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TWEET, POST, SHARE . . . GET HALED INTO COURT? *CALDER* MINIMUM CONTACTS ANALYSIS IN SOCIAL MEDIA DEFAMATION CASES

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ABSTRACT

Modern communication has been transformed by ubiquitous social media platforms and near-universal connectivity. Any individual, from any location, can now publish speech to thousands or potentially millions of readers, viewers, or listeners via Twitter, Facebook, Instagram, Snapchat, YouTube, and other social media platforms. For this reason, defamation claims based on social media content are increasingly common. Unfortunately, courts considering these suits lack clear and consistent rules for when a social media post satisfies "minimum contacts" and "fair play and substantial justice," the due process requirements for exercise of personal jurisdiction over a nonresident defendant. This Comment clarifies minimum contacts analysis in social media defamation cases by: (1) suggesting a standardized approach to the Calder v. Jones *effects-based personal jurisdiction analysis in social media defamation cases, and (2) identifying "markers" for finding minimum contacts based on social media posts alone.*

In defamation cases, the most common framework for personal jurisdiction analysis is the "effects" or "expressly-aiming" framework of Calder v. Jones. *The Supreme Court clarified* Calder*'s requirements in* Walden v. Fiore *but did not clarify what contacts would be constitutionally sufficient in an online defamation case. Currently, courts employ two main approaches to Calder analysis in online defamation cases. This Comment identifies these as "audience-focused" and "content-focused" approaches. Because these two approaches can lead to divergent results when applied to the same facts, the audience-based approach (typified by the Fourth Circuit's "targeting" test) should be abandoned in favor of a content-based approach like the Fifth Circuit's. However, courts should not adopt the Fifth Circuit's approach unchanged but should use an objective, text-based*

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analysis. Also, courts should reject the "brunt of the harm" standard used by several circuits in favor of the Ninth Circuit's sufficient harm standard.

Regardless of which approach to Calder *is used, only rarely will social media contacts alone provide constitutionally sufficient minimum contacts with a forum state. This Comment suggests, for the first time, three "markers" that may indicate these rare cases. One marker is "doxing" or "doxxing," in which social media users provide identifying personal information about a victim. Direct doxing, not sharing or retweeting, is required. A second marker is the use of "hashtags," "tagging," "shoutouts," or "mentions," indicated by use of the "@" or "#" symbols. A final marker is the use of social media platforms with an inherent geographic focus, like TripAdvisor, Yelp, or Nextdoor. While full* Calder *analysis will be required to confirm whether exercise of personal jurisdiction is consistent with due process, looking for these markers will help courts quickly identify situations where finding personal jurisdiction is most likely.*

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I. INTRODUCTION

IMAGINE you're at home on a Saturday afternoon, hosting a family wedding.[1] Without warning, your social media feeds flood with threatening messages from complete strangers. The tweets and posts say you're a murderer, a druggie, a left-wing or right-wing extremist. They reveal your personal information. As the social media threats escalate over the next few hours, police warn you to leave your home. You've done nothing wrong; you've simply been misidentified online as the perpetrator of a terrible crime. If you sue the individuals who made these false and defamatory tweets and posts—bringing a claim in federal court in your home state, under diversity jurisdiction—will the court find it can exercise personal jurisdiction based on the tweets and posts alone?

The internet has now been an integral part of American life for more than twenty-five years.[2] Throughout this time, the rules for when a court may exercise personal jurisdiction based on internet contacts have been murky. More than a decade ago, one legal scholar summarized the rule for "whether the target [of internet defamation] can [successfully] sue at home or not" by stating, "[T]here is no clear rule; . . . there is not even really a clear majority position."[3] In sum, he said, "It depends."[4] Today, internet communication has been radically transformed by ubiquitous social media platforms and near-universal connectivity. Any individual, from any location, can publish speech to thousands or potentially millions of readers, viewers, or listeners via Twitter, Facebook, Instagram, YouTube, and other social media platforms. Yet, in this changed landscape, the question of whether a court in a defamed individual's home district may exercise personal jurisdiction over these out-of-state social media users remains unclear.[5]

