NAVIGATING PERSONAL JURISDICTION BASED ON SOCIAL MEDIA ACTIVITY—TIPS FOR PRACTITIONERS

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INTRODUCTION

A sports celebrity residing in Texas is upset about the actions of a sports company in Oregon. While in Texas, the sports celebrity posts a series of negative social media posts about the company encouraging people and companies not to do business with it. These posts result in the company losing several contracts, and a loss of revenue and employees in Oregon. The company sues the celebrity in Oregon alleging tortious interference with business relations. Does the Oregon court have personal jurisdiction over the Texas celebrity? What if the posts included #OregonBadBusiness? What if the posts tagged several Oregon businesses that contract with the sports company? What if the posts included defamatory statements about the sports company's CEO, and tagged her friends, all of whom lived in Oregon?

Enter the wild world of personal jurisdiction based on social media activity in intentional tort cases. The U.S. Supreme Court has not weighed in on the personal jurisdiction standard in such cases, and ever-changing technology and social media use have created a fractured legal landscape. This article does two things: (1) provides an overview of the fractured landscape in Sections I and II, and (2) distills some guidelines for practitioners dealing with personal jurisdiction in intentional tort cases involving social media activity in Sections III and IV. Specifically, Section I provides a very brief overview of the concept of purposeful direction in intentional tort cases, and Section II discusses the key personal jurisdiction cases that form the basis for personal jurisdiction approaches in social media activity cases. Section III chronicles the development of personal jurisdiction caselaw specific to social media activity. Section IV identifies trends and contours for practitioners dealing with this murky area of law. The takeaway is that the defendant's targeting of the forum state, as opposed to targeting the plaintiff, remains the central issue. In general, a defamatory or negative statement in a social media post alone is insufficient. Where a defendant has doxed the plaintiff, targeted an audience in the forum state, or included forum state-specific content in posts, personal jurisdiction may be more likely.

I. BACKGROUND—SPECIFIC PERSONAL JURISDICTION AND PURPOSEFUL DIRECTION IN INTENTIONAL TORT CASES

As evidenced by the cases discussed in this essay, most claims involving social media activity are intentional tort claims, such as defamation or intentional interference with business relations or contracts. The vast majority of intentional tort cases brought based on a nonresident defendant's social media activity assert specific jurisdiction over the

defendant, as opposed to general jurisdiction.[1] To determine whether a court has specific personal jurisdiction over a defendant, a court first analyzes whether jurisdiction exists under a state or federal jurisdictional statute or rule of civil procedure, then if yes, asks whether the exercise of personal jurisdiction would violate the defendant's due process rights under the U.S. Constitution.[2] Regardless of whether a social media-based intentional tort claim is brought in state or federal court, personal jurisdiction over the defendant must comport with due process.[3]

II. DEVELOPMENT OF PERSONAL JURISDICTION BASED ON SOCIAL MEDIA ACTIVITY

Three cases form the basis for the approach the vast majority of courts take regarding personal jurisdiction in social media contacts cases—*Zippo v. Zippo*,[4] *Calder v. Jones*,[5] and *Walden v. Fiore*.[6] None of these cases involve social media, but because the U.S. Supreme Court has not weighed in on personal jurisdiction in a social media case, circuit and district courts have been forced to utilize the rules from these cases.[7] As discussed below in Part IV, without U.S. Supreme Court guidance, the landscape of approaches courts take to personal jurisdiction in social media contacts cases is fractured and unpredictable. Before discussing the present-day landscape, this Part discusses these foundational cases and the development of approaches that courts take in personal jurisdiction cases involving social media activity.

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1. For a useful background discussion on general and specific personal jurisdiction and the development of personal jurisdiction as technology has developed, see generally Zoe Niesel, *#Personal Jurisdiction: A New Age of Internet Contacts*, 94 IND. L.J. 103 (2019); Gregory C. Cook, *No End in Sight? Navigating the "Vast Terrain" of Personal Jurisdiction in Social Media Cases after* Ford, 73 ALA. L. REV. 621 (2022); Gizem Demirel, *Convergence without Predictability: Personal Jurisdiction Dilemma for Online Foreign Trademark Infringement in the EU and the US*, 31 TEX. INTELL. PROP. L.J. 1 (2022); Patrick Lin, *Internet Jurisdiction: Using Content Delivery Networks to Ascertain Intention*, 24 VA. J.L. & TECH. 1 (2020).

2. *See* 4A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE CIVIL § 1073 (4th ed. 2023); Ellen Smith Yost, *Comment: Tweet, Post, Share . . . Get Haled into Court? Calder Minimum Contacts Analysis in Social Media Defamation Cases*, 73 SMU L. REV. 693, 697–98 (2020).

3. Yost, *supra* note 2, at 697.

4. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Penn. 1997).

5. Calder v. Jones, 465 U.S. 783 (1984).

6. Walden v. Fiore, 571 U.S. 277 (2014).

7. *See* Erin Belfield, *Establishing Personal Jurisdiction in an Internet Context: Reconciling the Fourth Circuit "Targeting" Test with* Calder v. Jones *using Awareness*, 80 U. PITT. L. REV. 457, 467–68 (2018) ("The Court has not yet announced a definitive test to address personal jurisdiction in case involving the internet").

A. The *Zippo* Test for Website Interactivity

In 1997, the U.S. District Court for the Western District of Pennsylvania established the "*Zippo* test" for personal jurisdiction based on website activity.[8] This test categorized website activity for the purposes of personal jurisdiction into three categories—passive, active, and interactive.[9] The *Zippo* test has been widely used by courts assessing specific personal jurisdiction arising from a nonresident defendant's internet contacts in the e-commerce and website context.[10] However, as discussed below, it is not particularly useful in the social media context. Social media actions, such as liking, commenting, friending, following, or hashtagging, are qualitatively different methods of interaction than other internet activity, such as e-commerce, hosting or using a website, or using email.

B. The *Calder* Effects Test

Courts have developed a specific approach for intentional tort cases in which a nonresident defendant has allegedly targeted the plaintiff in the forum state. In intentional tort cases, a defendant "purposeful[ly] avails itself to personal jurisdiction" where the defendant "purposefully directs" allegedly tortious behavior to the forum state.[11] This purposeful direction test in intentional tort cases is often referred to as the "*Calder* effects test," based on the 1984 U.S. Supreme Court case *Calder v. Jones*.[12] The *Calder* effects test provided that a defendant's tortious acts can serve as the basis for personal jurisdiction if the plaintiff alleged defendant's acts were: (1) intentional, (2) expressly aimed at the forum state, and (3) caused foreseeable harm in the forum state.[13] The bulk of social media contacts

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8. *Zippo*, 952 F. Supp. at 1122–23. For a detailed discussion of *Zippo*, see Niesel, *supra* note 1. *See also* Belfield, *supra* note 7 (discussing *Zippo* test); Yost, *supra* note 2, at 700–01 (discussing *Zippo* test); Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs"*, 100 CORNELL L. REV. 1129, 1145–52 (discussing *Zippo* test).

9. *Zippo*, 952 F. Supp. at 1124.

10. *See* Niesel, *supra* note 1, at 118.

