No. 18-55041

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

PHATTHANA SEAFOOD CO., LTD.; S.S. FROZEN FOOD CO., LTD.; RUBICON RESOURCES, LLC; WALES AND CO. UNIVERSE LTD.,

Defendants-Appellees.

On Appeal from the District Court for the Central District of California,
Honorable John F. Walter Presiding, Case No. 2:16-CV-04271-JFW

BRIEF OF LAW PROFESSORS OF CIVIL PROCEDURE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR *EN BANC* REHEARING

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RULE 29(A)(2) STATEMENT

All parties have consented to this filing. No person other than amici and their counsel authored this brief or made a monetary contribution towards its preparation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Court should rehear this case *en banc* because the Panel's broadly written holding will erroneously rework personal jurisdiction law in this Circuit, is contrary to recent Supreme Court authority and caselaw from other Circuits, and will significantly curtail the ability of federal and state courts to hear disputes implicating important U.S. interests.

The case involves Cambodian plaintiffs allegedly trafficked into Thailand and forced to work for Defendant-Appellee Phatthana Seafood Company ("Phatthana") in violation of the Trafficking Victims Protection Act (TVPRA). The Panel dismissed the TVPRA claims against Phatthana for failing to satisfy the "present in" requirement of 18 U.S.C. § 1596. *See Ratha v. Phatthana Seafood Co.*, 26 F.4th 1029, 2022 U.S. App. LEXIS 5116, at *16-24 (9th Cir. 2022). In so doing, it assumed that Section 1596 incorporates the "minimum contacts" test for assessing the constitutionality of personal jurisdiction, but erroneously held that Phatthana – despite not contesting personal jurisdiction – lacked the contacts with the United States necessary to satisfy that standard. *See id.* at *19-24.

With respect to the facts relevant to the minimum contacts test, Phatthana did not dispute that it did substantial business in and obtained benefits from commerce with the United States, that it tried (albeit unsuccessfully) to sell seafood produced by trafficked workers here, and that it caused such seafood to be physically present in the United States. The Panel erred in its minimum contacts analysis for two primary reasons.

First, the Panel refused to consider whether Phatthana had purposefully availed itself of or deliberately sought benefits from the United States. According to the Panel, tort cases could only be assessed using a three-part "purposeful direction" approach to "minimum contacts" that grew out of *Calder v. Jones*, 465 U.S. 783 (1984). *Ratha*, 2022 U.S. App. LEXIS 5116, at *22. This was a clear error. The Supreme Court has frequently looked to a defendant's commercial exploitation of a forum when upholding jurisdiction in tort cases involving personal injury. Although the *Calder* test is useful for assessing minimum contacts in certain kinds of intentional tort cases, it does not foreclose other well-established routes for obtaining personal jurisdiction over defendants who seek to profit from the market in the forum state.

Second, the Panel's approach to "purposeful direction" erroneously requires that tort plaintiffs suffer their injury in the forum. *Id.* at *23. But a plaintiff's

connection to the forum does not control the due process inquiry; instead, the proper focus is on the *defendant*'s contacts with the forum.

Under the Panel's rule, no forum could exercise specific jurisdiction in many tort cases. The Panel's rule requires that tort plaintiffs bring their claims in the forum where they are injured. *Id*. But *Walden v. Fiore*, 571 U.S. 277 (2014), makes clear that a plaintiff's forum injury alone does not create jurisdiction. *Id.* at 290. The Panel's approach wrongly and unnecessarily creates the perverse result that a tort plaintiff's injury in the forum can be both necessary and insufficient to establish specific jurisdiction.

Ultimately, the Panel's forum-injury requirement creates a jurisdictional hurdle that is divorced from the primary objective of the "minimum contacts" test: ensuring fairness and providing defendants notice of potential amenability to suit. The consequences of such a constitutional requirement are vast. Take, for example, a case against a bank that processes transactions in the United States for a foreign terrorist organization that kills Americans outside of the United States; that case would fail the Panel's test because injury was suffered outside this forum. The Panel's decision would thus prevent disputes involving manifest forum interests from being heard in state or federal court, and the Court should rehear the case *en banc* to correct its errors.

