No. _____

# In The
# Supreme Court of the United States

TOFIG KURBANOV,

*Petitioner,*

v.

UMG RECORDINGS, INC.; CAPITOL RECORDS, LLC; WARNER BROS RECORDS INC.; ATLANTIC RECORDING CORPORATION; ELEKTRA ENTERTAINMENT GROUP INC.; FUELED BY RAMEN LLC; NONESUCH RECORDS, INC.; SONY MUSIC ENTERTAINMENT; SONY MUSIC ENTERTAINMENT US LATIN LLC; ARISTA RECORDS LLC; LAFACE RECORDS LLC; and ZOMBA RECORDING LLC,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Court should grant certiorari to address whether the Due Process Clause of the United States Constitution is violated when a foreign citizen is subjected to personal jurisdiction based entirely on: (1) his operation of a website that is popular both within the United States and worldwide, but which is not specifically aimed at the United States; and (2) minor internet-based and internet-initiated transactions entered into by the foreign citizen entirely from outside the United States.

Certiorari should be granted because: (1) the lower courts are divided on this issue, an issue which this Court has not previously addressed; (2) the issue arises frequently; (3) a proper determination is crucial to respect the sovereignty of foreign nations and to avoid the widespread imposition of *de facto* national jurisdiction over the operators of any popular website wherever the internet is accessible; and (4) by reversing the district court's dismissal of the action, the Fourth Circuit decided the issue incorrectly.

## PARTIES TO THE PROCEEDING

Petitioner (defendant-appellee below) is Tofig Kurbanov, a citizen and resident of Rostov-on-Dov, Russia.

Respondents are UMG Recordings, Inc.; Capitol Records, LLC; Warner Bros. Records, Inc.; Atlantic Recording Corporation; Elektra Entertainment Group, Inc.; Fueled by Ramen LLC; Nonesuch Records, Inc.; Sony Music Entertainment; Sony Music Entertainment US Latin LLC; Arista Records LLC; LaFace Records LLC; and Zomba Recording LLC.

## RELATED PROCEEDINGS

U.S. Court of Appeals for the Fourth Circuit:

> *UMG Recordings, Inc., et al. v. Kurbanov*, No. 19-1124 (4th Cir. July 24, 2020) (reported at 2020 U.S. App. LEXIS 23474) (denying *en banc* review)
>
> *UMG Recordings, Inc., et al. v. Kurbanov*, No. 19-1124 (4th Cir. June 26, 2020) (reported at 963 F.3d 344)

U.S. District Court for the Eastern District of Virginia:

> *UMG Recordings, Inc., et al. v. Kurbanov*, No. 18-cv-00957-CMH-TCB (E.D. Va. January 22, 2019) (reported at 362 F.Supp.3d 333)

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## PETITION FOR WRIT OF CERTIORARI

Tofig Kurbanov ("Kurbanov") respectfully petitions for a writ of certiorari to review the judgment of the Fourth Circuit in this case.

## OPINIONS BELOW

The Fourth Circuit's denial of rehearing *en banc* is reported at 2020 U.S. App. LEXIS 23474. App. 39-40. Its original opinion is reported at 963 F.3d 344. App. 1-24. The district court's order granting Kurbanov's motion to dismiss is reported at 362 F.Supp.3d 333. App. 25-37.

## JURISDICTION

The Fourth Circuit entered judgment on June 26, 2020. App. 1-24. Kurbanov timely petitioned for rehearing *en banc*, which was denied on July 24, 2020. App. 39-40. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

## STATEMENT

1. Plaintiff-Respondents are a collection of twelve record companies, not one of which is located in the Commonwealth of Virginia. Nevertheless, on August 3, 2018, Plaintiffs initiated the present action in the Eastern District of Virginia's "rocket docket," alleging violations of the Copyright Act against an alien individual, Defendant-Petitioner Tofig Kurbanov ("Kurbanov"), who resides in, and is a citizen of, Rostov-on-Don, the same small city in Southern Russia where he was born. App. 4, 25.

Kurbanov, who has never been to the United States (much less Virginia), and who does not even possess a visa that would *allow* him to travel to the United States, was named as a defendant in this action solely because he owns and operates two websites that are equally available to users world-wide and which are managed *entirely and exclusively from Russia*. App. 7-8, 27-28.

The websites at issue, FLVTO.biz and 2CONV.com (the "Websites"), are free to use and allow visitors to save the audio tracks from online videos to their computers without having to also save the video content. App. 26. The Websites are content neutral and there are substantial non-infringing reasons why users would and do utilize the Websites.[1] For example,

[1] *See*, *e.g.*, Timothy Geigner, *Techdirt*, "Music Industry Is Painting A Target On YouTube Ripping Sites, Despite Their Many Non-Infringing Uses" (Sept. 15, 2017), https://tdrt.io/gpJ ("[T]here are a ton of legitimate uses outside of the music business to use these sites. I use them all the time. I primarily use them

professors or students might download the audio portions of video lectures for later reference and playback, bands may capture the audio tracks from their live performances, and parents may want the audio portion of a school concert that they recorded, along with any other number of non-infringing uses.

Each of the Websites receives more than 90% of its traffic from outside of the United States and each is available in 23 different languages. Neither of the Websites – which are freely available anywhere in the world – is targeted in any way at either Virginia or the United States, nor are they in any way targeted at *users* in Virginia or the United States any more than they are targeted at users in Italy, Brazil, Turkey, or Mexico (each of which has more users of the Websites than the United States). App. 6, 26.

The Websites, which are free to use for users, are supported entirely by advertising revenue. Kurbanov does not sell the advertisements himself, nor does he interact with advertisers, but instead Kurbanov has agreements with advertising brokers. Kurbanov makes banner space on the Websites available for the advertising brokers but plays no role in selecting the advertisements that appear on the Websites. Instead,

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for videos that are essentially speech-based content so I can listen to them on the go. History lectures, public debates, reviews: they're all on YouTube, they're all perfectly listenable in audio format, and none of the makers of that content are shouting about YouTube MP3 rips.").

the brokers use the space as they see fit to place their own clients' advertisements. App. 5-6, 27.

2. Kurbanov appeared through counsel and filed a timely motion to dismiss for lack of personal jurisdiction under F.R.C.P. 12(b)(2).

