n.6 (3d Cir. 2003).

The Fifth Circuit similarly embraces a knowledge-plus standard. While recognizing that “[k]nowledge of the particular forum * * * forms an essential part of the *Calder* test,” *Revell* v. *Lidov*, 317 F.3d 467, 475 (5th Cir. 2002), the court nonetheless requires additional facts indicating “more direct aim,” *id.* at 476, such as express targeting of a forum State audience through choice of website or through the text of the posted statement, *id.* at 474-476 (citing *Young*, 315 F.3d at 258, 263). *Cf. Ouazzani-Chahdi* v. *Greensboro News & Record, Inc.*, 200 Fed. Appx. 289, 293 (5th Cir. 2006) (stating that the defendant’s knowledge of plaintiff’s forum residence “is insufficient to establish personal jurisdiction under *Calder*”).

Finally, the Minnesota Supreme Court—expressly adopting the Third Circuit’s approach—applies a knowledge-plus test when evaluating personal jurisdiction in the context of Internet-based intentionally tortious conduct. *Griffis* v. *Luban*, 646 N.W.2d 527, 534-537 (Minn. 2002). “The mere fact that [the defendant] knew that [the plaintiff] resided and worked in [the forum State] is not sufficient to extend personal jurisdiction over [the defendant] in [the forum State], because that knowledge does not demonstrate targeting of [the forum State] as the focal point of the allegedly defamatory statements.” *Id.* at 536.

The court in *Griffis* refused to enforce a default judgment entered by an Alabama court. It held that the defendant's knowledge of the plaintiff's Alabama residence was not sufficient to permit the exercise of personal jurisdiction: Because "nothing in the record indicate[d] that the statements were targeted at the state of Alabama or at an Alabama audience beyond [plaintiff] herself," *id.* at 535, the Alabama judgment was rendered by a court without personal jurisdiction and was "not entitled to full faith and credit in Minnesota." *Id.* at 537.

2. Three Courts Hold That Defendant's Knowledge Of The Plaintiff's Residence Is Sufficient.

The Seventh Circuit and the New Jersey Supreme Court agree with the court below that the defendant's knowledge of the plaintiff's state of residence is sufficient to establish personal jurisdiction under the Due Process Clause.

The court below rested its holding squarely on the fact that Roberts "knew" of the plaintiff's Ohio residence when posting the allegedly defamatory material to the Internet. App., *infra*, 23a (majority opinion). Jurisdiction was permissible because "Roberts knew that [respondent] was an Ohio company" and, because his target was respondent, he knew that "the brunt of the harm would be suffered in Ohio." App., *infra*, 18a.

Indeed, the dissenting justices below criticized the majority for applying a standard requiring proof only that the defendant knew that the plaintiff was located in Ohio. App., *infra*, 27a-28a, 30a-31a (O'Donnell, J., dissenting). They urged adoption of a standard requiring proof of an additional connection

between Roberts and the forum, citing the Fourth Circuit's *Young* decision discussed above. App., *infra*, 30a-31a.

The Seventh Circuit also holds that the defendant's knowledge that the plaintiff resides in the forum is sufficient to uphold personal jurisdiction. In *Tamburo* v. *Dworkin*, 601 F.3d 693 (7th Cir. 2010), *petition for cert. filed*, 2010 WL 2709857 (U.S. 2010), the court stated:

> [Defendants] engaged in [defamatory] conduct with the knowledge that [plaintiff] lived in Illinois and operated his business there; their affidavits do not deny this. Thus, although they acted from points outside the forum state, these defendants specifically aimed their tortious conduct at [plaintiff] and his business in Illinois with the knowledge that he lived, worked, and would suffer the "brunt of the injury" there.

Id. at 706. Because the corporate defendant did not know the plaintiff's state of residence, on the other hand, the assertion of personal jurisdiction over it was improper. *Id.* at 708.