11. The Due Process Clause requires that the defendant has "'purposefully availed itself of the privilege of conducting activities with a forum state' or [] purposefully directed its conduct into the forum state." Bristol-Myers Squibb Co. v. Super. Ct., 582 U.S. 255, 272 (2017) (internal quotation marks, brackets, and citations omitted). *See also* Cameron v. Thomson Int'l., No. CV 21-17-BLG-SPW-TJC, 2021 WL 3409999, at *4 (D. Mont. July 19, 2021) ("purposeful direction test is typically reserved for intentional torts"); Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 803 (9th Cir. 2004) ("We evaluate purposeful direction under the three-part 'effects' test traceable to . . . *Calder*").

12. *See, e.g.*, IMO Indus. v. Kiekert AG, 155 F.3d 254, 268 (3d Cir. 1998) (discussing "*Calder* effects test"); Sussman v. Playa Grande Resort, S.A. DE C.V., 839 Fed. App'x 166, 167 (9th Cir. 2021) (same); Old Republic Ins. Co. v. Cont'l Motors, Inc., 877 F.3d 895, 907 (10th Cir. 2017) (same).

13. *See* Calder v. Jones, 465 U.S. 783, 789–90 (1984). *See also* Belfield, *supra* note 7, at 468–70 (discussing the *Calder* effects test); Yost, *supra* note 2, at 700–02 (same).

involve inquiry into the second element—whether the nonresident defendant's acts were aimed at the forum state.[14]

In *Calder*, California residents brought a libel action against a magazine, the Enquirer, and its employees, all of whom were based in Florida.[15] The Court affirmed the California court's exercise of personal jurisdiction over defendants.[16] *Calder* found Defendants' "intentional and allegedly tortious actions were expressly aimed at California."[17] Because Defendants' article was drawn from California sources, the brunt of the harm was suffered in California, and California was "the focal point both of the story and the harm suffered," jurisdiction existed.[18] *Calder* created confusion because, while the *Calder* effects test requires the defendant's acts to be "expressly aimed" at the forum state, the Court held that the test was met despite no evidence of express aiming at California, largely due to the large number of allegedly defamatory publications circulated in the state.[19]

Courts have since applied the *Calder* effects test in intentional tort cases involving all types of internet communications, including social media activity.[20] Courts have narrowly interpreted *Calder* to avoid

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14. *See* WRIGHT & MILLER, *supra* note 2, at 4 ("To satisfy the second part of the three-part test, a plaintiff must show that the defendant purposely directed its Internet activities toward the forum state, or purposefully availed itself of the privilege of conducting its Internet activities in the forum state."). *See also* Vangheluwe v. Got News LLC, 365 F. Supp. 3d 850, 856–58 (E.D. Mich. 2019) (discussing cases).

15. *Calder*, 465 U.S. at 783.

16. *Id.*

17. *Id.* at 789.

18. *Id.* at 788–89.

19. Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000) ("Subsequent cases have struggled somewhat with *Calder*'s import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction").

20. *See* Yost, *supra* note 2, at 702–03 ("the *Calder* framework was frequently used in both traditional media and internet media defamation cases"); Niesel, *supra* note 1, at 131 ("Numerous courts have eschewed the *Zippo* test in favor of the *Calder* effects test when examining defamatory postings made on social media"); Cook, *supra* note 2, at 636 ("The logical starting point for an analysis of personal jurisdiction for social media posts and intentional torts is [*Calder*]"); Trammell & Bambauer, *supra* note 8, at 1142 ("*Calder* has been the subject of pitched criticism, but its approach has spread beyond intentional torts to areas such as trademark infringement"). *See generally* Alexander B. Punger, *Mapping the World Wide Web: Using* Calder v. Jones *to Create a Framework for Analyzing When Statements Written on the Internet Give Rise to Personal Jurisdiction*, 87 N.C. L. REV. 1952 (2009); Gretchen Yelmini*, Note: Internet Jurisdiction and the 21st Century:* Zippo*,* Calder*, and the Metaverse*, 55 CONN. L. REV. ONLINE 1 (2023). For internet contacts cases, see, e.g*.,* Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002); Young v. New Haven Advoc., 315 F.3d 256 (4th Cir. 2002); Cadle Co. v. Schlichtmann, 123 Fed. App'x 675 (6th Cir. 2005). For other communication technologies, see, e.g., Stover v. O'Connell Assoc., Inc., 84 F.3d 132, 137 (4th Cir. 1996) ("ordering a product or service by telephone from a company in a different state does not subject the customer to that state's jurisdiction"); Far W. Cap., Inc. v. Towne, 46 F.3d 1071, 1077 (10th Cir. 1995) ("it is well-established that phone calls and letters are not necessarily sufficient in themselves to establish minimum contacts"); Reynolds v. Int'l

eviscerating existing minimum contacts and purposeful availment requirements by potentially allowing personal jurisdiction any time the plaintiff alleged injury in the forum state.[21] Post-*Calder* cases repeatedly found no personal jurisdiction even where a defendant was allegedly intentionally harming a plaintiff where the actions were online only and were not otherwise targeting the forum state or its residents.[22]

For example, in *Best Van Lines v. Walker* in 2004, a New York federal court held an Iowa resident's website posting negative information about a New York moving company was insufficient to establish personal jurisdiction over the website operator in New York.[23] The court held that "the mere posting . . . is insufficient to sustain a finding of jurisdiction."[24] The court noted neither the post about Best Van Lines nor the website was for commercial purposes, but instead were "in line with the site's overall mission: to provide consumer advocacy and information focusing on

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Amateur Athletic Fed., 23 F.3d 1110, 1119 (6th Cir. 1994) ("The use of interstate facilities such as the telephone and mail is a secondary or ancillary factor and cannot alone provide minimum contacts required by due process").

21. *See* Esab Group, Inc. v. Centricut, Inc., 126 F.3d 617, 625–26 (4th Cir. 1997) (permitting *Calder* to be satisfied in a corporation's forum state based on lost sales would mean that jurisdiction in intentional tort cases would "always make jurisdiction appropriate in a plaintiff's home state, for the plaintiff *always* feels the impact of the harm there"); Gen. Elec. Cap. Corp. v. Grossman, 991 F.2d 1376, 1387–88 (8th Cir. 1993) (*Calder* "is of little help" to a plaintiff where "the focal point of the alleged wrongdoing" occurred outside the forum even where "effects of the harm" occurred in the forum state); IMO Indus. v. Kiekert AG, 155 F.3d 254, 268 (3d Cir. 1998) (*Calder* "requires more than a finding that the harm caused by the defendant's intentional tort is primarily felt within the forum").

