No. 22-

IN THE

Supreme Court of the United States

CHARLES JOHNSON,

Petitioner,

v.

THEHUFFINGTONPOST.COM, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the panel majority of the Fifth Circuit correctly held that a national news organization's website that harvests visitor location data to share with third parties for targeted marketing in a forum from which it derives substantial revenue does not subject that news organization to specific personal jurisdiction in that forum for a webpage on that site that contains an alleged libelous publication.

PARTIES TO THE PROCEEDING

Petitioner is Charles Johnson ("***Johnson***"). Respondent is TheHuffingtonPost.com, Inc., a Delaware/New York corporation ("***HuffPost***").

STATEMENT OF RELATED CASES

The following cases are the proceedings below and judgments entered:

a. *Charles Johnson v. TheHuffingtonPost.com, Inc.*, Civil Action No. 4:20-CV-0179, United States District Court, Southern District of Texas. Judgment entered on December 18, 2020.

b. *Charles Johnson v. TheHuffingtonPost.com, Inc.,* Case No. 21-20022, United States Court of Appeals for the Fifth Circuit. Judgment entered December 23, 2021, rehearing *en banc* denied on April 27, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit ("***COA***").

OPINIONS BELOW

The opinion of the COA[1] (App. A at 1a-37a) is published at 21 F.4th 314 (5th Cir. 2021) ("***COA Opinion***"). The opinion of the United States District Court for the Southern District of Texas ("***District Court***") is unpublished, ("***District Court Opinion***", App. B at 38a-41a). The opinion of the COA denying rehearing *en banc* (App. C at 42a-56a) is published at 32 F.4th 488 ("***En Banc Opinion***").

JURISDICTION

The judgment of the COA was entered on December 23, 2021. *See generally* App. A. Petitioner moved for rehearing *en banc* and that was denied by the COA on April 27, 2022. *See generally* App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law".

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1. Specific discussions of all Opinions below shall be cited to where they are found in the Appendix ("***App.***") followed by a page number suffixed with an "a" (*e.g.*, App. at __a).

STATEMENT

I. Overview

This case presents the opportunity for the Court to ensure personal jurisdiction jurisprudence for online news publications stays in line with 21st Century realities. A heavily divided Fifth Circuit construed this Court's prior holdings in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and *Ford Motor Co. v. Mont. Eighth Jud. Dist.*, 141 S. Ct. 1017 (2021) to require a news publication to distribute physical copies of their publications in the forum state to create jurisdictional minimum contacts to be sued for libel arising from those publications. The dissenting minority of the Fifth Circuit adopted the view of the majority of other circuits, which allows a media defendant to be sued for libel in a state where its website engages in forum-specific advertising and where it collects forum-specific data from users in the forum, among other things, in connection with its online publishing.

Under the panel majority's reasoning—outside of a handful of national publications that still circulate in print—the overwhelming majority of news media will almost never be subject to specific jurisdiction for the content of their national online publications. Thus, the online news media will be able to exploit markets in every state in the Union, while being subject to jurisdiction for the content of their publications nowhere except where there is *general* jurisdiction -- their principal place of business or state of incorporation. This is contrary to the basic principles of purposeful availment and minimum contacts. This Court should grant certiorari to reconcile the circuit split the Fifth Circuit has created and set forth

a standard for specific jurisdiction for online libel that mirrors the standard for print libel.

II. Factual Background

Johnson—a resident of Texas—sued HuffPost—a corporate citizen of Delaware and New York—for libel based on a January 17, 2019 article ("***Article***"),[2] wherein Johnson is accused of being a "white Nationalist" and a "Holocaust denier", among other things. The Article was published on the HuffPost's website at www.HuffPost.com (the "***Website***") and this Website is Johnson's putative basis for personal jurisdiction in Texas.

Johnson's Amended Complaint ("***Complaint***") is the live pleading and operative document for purposes of assessing the jurisdictional allegations. In the Complaint, Johnson does not contend that personal jurisdiction over HuffPost is grounded on general jurisdiction. Johnson's allegations that support this the exercise of specific jurisdiction are as follows:

> Defendant regularly conducted its online publishing and other business through its website in Texas through www.HuffPost.com [...] and derives substantial revenue from its subscription, sales, and advertising by servicing the Texas market through the Website and the Article complained of herein was published on the same Website. Moreover, by publishing "news" stories on its Website,

2. *See* https://www.huffpost.com/entry/gop-reps-host-chuck-johnson-holocaust-denying-white-nationalist_n_5c40944be4b0a8dbe16e670a

> Defendant attracts subscribers, advertisers, and customers who purchase merchandise and services. Defendant offers paid subscriptions to Texas residents and tracks the location and activities of Texas residents on the Website thereby enabling targeted advertising to Texas residents that generate substantial revenue for Defendant. Defendant sells merchandise and services on the Website to Texas residents and generates substantial profits from these sales. Defendant has actually entered into contracts for subscriptions to its online subscription services with Texas residents through its Website. Defendant has actually entered into contracts with advertisers in Texas to advertise on its Website and/or ran advertisements on its Website geared to the Texas market. Defendant has actually sold merchandise and services through its Website to Texas residents. These are sufficient minimum contacts with Texas from which the conduct complained of arises because the article was published on the same Website the HuffPost offers and obtains paid subscriptions to Texas residents, targets paid advertising toward Texas residents, and offers and sells merchandise and services to Texas residents. Based on this conduct, Defendant has purposefully availed itself of the privileges of doing business in Texas through online publishing, marketing, and sales to Texas residents and to exercise jurisdiction over Defendant would not offend traditional notions of fair play and substantial justice.

Complaint at ¶ 4.

III. Procedural Posture

HuffPost moved to dismiss the suit on the basis that the District Court lacked personal jurisdiction ("Motion to Dismiss"). The only evidence HuffPost provided to rebut Johnson's jurisdictional allegations were the Declarations of Andy Campbell ("Campbell", the author of the Article) and Victor Brand ("Brand", an editor with HuffPost). Campbell's testimony centers on whether he knew Johnson resided in Texas or made contact with Texas in connection with researching or writing the Article, which Johnson did not contest because Johnsons did not rely on any of these facts as his basis for jurisdiction.

Brand offers testimony that HuffPost does not maintain a physical presence in Texas and that supposedly "only" 8% of the online "hits" that read the Article were from Texas. Brand also makes the statement that he is "not aware of any class of goods or services" that HuffPost is a "lead supplier" of in Texas. Brand is an editor and does not purport to have personal knowledge of the interactivity of the Website or the revenue derived from it. Brand does explain or define what a "lead supplier" is.

In response to the Motion to Dismiss, Johnson introduced unrebutted and unobjected to evidence that the Website contains several features that allow interactivity with users to form contractual relationships, targeted advertising to particular forums, and sales of merchandise of products. Specifically, Johnson introduced evidence that the terms of service governing the Website specifically provide that the user consents to location access for the purpose of targeted marketing. In addition, the Website does, in fact, interact with the user by listing specific

advertisements on the webpage based on the user's location as promised by the terms of service. Third, the Website offers visitors the opportunity to enter into contracts with HuffPost for a subscription service offering enhanced access and participation with HuffPost's content. Finally, the Website has a "store" that allows users to purchase merchandise and services such as "online courses". The advertising, subscription, and sales links are all visible and clickable from the homepage of the Website and from news articles located in the Website, such as the Article that Johnson complains of.

On December 18, 2020, the District Court granted the Motion to Dismiss on the basis that Texas was neither part of the subject matter of the Article, nor were the sources relied on for the Article from Texas. App. B. Johnson filed his notice of appeal on January 9, 2021. The COA issued its Opinion on December 23, 2022, with a strong dissent. App. A. The En Banc Opinion was issued on April 27, 2022 with another robust dissenting opinion. App. C. Seven judges voted for rehearing the matter *en banc* and ten voted against. App. at 43a.

REASONS FOR GRANTING THE WRIT

As the Fifth Circuit dissenters observed, the Fifth Circuit majority's holding that *Keeton* only applies to print media, which ignores the realities of the digital age. In addition to being poor jurisprudence as it treats the internet differently than print media, the COA Opinion creates a circuit split because the Fourth, Seventh, and Ninth circuits have held contrary to the Fifth Circuit majority and have instead agreed with the Fifth Circuit dissent. If the Court does not grant review now, then

this split will likely grow and there will be uncertainty surrounding internet libel jurisdiction, which is the predominant type of libel complained of in today's world.

I. The Fifth Circuit's Application of Jurisdictional Precedent is Poor Jurisprudence that Ignores the Realities of the Internet Age.

The majority panel of the Fifth Circuit obsessed over the fact sets of early internet jurisdiction cases as well as this Court's seminal cases of *Keeton* and *Ford Motor*. For the reasons discussed below, the Fifth Circuit majority's reasoning is poor jurisprudence that would prevent courts from engaging in a meaningful jurisdictional analysis of online news publishers who reach nationwide audiences by publishing content online, economically profit from those nationwide audiences through their content, but escape jurisdiction in the markets they publish in/exploit because the exploitation/publication occurs over the internet as opposed to a "physical" presence. A sensible application of *Keeton* and *Ford Motor*. clearly point to jurisdiction in this case regardless of any "physical" presence by HuffPost in Texas.

A. The Reasoning Of The Fifth Circuit Majority Falls Short Of The Mark.

The Fifth Circuit majority held that commercial and interactive activities of the Website had essentially "nothing to do" with the Article and ensuing libel claim. App. A at 11a-12a. In so holding, the majority set up a straw-man arguments that completely miss the mark and ignore the realities of the modern virtual press. The panel majority compared upholding jurisdiction over HuffPost

in this case to subjecting "Granny" to jurisdiction from Maui to Maine for publishing a cooking blog online. App. A at 11a-12a. The panel majority held that "[w]hat matters is whether HuffPost aimed the alleged libel at Texas." *Id.*

As the dissenting judges would point out, the majority panel Opinion essentially made the *Calder v. Jones,* 465 U.S. 783 (1984) "targeting" test the only applicable one for internet libel. In so holding, the Fifth Circuit held that online news stories read across the nation that sanitize geographic references are not subject to jurisdiction anywhere other than the news organization's place of incorporation or headquarters.

But, as discussed below, the Fifth Circuit majority's conclusion that mugs, tee-shirts, paid subscriptions, and collecting and selling geolocated data to sell and target advertisements have "nothing to do" with the Article completely misunderstands the nature of online news. The reason why news organizations like HuffPost can sell user data that in turn are used for advertisements is not because people are accessing the site to buy shirts and mugs. It is because users are accessing the site to read the sensationalized articles like the one Johnson complains of. As other circuits have recognized, this generates user traffic, which generates data, which generates revenue and therefore constitutes publishing/market exploitation in the forum states by the online news organizations. The Fifth Circuit's holding that these targeted commercial activities have "nothing to do" with the "news" articles published is implausible and lacks common sense application in an age where almost all news is read online. In doing so, the Opinion conflicts with *Keeton*, *Ford Motor*, and the law of multiple other circuits.

B. The Fifth Circuit misapplied *Keeton* and *Ford Motor.*

In *Keeton*, the Court held that a resident of New York could hail Hustler Magazine into a New Hampshire court—a forum that at that time apparently had the nation's most lengthy defamation statute of limitations—where the allegedly libelous article in question had nothing to do with New Hampshire and plaintiff had no connection to New Hampshire. 465 U.S. at 772-81. The Court found that Hustler Magazine's circulation of roughly 15,000 copies of the subject magazine in New Hampshire was a "continuous and deliberate" exploitation of the New Hampshire market, regardless of the paucity of copies circulated in that state compared to other states and thus was "sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine." Id. at 773-74, 781. In other words, the holding of *Keeton* is that continuously circulating publishing material in a forum state subjects a publisher to jurisdiction in that state for any cause of action arising from the published material.