The New Jersey Supreme Court has also embraced a knowledge standard. In *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000), the court made clear that the plaintiff was obliged to show only that the defendant posted intentionally tortious material knowing that the plaintiff resided in the forum:

> We are satisfied that if defendants' statements are capable of a defamatory meaning and were published with knowledge or purpose of causing harm to plaintiff in * * * New

> Jersey, those intentional contacts within the forum would satisfy the minimum contacts requirement of *International Shoe*.

Id. at 556.

B. The Question Presented Regarding Due Process Limits On Personal Jurisdiction Arises Frequently And Is Important.

The issue addressed in this case is one of very substantial practical importance. It has recurred frequently in the lower courts, and—more significantly—is likely to arise even more often in the future given the increasing use of the Internet for posting consumer reviews and other comments. As a result, the uncertain and unpredictable standards for personal jurisdiction in tort claims based on Internet activity will affect an increasingly wide range of interests.

First, in addition to the appellate decisions just discussed, there are at least forty-one other reported decisions addressing the question regarding the due process limits on personal jurisdiction presented here.[4] This large number of decisions itself demon-

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[4] See *Marks* v. *Alfa Grp.*, 369 Fed. Appx. 368 (3d Cir. 2010); *Marten* v. *Godwin*, 499 F.3d 290 (3d Cir. 2007); *Cadle Co.* v. *Schlichtmann*, 123 Fed. Appx. 675 (6th Cir. 2005); *Silver* v. *Brown*, 2010 WL 2354123 (10th Cir. June 14, 2010); *Nw. Healthcare Alliance* v. *Healthgrades.com*, 50 Fed. Appx. 339 (9th Cir. 2002); *Xcentric Ventures, LLC* v. *Bird*, 683 F. Supp. 2d 1068 (D. Ariz. 2010); *EDIAS Software Int'l* v. *Basis Int'l Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996); *Callaway Golf Corp.* v. *Royal Canadian Golf Ass'n*, 125 F. Supp. 2d 1194 (C.D. Cal. 2000); *Copperfield* v. *Cogedipresse*, 26 Media L. Rep. (BNA) 1185 (C.D. Cal. 1997); *Naxos Resources (U.S.A.) Ltd.* v. *Southam Inc.*, 1996 WL 635387 (C.D. Cal. June 3, 1996); *Blumenthal* v. *Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Schnapp* v. *McBride*, 64 F. Supp. 2d

strates the need for this Court's guidance—both to clarify the law and to eliminate the need for lower courts to devote scarce judicial resources in choosing among the conflicting approaches for resolving the question.