INTERESTS OF AMICI CURIAE

Amici Curiae are professors of civil procedure at law schools throughout the United States. Amici have no personal interest in the outcome of this case but write to share their professional views regarding the need for this Court's review, given the Panel's errors on a fundamental area of civil procedure.

Adam Steinman is the University Research Professor of Law at the University of Alabama School of Law. He is an award-winning teacher and scholar, whose articles have been published in numerous prominent law reviews. Professor Steinman is a co-author of the Friedenthal Miller civil procedure casebook, an elected member of the American Law Institute, and a co-editor of the Wright & Miller Federal Practice & Procedure treatise volumes covering personal jurisdiction.

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ARGUMENT

The Panel held that Phatthana lacked minimum contacts with the United States because Phatthana did not "purposefully direct" its tortious conduct at the United States. *Ratha*, 2022 U.S. App. LEXIS 5116, at *23. Applying a test that purports to come from *Calder*, the Panel held that a tort defendant is subject to jurisdiction only where it "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Id.* at *22 (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 805 (9th Cir. 2004)). While the Panel assumed Phatthana committed intentional acts expressly aimed at the United States, it found no evidence of harm

in the forum because the trafficking occurred outside the United States. *Id.* at *23 & n.13. That holding conflicts with Supreme Court and Circuit precedent and misapplies the "minimum contacts" test in two significant ways.

First, the Panel's decision incorrectly held that *Calder*'s effects test is the exclusive route to personal jurisdiction over tort defendants, overlooking the well-established principle that a defendant also establishes minimum contacts when it purposefully avails itself of the forum. *Id.* This was significant because the Panel's forum-injury requirement was a product of the "purposeful direction test derived from *Calder*," *id.* at *22-23 (internal quotation marks omitted); and it was clear error because the Supreme Court has repeatedly used a purposeful availment analysis in tort and personal injury cases.

Second, even if tort plaintiffs could only establish jurisdiction under a purposeful direction approach, it was error to have that analysis turn on the existence of a forum injury. As with all minimum contacts analyses, the plaintiff's connection to the forum should not be the focus of the personal jurisdiction inquiry.

I. The minimum contacts analysis for specific jurisdiction turns on the defendant's contacts with the forum.

International Shoe v. Washington, 326 U.S. 310 (1945), laid down the general rule that jurisdiction over absent defendants is constitutionally permissible so long as they have "certain minimum contacts with [the forum] such that the

maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316 (internal quotation marks omitted).

After *International Shoe*, two lines of jurisdiction developed: general (all-purpose) jurisdiction, which is appropriately exercised only where a defendant is "essentially at home," and specific (claim-based) jurisdiction, which is permissible when the defendant has lesser contacts with the forum, but those contacts relate to the underlying dispute. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, ___ U.S. ___, 141 S. Ct. 1017, 1020, 1024 (2021). This case involves specific jurisdiction, which is "the centerpiece of modern jurisdiction theory" and allows tribunals "to hear claims against out-of-state defendants when the episode in-suit occurred in the forum or the defendant purposefully availed itself of the forum." *Daimler AG v. Bauman*, 571 U.S. 117, 128 (2014) (internal quotation marks omitted).

The specific jurisdiction analysis has three parts: Did the defendant have purposeful contact with the forum? Is there a nexus between plaintiff's claims and those contacts? And is exercising jurisdiction reasonable? *See Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006) (*en banc*). The Panel's decision implicates the first, under which the defendant must have purposeful contacts with the forum.[1] That requirement ensures that non-resident

[1] The Panel did not address the nexus prong or the reasonableness of jurisdiction – which is unsurprising as Phatthana did not object to jurisdiction – but neither

defendants are only haled into a foreign court if they themselves create a relationship with the forum. Jurisdiction is therefore permissible where a defendant has acted in, benefited from, or knowingly affected the forum; in those situations, a defendant can be reasonably charged with notice of the possibility of suit in the forum and can structure their affairs accordingly. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980).