On January 22, 2019, the District Court (Hilton, J.) issued a well-reasoned, 14-page opinion, holding that the minimum contacts needed for the Court to assert personal jurisdiction over Kurbanov were lacking both in Virginia and the United States as a whole.

In reaching its conclusion that Kurbanov was not subject to personal jurisdiction the District Court first noted that:

> The Fourth Circuit has made it clear that personal jurisdiction requires purposeful targeting of a forum with manifest intent to engage in business there. . . . An evaluation of the contacts in this case points to the absence of personal jurisdiction due to a lack of purposeful targeting of either Virginia or the United States.

App. 33.

Specifically, the District Court found, among other things, that:

> [T]he relationship between the Websites and the users is not based on a commercial contract. While users of the Websites must agree to the Terms of Use, the Websites are free to

use. Defendant does earn money from the sale of advertising space on the Websites, but all of this money comes from third party advertisers who Defendant does not deal with directly. The revenue from the advertisements cannot be the basis for finding a commercial relationship with the users because they are separate interactions and the due process analysis must only look at the acts from which the cause of action arises, here, the alleged aid in music piracy. . . .

Finally, Defendant took no action through the Websites that would demonstrate purposeful targeting of Virginia or the United States. Defendant does not advertise the Websites in either forum, nor does Defendant provide specific instructions or advice to users in either forum. . . . The contact that users have with the Websites is unilateral in nature and as such cannot be the basis for jurisdiction without more. . . . Users may access the Websites from anywhere on the globe and they select their location when they use the Websites. Plaintiffs make the contention that Defendant's tracking of where the users are located and use of geo-targeted advertisements demonstrates that he was targeting Virginians and Americans. This is an attenuated argument as tracking the location of a user does not show targeting of the user or their location; instead it is merely a recording of where the user's unilateral act took place. . . . Even if the Websites' servers knew exactly where the users were located, any interaction would still be in the unilateral control of the users as

> they initiate the contacts. . . . It is clear that Defendant did not take any actions which purposefully targeted Virginia or the United States.

App. 34-36 (citations omitted).

3. On January 31, 2019, Plaintiffs filed a timely notice of appeal. On June 26, 2020, the Fourth Circuit issued its Opinion, reversing and remanding the District Court's Order. App. 2. The Fourth Circuit's Opinion relied primarily on: (a) the Websites' display (by third-parties) of geotargeted advertisements (App. 17-18); (b) the Websites' "failure" to actively block (i.e. "geoblock") visitors from the United States (App. 20); (c) the raw number of visitors to the Websites (App. 16); and (d) certain minor internet-initiated "contacts" with the United States, such as the appointment of a Digital Millennium Copyright Act ("DMCA") agent for the acceptance of complaints of copyright infringement (App. 18-19).

4. Kurbanov timely petitioned the Fourth Circuit for rehearing *en banc*, which was denied on July 24, 2020. App. 39-40.

## REASONS FOR GRANTING THE PETITION

> *"To my mind, the most significant change wrought by the Internet has been with respect to personal jurisdiction. The constitutional principal of due process underlies our jurisprudence in this area. But it is an area where the Supreme Court has yet to weigh in, despite confusion and conflicts among the lower courts. . . .*
>
> *[W]here does that leave us with Internet jurisdiction? Almost nowhere. In some respects, we are approaching universal personal jurisdiction depending on how the court characterizes a certain website and its effect. In my view, there is no coherent theme in jurisdiction cases, and the risk is that we may be heading toward nationwide jurisdiction."*
>
> - The Hon. Margaret McKeon, United States Court of Appeals for the Ninth Circuit[2]

### I. The Absence of Direct Precedent From This Court Concerning the Use of Purely "Virtual Contacts" to Establish Personal Jurisdiction Has Left the Lower Courts in Disarray.

Faced with the question of how courts should decide questions of personal jurisdiction involving purely "virtual contacts," there is little agreement amongst

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[2] M. M. McKeown, *The Internet and the Constitution: A Selective Retrospective*, 9 WASH J.L. TECH. & ARTS 133, 143-46 (2014).

the lower courts and legal scholars, with one notable exception: all agree that the law is in complete disarray, arising from divergent analyses adopted by the lower courts and a lack of specific guidance from this Court.

Courts and commentators have repeatedly bemoaned the lack of Supreme Court precedent on these issues, noting almost wistfully that this Court's only direct mention of the use of virtual contacts in the context of a personal jurisdiction analysis came in a footnote in *Walden v. Fiore*, 571 U.S. 277 (2014), where this Court noted that, "this case does not present the very different questions whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State." *Id.* at 290 n.9. *See also XMission, L.C. v. Fluent LLC*, 955 F.3d 833, 844 (10th Cir. 2020) ("The Supreme Court has only alluded to these issues, 'leav[ing] questions about virtual contacts [via the Internet] for another day.' . . . Thus, for now, development of personal-jurisdiction law in the Internet context has been left to the lower courts."); *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014) ("The Supreme Court has not definitively answered how a defendant's online activity translates into 'contacts' for purposes of the 'minimum contacts' analysis. To the contrary it expressly 'le[ft] questions about virtual contacts for another day' in *Walden*. . . . We have faced that problem on several occasions. . . ."); *Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 7-8 (1st Cir. 2018) ("The Supreme Court has not definitively answered how a defendant's online activities translate into

contacts for purposes of the minimum contacts analysis. . . . In the absence of Supreme Court guidance, we are extremely reluctant to fashion any general guidelines beyond those that exist in law, so we emphasize that our ruling is specific to the facts of this case."); *Brightwell Dispensers Ltd. v. Dongguan ISCE Sanitary Ware. Indus. Co. Ltd.*, 2019 U.S. Dist. LEXIS 219976, *13 (D.D.C. Dec. 20, 2019) ("Although the Supreme Court has written extensively on minimum contacts, it left 'questions about virtual contacts for another day.' . . . In that silence, courts have used different approaches to evaluate whether website activity provides the requisite minimum contacts with a forum."); McKeown, *supra* at 146 ("The Supreme Court has not yet considered an Internet jurisdiction case. There was hope that its decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, [564 U.S. 915 (2011)] and *J. McIntyre Machinery, Ltd. v. Nicastro*, [564 U.S. 873 (2011)] might shed some light, even though they were not Internet cases. The closest insight came from Justice Breyer's comment in his concurrence that *McIntyre*, albeit an international case, wasn't the case to rework personal jurisdiction 'without a better understanding of the relevant contemporary commercial circumstances.' "); Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(K)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U.L. REV. 413, 437 (2017) ("All of the Supreme Court's decisions, including the recent ones, are decidedly old school. . . . The possibility that virtual contacts might raise different considerations earned a brief mention in *Walden*. But these asides give lower courts no guidance.").