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608 (E.D. La. 1998); *Jackson* v. *California Newspaper Partnerships*, 406 F. Supp. 2d 893 (N.D. Ill. 2005); *Dedvukaj* v. *Maloney*, 447 F. Supp. 2d 813 (E.D. Mich. 2006); *Winfield Collection, Ltd.* v. *McCauley*, 105 F. Supp. 2d 746 (E.D. Mich. 2000); *Amway Corp.* v. *Proctor & Gamble Co.*, 2000 WL 33725105 (W.D. Mich. Jan. 6, 2000); *Lofton* v. *Turbine Design, Inc.*, 100 F. Supp. 2d 404 (N.D. Miss. 2000); *Software Dev. & Inv. of Nevada* v. *Wall*, 2:05-CV-01109-RLH-LRL, No. 13 (D. Nev. June 2007) (order granting motion to dismiss); *Medinah Mining, Inc.* v. *Amunategui*, 237 F. Supp. 2d 1132 (D. Nev. 2002); *Machulsky* v. *Hall*, 210 F. Supp. 2d 531 (D.N.J. 2002); *Hammer* v. *Trendl*, 2003 U.S. Dist. LEXIS 623 (E.D.N.Y. Jan. 18, 2003) (dicta); *Realuyo* v. *Villa Abrille*, 2003 WL 21537754 (S.D.N.Y. July 8, 2003) (dicta); *Burleson* v. *Toback*, 391 F. Supp. 2d 401 (M.D.N.C. 2005); *Oasis Corp.* v. *Judd*, 132 F. Supp. 2d 612 (S.D. Ohio 2001); *Gorman* v. *Jacobs*, 597 F. Supp. 2d 541 (E.D. Pa. 2009); *D'Onofrio* v. *Il Mattino*, 430 F. Supp. 2d 431 (E.D. Pa. 2006); *English Sports Betting, Inc.* v. *Tostigan*, 2002 WL 461592 (E.D. Pa. Mar. 15, 2002); *Barrett* v. *Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999); *Bailey* v. *Turbine Design, Inc.*, 86 F. Supp. 2d 790 (W.D. Tenn. 2000); *Monarch Health Scis., Inc.* v. *Amazon Thunder, Inc.*, 2007 WL 3549434 (D. Utah Nov. 15, 2007); *Bochan* v. *La Fontaine*, 68 F. Supp. 2d 692 (E.D. Va. 1999); *Novak* v. *Benn*, 896 So. 2d 513, 514 (Ala. Civ. App.,2004); *Nam Tai Elec's, Inc.* v. *Titzer*, 113 Cal. Rptr. 2d 769 (Cal. Ct. App. 2001); *Jewish Defense Org., Inc.* v. *Superior Court of L.A. Cnty.*, 72 Cal. App. 4th 1045 (Ca. Ct. App. 1999); *Renaissance Health Publ'g, LLC* v. *Resveratrol Partners, LLC*, 982 So. 2d 739 (Fla. Dist. Ct. App. 2008); *Goldhaber* v. *Kohlenberg*, 928 A.2d 948 (N.J. Super. Ct. App. Div. 2007); *Dailey* v. *Popma*, 191 N.C. App. 64 (N.C. Ct. App. 2008); *Wagner* v. *Miskin*, 660 N.W.2d 593 (N.D. 2003); *Am. Bus. Fin. Serv., Inc.* v. *First Union Nat'l Bank*, 2002 WL 433735 (Pa. Com. Pl. Mar. 5, 2002); *Hibdon* v. *Grabowski*, 195 S.W.3d 48 (Tenn. Ct. App. 2005); *Fenn* v. *Mleads Enter., Inc.*, 137 P.3d 706, 709 (Utah 2006).

Second, the frequency with which courts are confronted with this question will continue to increase as a result of the growing ubiquity of online speech.

Surveys indicate that more than 73 million Americans have posted a comment or review online about a product or service; approximately 60 million have posted comments to an online news group, website, blog, or photo site; and over 30 million Americans have created their own online journal or blog.[5] Moreover, online statements have assumed an increasingly important role in Americans' decisionmaking. Over 166 million Americans research and buy products or services online; 173 million get news online; and more than 159 million search for information about someone they know or might meet.[6]

As this mode of communication grows, lawsuits claiming harm from allegedly defamatory speech inevitably will increase. Indeed, that trend already has been documented.[7] Many of these lawsuits will re-

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[5] See Trend Data, Pew Internet & American Life Project, http://www.pewinternet.org/Trend-Data/Online-Activites-Total.aspx.

[6] See *ibid*. Figures calculated using 231 million as the number of American Internet users. See The CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html.

[7] See Susan Stellin, *Hoteliers Look to Shield Themselves from Dishonest Reviews*, N.Y. Times, Oct. 25, 2010, at B7, *available at* http://www.nytimes.com/2010/10/26/business/26hotels.html (noting that 35 million hotel reviews have been posted on the TripAdvisor website and discussing a potential class action to be brought by American and British hotels against the website TripAdvisor and individuals who posted unfavorable reviews online).

quire courts to address the very due process issue presented in this case.

Third, continued uncertainty over the question presented will have a significant adverse effect on numerous individuals and businesses.

Statements posted by individuals and businesses on the Internet are automatically accessible worldwide—access is not limited geographically. A broad standard for establishing personal jurisdiction, such as the one adopted by the majority below, therefore carries a substantial risk that defendants with limited means and limited capacity for negotiating the legal system could be subjected to unanticipated jurisdiction in distant parts of the United States, or of the world.