In the parlance of the test, the first requirement can "be satisfied by purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof." *Yahoo!*, 433 F.3d at 1206. The central question, however, is always the same: did the *defendant* deliberately create a connection between itself and the forum? *Ford*, 141 S. Ct. at 1025 ("The contacts must be the defendant's own choice . . . ."). The connections that a third party or plaintiff have to the forum are therefore of limited relevance; they neither suffice to create jurisdiction, *see, e.g.*, *Walden*, 571 U.S. at 291 ("it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State"), nor defeat jurisdiction, *see, e.g.*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984) ("[W]e have not to date required a plaintiff to have minimum contacts with the forum State before permitting that State to assert

present an issue: Plaintiffs' claims relate to the goods Phatthana sought to sell in the United States; and there is no suggestion of undue burden or unfairness. Nor could there be when Phatthana deliberately sought out this forum.

personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking." (internal quotation marks omitted)).

II. Tort defendants that purposefully avail themselves of a forum are subject to jurisdiction in personal injury disputes.

The Panel took a circumscribed and categorical approach to analyzing the first requirement of purposeful contact, holding that tort cases involving personal injuries must be analyzed under a three-part "'purposeful direction test' derived from *Calder*." *Ratha*, 2022 U.S. App. LEXIS 5116, at *22. The Panel thus refused to consider whether the defendant purposefully availed itself of the forum.

The Supreme Court, however, has never made a categorical or constitutional distinction between contract-type cases (governed under a purposeful availment approach) and tort cases (governed by the purposeful direction or effects-based approach). Quite the opposite: the Supreme Court has frequently looked to or upheld jurisdiction in tort cases where the defendant purposefully availed itself of or benefited commercially from the forum's market. For example, *World-Wide Volkswagen* was a products liability case involving severe personal injuries. 444 U.S. at 288. In that *tort* suit, the Court looked to whether the "corporation 'purposefully avail[ed] itself of the privilege of conducting activities within the forum State[.]'" *Id.* at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958));

see also Ford, 141 S. Ct. at 1025-32 (jurisdiction in personal injury case proper based on commercial activities in the forum).[2]

Calder's recognition of effects-based jurisdiction over tort defendants did not exclude jurisdiction in cases (like *Ford*) where defendants have purposefully connected themselves to or benefited from the forum in other ways. *Calder* involved libel claims brought in California against a magazine publisher and two individuals who worked on the libelous story. Even though the individual defendants did not control the magazine's distribution nor benefit directly from its circulation in California, 465 U.S. at 789, the *effect* of their out-of-state acts in the forum was enough when "their intentional, and allegedly tortious, actions were expressly aimed at California" and "they knew that the brunt of that injury" would be felt there. *Id.* at 788-90. But *Calder* did not suggest that this was the only way to

[2] In *World-Wide Volkswagen*, suit was brought in Oklahoma against a foreign automobile manufacturer, a domestic importer, a regional distributor, and a retail dealer; only the distributor and dealer challenged jurisdiction. 444 U.S. at 288-89. While the Court refused to authorize jurisdiction over them – because neither had any purposeful contacts with or sales in Oklahoma, *id.* at 298-99 – it recognized that jurisdiction would be permissible "if the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the [defendant] to serve, directly or indirectly, the market for its product in other States." *Id.* at 297-98. Thus, personal jurisdiction was clearly proper in Oklahoma over the foreign manufacturer and the national distributor, who had deliberately sought to serve the market in that state. *See also Ford*, 141 S. Ct. at 1027 (describing why "Audi, the car's manufacturer, and Volkswagen, the car's nationwide importer" were subject to personal jurisdiction based on their purposeful availment of the Oklahoma market).

establish minimum contacts in tort cases. Personal jurisdiction over the publisher was based on its commercial activity in the market, without considering the "effects" test innovation; indeed, jurisdiction over the publisher went unchallenged. *Id.* at 784.