Into this vacuum, the lower courts have deeply split, with many, "desperate . . . for some path markers," relying on "the Western District of Pennsylvania case of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* [952 F.Supp. 1119 (W.D. Pa. 1997)]." Borchers, *supra* at 437. Other lower courts, however, have rejected *Zippo*, questioning whether virtual internet contacts require a unique jurisdictional analysis at all. *Compare Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002); and *Lakin v. Prudential Sec.*, 348 F.3d 704, 711 (8th Cir. 2003) (all adopting, to some degree, the *Zippo* model) *with Illinois v. Hemi Grp. LLC*, 622 F.3d 754, 758 (7th Cir. 2010) ("We wish to point out that we have done the entire minimum contacts analysis without resorting to the sliding scale approach first developed in *Zippo*. . . . This was not by mistake. Although several other circuits have explicitly adopted the sliding scale approach . . . our court has expressly declined to do so."); *Tamburo v. Dworkin*, 601 F.3d 693, 703 n.7 (7th Cir. 2010) (declining to adopt the *Zippo* test because "*Calder*[ *v. Jones*, 465 U.S. 783 (1984)] speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there can be applied to cases involving tortious conduct committed over the Internet."); *Shrader v. Biddinger*, 633 F.3d 1235, 1242 n.5 (10th Cir. 2011) (declining to either adopt or reject *Zippo* and deciding case on traditional factors); *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F.Supp.2d

1154, 1160 (W.D. Wis. 2004) ("Other courts have rejected *Zippo* while noting that traditional principles of due process are sufficient to decide personal jurisdiction questions in the internet context."); *Winfield Collection, Ltd. v. McCauley*, 105 F.Supp.2d 746, 750 (E.D. Mich. 2000) ("The need for a special Internet-focused test for 'minimum contacts' has yet to be established. It seems to this court that the ultimate question can still as readily be answered by determining whether the defendant did, or did not, have sufficient 'minimum contacts' in the forum state.").

In sum, there is a split between the Fourth, Fifth, Eighth, and Ninth Circuits on the one hand, and the Seventh and Tenth Circuits on the other with respect to this issue.

The result has been inconsistency and a lack of predictability, where the outcome of a jurisdictional challenge is more dependent on the forum in which the case is brought (and the particular panel hearing an appeal) and less on the facts of the case. *See*, *e.g.*, Max D. Lovrin, *Virtual Pretrial Jurisdiction for Virtual Contacts*, 85 BROOKLYN L. REV. 943, 945 (2020) ("Cases involving assertions of personal jurisdiction predicated on internet-based contacts have become especially unpredictable."); Elma Delic, *Cloudy Jurisdiction: Foggy Skies in Traditional Jurisdiction Create Unclear Legal Standards for Cloud Computing and Technology*, 50 SUFFOLK U. L. REV. 471, 488 (2017) ("Courts have added ambiguity through vague decisions, making it challenging for businesses to develop strategies for technological advancement because they do not know where

they could be open to litigation."); McKeown, *supra* at 146 ("In some respects, we are approaching universal personal jurisdiction depending on how the court characterizes a certain website and its effect. In my view, there is no coherent theme in jurisdiction cases. . . ."); Jonathan Spencer Barnard, *A Brave New Borderless World: Standardization Would End Decades of Inconsistency in Determining Proper Personal Jurisdiction in Cyberspace Cases*, 40 SEATTLE U. L. REV. 249, 257 (2016) ("Although the Internet is no longer a new phenomenon, and the concept of claims arising out of conduct performed in cyberspace is no longer novel, there remains no consistent standard for how to apply traditional notions of personal jurisdiction to cyberspace cases.").

Six years ago, this Court in *Walden* left "for another day" the proper test to be applied to virtual contacts in the context of a personal jurisdiction analysis. Petitioner respectfully suggests that, with the present matter, that day has arrived and this petition should be granted.

## II. The Opinion Below Represents a "Sea Change" in Personal Jurisdiction Law, in Conflict With This Court's Precedent, and Creating a Deep Circuit Split in the Lower Courts.

### A. The Fourth Circuit's Holding That Personal Jurisdiction Could Be Based on a Failure to "Geoblock" Visitors From the United States or the Simple Existence of Third-Party "Geotargeted" Ads Conflicts With This Court's Precedent and Creates a Split Amongst the Circuits.

The Fourth Circuit's opinion below incorrectly concluded that Kurbanov was subject to personal jurisdiction either because the Websites failed to *block* visitors from the U.S. ("geoblocking") or because the Websites *allowed* third-party advertising brokers to independently direct third-party advertisements to visitors in specific locations if they chose to do so ("geotargeted advertising").

With respect to geoblocking, the Fourth Circuit's opinion conflicts with this Court's decision in *J. McIntyre Mach.*, where this Court rejected the notion that personal jurisdiction could be based on a defendant's failure to "take some reasonable step to prevent the distribution of its products in [a] State." 564 U.S. at 879. This is consistent with the vast body of law on personal jurisdiction. As the D.C. District Court held (and the D.C. Circuit upheld) faced with similar questions:

> The operative test, after all, is whether the defendant has committed 'some *act*' by which it

> 'purposefully avails itself of the privilege of conducting activities within the forum.' . . . The Court is unaware of any authority suggesting that a *failure to act* might constitute purposeful availment.

*Triple Up Ltd. v. Youku Tudou Inc*., 235 F.Supp.3d 15, 25 (D.D.C. 2017).

Directly addressing the issue presented here, the *Triple Up* court held:

> The Court, however, is unpersuaded that the possibility of "geoblocking" warrants a different result here. . . . To hold otherwise would invite a sea change in the law of internet personal jurisdiction. . . . Triple Up's proposed rule – which equates a *failure to geoblock* with purposeful availment – would effectively mandate geoblocking for any website operator wishing to avoid suit in the United States. To say the least, such a rule would carry significant policy implications reaching beyond the scope of this lawsuit . . . and, indeed, could limit U.S. residents' access to what is appropriately called the *World* Wide Web.