Here, Johnson argues the same thing. He argues that because of the commercial activity of the Website (the virtual "magazine") that derived revenue from its news Website in Texas—by collecting data from and specifically advertising to Texas residents by assessing their locations, among other things—subjects HuffPost to jurisdiction in Texas for any claim arising from or related to the Website (magazine) that it "circulates" in Texas by targeting Texas as discussed above. And if it does so in every state then—yes—HuffPost is liable in every state for any claim arising from or relating to its Website in the same way that Hustler likely circulated magazines

in every state and was thus liable for the contents of its magazine in every state it continuously circulated in.

And to be sure, neither Johnson nor the dissenting Fifth Circuit judges equate "circulation" with simply being accessible from the forum state as suggested by the COA majority. Thus, a Maui "Granny" would not be subject to jurisdiction in Texas merely because her cooking blog was accessible from Texas. However, if said Granny created a "terms of service" for her blog readers to agree to wherein she tracked their location data so she could share it with third parties and sell advertisements targeted to Texas, sold "ad free" subscriptions to her blog in Texas, and sold Granny blog merchandise in Texas, then Granny would be commercially circulating her blog in Texas and thus subject to its jurisdiction for any claim arising from or relating to her blog/website. The commercial quid pro quo is that the more traffic to Granny's blog there is, the more advertising revenue Granny can derive from her blog readers and, the more targeted the advertising to a particular forum, the more effective (and thus valuable) the advertising. Thus, Granny could not argue that her cooking blog had "nothing to do" with her targeted advertising and merchandise sales because—like here—the primary generator of traffic and thus revenue is, in fact, the blog (i.e., the published content).

As a result, the panel majority is simply wrong when it concludes "[a]t bottom, the only reason to hale HuffPost into Texas is that Texans visited the site, clicking ads and buying things there." App. A at 10a. This, once again, creates the straw man argument of "universal accessibility" as the basis for jurisdiction. The undisputed facts—and the basis for jurisdiction—is

that, in connection with users accessing the "news" on the Website that HuffPost also actively obtains information from its users that it then exploits for commercial gain with its advertising partners. As such, the panel majority errs by concluding this is not "market exploitation" as it was in *Keeton*.

Further, the COA Opinion conflicts with *Ford Motor*. In that case, Ford argued that it was not subject to personal jurisdiction in Montana and Minnesota based on a claim of malfunction of Ford's cars in those states because, while Ford did business in those states, the specific malfunctioning cars were neither sold nor manufactured in those states. 141 S. Ct. at 1026. In rejecting Ford's argument, this Court noted that it only required a "connection" between the forum-related activities and the plaintiff's suit. *Id.* The Court also noted that the "relatedness" test only requires that plaintiff's suit need not specifically arise from the forum contacts but need only "relate to" the forum contacts. *Id.*

The Fifth Circuit majority ignores this principle in favor of a hair-splittingly myopic view of "relatedness". Johnson pleaded that the webpage for the Article—which he specifically cited to in his Complaint by URL address—was part of a Website that interactively obtained information from users for commercial purposes and otherwise engaged in business in Texas. Under *Ford Motor*, this would be sufficiently "related" to create jurisdiction. However, the panel majority justified its dereliction from *Ford Motor* based on the Fifth Circuit's prior holding in *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002).

But as the dissent points out, the fact set *Revell* was inapposite. In that case, the alleged libelous posting was on a passive bulletin board and there was no evidence that the commercial aspects of the website at issue in that case specifically targeted Texas with goods and services as HuffPost does with its Website. App. A at 33a. Indeed, it is unlikely that in the circa-2002 time frame when *Revell* was decided that any of the interactive and commercial aspects of geolocating aspects of targeted marketing present in this case were even contemplated by the *Revell* court or the other courts that addressed internet jurisdiction during that time frame, such as the well-known *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

Under *Ford Motor*, the bottom line is this: If the Website engages in substantial commercial activity in Texas and thus "market exploitation"—and the uncontroverted jurisdictional facts require the Court to accept this proposition—then is the Article "related to" the Website? Given that the Article appears on the Website, it is unquestionably "related to" the commercial activity—the minimum contacts and purposeful availment—regardless of whether the alleged libelous Article was "directed" at Texas. Because the panel majority has ignored the "related to" language of *Ford Motor* in favor of a narrower construction and over-reliance on the effects test of *Calder*, the panel majority has created Fifth Circuit law at odds with both *Ford Motor* and *Keeton*, which set forth a jurisdictional analysis independent of "intentional targeting" of a forum.

C. This Court should make clear that "publication" and "market exploitation" can occur through internet publishing.

As the dissent pointed out, the COA Opinion conflicts with the Fifth Circuit's own prior holding in *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005), which the panel majority completely ignored. In that case, the Fifth Circuit properly recognized that jurisdiction could be obtained either from *Keeton's* "substantial circulation" test or the *Calder* "effects" test. See 415 F.3d at 425. The panel majority holds that websites categorically cannot constitute a "circulation" because, as it concludes, "websites are different". App. A at 23a. In doing so, it concluded that *Keeton* was limited to the particular context of print media and that operating a website lacks the "affirmative act" of circulation present in *Keeton*. *Id.* In so holding that the circulation test of *Keeton* cannot apply to websites, the panel majority makes bad law in two respects.

First, it ignores the "affirmative act" that media defendants like HuffPost take by eliciting data from site visitors to commercialize and profit from – an act it could choose to refrain from in certain geolocations if it did not want to be hailed into court in those forums. Second, and most significantly, however, the panel majority has taken the dual jurisdictional analysis of *Fielding* (properly construing the *Keeton/Calder* jurisdictional dichotomy) and collapsed every jurisdictional analysis for internet libel into a *Calder* "effects only" analysis. In so doing, the panel majority has made the *Keeton* circulation test a veritable fossil that has application only to a handful of media that is still in national print circulation (The New

York Times, The Wall Street Journal, Time, etc.). The overwhelming majority of media—published online—will be invulnerable to the circulation test/market exploitation test because the panel majority has determined that this only applies to physical print media.

Because the panel majority's Opinion creates a *de facto* gutting of *Keeton* for any internet libel case, the panel majority's Opinion sets bad precedent that this Court should reject. In fact, as the dissenters note, this Court has already—albeit in the context of the Commerce Clause—rejected the antiquated "physical presence rule" and held that online retailers "avail[ed] [themselves] of the substantial privilege of carrying on business" in a state based in part on "both the economic and virtual contacts respondents have with the State" and on the fact that "respondents are large, national companies that undoubtedly maintain an extensive virtual presence" in the state. *Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018) (citations omitted). The Court should likewise reject such an "antiquated" rule for circulation/publishing/market exploitation of online news organizations.

II. Other Circuits Have Adopted the Rationale of the Fifth Circuit Dissent.

Unsurprisingly, multiple other circuits have rejected the poor reasoning of the Fifth Circuit majority and adopted the reasoning of the dissent. This Court should grant certiorari and adopt the reasoning of the Fifth Circuit dissent and the majority of other circuits to bring clarity to internet libel law.

In *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344 (4th Cir. 2020), the Fourth Circuit addressed a fact set much like the one in this case. In that case, the court rejected the defendant's arguments—similar to those made by the panel majority—that it did not engage in commercial activity within Virginia:

> Of course, the Websites are free to use, and no cash is exchanged. But the mere absence of a monetary exchange does not automatically imply a non-commercial relationship. It is hardly unusual for websites to be free to use in today's Internet because many corporations "make money selling advertising space, by directing ads to the screens of computers employing their software."
>
> Here, the visitors' acts of accessing the Websites (and downloading the generated files) are themselves commercial relationships because Kurbanov has made a calculated business choice not to directly charge visitors in order to lure them to his Websites. Kurbanov then requires visitors to agree to certain contractual terms, giving him the authority to collect, among other information, their IP addresses and country of origin. Far from being indifferent to geography, any advertising displayed on the Websites is directed towards specific jurisdictions like Virginia. Kurbanov ultimately profits from visitors by selling directed advertising space and data collected to third-party brokers, thus purposefully availing himself of the privilege of conducting business within Virginia.

963 F.3d at 353 (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)).

In *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421 (7th Cir. 2010), the Seventh Circuit addressed an internet-based defendant who claimed, much like HuffPost does here, that it was not subject to jurisdiction anywhere except where its physical offices and servers were located. 623 F.3d at 424. However, the Seventh Circuit recognized that the defendant—like HuffPost—had a "virtual presence" that was nationwide and, while its nationwide advertising campaign did not specifically target Illinois, it advertised there and solicited customers there making it reasonable, under *Keeton*, for it to be hailed into an Illinois court based on its internet "market exploitation" of Illinois for activities arising from or related to its internet activities. *See id.* at 427-28. The *uBID* court also rejected the "but the commercially exploitive contacts aren't the basis of the suit" argument that the Fifth Circuit majority embraced and held that the contacts only need be "related" to the market exploitation to give rise to specific jurisdiction (a conclusion that would later be confirmed by this Court in *Ford Motor* as discussed above). *See id.* at 430-32.

Finally, in *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218 (9th Cir. 2011), the Ninth Circuit expressly held that the type of targeted advertising HuffPost engaged in this case constituted "market exploitation" under *Keeton* and, therefore, specific jurisdiction could lie in California where the targeted advertising occurred. 647 F.3d at 1230-31. In so holding, the court recognized the negative policy implications of the Fifth Circuit majority's rationale because corporations, like mainstream media, can "exploit a national market to

defeat jurisdiction in states where those websites generate substantial profits from local consumers". *Id.* at 1231.

If the Opinion stands, the Fifth Circuit will create a circuit split with these decisions, which warrants granting the writ and reversing the COA Opinion.

III. The Critical Importance.

We no longer live in a world where Americans receive their news by reading the morning and evening editions of a printed newspaper or magazine. While there is still a market for print media, the overwhelming majority of Americans receive information through their smartphones, tablets, or computers. Media companies are a business. Those businesses have adapted to the consumer demand for digital publications and abandonment of print media. A plethora of companies like HuffPost provide media services and publications completely online.

Just as those media companies have evolved with the times, so must our jurisdictional jurisprudence. Online publishers like HuffPost knowingly and intentionally exploit markets across the country, tracking user data who read their content and profiting from it. HuffPost clearly published in and exploited the Texas market through the internet. The Court should not allow media defendants immunity from market exploitation and publication simply because it is done virtually rather than in tangible physical form. Accordingly, the Court should use this case as opportunity to demonstrate that *Keeton* will not become a jurisprudential dinosaur as the Fifth Circuit majority would have it, but rather provides the foundation for jurisdiction in internet libel cases in the 21st Century.

CONCLUSION

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

Respectfully submitted,

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Dated: July 26, 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED DECEMBER 23, 2021

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-20022

CHARLES JOHNSON,

Plaintiff-Appellant,

versus

THEHUFFINGTONPOST.COM, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas.
No. 4:20-CV-179.

December 23, 2021, Filed

Before KING, SMITH, and HAYNES, *Circuit Judges.* HAYNES, *Circuit Judge, dissenting.*

JERRY E. SMITH, *Circuit Judge*:

Charles Johnson says the Huffington Post ("HuffPost") libeled him by calling him a white nationalist and a Holocaust denier. He sued HuffPost in Texas. HuffPost

is not a citizen of Texas and has no ties to the state. But its website markets ads, merchandise, and ad-free experiences to all comers.