22. *See, e.g.*, Revell v. Lidov, 317 F.3d 467, 471 (5th Cir. 2002) (Texas court had no personal jurisdiction over Massachusetts resident or university located in New York for allegedly defamatory article posted on Columbia University's online bulletin board about Texas resident); Young v. New Haven Advoc., 315 F.3d 256, 264 (4th Cir. 2002) (Virginia court had no jurisdiction over Connecticut newspapers and staff for posting allegedly libelous news articles on the internet about the warden of a Virginia prison despite reporters gathering information in Virginia); Cadle Co. v. Schlichtmann, 123 Fed. App'x 675, 678 (6th Cir. 2005) (Ohio court did not have personal jurisdiction over Massachusetts resident for allegedly creating and making publicly available a deceptive website stating Plaintiff, an Ohio resident, engaged in unlawful activities); Xcentric Ventures, LLC v. Bird, 683 F. Supp. 2d 1068, 1074 (D. Ariz. 2010) (several district courts in the Ninth Circuit have "concluded that mere knowledge of the defamed individual's residence is not sufficient to create personal jurisdiction" and finding no personal jurisdiction over nonresident defendant for allegedly defamatory article about Arizona resident because "Plaintiffs have not met their burden of establishing that defendants purposefully directed their allegedly defamatory article at Arizona (or purposefully availed themselves of the forum)"); Realuyo v. Villa Abrille, No. 01 Civ. 10158 (JGK), 2003 WL 21537754, at *10 (S.D.N.Y. July 8, 2003) ("allegedly libelous article [] published on a website available to readers in New York is insufficient to exercise jurisdiction over [Defendant] consistent with due process" because post-*Calder* cases require "proof that the out-of-state defendant's internet activity is expressly targeted at or directed to the forum state").

23. Best Van Lines, Inc. v. Walker, No. 03 Civ. 6585(GEL), 2004 WL 964009, at *8 (S.D.N.Y. May 5, 2004), *aff'd*, 490 F.3d 239 (2d Cir. 2007).

24. *Id.* at *15–16.

moving companies."[25] The posting and website were available to anyone free of charge anywhere in the country, and the site's content was national in scope without a specific focus on New York businesses. The defendant did not advertise in New York or seek out New York viewers specifically, and therefore, "the mere fact that the allegedly defamatory postings may be viewed in New York is thus insufficient to sustain a finding of jurisdiction."[26]

This approach—that a defendant's online actions must specifically focus on a forum state, as opposed to merely be viewable there—was the prevailing interpretation of *Calder* in circuit and district courts.[27] Indeed, fourteen years after *Calder*, the Third Circuit observed, "[t]he majority of our sister circuits that have considered the application of *Calder* to business torts have adopted a narrow construction" and agreed "with the conclusion reached by the First, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits that jurisdiction under *Calder* requires more than a finding that the harm caused by the defendant's intentional tort is primarily felt within the forum."[28]

C. *Walden*'s Restrictive Reading of the *Calder* Effects Test

In 2014, *Walden v. Fiore* was the next major U.S. Supreme Court case to impact personal jurisdiction in social media contacts cases.[29] *Walden* involved a tort claim by a Nevada resident in federal court in Nevada arising out of the seizure of cash in Georgia by a Georgia police officer deputized as a Drug Enforcement Agency agent.[30] Like *Calder*, *Walden* did not involve social media, but it replaced *Calder* as the dominant approach taken by courts in social media contacts cases.[31]

In finding that Nevada had no personal jurisdiction over the Georgia police officer defendant, *Walden* confirmed that targeting a forum state *resident* is insufficient to create personal jurisdiction over nonresident defendants in intentional tort cases.[32] *Walden* clarified that, in such cases, "a defendant's relationship with a plaintiff or a third party, standing alone, is an insufficient basis for jurisdiction."[33] *Walden* held that "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."[34]

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25. *Id.*
26. *Id.* at *16.
27. *See, e.g.*, cases set forth at *supra* note 21.
28. IMO Indus. v. Kiekert AG, 155 F.3d 254, 261 (3d Cir. 1998).
29. Walden v. Fiore, 571 U.S. 277 (2014). *See also* Belfield, *supra* note 7, at 470–72 (discussing *Walden*); Yost, *supra* note 2, at 703–04 (discussing *Walden*).
30. *Walden*, 571 U.S. at 279.
31. *See id.* at 277. *See generally* Calder v. Jones, 465 U.S. 783 (1984).
32. *Walden*, 571 U.S. at 291.
33. *Id.* at 286.
34. *Id.*

As explained by one U.S. district court, "after *Walden*, it is no longer possible, if it ever was, to interpret *Calder* to mean that, when a plaintiff suffers a tort injury in a particular state, the fact that he suffered the injury in that state necessarily suffices to permit the exercise of personal jurisdiction over the accused defendant there."[35] *Walden* confirmed what many post-*Calder* courts concluded—targeting a forum state resident is insufficient to create personal jurisdiction over nonresident defendants.[36] Although *Walden* did not explicitly overrule *Calder*, it limited and modified its "effects" test.[37]

In *Walden*, one party expressed concerns regarding ramifications of the holding "in cases where intentional torts are committed via the Internet or other electronic means."[38] The Court responded 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 . . . . We leave questions about virtual contacts for another day."[39] Despite the Court's explicit exclusion of its holding from "virtual contacts" cases, the majority of courts addressing personal jurisdiction in social media contacts cases apply *Walden*'s narrow, defendant-focused interpretation of the *Calder* effects test.[40]

35. Majumdar v. Fair, 567 F. Supp. 3d 901, 909 (N.D. Ill. 2021).

36. *See* Cook, *supra* note 1, at 637 ("*Walden* stands for the principle that courts will emphasize whether conduct directed at the forum is connected to the forum in more ways than just affecting the plaintiff"); Demirel, *supra* note 1, at 16 ("the Supreme Court made clear in 2014 by *Walden v. Fiore*, [] that the plaintiff cannot be the only connection between the defendant and the forum state").

37. *See* Axiom Foods, Inc. v. Acerchem Int'l, Inc., 874 F.3d 1064, 1069–70 (9th Cir. 2017) ("noting that in *Walden*, the Court expressly rejected the view that *Calder*'s effects test is satisfied merely by the defendant's commission of an intentional tort that is aimed at a person known to be a resident of the forum state"). *See also* Trammell & Bambauer, *supra* note 8, at 1167 ("courts have sensibly shown an inclination to confine *Calder* to its facts").

38. *Walden*, 571 U.S. at 290 n.9.

39. *Id*.

40. *See, e.g*., Janus v. Freeman, 840 Fed. App'x 928, 931 (9th Cir. 2020); Blessing v. Chandrasekhar, 988 F.3d 889, 904–07 (6th Cir. 2021); Johnson v. TheHuffingtonPost.com, Inc., 21 F.4th 314, 318 (5th Cir. 2021); Old Republic Ins. Co. v. Cont'l Motors, Inc., 877 F.3d 895, 905 (10th Cir. 2017); Torre v. Kardooni, No. 22-4693, 2022 WL 17813069, at *7 (D. N.J. Nov. 29, 2022); FireClean, LLC v. Tuohy, et al., No. 1:16-cv-0294, 2016 WL 43952093, at *7 (E.D. Va. July 21, 2016); Brown v. Dash, No. 20-10980-FDS, 2020 WL 6806433, at *10–11 (D. Mass. Nov. 18, 2020); Binion v. O'Neal, 95 F. Supp. 3d 1055 (E.D. Mich. 2015). *See also* Cook, *supra* note 1, at 622 ("Today, the waters have grown even murkier in social media cases when 'sharing,' 'liking,' 'tweeting,' and 'friending' in one forum can affect another forum."); Demirel, *supra* note 1, at 17 ("Although the Court expressed explicitly that it would not address the question of intentional torts that are committed via the internet, the effects of the decision can be seen in trademark disputes over the internet.").