*Id. Contrast Plixer Int'l*, 905 F.3d at 8-9 (1st Cir.) (finding jurisdictionally relevant defendant's failure to geoblock website visitors from the U.S.).

The Fourth Circuit's order below erroneously works precisely the jurisdictional "sea change" warned of in *Triple Up*. If allowed to stand, it will subject website operators to personal jurisdiction in *every* location where their website is accessible (*i.e.*, where they

haven't blocked access), regardless of whether the defendant has expressly aimed his conduct at the forum or otherwise has the constitutionally required minimum contacts. It is precisely the type of "universal personal jurisdiction" that Ninth Circuit Justice McKeown warned of in her law review article examining the constitutional impacts of the internet. McKeown, *supra*.

As it stands, in addition to ignoring this Court's precedent, this issue presents a split between the First and Fourth Circuits, on the one hand, and the D.C. Circuit on the other.

As one commentator noted in reaction to the Fourth Circuit's opinion below:

> It should be immediately clear how dangerous this is for a healthy international internet to exist. The idea that a website, whatever its purpose, could find itself in the jurisdiction of any nation just because that nation's population can reach that website is absurd. Should Wikipedia be in the jurisdiction of Saudi Arabia just because it doesn't geoblock that country? Should Cosmo Magazine's site be subject to the laws of Mexico if its people can get to the site?
>
> No, that's absurd. Were that the standard, it would be a legal quagmire for any site to operate unless it geoblocked every country where it doesn't have a direct presence. And that, it should be obvious, would be the end of a free and open international internet.

Timothy Geigner, *Techdirt*, "Russian Stream-Rip Sites Attempt To Take Jurisdiction Issue All The Way To SCOTUS" (Aug. 3, 2020), https://tdrt.io/i0a.

Similarly, the Fourth Circuit's holding that Kurbanov was subject to personal jurisdiction because the Websites automatically collected data concerning visitors' location and allowed third-party advertising brokers to utilize that information to geographically direct the advertisements of *their* customers is erroneous and conflicts with the holdings from other circuit courts.

Indeed, in reversing the District Court's dismissal, the Fourth Circuit split with the Ninth Circuit and the D.C. Circuit, each of which recently faced this precise issue and reached the opposite conclusion. *See AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201 (9th Cir. 2020); *Triple Up, Ltd. v. Youku Tudou, Inc.*, 2018 U.S. App. LEXIS 19699 (D.C. Cir. July 17, 2018).

The relevant facts in the *AMA Multimedia* case are directly on point here:

> ePorner does not charge visitors; instead it generates revenue solely through advertising. ePorner contracts with a third-party advertising company that chooses the advertisements. The advertiser then "geolocates" the advertisements, meaning visitors to ePorner.com see advertisements based on their perceived location. For example, visitors thought to be in the United States see selected advertisements in English, while visitors thought to be

> in France see selected advertisements in French.

970 F.3d at 1204-05.

Despite these facts, and despite the fact that 20 percent of ePorner's traffic came from the United States (double the percentage of traffic in the present case), the Ninth Circuit found personal jurisdiction lacking:

> Here, nearly 20% of ePorner's traffic comes from U.S. users. But this does not establish that Wanat expressly aimed at the U.S. market. . . .
>
> AMA alleges, and Wanat's expert agreed, that ePorner uses geo-located advertisements, which tailor advertisements based on the perceived location of the viewer. This tailoring does not establish that Wanat *expressly aimed* ePorner at the United States. ePorner's geo-located advertisements, provided by a third-party advertising company . . . are always directed at the forum: a viewer in the United States will see advertisements tailored to the United States while a viewer in Germany will see advertisements tailored to Germany. . . .
>
> If such geo-located advertisements constituted express aiming, ePorner could be said to expressly aim at *any* forum in which a user views the website. . . . As a feature of the geo-located advertisements on ePorner's website, all users in every forum received advertisements directed at them. To find specific jurisdiction based on this would run afoul of the

> Supreme Court's directive in *Walden* and "impermissibly allow[] a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis."

*Id.* at 1211.

Under similar facts, the D.C. Circuit Court also rejected personal jurisdiction based on the placement of geotargeted ads by a third-party ad broker, finding that such ads did not constitute purposeful availment:

> Triple Up argues that Youku purposefully availed itself of the United States forum by passively permitting the videos to be streamed in the United States along with "geographically targeted" advertisements. Youku indisputably derives revenue from advertisements that accompany its videos, but Triple Up has not shown that Youku was in control of the advertisements' placement with particular films or "purposefully directed" them toward United States viewers. . . . Advertisers purchase Youku's online advertising services through third-party agencies. So while Youku "act[s] to maximize usage of [its] websites," . . . Triple Up has not alleged facts plausibly showing that Youku played a material role in pairing advertisements with specific videos based on viewership. . . .

2018 U.S. App. LEXIS 19699 at *7-8. *See also Mireskandari v. Daily Mail & Gen. Trust PLC*, 2020 Va. Cir. LEXIS 104 (Fairfax Cir. Ct. July 27, 2020) (rejecting geotargeted ads as a basis for an assertion of

personal jurisdiction, particularly where such ads did not form the basis of plaintiffs' complaint).

Legal commentators have noted with alarm that the Fourth Circuit's opinion in this case "stretch[es] the bounds of personal jurisdiction" and conflicts with the holdings of other courts:

> Prior court decisions have found geotargeting of advertisements in the forum state generally insufficient to establish personal jurisdiction, in particular where the claim does not arise out of the advertisement itself.
>
> Thus, [after the Fourth Circuit's decision] website owners that use geotargeted ads should take note. Just because they do not have a physical presence in the United States and do not intentionally seek to attract users from the United States, does not mean that they are safe from being hauled into a U.S. court.

J. Alexander Lawrence and Lily Smith, *Socially Aware*, "Stretching the Bounds of Personal Jurisdiction, 4th Circuit Finds Geotargeted Advertising May Subject Foreign Website Owner to Personal Jurisdiction in the U.S." (July 21, 2020). *See also* Eric Goldman, *Technology and Marketing Law Blog*, "Running Geotargeted Advertising Confers Personal Jurisdiction – UMG Recordings v. Kurbanov" (June 27, 2020) ("A globally available website located overseas has done nothing to specifically engage with Virginia other than to be popular on the web. The lower court sensibly dismissed the case for lack of personal jurisdiction. The Fourth

Circuit reverses and remands the case for further consideration. . . . [B]ut the prevalence of outsourcing ad sales and geotargeting ads suggests that the court nevertheless is describing pretty much every ad-supported website, whether it intended to or not. It's pretty clear this panel stretched jurisdiction law to help the copyright owners. This would be a good case for *en banc* rehearing.").