We must decide whether those features of HuffPost's site grant Texas specific personal jurisdiction over HuffPost as to Johnson's libel claim. They do not, so we affirm the dismissal and deny jurisdictional discovery.

I.

HuffPost is a website that publishes online articles and commentary. It's perhaps best known for its political coverage.

About three years ago, HuffPost reported that Johnson had met with two congressmen in Washington, D.C. The story identified Johnson as a "noted Holocaust denier and white nationalist." The story said nothing about Texas, nor did it rely on sources based in Texas or recount conduct that occurred in Texas.

Displeased with the portrayal, Johnson sued HuffPost for libel in the Southern District of Texas. At first, Johnson based jurisdiction on his Texas citizenship and said that the libel had occurred in Texas. But HuffPost is a citizen of Delaware and New York; it has no physical ties to Texas; it has no office in Texas, employs no one in Texas, and owns no property there.

To surmount that barrier, Johnson's amended complaint stressed HuffPost's online links to Texas.

Johnson calls four to our attention. *First*, HuffPost's website, which displays the alleged libel, is visible in Texas. *Second*, HuffPost sells an ad-free experience[1] and merchandise to everyone, including Texans. *Third*, advertisers from Texas have contracted with Huff-Post to show ads on the site. And *fourth*, HuffPost collects information about its viewers, including their location, to enable advertisers to show them relevant ads. All those contacts, Johnson avers, establishes that HuffPost "has purposefully availed itself of the privileges of doing business in Texas."

HuffPost moved to dismiss for want of personal jurisdiction. In a terse opinion, the district court granted that motion, noting that the story did not concern Texas, did not use Texas sources, and was not "directed at Texas residents more than residents from other states."

Johnson appeals. He urges that the district court erred by looking to the libel's effects in the forum state rather than to the features of HuffPost's website, which he says support jurisdiction in Texas. In the alternative, Johnson seeks discovery to support his jurisdictional claims.

HuffPost restates that it has no physical ties to Texas and that the story about Johnson does not target Texas or rely on Texas in any way. It also points out that Johnson's

1. Johnson calls this a "subscription." But the record shows that HuffPost is free to read. Readers may choose to pay for an ad-free experience.

injury arises only from the story's visibility in the forum—not from ads, merchandise, or ad-free experiences. And if those ties sufficed, HuffPost warns, personal jurisdiction would become "universal jurisdiction," allowing suit anywhere its website is visible.

II.

The dismissal was proper. Our precedents require affirmance.

A.

We review the dismissal *de novo*. *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002). As plaintiff, Johnson has the burden of demonstrating our jurisdiction, *id.*, but we must accept his uncontroverted, non-conclusory allegations of fact, *Diece-Lisa Indus. v. Disney Enters.*, 943 F.3d 239, 249 (5th Cir. 2019).

Because we are sitting in diversity and applying Texas law, we have jurisdiction over a nonresident defendant only to the extent consistent with his federal due process rights. *Id.* Those rights permit our jurisdiction only where the defendant has established enough purposeful contacts with the forum and where jurisdiction would comport with "traditional notions of fair play and substantial justice." *Revell*, 317 F.3d at 470 (cleaned up).

Johnson argues that we have claim-specific jurisdiction over HuffPost. We have that jurisdiction only when three conditions are met. *Seiferth v. Helicopteros Atuneros, Inc.*,

472 F.3d 266, 271 (5th Cir. 2006). *First*, the defendant must "purposefully avail[ ] itself of the privilege of conducting activities in the forum State." *Ford Motor Co. v. Mont. Eighth Jud. Distr. Ct.*, 141 S. Ct. 1017, 1024, 209 L. Ed. 2d 225 (2021) (cleaned up). The defendant's ties to the forum, in other words, must be ties that "the defendant *himself*" purposefully forged.[2] *Second*, the plaintiff's claim "must arise out of or relate to" those purposeful contacts.[3] A defendant may have many meaningful ties to the forum, but if they do not connect to the plaintiff's claim, they cannot sustain our power to hear it. *Third*, exercising our jurisdiction must be "fair and reasonable" to the defendant. *Seiferth*, 472 F.3d at 271.

Those limits "derive from and reflect two sets of values—treating defendants fairly and protecting interstate federalism." *Ford Motor*, 141 S. Ct. at 1025 (cleaned up). Put another way, a defendant must have "fair warning" that his activities may subject him to another state's jurisdiction. *Id.* That warning permits the defendant to "structure its primary conduct to lessen or avoid exposure to a given State's courts." *Id.* (cleaned up). The limits on specific jurisdiction also "ensure that States with little legitimate interest in a suit" cannot wrest that suit from "States more affected by the controversy." *Id.* (cleaned up).

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2. *Diece-Lisa*, 943 F.3d at 250 (quoting *Walden v. Fiore*, 571 U.S. 277, 284, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014)) (cleaned up).

3. *Ford Motor*, 141 S. Ct. at 1025 (cleaned up); *see also Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781, 198 L. Ed. 2d 395 (2017) ("What is needed . . . is a connection between the forum and the specific claims at issue.").

B.

In *Revell*, we explained how to apply those principles to cases in which a defendant's website is the claimed basis for specific jurisdiction vis-à-vis an intentional tort. We first look to the website's interactivity. *See Revell*, 317 F.3d at 470 (citing *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)). If the site is passive—it just posts information that people can see—jurisdiction is unavailable, full stop. *Id.* But if the site interacts with its visitors, sending *and* receiving information from them, we must then apply our usual tests to determine whether the virtual contacts that give rise to the plaintiff's suit arise from the defendant's purposeful targeting of the forum state. *See id.* at 472-76.

Like this lawsuit, *Revell* was an internet libel case. After deciding that the website in question was interactive, we looked to *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), to determine whether the publisher had targeted the alleged libel at Texas. *See Revell*, 317 F.3d at 472-76.

The key question, under *Calder*, is whether the forum state was "the focal point both of the [alleged libel] and of the harm suffered." *Calder*, 465 U.S. at 789. Thus, the *Calder* Court held that California had jurisdiction over two nonresident defendants because the alleged libel discussed "the California activities of a California resident" and "was drawn from California sources," "and the brunt of the harm" to the plaintiff "was suffered in California." *Id.* at 788-89.

Applying *Calder* in *Revell*, we dismissed for want of personal jurisdiction. The Texan plaintiff complained of an article in a Columbia University web publication that accused him of complicity in a terrorist attack. Columbia's publication was interactive, we explained, because it was "an open forum" where users could post content and interact with others. But the article never mentioned Texas, never discussed Revell's activities there, and was not aimed at Texans any more than at residents of other states. We acknowledged that the story "was presumably directed at the entire world, or perhaps just concerned U.S. citizens." *Revell*, 317 F.3d at 475. But that did not suffice. For Texas to have jurisdiction, we concluded, the article had to target Texas specifically and knowingly. *Id.* Because it did not, we lacked jurisdiction. *Id.* at 476.

C.

Our decision in *Revell* requires dismissal. HuffPost is interactive, but its story about Johnson has no ties to Texas. The story does not mention Texas. It recounts a meeting that took place outside Texas, and it used no Texan sources. Accordingly, we lack jurisdiction over HuffPost with respect to Johnson's libel claim.

Johnson contests that conclusion. He first claims that HuffPost's interactivity is all that matters. Once we decide that a website exchanges information with its users, he says, we must have personal jurisdiction. If HuffPost is interactive, Johnson thinks, it's irrelevant whether HuffPost targeted Texas with the alleged libel.

Johnson misreads our precedents. In *Revell*, we treated interactivity as a prerequisite to our standard jurisdictional inquiry. *See Revell*, 317 F.3d at 472. That position makes good sense. Interactivity reflects only a website's *capacity* to avail itself of a place. Sites that solicit information, purchases, and ad clicks from their viewers can more easily reach into a forum and cause injury there than can sites that do not. But just because a site *can* exploit a forum does not mean that it *has* or that its forum contacts produced the plaintiff's claim. Those requisites must be satisfied even where all the defendant's ties to the forum are virtual.[4]

Next, Johnson conjures that *Revell* is "completely different" from this case because HuffPost shows ads, sells merchandise, and offers an ad-free service "on the same page as" the alleged libel. The site in *Revell*, by contrast, solicited subscriptions on "separately navigable pages."

That distinction fails for two reasons. First, Johnson never pleaded it. His amended complaint makes clear that the *only* link between the alleged libel and HuffPost's virtual contacts with Texas is that the libel "was published on the same Website." The complaint never says or

4. *See Pervasive Software, Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 227 (5th Cir. 2012); *see also Admar Int'l, Inc. v. Eastrock, L.L.C.*, No. 21-30098, 18 F.4th 783, 783, 2021 U.S. App. LEXIS 34522, 2021 WL 5411010, at *2 (5th Cir. Nov. 19, 2021) (stressing that *Zippo* does not bear on whether the defendant's contacts relate to the plaintiff's claim or whether our jurisdiction is fair and reasonable).

suggests that we have jurisdiction because HuffPost's forum contacts sprang from the same web*page*, rather than from the same web*site*.

But even if it had, the distinction is specious. *Revell* discounted Columbia's solicitation of subscriptions because Revell's libel claim did not arise from it. "For specific jurisdiction," we explained, "we look only to the contact out of which the cause of action arises." *Revell*, 317 F.3d at 472. And Revell's claim arose only from the alleged libel, not from Columbia's inviting visitors to subscribe.[5]

Johnson also asserts that *Revell* turned on the limited interactivity of Columbia's web publication. We disagree. Though we did describe Columbia's site as having a "low level of interactivity," *Revell*, *id.* at 476 (cleaned up), we *held* that the site was interactive because it exchanged data with its visitors, *id.* at 472. We specifically rejected the contention that Columbia's website was passive and thus could not support our jurisdiction. *Id.*

5. *See Revell*, 317 F.3d at 472 ("For specific jurisdiction we look only to the contact out of which the cause of action arises—in this case the maintenance of the internet bulletin board [where the alleged libel was published]. Since this defamation action does not arise out of the solicitation of subscriptions or applications by Columbia, those portions of the website need not be considered." (footnote omitted)); *see also Clemens v. McNamee*, 615 F.3d 374, 379 (5th Cir. 2010) (noting that "the relevant contacts" for a defamation claim "are the allegedly defamatory remarks" themselves).

Johnson has put all his eggs into the interactivity basket. But under *Revell*, interactivity isn't enough. Johnson also must show that HuffPost's story targeted Texas in some way. He has not done that, so he cannot prevail.

III.

Revell controls this case. But even if it did not, settled principles of personal jurisdiction command affirmance.

At bottom, the only reason to hale HuffPost into Texas is that Texans visited the site, clicking ads and buying things there. But as far as Johnson has alleged, those visits reflect only HuffPost's universal accessibility, not its purposeful availment of Texas. Accessibility alone cannot sustain our jurisdiction. If it could, lack of personal jurisdiction would be no defense at all.

The defense of personal jurisdiction exists to ensure fairness to defendants and to protect federalism. *Ford Motor*, 141 S. Ct. at 1025; *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). Exerting our power here would undermine both goals.

A.

Fairness to defendants has at least two elements. *First*, defendants must have "fair warning" that their activities could furnish jurisdiction in the forum. *Ford Motor*, 141 S. Ct. at 1025. That's the idea behind purposeful

availment. Where a defendant lacks suit-related ties with the forum or did not forge those ties himself, *see Diece-Lisa*, 943 F.3d at 250, he cannot reasonably expect a suit there. *Second*, a defendant must have some chance to limit or avoid his exposure to the courts of a particular state. *See Ford Motor*, 141 S. Ct. at 1025. That's why a state cannot use a defendant's forum contacts—even purposeful ones—to invent jurisdiction over claims that do not relate to or arise from those contacts.