III. THE CURRENT LEGAL LANDSCAPE OF PERSONAL JURISDICTION IN SOCIAL MEDIA CONTACTS CASES

The lack of U.S. Supreme Court guidance has created a fractured and unpredictable legal landscape for personal jurisdiction in social media contacts cases.[41] The Tenth Circuit recently observed the unique challenges that personal jurisdiction in the internet context creates and noted "[t]he 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."[42]

In the absence of U.S. Supreme Court guidance, some courts have expressly declined to adopt a rule regarding personal jurisdiction based on social media activity.[43] At least one circuit has expressed reluctance to answer the question the Court left open in *Walden*.[44] The situation is further complicated because, in some circuits, appellate decisions exist regarding personal jurisdiction and websites, e-commerce, and email, but not social media specifically.[45] In such situations, practitioners must both apply potentially relevant circuit precedent for internet activity generally and identify out-of-circuit social media-specific caselaw that is more factually

41. *See* WRIGHT & MILLER, *supra* note 2, at 2 ("New appellate precedents are constantly appearing, showing the subject is still in a state of flux."); Cook, *supra* note 1, at 647 ("there is not yet a clear consensus test – except at the highest level of abstraction – for personal jurisdiction cases based upon social media, even for intentional torts such as defamation"); Marketa Trimble, *Targeting Factors and Conflict of Law on the Internet*, 40 REV. LITIG. 1, 3 (2020) ("Even twenty-five years after the Internet became a multi-use and mass medium, law in the United States is unclear as to the rules of specific jurisdiction on the Internet"); Trammell & Bambauer, *supra* note 8, at 1130 ("the Court has remained conspicuously silent about one of the most vexing and urgent questions in [the area of personal jurisdiction]: when (if ever) virtual conduct, often through the Internet, can ever justify the exercise of judicial power"); Jenny Bagger, *Dropping the Other Shoe: Personal Jurisdiction and Remote Technology in the Post-Pandemic World*, 73 HASTINGS L.J. 861, 879 (2022) ("The disjointed caselaw and confusion around virtual contacts will only compound in the post-pandemic personal jurisdiction jurisprudence without a definitive approach" and "there is still no uniformity in analysis or outcome").

42. XMission, L.C. v. Fluent LLC, 955 F.3d 833, 844 (10th Cir. 2020).

43. The First Circuit observed that this Court "has not definitively answered how a defendant's online activities translate into contacts for purposes of the minimum contacts analysis." Plixer Int'l v. Scrutinizer GmbH, 905 F.3d 1, 7 (1st Cir. 2018). The Second Circuit has expressly declined to adopt a test for specific personal jurisdiction based on internet contacts. *See* Best Van Lines, Inc. v. Walker, 490 F.3d 239, 255 (2d Cir. 2007) (discussing the interconnectedness of the New York long-arm statute analysis and Due Process Clause analysis, but finding no personal jurisdiction under the long-arm statute, and clarifying its holding should not "be interpreted to indicate our position with respect to due process principles recently developed in the internet context by other circuits").

44. *Plixer*, 905 F.3d at 8 ("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").

45. *See* Belfield, *supra* note 7, at 474.

analogous. Several different approaches to personal jurisdiction based on internet and social media activity in intentional tort cases exist across the circuits.[46] The main issues courts grapple with are how to square *Calder* with *Walden* and whether *Zippo* is still relevant.[47]

A. Circuit Approaches to *Calder* and *Walden* in Social Media Cases

Courts are divided as to whether *Walden* distinguished or modified *Calder*.[48] Additionally, uncertainty exists as to whether *Walden* limited *Calder* to apply only to reputational torts, such as defamation or libel, or whether *Calder* applies to all intentional tort cases.[49] Courts differ as to whether *Walden* (a) functionally overruled or substantively cabined in *Calder* by holding that targeting of the forum state itself, as opposed to targeting a plaintiff in the forum state, is required, (b) set forth a separate, more stringent test for non-reputational intentional torts, or (c) simply distinguished *Calder* without revisiting the standard it set forth.[50]

The Ninth and Eleventh Circuits generally apply *Calder* as clarified by *Walden* to internet contacts cases.[51] The Seventh, Ninth, and Tenth Circuits have suggested that *Walden* limited the *Calder* effects test to reputational torts.[52] The Tenth Circuit interpreted *Walden* as holding "[t]he crux of *Calder* was that reputation-based 'effects' of the alleged libel connected the Defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort."[53] The Sixth Circuit has adopted an approach assuming *Walden* simply

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46. *See id.* ("Lower courts have taken a variety of approaches to personal jurisdiction in cases involving the internet."). While several state courts have addressed personal jurisdiction based on social media activity, this Article focuses solely on federal caselaw.

47. *Id.* at 467–68.

48. *Id.* at 470.

49. *Id.* at 471.

50. *Id.*

51. *See, e.g.,* Janus v. Freeman, 840 Fed. App'x 928, 930 (9th Cir. 2020) (*Walden* "expressly rejected the view that *Calder*'s effects test is satisfied merely by the defendant's commission of an intentional tort that is aimed at a person known to be a resident of the forum state."); Skyhop Techs., Inc. v. Narra, 58 F.4th 1211, 1229 (11th Cir. 2023) ("[Defendant] responds by citing *Walden* for the proposition that 'the plaintiff cannot be the only link between the defendant and the forum.' We agree that that is an accurate statement of the law").

52. *See* Old Republic Ins. Co. v. Cont'l Motors, Inc. 877 F.3d 895, 917 n.34 (10th Cir. 2017) (*Walden* "suggested that the *Calder* effects test does not extend beyond the defamation context"); Curry v. Revolution Labs., LLC, 949 F.3d 385, 397 (7th Cir. 2020) ("The Court also clarified that its prior holding in [*Calder*] was 'largely a function of the nature of the libel tort' that was involved, because the 'crux of *Calder* was that the reputation-based "effects" of the alleged libel connected the defendants to California, not just to the plaintiff.'") (citing *Walden*, 571 U.S. at 287); *Janus*, 840 Fed. App'x at 931 (distinguishing multiple Facebook messages from defendant to plaintiff's employees with the reputational injury in the forum state in *Calder*).

53. Walden v. Fiore, 571 U.S. 277, 287 (2014).

distinguished *Calder*.[54] Most recently, the Sixth Circuit reasoned: "Two cases 'bookend' this application of personal jurisdiction to intentional torts. . . . *Calder* [] establishes that the effects of intentional torts sometimes may establish personal jurisdiction . . . *Walden* [] identifies the other side of the line."[55]

B. The Lingering *Zippo* Test

A circuit split also exists regarding the continued applicability of the *Zippo* test.[56] While some courts still apply *Zippo* to cases involving websites and e-commerce, others explicitly reject it, and others have adopted an adaptation of it.[57] Pursuant to this test, specific personal jurisdiction over a nonresident defendant is allowable when "that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the state, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts."[58] The Third Circuit and D.C. Circuit generally apply the *Zippo* test to cases involving websites.[59] The First and Seventh Circuits have explicitly rejected the *Zippo* test.[60] The Eleventh Circuit has expressly not determined *Zippo*'s applicability.[61] The Fourth and Tenth Circuits have adopted an adaptation of the *Zippo* test.[62]

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54. Johnson v. Griffin, 85 F.4th 429, 433 (6th Cir. 2023) (citations omitted).