This Court should grant the present petition both to rectify the split amongst the circuits and to correct the Fourth Circuit's failure to properly apply this Court's precedents.

### B. The Fourth Circuit's Focus on the Raw Number of U.S. Visitors to the Websites Ignored This Court's Direction That Only Suit-Related Contacts are Relevant and Splits With the Holdings of Other Circuit Courts (and District Courts).

In focusing solely on the raw number of viewers that the Websites draw from Virginia or the U.S., the panel improperly considered, indeed prioritized, non-claim related contacts with Virginia and the U.S. in direct contravention of this Court's holdings in *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cty.*, 137 S.Ct. 1773, 1781 (2017) and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930 n.6 (2011).

Preliminarily, the fact that an individual *visited* one of the Websites is not necessarily an indication

that the visitor utilized the Websites' functionality. As with any website, some visitors come to the website because they are curious as to what the website does, but then leave without ever utilizing its functionality. Of those visitors that *do* seek to save an audio track, any number are accessing videos that have nothing to do with music at all. Indeed, according to YouTube (which is just one of the services with which the Websites work), music related videos account for only 2.5% of its traffic.[3]

Nor does this mean that 2.5% of YouTube's traffic involves *Plaintiffs'* music; rather music *as a whole* constitutes 2.5% of YouTube's traffic. This includes copyrighted music, music subject to a Creative Commons license, and music freely offered to the public without restriction. And, given YouTube's international reach, much of that music is likely from outside of the U.S. and not owned by Plaintiffs.

Ultimately, though, the raw number of visitors to the Websites from Virginia and the U.S. is irrelevant as it does not speak to ***claim-related contacts*** with the forum. The Fourth Circuit's focus on these non-claim-related contacts conflicts with *Bristol-Myers*. In *Bristol-Myers*, "[m]ore than 600 plaintiffs, most of whom are not California residents, filed [a] civil action in a California state court against Bristol-Myers Squibb Company (BMS), asserting a variety of state-law

[3] See Paul Resnikoff, *Digital Music News*, "YouTube Says Just 2.5% Of Its Traffic Is Music-Related" (April 29, 2016), https://www.digitalmusicnews.com/2016/04/29/youtube-says-just-2-5-of-its-traffic-is-music-related.

claims based on injuries allegedly caused by a BMS drug called Plavix." 137 S.Ct. at 1777.

Although this Court found that Bristol-Myers "engages in business activities in California and sells Plavix there," it nonetheless held that the California courts could not exercise personal jurisdiction over the claims brought by non-California residents despite the fact that, "[b]etween 2006 and 2012, it ***sold almost 187 million Plavix*** pills in the State and took in more than $900 million from those sales." *Id.* at 1778 (emphasis added).

This Court rejected the argument that these contacts could be considered for specific jurisdiction purposes because the contacts did not relate directly to the claims brought by the non-resident plaintiffs:

> [F]or a court to exercise specific jurisdiction over a claim there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.' . . . When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. . . . What is needed – and what is missing here – is a connection between the forum and the specific claims at issue.

*Id.* at 1781. *See also Goodyear*, 564 U.S. at 930 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.").

The Fourth Circuit's holding in this case also puts it at odds with other circuit courts as well as other decisions from the Fourth Circuit. *See*, *e.g.*, *Xmission*, 955 F.3d at 849 (10th Cir.) (rejecting personal jurisdiction in Utah over internet service provider that received more than $3 million in revenue from Utah during the relevant time period because plaintiff failed "to show that Fluent's $3 million in Utah revenue reflected a sufficient 'affiliation between the forum and the underlying controversy.'"); *Matus v. Premium Nutraceuticals, LLC*, 715 Fed. Appx. 662, 663 (9th Cir. 2018) (rejecting plaintiff's claims that defendant could be haled into court in California based on defendant's "online business in California," because "his claims do not 'arise from' an online purchase that Matus made from Premium's website. . . . Rather, Matus's claims 'arise from' only the online activities that Premium aimed at the entire world. If Premium can be haled into California merely on the basis of its universally accessible website, then, under Matus's proposed rule, it can be haled into every state, and respectively, every online advertiser worldwide can be haled into California."); *Advanced Tactical Ordnance Sys.*, 751 F.3d at 801-02 (7th Cir.) ("Looking at the over 600 sales that Real Action allegedly made to Indiana residents in the two years before suit was filed does not help matters. Specific jurisdiction must rest on the *litigation-specific* conduct of the defendant in the proposed forum state. The only sales that would be relevant are those that were related to Real Action's allegedly unlawful activity. Advanced Tactical – which has the burden of proof here – has not provided evidence of any such

sales."); *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 139 (4th Cir. 2020) ("Marriott's business activity in South Carolina is not insignificant, as it franchises, licenses, or manages ninety hotels in the state. Those activities, however, have nothing to do with the claims asserted by the Plaintiffs in this action. That is, the claims asserted after Bud Fidrych's injury in a Marriott-affiliated hotel in Milan do not in any sense 'arise out of or relate to' Marriott's connections to the hotels located in South Carolina. Because the Plaintiffs' claims do not arise from them, Marriott's hotel-related connections to South Carolina are not relevant to our specific-jurisdiction inquiry.").

In the absence of a connection between the number of U.S. visitors to the Websites and Plaintiffs' claims, and in contravention of this Court's precedent, the Fourth Circuit's focus on raw numbers also improperly conflated foreseeability with express aiming. *See*, *e.g.*, *J. McIntyre Mach.*, 564 U.S. at 880 (rejecting prior holdings suggesting that merely placing a product into the "stream of commerce" was a sufficient basis for jurisdiction and holding that "[f]reeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law. As a general rule, the sovereign's exercise of power requires some act by which the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . .'"); *Walden*, 571 U.S. at 289-90 ("[The Court of Appeals'] approach to the 'minimum contacts' analysis

impermissibly allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis. Petitioner's actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections. Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis. . . . It also obscures the reality that none of petitioner's challenged conduct had anything to do with Nevada itself."); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) ("Although it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction.").