None of the alleged ties with Texas gives HuffPost fair warning that it should expect a libel suit there. Making a website that's visible in Texas, of course, does not suffice. *See Admar*, 18 F.4th at , 2021 U.S. App. LEXIS 34522, 2021 WL 5411010, at *4. If it could, our jurisdiction would have no limit; "a plaintiff could sue everywhere." *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014). That result would not be fair or consistent with defendants' reasonable expectations. Grannies with cooking blogs do not, and should not, expect lawsuits from Maui to Maine.

Johnson says that HuffPost sells merchandise to Texans. But that doesn't matter. Johnson complains about a written article, not articles of clothing. Branded tees and coffee mugs have nothing to do with Johnson's libel claim, so they cannot sustain claim-specific jurisdiction.[6]

6. *See Bristol-Myers*, 137 S. Ct. at 1781 ("[F]or a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy . . . . When there is no such connection, specific jurisdiction is lacking *regardless of the extent of a defendant's unconnected activities in the State*." (cleaned up) (emphasis added)).

The same is true of the ads that HuffPost shows its visitors. Recall that Johnson alleged two ad-based ties with Texas. *First*, HuffPost displayed ads from Texas-based advertisers. *Second*, it used visitors' location data to tailor advertising to them. So when the site detects that a user is visiting the site from Texas, advertisers may use that data to generate a relevant ad—such as the "Attention Texas Driver!" ads that no one clicks.

The first tie is irrelevant. Johnson's libel claim arises from the story declaring him a white-nationalist Holocaust denier. It does not stem from or relate to HuffPost's ads or the citizenship of those placing them. *See Revell*, 317 F.3d at 472.

That point is clear in the context of print media. Suppose that someone advertises a truck in the classified section of a New York newspaper. The paper then calls a Texan a Holocaust denier, and that Texan sues for libel. Should our jurisdiction turn on whether the truck's owner was a citizen of Texas? Surely not. *See, e.g., Hanson v. Denckla*, 357 U.S. 235, 253-54, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

The second tie has the same problem. Selling ads is no different from hawking tees and mugs. Those sales neither produced nor relate to Johnson's libel claim. That relatedness problem remains even if HuffPost used location data to tailor ads to each visitor.

There is another barrier: The place from which a person visits Huff-Post's site is entirely beyond HuffPost's

control. Johnson never says that HuffPost reached beyond the site to attract Texans to it or to the story about Johnson. He does not say, for example, that HuffPost aimed the alleged libel at Texas through geotargeted ads on Facebook or Google. Instead, he alleges only that HuffPost showed unrelated ads to those *already visiting its site*.

That point matters because "the defendant *himself*" must create the contacts that sustain the forum state's jurisdiction.[7] Because Johnson does not allege that HuffPost solicited Texan visits to the alleged libel, we cannot conclude that those visits are *HuffPost's* purposeful contacts with Texas. Instead, those visits reflect the "unilateral activity," *Hanson*, 357 U.S. at 253, of persons in Texas typing "huffpost.com" into their web browsers and pressing "Enter."

Johnson protests that ads are how HuffPost makes money. But whether HuffPost generates revenue by selling ads, tees, or chewing gum is beside the point. Johnson chose to plead a libel claim. The harm of libel is the reputational injury that results from the defendant's purposefully sharing that libel with others. *See Walden v. Fiore*, 571 U.S. 277, 288, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014). It does not turn on whether the defendant's unrelated activities make or lose money.

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7. *Diece-Lisa*, 943 F.3d at 250 (cleaned up); *see also Walden*, 571 U.S. at 286 ("Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State." (cleaned up)).

What matters is whether HuffPost aimed *the alleged libel* at Texas.[8] Third-party ads on HuffPost's site reflect no such aiming. They neither caused nor relate to the harm that the story caused. They do not drive Texans to the site or even to the alleged libel. Instead, they direct Texans *away* from the site, to third-party advertisers. And HuffPost shows ads to all comers; it treats Texans like everyone else. To target every user everywhere, as those ads do,[9] is to target no place at all.[10]

We can translate that point to a physical context. Liken HuffPost's website for a physical store in New York, where HuffPost is "at home."[11] A resident of Texas

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8. *See, e.g., Clemens*, 615 F.3d at 380 ("[T]he question [is] whether McNamee's allegedly defamatory statements were aimed at or directed to Texas."); *Herman v. Cataphora, Inc.*, 730 F.3d 460, 465 (5th Cir. 2013) ("In applying the *Calder* analysis, we have emphasized the importance of the 'focal point' language . . . . [F]or minimum contacts to be present the allegedly defamatory statements must be adequately directed at the forum state." (citation omitted)).

9. Johnson's own exhibits show that HuffPost collects location data from every visitor, no matter where he resides.

10. *See Revell*, 317 F.3d at 475 ("[O]ne cannot purposefully avail oneself of 'some forum someplace'; rather, as the Supreme Court has stated, due process requires that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." (cleaned up)); *see also Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 915-18 (10th Cir. 2017).

11. Of course, websites, like emails, are commonly understood to have no physical location at all. *Cf. Advanced Tactical*, 751 F.3d

visits the store, peruses the aisles, and speaks with a salesperson. She tells the salesperson that she is from Texas and describes what she would like to buy. After determining that the customer wants something that the store does not sell, the salesperson refers her to a shop down the street, earning a few cents from that shop for the favorable reference.

That interaction, if Johnson were correct, would allow a *different* Texan to sue HuffPost in Texas over a tort at the New York store. That can't be right. Of course, jurisdiction might exist if HuffPost aimed the tort at Texas in some way.[12] Or perhaps it might exist if HuffPost had reached into Texas to solicit the plaintiff's visit, without which the tort could not have occurred.[13] But

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at 803. Creating a website is not like erecting billboards in all fifty states; that act cannot give every place power to hear claims about what the website displays. For that reason, it makes more sense to see a website as a physical site or store where the defendant resides. The defendant surely can expect suit there, *see Daimler AG v. Bauman*, 571 U.S. 117, 122, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), and elsewhere he purposefully targets with the conduct that induces the plaintiff's suit.

12. *See Walden*, 571 U.S. at 287 ("[In *Calder*,] we examined the various contacts the defendants had created with California (and not just with the plaintiff) *by writing the allegedly libelous story*.") (emphasis added).

13. *Cf. Shute v. Carnival Cruise Lines*, 897 F.2d 377, 379 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991). In *Shute*, a Florida cruise line advertised a Mexican cruise in Washington. A Washington resident booked the cruise, during which she suffered injuries due to the cruise

absent ties of that sort—ties that link HuffPost's tort to Texas—we could not drag HuffPost to Texas to answer for it. *See, e.g., Walden*, 571 U.S. at 291. Fair warning to HuffPost would be entirely absent.

Fairness also dictates that a defendant must have some chance to limit or avoid its exposure to a particular state's courts. *See Ford Motor*, 141 S. Ct. at 1025. The Supreme Court has read that principle as the inverse of the purposeful-availment requirement: Just as jurisdiction is proper when a defendant intentionally creates suit-related contacts with the forum, jurisdiction is absent where a defendant does not reach, or has ceased to reach, into the forum state in that way. *See World-Wide*, 444 U.S. at 297-99.

That principle does not require defendants to wall themselves off from the world. A hospital need not deny care to nonresident patients to avoid jurisdiction where those patients reside.[14] A resort need not bar nonresident travelers to avoid jurisdiction in their home states when those travelers eat tainted food at the resort, take ill, and

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line's negligence. The Ninth Circuit held that a Washington court could hear her claim because the cruise line had reached into the state to solicit the trip that allegedly injured her. *Id.* at 382. Our circuit has not endorsed *Shute*'s broad view of specific jurisdiction. *See Inmar Rx Sols. v. Devos, Ltd.*, 786 F. App'x 445, 449 n.2 (5th Cir. 2019) (per curiam).

14. *See, e.g., Harlow v. Children's Hosp.*, 432 F.3d 50, 68-69 (1st Cir. 2005); *Frazier v. Univ. of Miss. Med. Ctr.*, No. 16-CV-976, 2017 U.S. Dist. LEXIS 161842, at *13-15 (S.D. Miss. Oct. 2, 2017) (same).

sue after returning home.[15] Likewise, HuffPost need not block Texans from visiting its site, receiving relevant advertising, or buying T-shirts to escape the ability of Texas courts to hear Johnson's libel claim.

Instead, that principle means that HuffPost may avoid the authority of Texas's courts by not purposefully directing at Texas the conduct that produced Johnson's suit. Because HuffPost did not aim the alleged libel at Texas or reach into Texas to share it there, we cannot hear Johnson's libel claim.

B.

Limits on personal jurisdiction also protect interstate federalism. *Ford Motor*, 141 S. Ct. at 1025. Hearing Johnson's claim would undermine that.

Personal jurisdiction comes in two flavors: general and specific. Unlike claim-specific jurisdiction, general jurisdiction does not demand that the plaintiff's claims arise from the defendant's forum ties. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011). But for a state to have the power to hear claims against a defendant, the defendant's ties with the state must be so pervasive that he is "essentially at home" there. *Id.* That is a high bar, which Johnson concedes he cannot meet.

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15. *See, e.g., Moon v. Sandals Resorts Int'l, Ltd.*, No. 13-cv-00134, 2013 U.S. Dist. LEXIS 203230, at *10-11 (W.D. Tex. Dec. 27, 2013).

Claim-specific jurisdiction is different. As we have explained, it may arise only from the defendant's forum ties that relate to the plaintiff's claim. One reason for that limit is to respect federalism. When one state tries a suit, it "may prevent sister States from exercising their like authority," even when those states have a greater interest in the dispute. *Ford Motor*, 141 S. Ct. at 1025 (cleaned up).

That federalism interest carries enormous weight. It may preclude our power even when all other factors—the burden on the defendant, the forum state's interest in applying its own law, and the convenience of the forum—strongly favor our jurisdiction.[16]

Exercising jurisdiction over HuffPost would collapse the distinction between specific and general jurisdiction. If marketing ads, merchandise, and ad-free experiences to all visitors can create jurisdiction over a website with respect to an unrelated libel claim, we can imagine few claims against a website that would fall beyond the reach of "claim-specific" jurisdiction.[17]

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16. *See World-Wide*, 444 U.S. at 293-94; *see also Bristol-Myers*, 137 S. Ct. at 1780-81; *Ford Motor*, 141 S. Ct. at 1025.

17. It is not even clear that Johnson's theory would limit Texas's power to claims that arise from HuffPost's website. Suppose that a HuffPost employee, while chasing down a story outside Texas, crashes his car into a citizen of Texas. Could that victim sue Huff-Post in Texas? Under Johnson's theory, we see no reason why he could not. If selling tees and mugs to Texans can support our jurisdiction over HuffPost with respect to a libel claim unrelated to those items, that virtual activity likewise could sustain our power to hale Huff-Post to Texas to answer for a physical tort that harms a Texan elsewhere.

Erasing the line between specific and general jurisdiction as Johnson proposes would vitiate the sovereign interests of the states where defendants like HuffPost are "at home." General jurisdiction for every state where Huff-Post is visible would destroy its meaning for HuffPost's home states, to whom that awesome power is properly reserved.[18] If Johnson wants to sue HuffPost without showing that HuffPost aimed its suit-related conduct at the place where he sues, he may sue HuffPost in Delaware or New York, where the site is at home. *See Bristol-Myers*, 137 S. Ct. at 1783.

IV.