Requiring individual Internet users to litigate in a distant forum based solely on knowledge of the location of the business or individual discussed in an online communication differs significantly from requiring a more sophisticated business enterprise that is participating commercially in a State's market to appear in that State's courts. Yet some lower courts are equating the two situations, even when the individual has not directed his or her expression to any particular State or recipient. As one commentator has observed, "the intersection of personal jurisdiction law and the Internet raises the specter of subjecting far more persons to suit in far more places." Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 Harv. L. Rev. 1821, 1823 (2003).

For an individual, the threat of having to defend oneself in a court far from home could have a chilling effect on Internet speech. "Incorrect characterization

of Internet-based contacts threatens a collision between personal jurisdiction and the First Amendment" that could "destroy the unique platform of free speech provided by the Internet." Brian E. Daughdrill, *Personal Jurisdiction and the Internet: Waiting for the Other Shoe to Drop on First Amendment Concerns*, 51 Mercer L. Rev. 919, 920 (2000).

These practical consequences confirm the need for guidance from this Court regarding the application of the due process standard in this context.

Fourth, numerous commentators have recognized the lack of clarity regarding the due process limits on personal jurisdiction in intentional tort actions involving the Internet.

One commentator has observed: "This basic scenario has been played out in dozens of reported cases * * * whether the target [of internet defamation] can sue at home or not.* * * [T]here is no clear rule; in fact, there is not even really a clear majority position.* * * [B]ut what seems beyond debate is that there ought to be some relatively clear answer so that litigants can direct their resources to resolving the merits of the case rather than the preliminary question of jurisdiction." Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 Nw. U. L. Rev. 473, 473-474 (2004). Other commentators have made the same point.[8] Now is the time for this Court to eliminate the uncertainty and address this important issue.

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[8] See Arthur R. Miller, *The Emerging Law of the Internet*, 38 Ga. L. Rev. 991, 996 (2004) ("[I]n just a few years, there are more cases that have been decided about Internet jurisdiction than have been decided regarding all [other communications] technologies put together * * *."); Wendy Perdue, *Aliens, the*

C. The Ohio Court's Assertion Of Personal Jurisdiction Violates Due Process.

The Ohio Supreme Court's decision is starkly inconsistent with this Court's personal jurisdiction precedents in two key respects. First, the ruling below significantly reduces the nature and extent of the

Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction, 98 Nw. U. L. Rev. 455, 455-456 (2004) ("[J]urisdictional approahes to e-commerce and cyberspace is complicated by an overlay of constitutional law.* * * [T]he United States is wrestling with what constitutes 'purposeful availment' under the Due Process Clause."); C. Douglas Floyd & Shima Baradaran-Robinson, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects,* 81 Ind. L.J. 601, 612 (2006) ("Post-*Calder* decisions applying the effects test in cases involving intentional * * * torts committed by means of the Internet have evidenced considerable confusion over * * * applying the *Calder* test."); Daughdrill, *Personal Jurisdiction and the Internet*, at 919 ("Courts attempting to impose traditional personal jurisdiction analysis on Internet-related contacts have no guidance from the Supreme Court and continue to reach inconsistent results * * *."); Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"?: It's Time for the Supreme Court To Straighten Out the Personal Jurisdiction Standard Once Again*, 54 Cath. U. L. Rev. 53 (2004); Michele N. Breen, Comment, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace into* International Shoe, 8 Seton Hall Const. L.J. 763, 764-766 (1998); Daniel V. Logue, Note, *If the International Shoe Fits, Wear It: Applying Traditional Personal Jurisdiction Analysis to Cyberspace in* Compuserve, Inc. *v.* Patterson, 42 Vill. L. Rev. 1213, 1214 (1997); Michael A. Geist, *Is There a There There?: Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L.J. 1345 (2001); Titi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 Berkeley Tech. L.J. 519 (2004); Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DePaul L. Rev. 1147 (2005); Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. Pa. L. Rev. 1951 (2005).

"minimum contacts" between defendant and forum necessary to impose upon the defendant the costs and inconvenience of litigating, in a distant location, what may well turn out to be a meritless lawsuit. Second, the decision permits personal jurisdiction based on the very foreseeability standard that this Court has consistently rejected.