In sum, the "purposeful availment" and "purposeful direction" approaches are not exclusive and separate tests for tort and contract cases. *Calder* merely recognized an *additional* theory for establishing jurisdiction in cases where a party's intentional tort was expressly aimed at the forum state and caused injury there.

Although many tort plaintiffs *want* to litigate their cases in the forum where their injury was suffered, the Panel's decision would *require* it. Similarly, as compared to contract cases, it may be more "typical" for tort defendants to have obtained no benefits from the forum and thus tort plaintiffs need to establish jurisdiction using a purposeful direction approach. The Panel, however, turned what may be "typical" into a prerequisite. *See Yahoo!*, 433 F.3d at 1206.[3] Such a requirement conflicts with both Supreme Court precedent and this Court's instruction in *Yahoo!* that the first prong of the minimum contacts analysis can be

[3] *Yahoo!* is a good example of a case in which the *Calder* effects test was needed. There, the defendants had no commercial dealings with and obtained no benefits from California; their only other connections to California involved sending litigation documents – related to separate litigation between the defendants and Yahoo! in France – into the State. 433 F.3d at 1205.

met "by purposeful availment of the privilege of doing business in the forum; by purposeful direction of activities at the forum; or by some combination thereof." *Id.*

The Panel's decision is out of step with the decisions of sister circuits as well. For example, both the District of Columbia and Second Circuits have upheld jurisdiction over Anti-Terrorism Act claims involving foreign injuries based on the defendant's commercial activities in, and purposeful availment of, the United States. *See Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 173 (2d Cir. 2013); *Atchley v. Astrazeneca UK Ltd.*, 22 F. 4th 204, 2022 U.S. App. LEXIS 99, at *71-72 (D.C. Cir. 2022). As the Second Circuit correctly held: "the 'effects test' [is not] a prerequisite to the constitutional exercise of personal jurisdiction . . . in cases where the conduct on which the alleged personal jurisdiction is based occurs *within* the forum" as long as "this in-forum activity sufficiently reflects the defendant's 'purposeful availment.'" *Licci*, 732 F.3d at 173 (emphasis in original, internal quotation marks omitted). The Panel's rule would foreclose such anti-terrorism cases.

III. A tort plaintiff need not be injured in the forum in which tortious acts occur or effects are felt.

Even if tort plaintiffs had to proceed under a "purposeful direction" approach – and could not rely on a defendant's commercial connections to the forum – the Panel's strict forum injury requirement would still be wrong. The due

process inquiry always turns on the defendant's connections to the forum, not the plaintiff's.

Having the "purposeful direction" inquiry turn on whether the plaintiff suffered a forum injury makes little sense, considering the primary aim of the due process inquiry: notice and fairness to defendants. Whether a plaintiff suffers its injury in the forum says little (and certainly nothing conclusive) about whether a defendant's own conduct puts it on notice that it may subject to suit in the forum. Whether a defendant should reasonably expect to answer suit in the forum turns on its own deliberate acts and contacts with the forum. *See Ford*, 141 S. Ct. at 1025.

"The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Walden*, 571 U.S. at 290. A defendant's tortious acts can meaningfully connect it to the forum without necessarily causing a forum injury to the plaintiff. Indeed, the Supreme Court's decisions strongly suggest that the tortious *effects* of the defendant's acts on the forum need to be considered separately from the injury to the plaintiff. In *Calder*, the plaintiff was libeled in California, but the effect of the libelous statements on the forum's market and consumers was treated as most significant in the jurisdictional inquiry. *See Walden*, 571 U.S. at 286-88 (discussing *Calder*). While the forum injury was not absent

from the analysis, it was the broader effects of the tortious activity on the forum that permitted jurisdiction.