The well-crafted dissent says we have disregarded binding precedent "because we disagree with its policy implications" for our increasingly virtual world. To the contrary, we apply longstanding, uncontroversial limits on personal jurisdiction. We may not discard those limits just because the defendant operates a website.[19] Yet the dissent, we fear, would strip the shields of relatedness and purposeful availment from virtual defendants.

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18. *See Ford Motor*, 141 S. Ct. at 1025 ("One State's sovereign power to try a suit, we have recognized, may prevent sister States from exercising their like authority." (cleaned up)); *cf.* THE INCREDIBLES (Walt Disney Pictures 2004) ("Syndrome: 'And when everyone's super, . . . no one will be.'").

19. *See Admar*, 18 F.4th at __, 2021 U.S. App. LEXIS 34522, at **4-5, 2021 WL 5411010, at *2 ("The analysis applicable to a case involving jurisdiction based on the Internet should not be different at its most basic level from any other personal jurisdiction case." (cleaned up)).

Appendix A

A.

Let's turn first to relatedness. Our distinguished dissenting colleague posits that *Ford Motor* would authorize our jurisdiction here: *Ford Motor* "made clear that the state in which an injury occurred can exercise specific personal jurisdiction over a defendant if the defendant deliberately engaged in commercial activities in that state."

Though *Ford Motor* did reject a strict causal theory of relatedness, it did not say that "anything goes." *Ford Motor*, 141 S. Ct. at 1026. Quite the contrary. For specific jurisdiction, a plaintiff must link the defendant's *suit related* conduct to the forum. Mere market exploitation will not suffice.

Review *Ford Motor*'s facts. Ford regularly advertised, sold, and serviced cars in Montana and Minnesota. Customers in each state sued after their Ford cars injured them. Though Ford sold those car models in both states, Ford claimed that those sales did not relate to the plaintiffs' claims because it had sold in *other* states the *specific* cars that injured the plaintiffs. In other words, Ford demanded a strict causal link between the forum states and the plaintiffs' cars. *See id.* at 1022-24.

After rejecting that unduly narrow view, the Court stressed that the plaintiffs still had to show that Ford's forum contacts related to their claims. The plaintiffs did show that, the Court said, because Ford sold the injurious

models in Montana and Minnesota.[20] That link—between the products that injured the plaintiffs and Ford's selling those products in the forum states—supported specific jurisdiction.[21]

Ford Motor does not say, as the dissent suggests, that *any* "commercial activities in a state" support specific jurisdiction over a defendant there. The only relevant activities of the defendant are those that relate to the plaintiff's suit. That crucial link is missing here. Johnson contends that HuffPost's unrelated activities—selling merch and showing ads to every visitor—can support personal jurisdiction over HuffPost with respect to his libel claim. That, *Ford Motor* shows, is a bridge too far.

B.

Next, the dissent insists that *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984), dictates that we have personal jurisdiction over HuffPost. But woodenly applying *Keeton* to internet publications, as the dissent suggests, would vitiate the requirement that a defendant purposefully avail himself of the forum state before he may be haled into court there.

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20. *See Ford Motor*, 141 S. Ct. at 1028 ("Ford had systematically served a market in Montana and Minnesota *for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States*." (emphasis added)).

21. *Id.; see also id.* at 1030 ("An automaker regularly marketing a vehicle in a State . . . has 'clear notice' that it will be subject to jurisdiction in the State's courts when the product malfunctions there . . . ." (quoting *World-Wide*, 444 U.S. at 297)).

Keeton, a libel case, authorized specific jurisdiction over Hustler Magazine in New Hampshire because it mailed tens of thousands of libelous magazines there. The instant dissent thinks this case is much the same. HuffPost is a publisher too, she explains, and "has fulsome circulation in Texas"; that should resolve this case. The fact that HuffPost has a website, rather than a print magazine, she says, should not matter a whit.

We agree with that last observation. Our personal-jurisdiction inquiry should not change just because a defendant operates a web publication instead of a physical one. *See Admar*, 18 F.4th at , 2021 U.S. App. LEXIS 34522, 2021 WL 5411010, at *2. But that's why we cannot transpose *Keeton* to the Internet without invoking first principles. Like *Calder* and the rest of the Court's specific-jurisdiction cases, *Keeton* applied the requisites of specific jurisdiction—purposeful availment, relatedness, and fairness to defendants—in a particular context. It did not forge an iron law of specific jurisdiction for all publishers in all mediums.

Keeton stressed the substantial physical circulation of print media because that reflects purposeful availment of the forum state. *See Walden*, 571 U.S. at 285 (noting that *Keeton* addresses a defendant's "physical entry" into the forum). Sending tens of thousands of magazines to a state is an affirmative act that displays the publisher's specific intent to target that state with what the magazines contain. That's why *Keeton* concluded, 465 U.S. at 781, that Hustler had "continuously and deliberately exploited the New Hampshire market" by sending magazines

there. That also explains why the *Keeton* Court had no trouble linking Hustler's suit-related conduct to New Hampshire.[22]

The challenge here, which the dissent does not squarely confront, is that websites are different. To circulate a print magazine, the publisher must send it somewhere. But websites are "circulated" to the public by virtue of their universal accessibility, which exists from their inception. That's why clicks, visits, and views from forum residents cannot alone show purposeful availment. They are not evidence that "the *defendant* has formed a contact with the forum state." *Advanced Tactical*, 751 F.3d at 803.

We again stress that Johnson pleaded no facts showing that HuffPost aimed the alleged libel or its website at Texas. Johnson identifies only one link to Texas that relates to the dispute before us: the fact that HuffPost's website and the alleged libel are visible in Texas. But mere accessibility cannot demonstrate purposeful availment, as we and our sister circuits have held many times.[23] Though

22. *Cf. Calder*, 465 U.S. at 790 ("An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.").

23. *See, e.g., Admar*, 18 F.4th at __, 2021 U.S. App. LEXIS 34522, 2021 WL 5411010, at *4 ("Merely running a website that is accessible in the forum state does not constitute the purposeful availment required to establish personal jurisdiction . . . ."); 2021 U.S. App. LEXIS 34522, [WL] at *3 (collecting cases from three other circuits).

HuffPost's site shows ads and sells merchandise, neither act targets Texas specifically. And even if those acts did target Texas, neither relates to Johnson's claim, so neither supports specific jurisdiction.[24]

At bottom, the dissent urges that we have power over HuffPost because it erected a website where Texans can visit and click ads. Accepting that position would give us unlimited jurisdiction over virtual defendants—and not just our cooking-blog granny. A rising YouTube star enables advertising on his channel, then libels someone in a video he posts there. If the dissent is right, all fifty states may hale him into court to answer for it. But our law is clear that more is needed to protect due process. How much more is a question for another day.

V.

Having failed to plead an adequate basis for our jurisdiction, Johnson asks us to let him fish for facts to support it. We will not.

To merit jurisdictional discovery, Johnson must show that it is "likely to produce the facts needed to withstand" dismissal. *Davila v. United States*, 713 F.3d

24. *Cf. Keeton*, 465 U.S. at 779-80 ("[Hustler's] activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities. But [Hustler] is carrying on a 'part of its general business' in New Hampshire, and that is sufficient to support jurisdiction *when the cause of action arises out of the very activity being conducted, in part, in New Hampshire*." (emphasis added) (footnote omitted)).

248, 264 (5th Cir. 2013) (cleaned up). He must make clear which "specific facts" he expects discovery to find. *Bell Helicopter Textron, Inc. v. Am. Eurocopter, LLC*, 729 F. Supp. 2d 789, 797 (N.D. Tex. 2010). We will not authorize "a jurisdictional fishing expedition" based on a plaintiff's general averments that more discovery will prove our jurisdiction. *Id.* at 798.

The district court denied jurisdictional discovery; we review that ruling for abuse of discretion. *Davila*, 713 F.3d at 264. Johnson has not met his burden. He has not alleged specific facts that discovery will prove. Instead, he says that discovery would determine "the extent" of the activities that we already have said cannot support jurisdiction. We see no reason to confirm Johnson's allegations with discovery when they cannot sustain our power as a matter of law. *See Seiferth*, 472 F.3d at 277.

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The Constitution permits specific jurisdiction only where the defendant himself purposefully creates the forum contacts from which the plaintiff's claims arise. And as to a libel claim, a website selling ads, merchandise, and ad-free experiences to all comers is not enough.

AFFIRMED.

Appendix A

HAYNES, *Circuit Judge*, dissenting:

Just this year, the Supreme Court made clear that the state in which an injury occurred can exercise specific personal jurisdiction over a defendant if the defendant deliberately engaged in commercial activities in that state. *Ford Motor Co. v. Mont. Eighth Jud. Dist.*, 141 S. Ct. 1017, 1025-27, 209 L. Ed. 2d 225 (2021). Earlier decisions followed that same path. *See, e.g.*, *Daimler AG v. Bauman*, 571 U.S. 117, 127 n.5, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1990); *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

This case involves a Texas citizen (Johnson) who claims to have been libeled by TheHuffingtonPost.com, Inc. ("HuffPost"), bringing suit in Texas.[1] As a citizen of Texas, Johnson, of course, suffered injury in Texas as a result of his citizenship there. The question then becomes what connection HuffPost has to Texas relative to this incident. The majority opinion finds no sufficient connection. Concerned about the expansion of personal jurisdiction in the age of digital media, the majority opinion ignores the Supreme Court's recent decision in *Ford Motor*. Worse, the majority opinion all but nullifies the Supreme Court's decision in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984), and our own court's decision in *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005).

1. Obviously, we do not know the actual truth of the facts asserted here, but I will assume the plaintiff's claims to be valid for purposes of the jurisdictional analysis.

The reality of the modern world is that printed newspapers are far less common than virtual ones. But just as we are bound to apply constitutional provisions to modern situations—often, unimaginable to the founders—we are bound to apply Supreme Court and circuit precedent. Therein lies my disagreement with the majority opinion. Because I believe that modernity does not excuse our obligation to apply existing legal frameworks, I respectfully dissent.

To be subject to specific personal jurisdiction in Texas, HuffPost must have "purposefully avail[ed]" itself of the benefits of conducting activities in Texas, and Johnson's claim must "arise out of or relate to" those activities. *Ford Motor Co.*, 141 S. Ct. at 1025 (quotations omitted).

But how do we analyze the virtual world instead of the physical automobiles at issue in *Ford Motor*? In *Mink v. AAAA Development LLC*, 190 F.3d 333 (5th Cir. 1999), our court adopted the *Zippo* test for determining personal jurisdiction over websites. *Id.* at 336. *Zippo* categorized websites into three types:

> (1) websites that merely passively advertise—which categorically do not establish personal jurisdiction;
>
> (2) websites that facilitate contracting and repeated file transfers—which categorically do; and
>
> (3) websites with other degrees of user interaction—which can go either way,

> depending on the "level of interactivity" and the "commercial nature of the exchange."

Id. (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)).

I agree with the majority opinion that the HuffPost website falls under *Zippo* category three, requiring us to determine the level of interactivity, which in turn requires us to assess specific personal jurisdiction as it relates to the alleged libel itself. *See Revell v. Lidov*, 317 F.3d 467, 470-76 (5th Cir. 2002). There are two ways to do that. As we explained in *Fielding*:

> Specific jurisdiction for a suit alleging the intentional tort of libel exists for (1) a publication with adequate circulation in the state, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984), or (2) an author or publisher who "aims" a story at the state knowing that the "effects" of the story will be felt there. *Calder v. Jones*, 465 U.S. 783, 789-90, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984).