The Fourth Circuit's holding here is also at odds with the holdings of the other Circuit Courts that have examined this issue as well as with holdings from other Fourth Circuit panels. This creates a situation in which the fundamental precepts of personal jurisdiction no longer exist and the operator of a website can be haled into court in *every* jurisdiction where the website is popular, regardless of whether the website was aimed at that jurisdiction or not. *See*, *e.g.*, *AMA Multimedia*, 970 F.3d at 1210 (9th Cir.) ("ePorner's content is primarily uploaded by its users, and the popularity or volume of U.S.-generated adult content does not show that Wanat expressly aimed the site at the U.S.

market. . . . Instead, it merely suggests the United States produces a significant quantity of adult content or that ePorner's users are more likely to upload content produced in the United States. Although Wanat may have foreseen that ePorner would attract a substantial number of viewers in the United States, this alone does not support a finding of express aiming."); *Fidrych*, 952 F.3d at 141 (4th Cir.) ("While Marriott obviously uses its website to engage in commercial transactions, the website does not target South Carolina residents for commercial transactions any more than it targets any other state. Instead of targeting any particular state, the website makes itself available to anyone who seeks it out, regardless of where they live. In our view, the mere fact that the website is accessible in a given state does not mean that Marriott is targeting its activities at that state."); *Xmission*, 955 F.3d at 846-47 (10th Cir.) ("General knowledge that a message will have a broad circulation does not suffice. . . . Purposeful direction cannot be satisfied if the website host, web poster, or email sender simply wants as many responses as possible but is indifferent to the physical location of the responder."); *be2 LLC v. Ivanov*, 642 F.3d 555, 558-59 (7th Cir. 2011) ("Beyond simply operating an interactive website that is accessible from the forum state, a defendant must in some way *target* the forum state's market. . . . If the defendant merely operates a website, even a 'highly interactive' website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution."); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d

Cir. 2003) ("[T]he mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world. Rather, there must be evidence that the defendant 'purposefully availed' itself of conducting activity in the [jurisdiction]. . . ."); *ALS Scan*, 293 F.3d at 712 (4th Cir.) ("If we were to conclude as a general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State.").[4]

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[4] Numerous district courts have similarly rejected the argument that a foreign defendant may be subject to personal jurisdiction in the United States based simply on the amount of traffic generated by the website originating from the United States. *See*, *e.g.*, *Liberty Media Holdings, LLC v. Letyagin*, 2011 WL 13217328, *4 (S.D. Fla. Dec. 14, 2011) ("Plaintiff contends that Defendant has 'considerable' web traffic originating from the United States and has presented an exhibit showing that fifteen percent of the visitors to the website are from the United States. . . . Precedent, however, establishes that maintaining a website accessible to users in a jurisdiction does not subject a defendant to be sued there; those users must be directly targeted, such that the defendant can foresee having to defend a lawsuit. . . ."); *Fraserside IP L.L.C. v. Hammy Media, Ltd.*, 2012 WL 124378, *7 (N.D. Iowa Jan. 17, 2012) (rejecting personal jurisdiction despite allegations that "xHamster's website www.xHamster.com is visited daily by over 1,500,000 internet users worldwide with roughly 20 percent of the site's visitors being from the United States"); *Fraserside IP, L.L.C. v. Youngtek Solutions, Ltd.*, 2013 WL 139510, *14 (N.D. Iowa Jan. 10, 2013) (allegations that "17 to 20 percent of visitors to Youngtek's websites

This Court should grant the present petition both to rectify the split amongst the circuits and the lower courts and to correct the Fourth Circuit's failure to properly apply this Court's precedents.

### C. The Fourth Circuit's Consideration of Certain Minor Internet-Initiated Contacts Conflicts with this Court's Precedent and Creates a Circuit Split.

#### 1. Appointment of a DMCA Agent

The Fourth Circuit held that it was jurisdictionally relevant that the Websites appointed a U.S. DMCA agent to receive infringement complaints. This decision conflicts with decisions from other circuits, other Fourth Circuit panels, and this Court, all of which have held the appointment of an agent for service of process is irrelevant. *See*, *e.g.*, *Chipman, Ltd. v. Thomas B. Jeffery Co.*, 251 U.S. 373, 379 (1920) ("Unless a foreign corporation is engaged in business within the State, it

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are U.S. citizens"); *Fraserside IP L.L.C. v. Netvertising Ltd.*, 2012 WL 6681795, *11 (N.D. Iowa Dec. 21, 2012) (allegations that "16.7% percent of HardSexTube's website's daily visitors are from the United States"); *Fraserside IP L.L.C. v. Letyagin*, 885 F.Supp.2d 906, 921 (N.D. Iowa 2012) (allegations that "Eighteen percent of SunPorno's website's 2,500,000 daily visitors are from the United States"); *Fraserside IP L.L.C. v. Youngtek Solutions Ltd.*, 2012 WL 2906462, *7 (N.D. Iowa July 16, 2012) ("The EmpFlix.com website is allegedly visited daily by over 1,500,000 internet users worldwide with approximately 16.9 percent of the site's visitors coming from the United States. The TNAFlix.com website is allegedly visited daily by over 3,000,000 internet users worldwide with approximately 21.5 percent of the site's visitors coming from the United States.").

is not brought within the State by the presence of its agents. . . ."); *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 576 (9th Cir. 2011) ("[I]t is the corporate activities of the defendant, not just the mere designation of a statutory agent, that is helpful in determining whether the court has personal jurisdiction over the defendant. . . . The simple act of appointing a statutory agent is not, nor has it ever been, a magical jurisdictional litmus test."). *See also Fidrych*, 952 F.3d at 136-38; *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745, 748 (4th Cir. 1971); *Bankhead Enterprises, Inc. v. Norfolk & W. Ry. Co.*, 642 F.2d 802, 805 (5th Cir. 1981); *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992); *Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000).[5]

### 2. Other Minor Internet-Related and Internet-Initiated "Contacts"

The Fourth Circuit below also improperly elevated the importance of certain insignificant internet-related

[5] Strong public policy considerations also counsel against consideration of the appointment of a DMCA agent as jurisdictionally relevant. Congress enacted the DMCA to "foster cooperation among copyright holders and service providers in dealing with infringement on the Internet. . . . These considerations are reflected in Congress' decision to enact a notice and takedown protocol encouraging copyright holders to identify specific infringing material to service providers." *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1021-22 (9th Cir. 2013). If a foreign website-operator subjects itself to jurisdiction within the United States simply by virtue of designating a DMCA agent, the website operator would have strong incentive not to do so, thwarting the purposes of the DMCA.

factors such as having registered the domain names for the Websites with a U.S. based registrar, utilization of "top level" domains, and the existence (at one point) of servers in the U.S., all in contrast with prior precedent.