To help courts and practitioners answer this question, this Comment analyzes the current law of *Calder v. Jones* effects-based personal jurisdiction in social media defamation cases. The Comment recommends standardizing the *Calder* interpretations to resolve the current circuit split and inconsistent applications of *Calder*. It also identifies, for the first time, "markers" to help courts engaged in *Calder* analysis identify the

1. This scenario is based on the facts of *Vangheluwe v. Got News, LLC*, 365 F. Supp. 3d 850, 855–56 (E.D. Mich. 2019). *See* discussion *infra* Section V.A.

2. *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

3. Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L.R. 473, 473 (2004).

4. *Id.*

5. *See infra* Parts III, V.

rare case where personal jurisdiction in a defamation case may be proper based on social media contacts alone. Standardizing *Calder* analysis in social media cases and identifying markers of minimum contacts in this area will help social media users have fair notice of when their posts will justify haling them into a distant court. This is the essence of due process.[6]

Part II introduces personal jurisdiction jurisprudence, briefly describes common "frameworks" for determining "purposeful availment" sufficient for minimum contacts, focuses on the *Calder* effects framework for finding these contacts, and identifies significant differences between the circuits' current *Calder* interpretations. Part III synthesizes current circuit interpretations of the "expressly aiming" prong of the *Calder* effects framework, identifying two broad approaches: "audience-focused" and "content-focused" tests. Part IV offers suggestions to resolve the circuit split or inconsistencies in application by standardizing the *Calder* analysis, generally and in social media defamation cases. Finding the Fourth Circuit's audience-focused test and the Fifth Circuit's content-focused test each deficient in some way, it recommends adopting a new, objective, textually based, and content-focused test. Finally, this Comment finds personal jurisdiction over a nonresident based solely on social media contacts is unlikely under either current approaches to *Calder* or the proposed alternative. Recognizing this, Part V identifies three "markers," based on recent cases, that may indicate the relatively rare circumstances in which social media contacts alone justify the court's exercise of personal jurisdiction. These markers are (1) doxing, (2) geographically focused hashtags or tagging, and (3) the use of social media platforms with an inherent geographic focus, like TripAdvisor, Nextdoor, and Yelp.

Courts and practitioners need this guidance as, in the social media era, *Calder* may be a defamation victim's sole route to finding relief in a local court.[7] Because social media companies cannot be sued based on content posted by their users, social media cases are more likely than traditional media or other internet cases to involve only individual, non-corporate defendants.[8] *Calder*, unlike other frameworks that may readily establish minimum contacts by a corporate publisher or website owner or operator, reaches an individual author or speaker.[9] Moreover, users of social media need fair notice about when their social media posts are likely to justify haling them into court in a distant forum. By helping resolve these issues, this Comment addresses an important issue in a complex and fast-developing area of the law.

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6. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

7. *See* Borchers, *supra* note 3, at 474.

8. *See* 47 U.S.C. § 230(c)(1) (2018) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); *see, e.g.*, Klayman v. Zuckerberg, 753 F.3d 1354, 1358 (D.C. Cir. 2014) (interpreting § 230(c)(1) as granting Facebook immunity for suits based on content posted by users).

9. *See* Calder v. Jones, 465 U.S. 783, 789–90 (1984); *see also infra* Section II.A.