415 F.3d at 425. So, our precedent requires an examination of the differences between *Keeton* and *Calder*.

In *Keeton*, the plaintiff sued Hustler Magazine in New Hampshire over an allegedly libelous article. 465 U.S. at 772. The plaintiff was a New York citizen; Hustler Magazine was "an Ohio corporation with its principal place of business in California." *Id.* The article had nothing to do

with New Hampshire, and the plaintiff's "*only* connection with New Hampshire was the circulation of Hustler Magazine in the state." *Id.* (emphasis added). So why'd she sue in New Hampshire? Because New Hampshire had an "unusually long statute of limitations," making it "the only State where petitioner's suit would not have been time-barred when it was filed." *Id.* at 773, 775. Put another way, the case had nothing to do with New Hampshire, and, unlike this case, New Hampshire didn't even have an interest in hearing the case due to an injury to one of its citizens. Seeing such an inconsequential connection to the forum, the First Circuit affirmed dismissal for lack of personal jurisdiction, explaining that "the New Hampshire tail is too small to wag so large an out-of-state dog." *Id.* at 772.

The Supreme Court reversed. Its decision turned on the following facts: Hustler Magazine circulated between 10,000 and 15,000 copies of its magazine in New Hampshire per month, and that circulation was not "random, isolated, or fortuitous"—it was purposeful. *Id.* at 772-74. Jurisdiction over Hustler Magazine was therefore appropriate, the Court held, because "regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine." *Id.* at 773-74. As for fairness to the defendant, the Court saw no concern: "Certainly Hustler Magazine, Inc., which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner." *Id.* at 779. When a publication

"continuously and deliberately exploit[s] [a] market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine." *Id.* at 781. This analysis sounds very similar to that of *Ford Motor*, albeit a different form of "exploitation of a market."

On the same day it decided *Keeton*, the Supreme Court issued a jurisdictional decision in another libel case, *Calder*. Again, the Court held that specific personal jurisdiction existed, but for a very different reason. Jones, the plaintiff, sued the National Enquirer, its local distributing company, and two employees of the Enquirer in California over an allegedly libelous article. *Calder*, 465 U.S. at 785-86. Jones was a California resident, the National Enquirer was a Florida corporation with its principal place of business in Florida, and the employees were both Florida residents. *Id.*

Circulation of the Enquirer in California was certainly substantial—the Enquirer circulated 600,000 copies every week, "almost twice the level of the next highest State." *Id.* at 785. But the Court fashioned a different test: Specific personal jurisdiction was appropriate if the effects of defendants' conduct are felt in the forum state. The Court explained:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm,

> in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.

Id. at 788-89 (footnote omitted).

Why the different outcomes? Well, the Court faced an entirely different situation in *Calder* than it did in *Keeton*. In *Calder*, the National Enquirer (the publication in which the libel was printed) didn't contest jurisdiction. *Id.* at 785. Instead, the two *employees* who authored the statement and approved its publication objected to personal jurisdiction, and the Court explained that "their contacts with California" could not "be judged according to their employer's activities there." *Id.* at 785-86, 789-90. Put differently, because personal jurisdiction requires an assessment of a defendant's relationship to the forum, the nature of the defendant matters when deciding whether the requirements of personal jurisdiction are satisfied, and an author's connections to a state will inherently be different than a publication's connections.

Indeed, that is exactly what our court in *Fielding* recognized: that the Supreme Court articulated two different rules that turned on the nature of the defendant in a libel case. *See* 415 F.3d at 425. If the defendant alleging lack of personal jurisdiction is a publication (like Hustler Magazine in *Keeton*), then personal jurisdiction

is appropriate when that publication is in "substantial circulation" and that circulation is not "random, isolated, or fortuitous." *See id.* (quotation omitted). If the defendant alleging a lack of personal jurisdiction is the author or the individual approving publication (like the employees in *Calder*), then personal jurisdiction is appropriate when the effect of the defendant's conduct is felt in the forum state. *See id.*

Note that the Court could not have reached its decisions in both *Keeton* and *Calder* if these two different rules did not exist. If only the *Keeton* substantial circulation test existed, then *Calder* makes no sense—how can two people be in "substantial circulation"? If only the *Calder* effects test existed, then *Keeton* was wrongly decided—again, the article had absolutely nothing to do with New Hampshire. Each test addressed a different situation.

I now address how these precedents apply in our case. Johnson sued HuffPost, a publication, *not* the author of the article.[2] The *Keeton* test therefore applies. HuffPost has fulsome circulation in Texas, and its presence in Texas was not "random, isolated, or fortuitous." Far from it: HuffPost actively exploited the forum through Texas-specific advertising. As in *Keeton*, HuffPost "continuously and deliberately exploit[s]" the Texas market, so it should not

2. The byline of the article lists Andy Campbell as the author, not HuffPost. *See* Andy Campbell, *2 GOP Lawmakers Host Chuck Johnson, Holocaust-Denying White Nationalist*, HUFFPOST (Jan. 17, 2019), https://www.huffpost.com/entry/gop-reps-host-chuck-johnson-holocaust-denying-white-nationalist_n_5c40944be4b0a8dbe16e670a.

be surprised if it is "haled into court there" for allegations of libel. 465 U.S. at 781. As in *Keeton*, it doesn't matter that the article did not expressly address Texas. As in *Keeton*, jurisdiction exists.

Other precedents do not mandate a different outcome. In *Clemens v. McNamee*, 615 F.3d 374 (2010), *Calder* was applied because the defendant was the author of the allegedly defamatory statement (Brian McNamee)—not the publication (Sports Illustrated). *See id.* at 377, 379. The same was true in *Herman v. Cataphora, Inc.*, 730 F.3d 460 (5th Cir. 2013). The defendants were the author of the allegedly defamatory statement (Roger Chadderdon) and his employer (Cataphora, Inc.); not the publication (Above the Law). *Id.* at 462-65.

Revell involved a different factual scenario. As explained above, the facts of *Keeton* do not arise in every libel case. *Keeton* applies when: (1) the defendant is a publication; (2) the publication has substantial circulation in the state; and (3) that circulation isn't "random, isolated, or fortuitous" (i.e., the publication must have *meant* for that substantial circulation to happen in that state). 465 U.S. at 772-74. So when an online bulletin board post at Columbia University is just accessed by a Texas resident (as was the case in *Revell*), *Keeton* plainly didn't apply. *Revell*, 317 F.3d at 469. *Revell* makes no mention that the bulletin board was in "substantial circulation" in Texas, and even if it was, there's nothing to suggest that Columbia meant it to be, unlike here where HuffPost happily makes money advertising Texas-specific goods and services. *Keeton* did not apply because mere accessibility of a publication cannot trigger it.

Unfortunately, the majority opinion does not once cite to *Fielding* and applies "first principles" to contend that *Keeton* is limited to a bygone era. It insists that only *Calder* is a relevant precedent. Is it accurate to limit *Keeton* to print publications while applying *Calder* to websites? Of course not. *Calder* and *Keeton* both involved print publications, not websites in the 1984 era when websites for the vast majority of people were non-existent and largely unknown. We cannot, then, say that one decision from the pre-website era applies in modern times while the other doesn't.

On the surface, the majority opinion seems to agree, twice citing to a recent Fifth Circuit case for the proposition that "[t]he analysis applicable to a case involving jurisdiction based on the Internet should not be different at its most basic level from any other personal jurisdiction case." *Admar Int'l, Inc. v. Eastrock, L.L.C.*, 18 F.4th 783, 783 , 2021 U.S. App. LEXIS 34522, at **4-5 (5th Cir. 2021). But then it confusingly contends that the dissenting opinion fails to "squarely confront . . . that websites are different." Majority Op. at 18.

But neither our own court nor our sister courts have distinguished *Keeton* on the grounds that "websites are different." In fact, the First, Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all analyzed *Keeton* in cases concerning the internet—none have restricted application of *Keeton* to print publications.[3]

3. *See, e.g., Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 10-11 (1st Cir. 2018); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 241, 243 (2d Cir. 2007); *uBID, Inc. v. GoDaddy Grp., Inc.*,

As the Tenth Circuit observed: "Some circuit courts have applied the *Keeton* analysis in cases where the out-of-state defendant's *only* contacts with the forum state occurred over the internet . . . ." *Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 906 (10th Cir. 2017) (emphasis added).

If the majority opinion restricts *Keeton* in such a way, it would be creating a circuit split. It would also impose the very causal requirement that the Supreme Court so recently rejected. Nominally, the majority opinion recognizes that it must adhere to *Ford Motor*, but in actuality, the majority opinion seems to suggest that only if the (extensive) Texas-based advertising *caused* the lawsuit might there be jurisdiction. *See* Majority Op. at 9 ("It does not stem from or relate to HuffPost's ads or the citizenship of those placing them.").

In addition to ignoring the fact that there was no causation in *Keeton* either (there was nothing tying New Hampshire to the libel), the majority opinion overlooks just how close this case is to *Ford Motor*. Just like Ford, HuffPost regularly sold its products and advertised in the forum state. Just like Ford, a consumer of HuffPost's core product (the newspaper) was injured by that product. Ford claimed that because it did not make the specific cars that led to injury in Montana or Minnesota, it shouldn't be

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623 F.3d 421, 427-28 (7th Cir. 2010); *Steinbuch v. Cutler*, 518 F.3d 580, 584, 586 (8th Cir. 2008); *Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 977, 981 (9th Cir. 2021); *Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 900, 914-15 (10th Cir. 2017); *Licciardello v. Lovelady*, 544 F.3d 1280, 1285-86 (11th Cir. 2008).

subject to litigation in Montana or Minnesota. Similarly, HuffPost argues that because it did not write the specific article that contains the alleged libel in Texas, it shouldn't be subject to litigation in Texas. The Court rejected that argument in *Ford Motor* because, as the majority opinion explains: "That link—between the products that injured the plaintiffs and Ford's selling those products in the forum states—supported specific jurisdiction." Majority Op. at 15-16 (footnote and citation omitted). We should reject HuffPost's argument for that same reason: That link—between the article that injured Johnson (who is in Texas) and HuffPost purposely circulating articles to Texas—supports specific jurisdiction.

There also appears to be some confusion regarding the position this dissenting opinion takes. The majority opinion incorrectly suggests that my "position would give us unlimited jurisdiction" because the only connection HuffPost has in Texas is that "Texans can visit [it] and click ads." Majority Op. at 18. That's not at all my position. Here, HuffPost is purposefully in wide circulation in Texas and specifically targets Texans with Texas-specific ads. Thus, we should not, and I do not, consider the issue of jurisdiction over a similar company spouting only generalized, national-level advertisements (though, again, *Keeton* did not involve New Hampshire-specific materials).

Yet, the majority opinion ignores that distinction. "Grannies with cooking blogs," the majority opinion warns, "should not, expect lawsuits from Maui to Maine." At this point, we're talking in circles. HuffPost is not a "grannie" with a passive "cooking blog." It's a publication.

Of course, there must be some relatedness for personal jurisdiction. But there is, here. HuffPost is not accidentally found in Texas but is actively seeking Texas readers and, more importantly, the money from advertising to them. It benefits from its Texas readership through money made off of Texas-specific advertising; if it does so in Maui as well, so be it. It is not an accident that Texans can access HuffPost, and the approach HuffPost takes towards Texas is the modern equivalent of Keeton sending magazines to New Hampshire. This case does not involve the individual author or a "grannie" who talks virtually to her friends in other states.