The Fourth Circuit previously recognized that the registration of a domain name is insufficient to support personal jurisdiction. *See Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 223 (4th Cir. 2002) ("[T]he mere act of registering the Domain Names in Virginia was deemed insufficient to provide personal jurisdiction over Harrods BA.").

Moreover, the District Courts where some of the largest registrars are located have routinely rejected basing personal jurisdiction on domain name registration, which would result in millions of individuals and businesses being subject to jurisdiction based on the minor ministerial action of registering a domain name. *See*, *e.g.*, *EZScreenPrint LLC v. SmallDog Prints LLC*, 2018 U.S. Dist. LEXIS 131611 at *8 (D. Ariz. Aug. 6, 2018) ("GoDaddy is apparently the largest domain registrar in the world and maintains over 50 million domain names worldwide, as of 2013. . . . The argument Plaintiff advances could allow millions of companies with domain names registered through GoDaddy to be subject to general personal jurisdiction in the state of Arizona."); *Proprietors of Strata Plan No. 36 v. Coral Gardens Resort Mgmt., Ltd.*, 2009 U.S. Dist. LEXIS 97704, at *15 (E.D. Va. Oct. 16, 2009) ("'[M]ere registration of the domain name with a company located in Virginia does not support personal jurisdiction in this

state.' "); *Am. Online, Inc. v. Huang*, 106 F.Supp.2d 848, 858 (E.D. Va. 2000) ("Even assuming that a domain name registration is a 'thing' that may be located in Virginia, it is nonetheless a relatively minor portion of the Internet's architecture, and a minuscule presence in this Commonwealth; in terms of physical or electronic presence, it is merely 'a reference point in a computer database.' . . . [B]y registering the two domain names at issue here, eAsia did not purposefully direct its activities at this forum, and due process would be offended were personal jurisdiction granted based on those contacts.").[6]

Similarly, both the Fourth and Fifth Circuits have held that the use of a computer server in a jurisdiction is an insufficient basis to exercise personal jurisdiction where the server is located. *See Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003) ("[W]e have described as 'de minimis' the level of contact created by the connection between an out-of-state defendant and a web server located within a forum."); *GreatFence.com, Inc. v. Bailey*, 726

[6] Similarly troubling is the Fourth Circuit finding significance to the fact that U.S. based Verisign, Inc. *oversees* the entire top-level .com domain and U.S. based Neustar, Inc. *oversees* the entire top-level .biz domain. Currently, there are **149.8 million registered .com domains and an additional 1.38 million .biz domains**. *See* DomainTools, "Domain Count Statistics for TLDs" (last accessed Oct. 6, 2020), http://research.domaintools.com/statistics/tld-counts. Under the Fourth Circuit's holding, every registrant of each of those 150+ million domains is subject to personal jurisdiction in Virginia by virtue of their use of a .com or .biz domain, even if they register their domain names with a foreign domain name registrar.

Fed. Appx. 260, 261 (5th Cir. 2018) (rejecting personal jurisdiction based on the location of defendant's server "particularly . . . where, as here, the 'administration, maintenance, and upkeep of [the] website'" occurred outside the jurisdiction). *See also BidPrime, LLC v. SmartProcure, Inc.*, 2018 U.S. Dist. LEXIS 180546, at *7 (W.D. Tex. Oct. 22, 2018) ("Courts have repeatedly rejected the argument that a server's physical location is relevant to specific jurisdiction." (collecting cases)); *Amberson Holdings LLC v. Westside Story Newspaper*, 110 F.Supp.2d 332, 336 (D.N.J. 2000) (finding contacts with a server within the forum to be "de minimis, and to uphold jurisdiction on this basis would defy common reason.").

Here, too, the Court should grant the present petition both to rectify the split in the lower courts and to correct the Fourth Circuit's failure to properly apply this Court's precedent.

### D. The Circuits Are Deeply Split Concerning the Utility of the *Zippo* Test Which, If It Was Ever Useful, Is Now Dated Beyond Utility.

As discussed in detail above, there has been considerable disagreement from the start whether the *Zippo* test ever provided a useful guide for determining personal jurisdiction, given that it appeared to abandon this Court's traditional constitutional guideposts in favor of a simplistic test that often produced conflicting results. *See*, *e.g.*, McKeown, *supra* at 10-11 ("As is

often the case, first may not be right, but it is first, and the Zippo test took off like a bolt of lightning. The test, however, was not universally accepted and has eroded over time, with more sophisticated analysis of the Web and the nature of websites and e-commerce changing drastically."); Zoe Niesel, *#PersonalJurisdiction: A New Age of Internet Contacts*, 94 IND. L. J. 103, 136 (2019) ("The reality is that the internet is no longer the same animal that it was when *Zippo* was decided in 1997. Despite this transformation, the personal jurisdiction landscape has remained relatively unchanged, and the problem on basing internet jurisdiction on 'interactivity' is coming into sharper focus."); David Swetnam-Burland and Stacy O. Stitham, *Back to the Future: Revisiting* Zippo *in Light of 'Modern Concerns*,' 29 J. MARSHALL J. COMPUTER & INFO. L. 231 (2012) ("The 'modern concern' . . . is not that a contacts-based jurisdiction cannot adequately deal with Internet-based contacts, but rather that *Zippo*-based jurisprudence will swallow the doctrine of personal jurisdiction whole. If every business with a virtual presence can be sued anywhere, and virtually every business is online, then virtually every business can be sued virtually anywhere.").

Nonetheless, *Zippo* became and remains "one of the most widely cited district court cases in the country." *Sioux Transp., Inc. v. XPO Logistics, Inc.*, 2015 U.S. Dist. LEXIS 171801, at *17 (W.D. Ark. Dec. 22, 2015) (noting that, as of 2015, "the case has been cited 5,699 times"). *See also* Mark Sableman and Michael Nepple, "Will the *Zippo* Sliding Scale for Internet Jurisdiction

Slide into Oblivion?" *Journal of Internet Law* at 6 (July 2016) ("Though the Zippo test remains an easy refuge for a judge or law clerk looking for a simple rule, its influence is waning. In the last 18 years, Zippo has been cited more than 5,000 times. You might call it a highly interactive precedent. But one that may be headed for passivity and retirement.").