55. *Id*.

56. *See* Trammell & Bambauer, *supra* note 8, at 1150 fig.1 (setting forth treatment of *Zippo* test by circuit).

57. For a more detailed discussion of post-*Zippo* cases, see Niesel, *supra* note 1, at 125; Trimble, *supra* note 41, at 9–12.

58. ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002).

59. *See, e.g.*, Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452–53 (3d Cir. 2003) (noting *Zippo* "has become a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site" and discussing circuit court decisions "consistent with the principles articulated in the Zippo line of cases"); Fatouros v. Lambrakis, 627 Fed. App'x 84, 88 (3d Cir. 2015) (following *Toys "R" Us, Inc.*); Gorman v. Ameritrade Holding, 293 F.3d 506, 513 (D.C. Cir. 2002) ("on the record before this court, it is quite possible that, through its website, Ameritrade is doing business in the District of Columbia by continuously and systematically 'entering into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet.'") (citing *Zippo*, 952 F. Supp. at 1124).

60. *See* Chen v. United States Sports Acad., Inc., 956 F.3d 45, 55 n.3 (1st Cir. 2020) ("This court has never embraced that sliding scale analysis, and we have no occasion to consider the matter today. . . . where, as here, purposeful availment is plainly lacking, . . . the sliding scale adds nothing of consequence to the specific jurisdiction analysis"); Illinois v. Hemi Group 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.").

61. *See* Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1219 n.26 (11th Cir. 2009) (internet contacts case involving website in which court held "[a]lthough we pause

General applicability of the *Zippo* test aside, courts generally reject the *Zippo* test for cases involving social media activity.[63] As explained by one court, "[s]ocial media sites do not lend themselves to the Zippo interactivity test" because (1) "[d]efendants neither own nor operate the websites," and (2) social media posts are often not "primarily used to conduct business" but instead are used as a means of spreading information.[64]

C. Other Approaches

Beyond the varying interpretations of *Calder*, *Walden*, and *Zippo* discussed above, the Fifth and Eighth Circuits take other approaches to specific personal jurisdiction based on internet contacts.[65] The Fifth Circuit applies both the *Zippo* sliding scale test and *Calder* when considering specific personal jurisdiction over internet contacts cases.[66] The Eighth Circuit applies *Calder* as an "additional factor" in its minimum contacts analysis.[67] In addition to the variety of approaches taken by different circuits, each set of contacts is different and fact-specific, meaning counsel and courts can rely on out-of-circuit caselaw where analogous facts exist, such as tagging or social media sharing.

IV. GUIDANCE FOR PRACTITIONERS

A. Focus on *Walden* and Forget about *Zippo*

The *Calder* effects test can only be understood through the lens of *Walden*. *Walden* confirmed what most courts understood *Calder* to mean—that personal jurisdiction over a defendant can only exist in an intentional tort case where the defendant targeted the forum *state*, not just the plaintiff

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briefly to discuss the *Zippo* decision and the debate surrounding it, we express no opinion as to its applicability to the case at hand.").

62. *See* ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714–715 (4th Cir. 2002); Fidrych v. Marriott Int'l, Inc., 952 F.3d 124, 142 (4th Cir. 2020); Shrader v. Biddinger, 633 F.3d 1235, 1240–41 (10th Cir. 2011).

63. *See, e.g.,* Hyperbaric Options, LLC v. Oxy-Health, LLC, No. 12-12020, 2013 WL 5449959, at *5 (E.D. Mich. Sept. 30, 2013); Binion v. O'Neal, 95 F. Supp. 3d 1055, 1060 (E.D. Mich. 2015).

64. *Hyperbaric Options*, 2013 WL 5449959, at *6–7.

65. *See* Johnson v. TheHuffingtonPost.com, Inc., 21 F.4th 314, 318 (5th Cir. 2021) (explaining the court first analyzes interactivity, and if the site is interactive the court then applies "our usual tests" to determine "purposeful targeting"). *But see* Bros. & Sisters in Christ, LLC v. Zazzle, Inc., 42 F.4th 948, 954 (8th Cir. 2022) ("We 'use[] the Calder test merely as an additional factor to consider when evaluating a defendant's relevant contacts with the forum state,' and we construe the test narrowly, meaning that 'absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction'") (citations omitted).

66. *TheHuffingtonPost.com*, 21 F.4th at 318.

67. *See Zazzle*, 42 F.4th at 954.

in a forum state.[68] As such, *Walden* is, and should be, the dispositive test for personal jurisdiction in intentional tort cases arising out of a defendant's alleged social media activity. *Walden* is consistent with bedrock due process principles of fairness to the defendant and interstate federalism by requiring not just targeting of the plaintiff, but targeting of the forum state itself in order to justify personal jurisdiction based on a defendant's social media activity.

The *Zippo* test is wholly unhelpful and inappropriate to analyze personal jurisdiction based on social media activity.[69] As internet technology evolved from the creation of websites and e-commerce to social media, the *Zippo* test became obsolete for personal jurisdiction analyses involving social media.[70] As one scholar summed up: "The era of Zippo is over."[71] *Zippo*'s "interactivity" test for websites does not neatly overlay with social media as a technology for purposes of personal jurisdiction. *Walden*'s interpretation of the *Calder* effects test makes more sense for social media cases, and despite the absence of U.S. Supreme Court guidance, very loose contours of a personal jurisdiction paradigm in cases involving social media are developing.

B. Bedrock Due Process Principles Still Apply

A benefit of applying *Walden* when determining personal jurisdiction in social media contacts cases is *Walden*'s consistency with bedrock due process principles.[72] The U.S. Supreme Court appears reluctant to weigh in on social media contacts cases.[73] However, the Court has

68. Walden v. Fiore, 571 U.S. 277, 290 (2014).

69. *See* Yost, *supra* note 2, at 701 ("*Calder*—and not *Zippo*—is the relevant framework in social media defamation cases where the user is not the website owner"); Niesel, *supra* note 1, at 105 (arguing "courts should move away from interactivity-based analyses to a more holistic analysis that examines the defendant's expectations based on the increased global presence of the internet and traditional notions of fairness"). In fact, even before social media arose, problems with the *Zippo* test as applied to the internet arose. *See generally* Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147 (2005).

70. *See* Niesel, *supra* note 1, at 126 ("[t]he *Zippo* test is ultimately problematic because it is the product of an internet that no longer exists"); Cook, *supra* note 1, at 625 (identifying several differences between social media and websites, including (1) social media is "more interactive between users," (2) "individuals are far more likely to be parties speaking on social media," (3) "social media is often very personal rather than commercial," (4) "social media can have an immense, and very fast, effect on people and forums, while also having the added discomfort of being very invasive," and (5) "social media is also more likely to be more widely used each day relative to the average website"); Demirel, *supra* note 1, at 27 ("The *Zippo* method is especially not appropriate in social media, which both individuals and businesses use for their commercial activities via smartphone applications such as Instagram, Facebook, and Twitter.").