Finally, even if the majority opinion is correct that restricting personal jurisdiction would be beneficial as a policy matter, I do not believe that federal circuit judges are policymakers, and we certainly do not get to disregard precedent because we disagree with its policy implications. I recognize and agree that federal courts are courts of limited jurisdiction. But as judges on this court, we must follow Supreme Court precedent and our own precedents under the rule of orderliness, whether we like them or not. *See Jacobs v. Nat'l Drug Intell. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("[E]ven if a panel's interpretation of the law appears flawed, the rule of orderliness prevents a subsequent panel from declaring it void."). Accordingly, we are bound to apply *Ford Motor*, *Keeton*, and *Fielding*. Based on the relevant precedent, I would vacate the district court's dismissal and remand for further proceedings. Because the majority opinion fails to do so, I respectfully dissent.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED DECEMBER 18, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

CASE NO. 4:20-CV-0179

CHARLES JOHNSON,

Plaintiff,

v.

VERIZON CMP HOLDINGS, LLC, *et al.*,

Defendants.

December 18, 2020, Decided;
December 18, 2020, Entered

ORDER

Pending before the Court is Defendant TheHuffingtonPost.com, Inc.'s Motions to Dismiss for Lack of Personal Jurisdiction and Failure to State a Claim. **(Instruments No. 32; No. 33)**.

On or about January 17, 2019, the TheHuffingtonPost.com published an article (the "Article") that reported

a meeting that took place on January 15, 2019, in Washington, D.C., between Plaintiff Charles Johnson ("Plaintiff') and U.S. Representatives Andy Harris of Maryland and Phil Roe of Tennessee. (Instruments No. 32 at 6; No. 33-1 at 5). The Article discusses the U.S. House of Representatives' unanimous vote to condemn white supremacy and contains comments it alleges Plaintiff made. (Instrument No. 33-1 at 5-8). On April 9, 2020, Plaintiff filed a First Amended Complaint against TheHuffingtonPost.com for libel. (Instrument No. 25 at 7). On April 23, 2020, TheHuffingtonPost.com filed its Motion to Dismiss for Lack of Personal Jurisdiction and Motion to Dismiss for Failure to State a Claim. (Instruments No. 32; No. 33).

TheHuffingtonPost.com moves to dismiss based on lack of general and specific personal jurisdiction. (Instrument No. 32 at 7, 14). Plaintiff concedes there is no general jurisdiction. (Instrument No. 36 at 2). Thus, the Court evaluates whether there is specific jurisdiction.

Plaintiff asserts that the Court has specific jurisdiction because the Defendant made requisite contacts through its website, which allows Texas residents to make purchases. (Instrument No. 36 at 7-9). TheHuffingtonPost.com contends there is no specific jurisdiction because the Article's author was unaware that the Plaintiff was a Texas resident and the Article did not mention Texas or rely on any sources in Texas. (Instrument No. 32 at 13-14).

A plaintiff need only present prima facie evidence to establish personal jurisdiction over a non-resident

defendant. *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). Specific jurisdiction is based on activities that arise out of or relate to the cause of action and can exist even if the defendant's contacts are not continuous or systematic. *McFadin v. Gerber*, 587 F.3d 753, 759 (5th Cir. 2009). A plaintiff seeking to assert specific personal jurisdiction over a non-resident defendant in a defamation case must show that: (1) the subject matter of and (2) the sources relied upon for the article were in the forum state. *Clemens v. McNamee*, 615 F.3d 374, 376, 380 (5th Cir. 2010) (citing to *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804(1984); *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005); *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002)).

Here, the Article contains no reference to Texas and does not refer to the Plaintiff's Texas activities, residence, or work. (Instrument No. 33-1 at 5-8). Plaintiff has not alleged that the Article drew upon Texas sources, and the Court has not found that the Article has done so. Additionally, there is no evidence that the Article was directed at Texas residents more than residents from other states. (Instrument No. 36). The Court finds that Texas was neither the subject matter of the Article nor the supplier of sources for the Article. (Instrument No. 33-1 at 5-8). Thus, the Court further finds that Plaintiff cannot establish his burden and there is no specific jurisdiction. Therefore, the Court lacks personal jurisdiction over the Defendant. Because the Court finds that it lacks personal jurisdiction, it need not address whether the Plaintiff has sufficiently pled his claim.

Accordingly, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss for Lack of Personal Jurisdiction is **GRANTED** and Defendant's Motion for Failure to State a Claim is **DENIED as moot. (Instruments No. 32; No. 33)**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 18th day of December, 2020, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 27, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-20022

CHARLES JOHNSON,

Plaintiff—Appellant,

versus

THEHUFFINGTONPOST.COM, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Texas.
No. 4:20-CV-179.

April 27, 2022, Filed

Before KING, SMITH, and HAYNES, *Circuit Judges.*

ON PETITION FOR REHEARING EN BANC

Appendix C

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (*5TH CIR. R. 35* I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (*FED. R. APP. P. 35* and *5TH CIR. R. 35)*.

In the en banc poll, 7 judges voted in favor of rehearing (Judges Elrod, Haynes, Costa, Willett, Engelhardt, Oldham, and Wilson), and 10 voted against rehearing (Chief Judge Richman and Judges Jones, Smith, Stewart, Dennis, Southwick, Graves, Higginson, Ho, and Duncan).

Appendix C

JENNIFER WALKER ELROD, *Circuit Judge*, joined by HAYNES, ENGELHARDT, and WILSON, *Circuit Judges*, dissenting from the denial of *en banc* rehearing:

Does the Constitution immunize online news-media outlets from libel lawsuits in states in which they circulate their content online? The panel opinion in this case held that it does. I am not so sure. The Supreme Court has held that a print publication "aimed at a nationwide audience" is not immune from defamation actions in any state where it has "regular circulation." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74, 781, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984). Are *online* publications to be treated differently? We should have reheard this case *en banc* to reassess this question of exceptional importance.

We should also have reheard this case in light of the circuit split that the panel opinion begat. None of our sister circuits have "restricted application of *Keeton* to print publications" like the panel majority opinion does in this case. *Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 330 (5th Cir. 2021) (Haynes, J., dissenting). In fact, decisions of the Seventh and Ninth Circuits have relied heavily on *Keeton* to uphold personal jurisdiction over companies whose Internet-driven business models evince intent to avail themselves of the privilege of doing business in the states in which they were sued. *See uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 427-30 (7th Cir. 2010); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, *647 F.3d 1218, 1229*-31 (9th Cir. 2011). The Fourth Circuit recently held similarly. *See UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344, 352-55 (4th Cir. 2020), *cert. denied*, 141 S.

Ct. 1057, 208 L. Ed. 2d 525 (2021). The panel opinion in this case broke with these decisions, cabining *Keeton* to the almost-bygone world of print-only media.

I.

In January of 2019, the Huffington Post published a headline on its website that labeled plaintiff-appellant Charles ("Chuck") Johnson a "Holocaust-Denying White Nationalist." Johnson sued HuffPost for libel. Characterizing the piece as a fake-news "hit job" by a "notoriously left-leaning" news outlet, Johnson adamantly repudiated the positions that HuffPost had publicly attributed to him and sought damages in excess of $1 million.

Johnson, a Texan, filed his complaint with the United States District Court for the Southern District of Texas. To establish the court's power to hear the case, Johnson alleged several interrelated contacts tying HuffPost—a Delaware corporation headquartered in New York—to Texas: HuffPost's online publication and its allegedly libelous article are freely available in Texas, where Johnson resides and where the article allegedly caused him reputational injury. The national media outlet "derives substantial revenue" in the course of "servicing the Texas market through [its] [w]ebsite." It "tracks the location and activities of Texas residents on [its] [w]ebsite thereby enabling targeted advertising to Texas residents that generate substantial revenue." And it has contracted "with advertisers in Texas to advertise on its [w]ebsite" and run ads on its site that are "geared to the Texas market."

Appendix C

HuffPost moved to dismiss for lack of personal jurisdiction, and the district court granted the motion. Our court's panel majority opinion affirmed, holding that none of these alleged contacts sufficed to empower a Texas federal court to hear this libel case against HuffPost. *Johnson*, 21 F.4th at 325. The opinion reasons that *Keeton* cannot be "woodenly appl[ied] . . . to [I]nternet publications" because "websites are different" than print publications. *Id.* Johnson sought rehearing of his case *en banc*, which, regrettably, today we deny.

II.

"The analysis applicable to a case involving jurisdiction based on the Internet should not be different at its most basic level from any other personal jurisdiction case." *Admar Int'l, Inc. v. Eastrock, L.L.C.*, 18 F.4th 783, 786 (5th Cir. 2021) (quoting *Pervasive Software, Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 226-27 (5th Cir. 2012)). The panel majority opinion gives lip-service to this key principle, but it swiftly dismisses Johnson's reliance on *Keeton* simply because "websites are *different*." *Johnson*, 21 F.4th at 325 (emphasis added); *id.* at 330-31 (Haynes, J., dissenting). The panel opinion thus bifurcates the law of specific jurisdiction over defamation actions: we now have one rule for *print* publications and a new special rule for *web* publications. This approach plainly conflicts with our professed application of the same law to the Internet as to the material world.

Appendix C

A.

This case turns on purposeful availment. The central question is this: what proves a publication's purposeful availment through cyberspace? In Johnson's view, HuffPost's online circulation of its content (including the disputed article), considered in light of its ad-driven business model, shows that the company intended to avail itself of the Texas market. The panel majority opinion says that Johnson must show something more: namely, that HuffPost specifically "aimed *the alleged libel* at Texas." *Id.* at 320-21 (majority opinion). As Judge Haynes meticulously explained in her panel dissent, we apply the Supreme Court's instructions in *Keeton* when a defamation defendant is a publication. *See id.* at 327-30 (Haynes, J., dissenting); *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 425 (5th Cir. 2005); *cf. Calder v. Jones*, 465 U.S. 783, 789-90, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984) (*Keeton*'s companion case furnishing the "aiming" test for *author–editor* defendants).

In *Keeton v. Hustler*, the Supreme Court instructed us how to apply the purposeful availment requirement to defamation lawsuits against publications. *Keeton* held that a New Hampshire federal court had personal jurisdiction over Hustler, an Ohio-domiciled magazine with its principal place of business in California, to hear a libel lawsuit brought by a New Yorker.[1] 465 U.S. at

1. The Court noted that the New York plaintiff was flagrantly forum shopping: she had no particular connection with New Hampshire; she simply wanted to take advantage of that state's generous statute of limitations for libel. 465 U.S. at 772 n.1, 778-

781. Hustler's *only* contact with New Hampshire was its circulation of 10,000-15,000 magazines (containing the alleged libel) in that state. *Id.* at 772. But that was sufficient for specific jurisdiction over Ms. Keeton's libel suit. It mattered not a whit that the alleged libel had *nothing* to do with New Hampshire besides the mere fact of its circulation there. *Id.* And why? Because circulation *itself* showed that Hustler "continuously and deliberately exploited the New Hampshire market" such that "it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine." *Id.* at 781 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)). The bottom line is this: for a publishing company to purposefully avail itself of a state's marketplace, *Keeton* says its publication simply needs to be in "regular circulation" there. *Id.* at 773-74.

The Internet only presents a new twist for the old test: how do we *know* that a defendant publishing company continuously *and deliberately* exploited the forum state's market when its publication only 'circulates' by virtue of the Internet's universal accessibility? The panel majority opinion in this case holds that HuffPost's online circulation cannot constitute purposeful availment because Texans act *unilaterally* in visiting huffpost.com. *Johnson*, 21 F.4th at 320-21. And as for HuffPost's geolocation tracking, Texan advertisers, and ads targeting Texans? "[I]rrelevant," says the panel majority opinion; "Johnson's

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79. Here, by contrast, Johnson is a resident of the forum state, sensibly suing where he says he was injured.

libel claim arises from the story declaring him a white-nationalist Holocaust denier"—not HuffPost's sale of ads, the citizenship of its advertising counterparties, or the ads themselves. *Johnson*, 21 F.4th at 320-21.