This principle was also recognized in *Keeton*, another libel case that the Supreme Court decided the same day as *Calder*. There, personal jurisdiction was upheld, for injuries that occurred almost entirely outside the forum, based on the publishers' exploitation of the forum market. 465 U.S. at 775-81. The Supreme Court acknowledged that "[f]alse statements of fact harm both the subject of the falsehood *and* the readers of the statement." *Id.* at 776 (emphasis in original). And there, jurisdiction swept well beyond the plaintiff's forum injury, extending to her libel claims and injuries in all fifty States. *Id.* at 780 (permitting jurisdiction in New Hampshire over nationwide libel claims even where "the bulk of the harm done to petitioner occurred outside New Hampshire").

This type of forum interest is not limited to libel cases. U.S. consumers are affected when they unknowingly purchase and consume goods produced by trafficking, and U.S. business are impacted when they compete with business that use trafficked labor. The "effects" on the United States of bringing goods produced by trafficking into our market meaningfully connect a trafficking defendant to this forum. *Cf. J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion of Kennedy, J.) ("[T]he question is whether a defendant has followed a course of conduct directed at the society or economy existing within the

jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.").

IV. A forum-injury requirement would restrict personal jurisdiction across a wide range of cases.

The ramifications of a constitutional forum-injury requirement are significant. Civil tort cases are routinely litigated where relevant conduct occurred even if the injury arose elsewhere; in some cases, that might be the only place where they could be litigated.

A closely analogous example involves cases under the Anti-Terrorism Act. That statute covers and provides a cause of action to the victims of "international terrorism," which is defined as "violent acts or acts dangerous to human life" that *inter alia* "occur primarily outside the territorial jurisdiction of the United States." 18 U.S.C. § 2331. These cases, by definition, involve injuries outside the United States, yet courts have exercised personal jurisdiction over foreign defendants where the defendant transferred dollars to the terrorist groups through the United States, *see, e.g.*, *Licci*, 732 F.3d at 173; or sourced products provided to terrorist groups from the United States, *see, e.g.*, *Atchley*, 2022 U.S. App. LEXIS 99, at *71-72.

Or take *Nicastro*. There, the plaintiff was injured in New Jersey by a metal-shearing machine made by a U.K. company; the U.K. company did not sell in the U.S. directly or New Jersey specifically, but it did intentionally exploit the U.S.

market through a U.S. distributor. 564 U.S. at 878. The plurality opinion held that the U.K. company could not be sued in New Jersey where the forum injury occurred because the company did not target that market or purposefully avail itself of that forum. *Id.* at 886-87. But under the holding of the Panel in this case, no other forum would be available because New Jersey, as the forum of injury, would be the only place a plaintiff could sue. Thus, if the Panel is correct, there would be no forum with specific jurisdiction—not even the state where the distributor accepted the goods and with which the U.K. company had deliberate contacts.

A similar problem arises after *Walden*. That decision makes clear that "mere injury to a forum resident" is an insufficient basis for personal jurisdiction; rather, the defendant's conduct must also create a "meaningful" connection to the forum. 571 U.S. at 290. If tort plaintiffs cannot show that their injury meaningfully ties the defendant to the forum, as was the case in *Walden*, they would need to find another forum. Typically, this would be where the defendant has deliberately acted or connected itself, but the Panel's decision would foreclose this option. Thus, if tort plaintiffs are constitutionally required to litigate their cases only where they are injured, but a forum injury is insufficient for personal jurisdiction, there may well be no forum in the United States that can exercise specific jurisdiction over disputes exclusively involving U.S. conduct.

CONCLUSION

The Panel's decision would severely curtail specific personal jurisdiction in the Ninth Circuit, in contravention of well-established Supreme Court authority. Rehearing is warranted to correct this grave error in the law.

April 21, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2022, I filed the foregoing document BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANTS' PETITION FOR REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Ninth Circuit electronic filing system ECF. I hereby certify that all parties are registered and will be served electronically via the Ninth Circuit electronic filing system ECF.

Dated: April 21, 2022

/s/Marco Simons
Marco Simons