71. Niesel, *supra* note 1, at 127.

72. *Walden*, 571 U.S. at 283.

73. Niesel, *supra* note 1, at 115.

recently restated bedrock due process principles implicated in all personal jurisdiction cases, including those involving social media activity.[74] These principles include "treating defendants fairly and protecting 'interstate federalism.'"[75] These principles can be guideposts for practitioners navigating personal jurisdiction in social media contacts cases.

Regarding fairness to defendants, the U.S. Supreme Court has held that "the 'primary concern' in assessing personal jurisdiction is 'the burden on the defendant.'"[76] Recent holdings have reiterated this consistent refrain.[77] As explained by the U.S. Supreme Court in 2011, limitations on a court's exercise of personal jurisdiction over nonresidents are "a matter of individual liberty" because "due process protects the individual's right to be subject only to lawful power."[78] Because "'a state court's assertion of jurisdiction exposes defendants to the State's coercive power,'" personal jurisdiction over nonresident defendants requires that the defendant submit to the forum state's jurisdiction through actions directed at the state itself.[79]

With regard to the second principle of interstate federalism, the U.S. Supreme Court case law has repeatedly relied on interstate sovereignty when determining whether a court's exercise of personal jurisdiction comports with due process.[80] As explained by the Court, "[t]he sovereignty of each state, in turn implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."[81]

Over the years, both the U.S. Supreme Court and other courts have consistently held that defendants' liberty interest and interstate federalism limitations on courts' exercise of personal jurisdiction have not changed

74. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 529 U.S. 351, 359–60 (2021).

75. *Id.* (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980)). Significant scholarly writings exist addressing these principles. The goal of this Article, however, is simply to re-state these principles as one of several reasons for courts to follow *Walden* in the social media context, not to provide an exhaustive analysis of these principles, and therefore, such works are not included here.

76. Bristol-Myers Squibb Co. v. Super. Ct., 582 U.S. 255, 263 (2017) (citing *World-Wide Volkswagen*, 444 U.S. at 292).

77. *See, e.g., Ford*, 529 U.S. at 360 ("This opinion, [] resolves these cases by proceeding as the Court has done for the last 75 years—applying the standards set out in *International Shoe* and its progeny, with attention to their underlying values of ensuring fairness and protecting interstate federalism."). *See also* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 879 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty or property only by the exercise of lawful power" and "[t]his is no less true with respect to the power of a sovereign to resolve disputes through the judicial process than with respect to the power of a sovereign to prescribe rules of conduct for those within its sphere"); *Walden*, 571 U.S. at 283 (due process "constrains a State's authority to bind a non-resident defendant to a judgment of its courts").

78. *Nicastro*, 564 U.S. at 884. *See also* Trammell & Bambauer, *supra* note 8, at 1152.

79. *Bristol-Myers Squibb Co.*, 582 U.S. at 261, 263 (citations omitted).

80. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

81. *Id*. *See also Ford*, 529 U.S. at 360 ("One state's 'sovereign power to try' a suit, we have recognized may prevent 'sister States' from exercising their like authority.") (citing *World-Wide Volkswagen*, 444 U.S. at 293).

with technological and economic development, including the internet.[82] As explained by the Fourth Circuit:

> 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.[83]

Put simply by the Fifth Circuit: "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.'"[84]

Walden comports with these principles by requiring that a defendant actually targets the forum state.[85] *Walden* made clear that "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way."[86] If a plaintiff alleges targeting of a forum state, then adherence to the principles of fairness to the defendant and interstate

82. *World-wide Volkswagen*, 444 U.S. at 294 ("[I]t is a mistake to assume that this trend [in flexible approaches to jurisdiction] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. These restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states."); Illinois v. Hemi Group, LLC, 622 F.3d 754, 758 (7th Cir. 2010) ("the traditional due process inquiry . . . is not so difficult to apply to cases involving Internet contacts that courts need some sort of easier-to-apply categorical test"); Best Van Lines, Inc. v. Walker, 490 F.3d 239, 252 (2d Cir. 2007) ("traditional statutory and constitutional principles remain the touchstone of the [personal jurisdiction] inquiry"); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 711 (4th Cir. 2002) ("technology cannot eviscerate the constitutional limits on a State's power to exercise jurisdiction over a defendant"); Johnson v. TheHuffingtonpost.com, Inc., 21 F.4th 314, 325 (5th Cir. 2021) ("[o]ur personal jurisdiction inquiry should not change just because a defendant operates a web publication instead of a physical one" but noting "substantial physical circulation of print media" may reflect purposeful availment in a way that websites, which are "'circulated' to the public by virtue of their universal accessibility, which exists from their inception" does not) (citations omitted); GTE New Media Servs. v. Bellsouth Corp., 199 F.3d 1343, 1350 (D.C. Cir. 2000) ("[w]e do not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal court jurisdiction"); Eternal Asia Supply Chain Mgmt. (USA) Corp. v. Chen, No. 12 Civ. 6390(JPO), 2013 WL 1775440, at *8 (S.D.N.Y. Apr. 25, 2013) ("[t]he Second Circuit is thus aligned with other circuits skeptical of calls for major doctrinal innovation while applying settled principles of personal jurisdiction to the Internet").

83. *ALS Scan*, 293 F.3d at 712.

84. *TheHuffingtonpost.com, Inc*., 21 F.4th at 325 (citations omitted).

85. Walden v. Fiore, 571 U.S. 277, 291 (2014).

86. *Id.* at 290.

federalism follows.[87] If, however, a plaintiff cannot allege more than a defendant's intentional act to harm the plaintiff in the forum state, then a strict reading of *Walden* and *Calder* compels a court to find no personal jurisdiction, which also furthers these bedrock principles.

C. Trends in what Constitutes "Targeting" in Social Media Cases

A default rule has emerged that "merely posting a defamatory statement about the plaintiff online is not enough to hale the poster into the state where the plaintiff resides; instead, the poster's conduct must have involved the plaintiff's state in some additional way."[88] The cases in which courts found personal jurisdiction generally fall into three categories: (1) doxing, (2) including forum state-specific content in social media posts, and (3) taking steps to make state residents the post's intended audience. As explained by one scholar, these categories make up three "markers that may indicate the rare cases" in which "social media alone provide constitutionally sufficient minimum contacts with a forum state."[89] As another scholar explains, "Courts are looking for plus factors to demonstrate such 'aiming'; these plus factors will vary by the particular social media involved but might include, for instance, efforts to increase or limit the audience, hashtags, references to particular content relevant to a forum state, references to addresses, or a physical contact, among others."[90] Without the presence of at least one of these categories of acts, personal jurisdiction is very unlikely.