That is all true. Third parties' unilateral activities do not create forum contacts for an unwitting defendant, *see Hanson v. Denckla*, 357 U.S. 235, 253-54, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), and a defendant's own forum contacts that are unrelated to the lawsuit itself are insufficient to support specific jurisdiction, *see Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026, 209 L. Ed. 2d 225 (2021). The problem, though, is that the panel majority opinion's blinkered analysis did not put the puzzle pieces together. It did not consider HuffPost's online circulation *in light of* its ad-driven business model. As a result, it failed to tackle the harder and more consequential issue in this case. To wit: does HuffPost's ad-driven business model *prove* that HuffPost *intended* that its (ostensibly passive) online circulation would reach the Texas market?

The logic behind *Keeton* suggests that it very well might. HuffPost exploits the Texas market just as Hustler exploited the New Hampshire market. 465 U.S. at 781. The only difference is how they do so. Whereas Hustler sold magazines, HuffPost sells ads. By making its content freely available online, HuffPost lures visitors from far and wide. This creates value for advertisers, which HuffPost enhances by tracking visitors' geolocation data and enabling geotargeted ads. Hustler's circulation in New Hampshire was obviously no accident: it mailed

print magazines there regularly. Likewise, the argument goes, HuffPost's Texan audience online was no accident: HuffPost put its content online with the expectation that it would attract viewers from the nation's second most populous state, whose views would drive sales of targeted ads and thus boost HuffPost's revenue.[2] *See Johnson*, 21 F.4th at 331 (Haynes, J., dissenting) ("It is not an accident that Texans can access HuffPost, and the approach HuffPost takes towards Texas is the modern equivalent of Keeton sending magazines to New Hampshire."); *cf. Woodson*, 444 U.S. at 297-98 (authorizing personal jurisdiction when a corporation "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State"); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092, 201 L. Ed. 2d 403 (2018) ("'[W]hile nexus rules are clearly necessary,' the Court 'should focus on rules that are appropriate to the twenty-first century, not the nineteenth.'") (citing Walter Hellerstein, *Deconstructing the Debate over State Taxation of Electronic Commerce*, 13 Harv. J. Law & Tec 549, 553 (2000)).[3] If that is so, HuffPost's online circulation

2. HuffPost could put its content online *without* subjecting itself to jurisdiction in all fifty states if it wanted to. For instance, the publishing company could put its content behind a paywall and refuse to offer subscriptions to would-be visitors from certain undesired states. Or, it could simply refrain from showing ads to visitors from such states.

3. *See also Wayfair*, 138 S. Ct. at 2099 (rejecting the antiquated "physical presence rule" in the dormant Commerce Clause context and holding that online retailers "avail[ed] [themselves] of the substantial privilege of carrying on business" in a state based in part on "both the economic and virtual contacts respondents

'in' Texas provides the basis, under *Keeton*, for specific jurisdiction in Texas federal court.

B.

If Johnson were to succeed on this theory of purposeful availment, the rest of the specific-jurisdiction analysis would easily fall into place. Start with relatedness, the second prong of the analysis. HuffPost's online *circulation* in Texas is *itself* the relevant contact—not HuffPost's geolocation tracking, targeted ads, or contracts with Texan advertisers. And it is plain as day that Johnson's libel claim arose out of HuffPost's circulation: Johnson's reputation was injured because HuffPost published allegedly false statements about him online.[4] *Cf. Keeton*, 465 U.S. at 772, 781. Indeed, as a Texas resident, Johnson was largely injured *in Texas*, where HuffPost purposefully circulated its allegedly libelous story and damaged his reputation most significantly: his own community. Clearly, online circulation gave rise to (or, at a bare minimum, "related to") Johnson's libel claim, just as Hustler's print circulation in New Hampshire gave rise to (or "related to") Ms. Keeton's libel claim. *See Ford Motor*, 141 S. Ct. at 1024-28 (reminding us that defendant's contacts need only "relate to" the plaintiff's claim).

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have with the State" and on the fact that "respondents are large, national companies that undoubtedly maintain an extensive virtual presence" in the state (citations omitted)).

4. Libel is written defamation, and defamation requires *publication* of a false statement. *See Bedford v. Spassoff*, 520 S.W.3d 901, 904, 906 n.2 (Tex. 2017).

Now consider the final prong of the analysis, fairness to the defendant. The panel majority opinion compares news—media giants like HuffPost to "[g]rannies with cooking blogs [who] do not, and should not, expect lawsuits from Maui to Maine." *Johnson*, 21 F.4th at 320. It is hard to take this comparison seriously. HuffPost is no tech-savvy octogenarian sharing apple-pie recipes online. *Id.* at 331 (Haynes, J., dissenting). The publishing company does not casually post its content just to share its interest in current events with fellow enthusiasts wherever they may happen to reside. On the purposeful availment theory described above, HuffPost is a robust commercial enterprise, covetous of Texan clicks to help drive ad sales and thus boost its bottom line. And having taken advantage of Texas's market, it is only fair that HuffPost accept the burden of jurisdiction in Texas courts. Put simply, if HuffPost gets the *quid*, it cannot escape the *quo*. *See Curtis Publ'g Co. v. Golino*, 383 F.2d 586, 593 (5th Cir. 1967) ("Having accepted the benefits of the market place, [a publishing company] cannot complain that one of the fruits of the harvest [is] a lawsuit [for libel]." (quoting *Curtis Publ'g Co. v. Birdsong*, 360 F.2d 344, 353 (5th Cir. 1966) (Rives, J., concurring))).[5]

III.

The panel opinion in this case takes us out on a limb. It parts ways with every sister circuit to have addressed

5. *See also Choice Healthcare v. Kaiser Found. Health Plan of Colo.*, 615 F.3d 364, 374 (5th Cir. 2010) ("Deriving revenue from such commercial activity is the quid pro quo for requiring the defendant to suffer a suit in the foreign forum.").

the matter. For this reason too, we should have reheard this case.

For starters, no other circuit has limited *Keeton*'s application solely to print-media defendants. *See, e.g.*, *Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 977, 981 (9th Cir. 2021) (applying Keeton to the volume of skincare product sales); *Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 10-11 (1st Cir. 2018) (applying *Keeton* to uphold personal jurisdiction over a foreign company that "used its website to obtain U.S. customer contracts"); *see also Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 900, 906, 914-15 (10th Cir. 2017) (observing that "[s]ome circuit courts have applied the *Keeton* analysis in cases where the out-of-state defendant's *only* contacts with the forum state occurred over the internet . . . ." (emphasis added)). The panel opinion's constrictive reading of *Keeton* is thus at odds with our sister circuits' application of that case.

But that is not all. The Fourth, Seventh, and Ninth Circuits have each specifically concluded that online companies whose business models depend upon attracting a wide audience for ad-driven revenue purposefully avail themselves of the privilege of doing business virtually in states where their sites are widely accessed. The panel majority opinion splits with these three sister circuits in concluding that HuffPost did not purposefully avail itself of the privilege of doing business in Texas.

Consider the Seventh Circuit's analysis in *uBID v. GoDaddy*. 623 F.3d at 427-30. In that case, the court discerned purposeful availment from an out-of-state

domain-registration site's "way of doing business" online. *Id.* Arizona-based GoDaddy had conducted a nationwide ad campaign, targeting no state in particular, but it was sued in Illinois. Relying on *Keeton*, the court held that GoDaddy had "deliberately and continuously exploited the Illinois market." *Id.* at 427-29 & n.1, 433. "[I]t is easy to infer," the court observed, that GoDaddy "intended to reach as large an audience as possible, including the 13 million potential customers in the nation's fifth most populous state." *Id.* at 428. It did not matter that Illinois residents "unilaterally initiated" transactions with GoDaddy online; GoDaddy obviously wanted their business and used the Internet to get it. *Id.* at 428-29. Since a "typical business" operating on the same scale in terms of Illinois revenue and customers—but without the Internet—"would *unquestionably* be subject to personal jurisdiction," the Seventh Circuit concluded that GoDaddy's "unusual [Internet-based] business model [should not] complicate an otherwise straightforward case for sufficient minimum contacts" under *Keeton*. *Id.* at 429 (emphasis added).

The Ninth Circuit too has clearly held that a website whose "economic value turns, in significant measure, on its appeal to [forum residents]" may be subject to personal jurisdiction in the forum state. *Mavrix*, 647 F.3d at 1227-31.[6] In *Mavrix*, an Ohio-based online publication

6. *See also AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1211 (9th Cir. 2020) (reaffirming the core teaching of *Mavrix*, as relevant here, that when "[ad] targeting itself indicate[s] that [a defendant website] knew about the [forum's] user base which it then exploit[s] 'for commercial gain by selling space on its website

was sued in California. Applying *Keeton*, the court noted that the defendant website, like Hustler, "sought and attracted [a] nationwide audience[]" and "cultivated [its] nationwide audience[] for commercial gain." *Id.* at 1230. The court reasoned that the breadth of the defendant online publication's audience was "integral" to its ad-based "business model." *Id.* It was no accident that Californians visited Mavrix's website: Mavrix, like Hustler, *wanted* viewers "in any state"—including a populous state like California. *Id.* It was a "predictable consequence" of the website's "business model[]." *Id.* Thus, following *Keeton*, the Ninth Circuit held that when "a website with national viewership and scope appeals to, and profits from, an audience in a particular state, the site's operators can be said to have 'expressly aimed' at that state." *Id.* at 1231. Hence, specific jurisdiction in California was proper.

Most recently, in the international context, the Fourth Circuit held that a foreign website operator purposefully availed himself of the privilege of conducting business in Virginia. *See Kurbanov*, 963 F.3d at 352-55. Noting that "[i]t is hardly unusual for websites to be free to use in today's Internet because many corporations 'make money selling advertising space,'" the court concluded that forum-residents' "acts of accessing the Websites" supported specific jurisdiction because the website operator "made a *calculated business choice* not to directly charge visitors in order to lure them to his Websites." *Id.* at 353 (emphasis added) (quoting *Metro-*

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for advertisements,'" the website can be said to have purposefully availed itself of the forum (quoting *Mavrix*, 647 F.3d at 1230)), *cert. denied*, 142 S. Ct. 76, 211 L. Ed. 2d 13 (2021).

Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 926-27, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005)). Because the website operator "ultimately profits from visitors by selling directed advertising space and data collected to third-party brokers, [he] thus purposefully avail[s] himself of the privilege of conducting business within Virginia." *Id.*

IV.

The panel majority opinion expresses concern at the jurisdiction-expanding implications of applying *Keeton* to cyberspace. *Johnson*, 21 F.4th at 321, 324, 326. To be sure, the Internet has revolutionized countless industries—news-media chief among them—and it has all but dissolved states' borders in matters of commerce. The Internet allows corporations to continuously and deliberately exploit more states' markets more easily. No doubt, that may mean that corporations taking advantage of the Internet's vast reach may be haled into more states' courts. As Judge Haynes reminded us in her excellent dissent, it is not for us to worry whether this is good or bad as a policy matter. *Id.* at 331-32 (Haynes, J., dissenting). That is properly left to the states and their long-arm statutes. Our sole concern is what the Constitution—as interpreted by the Supreme Court—requires.

In refusing to apply *Keeton* and failing to apply the appropriate purposeful availment test correctly, the panel majority opinion gave short shrift to the Supreme Court's guidance and broke with our sister circuits. For these reasons, I respectfully dissent from our denial of Johnson's petition for rehearing *en banc*.