But, as courts and legal commentators have noted with increasing frequency and concern, even if *Zippo* had *some* utility in the earliest days of the World Wide Web, such utility has long disappeared, leaving a test that is both flawed and outdated. *See*, *e.g.*, *Douglas Co. v. My Brittany's LLC*, 2020 U.S. Dist. LEXIS 92876 (D.N.H. May 28, 2020) ("[T]he decision in Zippo is more than 20 years old and much has changed since it was issued – particularly the ways by which websites now monetize viewership, and the relative paucity of purely 'passive' or 'informational' websites."); *Baldwin v. Athens Gate Belize, LLC*, 2019 U.S. Dist. LEXIS 164295, at *8-9 (D. Colo. Sep. 24, 2019) ("The Court agrees that *Zippo* is limited in its ability to guide modern internet-based personal jurisdiction inquiries. *Zippo* was decided over twenty years ago and, in the years since, the internet has expanded and changed immensely. . . . The effect of applying *Zippo* to website-based personal jurisdiction cases today would permit numerous defendants to be haled into court in practically any jurisdiction in the country, so long as the defendant's website was deemed sufficiently 'interactive.' Such a practice would 'resemble[ ] a loose and spurious form of general jurisdiction.' "); *Kindig It Design, Inc. v.*

*Creative Controls, Inc.*, 157 F.Supp.3d 1167, 1174 (D. Utah 2016) ("The *Zippo* test effectively removes geographical limitations on personal jurisdiction over entities that have interactive websites. And because the number of entities that have interactive websites continues to grow exponentially, application of the *Zippo* framework would essentially eliminate the traditional geographic limitations on personal jurisdiction."); Sableman, *supra* at 3, 6 ("The wonderfully simple *Zippo* legal test, however, ultimately brought to mind an aphorism of H.L. Menklen: 'For every complex problem, there is an answer that is clear, simple, and wrong.' . . . Ultimately *Zippo*'s real problem is that its test was crafted for a snippet of what was happening in the digital world in 1997, which isn't representative of all of the many ways in which our current digital world is affecting life and commerce.").

Given the ubiquity of the lower courts' reliance on (and grappling with) the *Zippo* test, it is all the more urgent for this Court to grant the current petition and provide the courts with guidance as to the continuing viability of *Zippo*.

## III. The Question Presented Arises Frequently, is of Substantial Importance, and is of Particular Concern Here.

Cases such as the one at bar present two additional concerns: (1) the need to consider concerns of international comity as required by this Court's precedent, and (2) the simple fact that these cases are

brought by plaintiffs who do not expect the defendants to show up, often resulting in default judgments that allow the plaintiffs to seize defendants' domain names (and, by extension, shutter their businesses).

As this Court and the lower courts have held, "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal.*, 480 U.S. 102, 115 (1987); *Gray v. Riso Kagaku Corp.*, 1996 U.S. App. LEXIS 8406, at *11 (4th Cir. Apr. 17, 1996) ("When personal jurisdiction over an alien defendant is at issue, a court must also consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by a court in the United States."); *Base Metal Trading, Ltd. v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208, 214 (4th Cir. 2002) ("'[T]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.'"); *Wortham v. KarstadtQuelle AG*, 153 Fed. Appx. 819, 825 (3d Cir. 2005) (same); *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988) ("The Supreme Court, though, has cautioned against extending state long arm statutes in an international context. . . . This circuit has also stated that litigation against an alien defendant creates a higher jurisdictional barrier than litigation against a citizen from a sister state because important sovereignty concerns exist."); *Conn v. Zakharov*, 667 F.3d 705, 720 (6th

Cir. 2012) ("[T]he burden on Zakharov to defend this action in Ohio is heavy because he lives in Russia and would have to travel around the world to engage in litigation. . . . We also note that '[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.' ").

This Court reaffirmed its concerns about extending jurisdiction over foreign defendants in *Daimler AG v. Bauman*, holding:

> Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. . . . The Solicitor General informs us, in this regard, that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments."

571 U.S. 117, 141-42 (2014). *See also Siegel v. HSBC Holdings PLC*, 2018 U.S. Dist. LEXIS 8986, at *7 (S.D.N.Y. Jan. 19, 2018) ("The Advisory Committee on the Federal Rules has cautioned that a 'district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selection so onerous that injustice could result.' ").

The Fourth Circuit's opinion below is silent about such concerns and, combined with its improper focus on non-suit-related contacts with the U.S. (i.e., raw numbers of website visitors), resulted in precisely the "loose and spurious form of general jurisdiction" this

Court warned of in *Bristol-Myers Squibb*, 137 S. Ct. at 1781 ("Under the California approach, the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims. Our cases provide no support for this approach, which resembles a loose and spurious form of general jurisdiction.").

Finally, as the Electronic Freedom Foundation ("EFF") noted in its *amicus* brief before the Fourth Circuit, "Defendants lacking minimum contacts with a forum are, almost by definition, unlikely to appear in court." Fourth Circuit Docket No. 48-1, p.18. The result is both predictable and intentional: the vast majority of cases such as this one are decided by default, with courts never examining the gateway question of whether they have jurisdiction over the defendants at all. As the EFF told the Fourth Circuit:

> Over the last several years, major copyright and trademark holders, including many of the Appellants here and their amici, have sued foreign website owners who are unlikely, or indeed unable, to appear in a U.S. court to respond. Upon the inevitable default, the plaintiffs request staggeringly broad injunctions that purport to bind nearly every type of intermediary business that forms part of the Internet's infrastructure, enlisting them to help make the foreign website disappear from the Internet.

*Id.* at p.20.

Accordingly, even though the very legitimacy of our judicial system is premised on the idea that a court has no power over a litigant in the absence of personal jurisdiction, plaintiffs such as those here are managing to secure default judgments against defendants by intentionally selecting defendants in far-flung parts of the globe who have no legitimate contacts with the United States and whom often lack the resources to fight jurisdiction in U.S. Courts. This case, then, presents a unique opportunity for this Court to address a problem that occurs frequently yet often evades review. As such, Kurbanov's petition should be granted.

## CONCLUSION

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

Respectfully submitted,

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