1. Doxing

Doxing is use of "the Internet to source out and collect someone's personal and private information and then publicly releasing that information online."[91] Where a defendant allegedly doxes a plaintiff by including their physical address in a social media post, at least two courts have found sufficient targeting of the forum state by the defendant to justify personal jurisdiction.[92] Although doxing a plaintiff's online information

87. *Id.*

88. Vangheluwe v. Got News LLC, 365 F. Supp.3d 850, 858 (E.D. Mich. 2019) (citations omitted). *See also* Torre v. Kardooni, No. 22-4693, 2022 WL 17812193, at *1 (D.N.J. Nov. 29, 2022); Brana v. Moravcik, No. 1:19-CV-2802, 2020 WL 5026502, at *2 (N.D. Ohio Aug. 25, 2020); Blessing v. Chandrasekhar, 988 F.3d 889, 905 n.15 (6th Cir. 2021) ("our sister circuits have routinely held that 'posting allegedly defamatory comments or information on an internet site does not, without more, subject the poster to personal jurisdiction wherever the posting could be read (and the subject of the posting may reside)'") (citations omitted).

89. *See* Yost, *supra* note 2, at 693.

90. Cook, *supra* note 1, at 658.

91. *Vangheluwe*, 365 F. Supp. 3d at 858 (citations omitted).

92. *Id.*; Lord v. Smith, No. 22 C 2689, 2022 WL 17668707, at *4 (N.D. Ill. Dec. 14, 2022) ("critically, Smith also outed Ryan Lord as Ohmwrecker to millions of Smith's

may not amount to targeting a forum state, doxing using a plaintiff's physical address may be sufficient targeting of the forum state by the defendant to justify personal jurisdiction.[93] As explained by one court, physical address doxing results in forum state residents' increased likelihood of visiting the physical address, can involve police in the forum state, and have a greater impact on forum state residents associated with the physical address.[94]

2. Social Media Posts Making the Forum State the Focal Point

Pre-social media personal jurisdiction cases focused on whether internet activity generally made the forum state the "focal point" of the internet activity.[95] More recently, social media cases similarly focus on whether the forum state is the "focal point" of the social media post.[96] Some courts have found a defendant targeted the forum state where a defendant's social media activity includes state institutions or otherwise makes the forum state, as opposed to the plaintiff, the "focal point" of the post.[97] Defendants' social media activity can make the forum state a focal point by "tagging and hashtags that . . . address the plaintiff's homestate" or if a post "tags or mentions other users or accounts associated with the forum state."[98] Hashtags allow users interested in a specific subject or place to see multiple posts relating to it, for example, #Montana or #Siamesekittens. Tagging refers to identifying specific social media users in social media posts by

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followers, and he then published Lord's home address and directed those who saw his posts to threaten Lord. . . . This practice of defamation and harassment in the online community is known as 'doxing.' By allegedly publishing Lord's home address and encouraging others to take action against him, he expressly aimed his defamatory conduct at Illinois.") (citations omitted).

93. *See* Yost, *supra* note 2, at 716 ("A first marker showing constitutionally sufficient minimum contacts is 'doxing.'").

94. *Vangheluwe*, 365 F. Supp. 3d at 858. *See also* Yost, *supra* note 2, at 716–17 (discussing *Vangheluwe*).

95. *See* IMO Indus. v. Kiekert AG, 155 F.3d 254, 264 (3d Cir. 1998) ("the forum must be the focal point of the harm and that the defendant must expressly aim the tortious activity at the forum").

96. *See* Torre v. Kardooni, No. 22-4693, 2022 U.S. Dist. LEXIS 228356, at *22 (D. N.J. Nov. 29, 2022) (finding no personal jurisdiction because "New Jersey is not the focal point of the allegedly defamatory statements"); Feehan v. Doe, No. 1:19-CV-1169-RP, 2021 U.S. Dist. LEXIS 256774, at *11–12 (W.D. Tex. Aug. 9, 2021) ("The Court finds that Plaintiffs have failed to carry their burden to show that the comments posted on the Internet by Defendants were aimed at Texas or Texans as required to support a finding of personal jurisdiction . . .").

97. One scholar refers to this as a "context-focused test," in which courts ask "whether the forum state, or possibly the defendant's activities in the forum state, is the actual focus of the text." *See* Yost, *supra* note 2, at 707. Yost argues that "a forum state is the 'focal point' or 'subject' of content when: (1) the text significantly discusses the forum state by name; or (2) the text significantly discusses an industry or community so understood to be centered in the forum state as to signify the forum state itself. *Id.*

98. *Id.* at 719.

including the users' social media accounts to ensure they receive the post or that a user's account is linked to the original post.

For example, an Illinois court determined that it had personal jurisdiction in a case involving defamatory statements about professors at the University of Chicago.[99] The court noted that the defendant had tagged @UChicago, the University's handle, in tweets criticizing the University.[100] Additionally, the underlying actions giving rise to defendant's statements occurred in Illinois and were related to the University and its employees.[101] The Court considered the reputational nature of defamation, and concluded the reputational injury alleged is relative to "members of the University of Chicago community in Illinois."[102] The court concluded that "the University of Chicago—and therefore, its home state of Illinois—is plainly the 'focal point both of the story and of the harm suffered.'"[103] The court held "by using the '@UChicago' handle in her Twitter posts, it is as if defendant sent open letters to the University of Chicago and posted copies on campus bulletin boards for all to see. . . . [T]he letter also exists in a public forum where anyone else with interest in the community can read it by searching Twitter for '@UChicago' mentions."[104]

3. Tagging or Sharing Social Media Posts with Forum State Residents

Where it is clear that the intended "audience" for a social media post is forum state residents, this may be sufficient purposeful direction to establish personal jurisdiction.[105] Targeting forum state residents can occur if the post does "something more"[106] than merely being viewable to forum state residents, such as tagging them, adding forum state-related hashtags, or sharing the post specifically with a significant number of forum state residents. Several courts have found personal jurisdiction over nonresident defendants in social media contacts cases in part based on tagging or sharing the social media posts with residents.[107] For example, a California

99. Majumdar v. Fair, 567 F. Supp. 3d 901, 909 (N.D. Ill. 2021).

100. *Id.*

101. *Id.*

102. *Id.* at 910.

103. *Id*.

104. *Id.* at 911.

105. Yost, *supra* note 2, at 706 (discussing the "audience-focused approach in which courts focus on the communication's intended readers").

106. Vangheluwe v. Got News LLC, 365 F. Supp. 3d 850, 858 (E.D. Mich. 2019) ("pre- or post-Walden, there must be 'something more' than just mere injury to the plaintiff in the forum"); Young v. New Haven Advoc., 315 F.3d 256, 263 (4th Cir. 2002) ("Something more than posting and accessibility is needed to 'indicate that the [newspapers] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state . . .'") (citations omitted).