1. A court may exercise personal jurisdiction over a defendant only if the defendant has "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play.'" *International Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463). A key element of this fairness inquiry assesses the "inconveniences [to the defendant] which would result * * * from a trial away from * * * home." *Id.* at 317 (internal quotations omitted).

Under the rule adopted by the court below, individuals who post online comments about a product purchased from an out-of-state business may be obligated to travel enormous distances to defend themselves against a defamation suit. If a citizen of Miami, for example, ordered what turned out to be a defective product from an Anchorage-based company, she could not use informational websites to warn others about those defects without opening herself up to an intentional tort suit in faraway Alaska.

As long as the purchaser had glanced at the shipping label, the plaintiff business would be able to show that she knew where the business was located. The rule adopted by the court below would allow an Alaska court to assert jurisdiction in a defamation suit—as here, the Alaska court could find that the posting of negative comments was intended to harm the Alaska company and that the Florida resident

knew the harm would occur in Alaska. The Florida resident would then be obligated to mount a defense nearly five thousand miles away from her hometown.

This Court has never permitted the assertion of jurisdiction based on so thin a reed. In *Calder*, for example, the Court's holding that jurisdiction in California was permissible did *not* rest solely on the defendants' knowledge that the subject of their magazine article resided in California; the Court also cited the fact that the magazine for which they worked "ha[d] its largest circulation" in that State. *Calder*, 465 U.S. at 790. And in *Keeton*—another defamation case—the Court concluded that New Hampshire had jurisdiction over a nonresident magazine publisher because it "chose to enter the New Hampshire market," 465 U.S. at 779, by "circulating * * * thousands of magazines" there each month. *Id.* at 774 (internal quotation marks omitted).

Other lower courts have recognized this requirement and have upheld personal jurisdiction only where there is some other connection between the defendant and the forum equivalent to the circulation of a physical publication in the forum State. For example, courts have upheld jurisdiction where the defendant's comments were posted on a website that specifically targets the forum State. See pages 11-14, *supra*.[9]

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[9] The court below did not find that any of the websites on which petitioner posted his comments targeted Ohio; to the contrary, as the dissenting justices pointed out, they were "general auto-racing websites and an auction site, none of which have any specific connection to Ohio or are more likely to be viewed by a resident of Ohio than by a resident of any other state." App., *infra*, 29a (O'Donnell, J., dissenting).

Basing jurisdiction on the mere awareness that the plaintiff is located in the forum State—with no other connections between the defendant and that State—would subject large numbers of nonresidents, frequently individuals with limited resources, to the cost of litigating far from home. As the dissenting justices below concluded, "[s]ubjecting all individuals to suit in Ohio who post Internet reviews—no matter how scathing—of purchases made from Ohio companies does not comport with the due process notions of 'fair play and substantial justice.'" App., *infra*, 31a.

2. This Court has held consistently that the mere foreseeability that a defendant's actions could have effects in the forum State is not a "sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295. See also *Burger King*, 471 U.S. at 474. Here, however, the Ohio court held that the mere foreseeability of adverse effects in Ohio *does* allow Ohio to exercise jurisdiction over a nonresident whose actions produced those effects.

The court based its decision on two facts: that petitioner posted comments to an Internet website with the intent to make others aware of what were—in Roberts's estimation—unreasonable business practices by the respondent, see App., *infra*, 2a-5a (majority opinion), and that petitioner knew that respondent was based in Ohio, App., *infra*, 18a.

To conclude—as the Ohio Supreme Court did here—that Ohio may assert personal jurisdiction over Roberts based on these facts, would be to rest jurisdiction on grounds of mere foreseeability. For Roberts's knowledge of respondent's location, combined with his alleged intent to injure respondent, meant that he could foresee that his acts would

cause injury in Ohio. And according to the courts below, that foreseeability is sufficient for jurisdiction.

Indeed, the dissenting justices below recognized that the majority's reasoning was flawed. App., *infra*, 27a-28a, 31a (O'Donnell, J., dissenting) (stating that "the majority focuses on the fact that Roberts could foresee * * * injury to [respondent], an Ohio company," and that "this standard falls far short of due process"). For that reason, as well, the decision should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2010