107. *See, e.g.*, Hawbecker v. Hall, 88 F. Supp. 3d 723, 725 (W.D. Tex. 2015) (defendant "contacted Hawbecker's friends, family members, and employer during 2014 via Facebook messages and e-mail in an effort to publicize her allegations"); Hogan v.

district court exercised personal jurisdiction over a nonresident for a social media post that "included the username of '@rams,' which is a well-known Los Angeles sports team."[108] The court reasoned that "[w]hile the '@rams' does not identify Plaintiff in the way that his physical address would, it is still reasonable to infer that [defendant]'s posts were intended to cause some action in California or catch the eye of Rams fans, who are more likely to reside in California than in any other state."[109] Where it appears clear that the defendant is intentionally targeting the forum state's residents as the audience for its message by tagging or sharing the message, courts are more likely to find the defendant targeted the forum state.[110]

However, tagging of forum state residents is not *ipso facto* targeting of the forum state. In fact, several cases have held no personal jurisdiction exists over a nonresident defendant in social media contacts cases where the defendant tagged residents in the allegedly defamatory posts.[111] Tagging of forum residents must evidence a specific targeting of the forum state together with case-specific facts to justify personal jurisdiction.[112]

D. Practical Tips

Personal jurisdiction is generally decided on a motion to dismiss under federal or state rule of civil procedure 12(b)(2).[113] Jurisdictional discovery and an evidentiary hearing are possibilities where a defendant seeks to dismiss for lack of personal jurisdiction.[114] Unlike motions to dismiss for failure to state a claim, a defendant can add to the record when filing a motion to dismiss for lack of personal jurisdiction.[115] Counsel for both sides should remember these options when devising strategies for challenging personal jurisdiction or responding to personal jurisdiction

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Weymouth, No. CV192306MWFAFMX, 2020 WL 8028111, at *7 (C.D. Cal. Nov. 13, 2020).

108. *Hogan*, 2020 WL 8028111, at *7.

109. *Id.*

110. *See* Yost, *supra* note 2, at 706.

111. *See, e.g.*, Torre v. Kardooni, No. 22-4693, 2022 U.S. Dist. LEXIS 228356, *3 (D. N.J. Nov. 29, 2022); Brown v. Dash, No. 20-10980-FDS, 2020 WL 6806433, at *12 (D. Mass. Nov. 18, 2020); Cityzenith Holdings, Inc. v. Liddell, No. 22 C 5101, 2023 WL 5277888, at *8 (N.D. Ill. Aug. 15, 2023).

112. *See* Yost, *supra* note 2, at 721.

113. FED. R. CIV. P. 12(b) ("Every defense to a claim for relief must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (2) lack of personal jurisdiction").

114. FED. R. CIV. P. 12(i). *See generally* 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE CIVIL § 1067.6 (4th ed. 2023) (discussing federal courts' ability to order jurisdictional discovery, evidentiary hearings, or quasi-evidentiary hearings, and citing cases regarding each).

115. WRIGHT & MILLER, *supra* note 114 ("In considering the jurisdictional issue, a district court may examine discovery material as well as affidavits submitted by the parties").

challenges. For example, where a plaintiff believes that defendant has posted from multiple accounts or has removed previous posts, requests for jurisdictional discovery may be useful as an alternative request when responding to a motion to dismiss.

For plaintiffs, tort claims based solely on a defendant's social media activity should include all allegations proactively preempting a personal jurisdiction challenge. Plaintiff counsel should identify all related social media posts by defendant prior to filing suit. Complaint allegations should identify all tagging, hashtagging, and sharing done by defendant of their social media posts at issue. If physical address doxing has occurred, it should be alleged in the complaint. Although an intentional tort cause of action generally focuses on harm to the plaintiff, a pleading must also focus on a defendant's targeting of the forum state to establish personal jurisdiction. A plaintiff should be prepared to address why the exercise of jurisdiction over a nonresident defendant does not offend due process principles of fairness and interstate federalism.

For defendants, it is crucial not to waive a challenge to personal jurisdiction by failing to raise it in a responsive pleading or motion.[116] Where a plaintiff's pleading has clearly not established targeting of a forum state by the defendant, seek to dismiss on those pleadings. Where the issue may be close, consider requesting an evidentiary hearing as an alternative. If your client has additional social media posts relating to the claims against him not yet raised by the plaintiff, prepare for the possibility that the court will allow jurisdictional discovery or allow the plaintiff to amend the complaint. If your client does not have related additional social media posts, an affidavit stating this in conjunction with an argument that plaintiff's allegations do not establish targeting of the forum state may be successful. Focusing on the well-established principles of fairness to the defendant and interstate federalism can buttress arguments that the defendant has not purposefully directed activity to the forum state.

For both plaintiffs and defendants, keep in mind that purposeful direction through targeting of the forum state is just one of several personal jurisdiction requirements. The state law standard for personal jurisdiction must be met, which may have specific language about where the action accrued that could implicate social media activity. The social media posts must be related to the claims brought by the plaintiff.[117] And in all cases, personal jurisdiction must be "reasonable," giving rise to the ability to

116. *See, e.g.*, FED. R. CIV. P. 12(b).

117. Walden v. Fiore, 571 U.S. 277, 284 (2014) ("For a state to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State"). *See* WRIGHT & MILLER, *supra* note 2 ("If the cause of action does not arise from the defendant's Internet contacts with the forum state, the court will not exercise specific jurisdiction over the defendant"); Trammell & Bambauer, *supra* note 8, at 1137–38 ("there has to be a fairly tight nexus between the 'minimum contacts' and the lawsuit – in the Court's usual language, the plaintiff's claim must 'arise out of or relate to' the defendant's forum contacts") (citations omitted).

argue other various issues, such as the burden on the defendant, the forum state's interest in adjudicating the dispute, and efficiency.[118]

Counsel for both sides should be aware of the particular approach to *Calder*, *Walden*, and *Zippo* in their circuit. If there is not a clear rule in the social media context, do not be afraid to pull from social media caselaw in other circuits that have similar facts. In many circuits, social media cases specifically are issues of first impression. Even if a circuit has followed or adopted *Calder*, *Walden*, and *Zippo* in e-commerce or website precedent, it does not follow that the same approach is justified in a social media contacts case.

CONCLUSION

The lack of a clear legal test regarding personal jurisdiction in social media contacts cases is frustrating for practitioners, parties, and courts. While the current state of ambiguity is an opportunity for fact-specific analysis, persuasive advocacy, and crafting of standards, it also fosters unpredictability. Like most areas of technology, the law lags behind, leaving courts stuck either trying to fashion new tests or use old tests created for different technology.

Because the U.S. Supreme Court has not weighed in on personal jurisdiction in social media contacts, courts have relied on *Calder*, *Walden*, and *Zippo*. This approach is complicated given that *Walden* functionally overruled *Calder* but technically did not. *Walden*'s interpretation of the *Calder* effects test is the approach most courts are moving toward, which allows courts to analyze whether the defendant's social media activity targeted the forum state, thereby preserving principles of fairness to the defendant and interstate federalism. For the run of the mill negative post by an out-of-state resident, personal jurisdiction will not lie. Where a defendant has doxed the plaintiff, targeted an audience in the forum state, or included forum state-specific content in posts, personal jurisdiction may be more likely.

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118. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351, 358 (2021) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945)); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) ("The relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the corporation to defend the particular suit which is brought there.'") (citing *Int'l Shoe Co*., 326 U.S. at 317). *See also* Trammell & Bambauer, *supra* note 8, at 1138 ("the exercise of personal jurisdiction must be fundamentally fair and reasonable").