II. PERSONAL JURISDICTION JURISPRUDENCE AND HOW IT ACCOMMODATES THE INTERNET AND SOCIAL MEDIA

Personal jurisdiction jurisprudence considers when a court may exercise its judgment over a defendant, consistent with due process.[10] Traditionally, personal jurisdiction was based on the physical presence of the defendant within the court's territorial jurisdiction.[11] As American society developed in size, complexity, and mobility, however, the Supreme Court in *International Shoe Co. v. Washington* abandoned a requirement of actual or fictional "presence" within the jurisdiction and announced a test based on "minimum contacts" and "fair play and substantial justice."[12]

Today, a finding of personal jurisdiction over a nonresident defendant requires considering minimum contacts and fair play and substantial justice via one of two alternative analyses: general jurisdiction or specific jurisdiction.[13] General jurisdiction analysis asks whether the defendant is "at home" in the forum state.[14] For an individual defendant, "the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place," generally the corporation's place of incorporation or location of its corporate headquarters.[15] Outside the "paradigm" fora, only a limited set of extremely continuous and systematic contacts will satisfy this inquiry.[16] A court with general jurisdiction over a nonresident defendant may hear any claim against that defendant.[17]

Specific jurisdiction, by contrast, is only available if the plaintiff's claim against a nonresident defendant "aris[es] out of or relate[s] to the defendant's contacts with the forum."[18] This Comment is concerned with specific jurisdiction, as general jurisdiction is usually not available over a nonresident defamation defendant like the one this Comment considers.[19]

Specific jurisdiction analysis proceeds in two steps.[20] First, the court

10. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 722 (1877); *Int'l Shoe*, 326 U.S. at 316.
11. *Int'l Shoe*, 326 U.S. at 316.
12. *See id.* As many prior articles thoroughly discuss the historical background and subsequent development of the Court's personal jurisdiction jurisprudence from *Pennoyer* to *International Shoe* and beyond, this Comment does not duplicate those efforts. *See, e.g.*, 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, 458–67 (2018); Zoe Niesel, *#PersonalJurisdiction: A New Age of Internet Contacts*, 94 IND. L.J. 103, 105–14 (2019).
13. *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1780 (2017).
14. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).
15. Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) ("With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.'" (alteration in original)).
16. *Id.*
17. *Bristol-Myers Squibb*, 137 S. Ct. at 1780.
18. *Daimler*, 571 U.S. at 127 (alteration in original).
19. *See, e.g.*, Calder v. Jones, 465 U.S. 783, 789–90 (1984).
20. *See, e.g.*, Revell v. Lidov, 317 F.3d 467, 469 (5th Cir. 2002).

examines whether the state's long-arm statute permits that state's courts to exercise jurisdiction over the type of claim asserted.[21] Second, if the long-arm statute does permit jurisdiction, the court examines whether its exercise of jurisdiction over the defendant satisfies due process.[22] When the state's long-arm statute is coextensive with due process, as are the statutes of many states (including Texas), the two steps merge into a single due process analysis.[23]

Many courts apply a three-part approach to specific jurisdiction due process analysis.[24] First, the court assesses whether the plaintiff's claims arise out of, or are related to, the defendant's forum-related activities.[25] This is the "relatedness" prong.[26] Second, the court considers whether the defendant has purposefully availed himself of the protections and benefits of the forum state's laws, such that he should reasonably foresee being haled into court there.[27] This is the "purposeful availment" prong, which determines if the defendant has minimum contacts with the forum state.[28] Finally, the court considers whether the exercise of jurisdiction is reasonable under the circumstances.[29] This is the "reasonableness" prong, which determines whether the exercise of jurisdiction satisfies fair play and substantial justice.[30] The analysis commonly proceeds from relatedness, to minimum contacts, to reasonableness, with courts completing each subsequent analytical step only if the prior step is satisfied.[31]

Because the critical threshold question in an individual defamation suit is often whether the minimum contacts prong of a specific jurisdiction due process analysis is satisfied,[32] this Comment focuses on common frameworks for finding purposeful availment and how purposeful availment may be satisfied by social media contacts.

A. Four Purposeful Availment Frameworks: *Burger King*, *Keeton*, *Zippo*, and *Calder*

Courts employ at least four "frameworks for determining whether an out-of-state defendant's activities satisfy the purposeful direction require-

21. *Id.* In the Second Circuit, personal jurisdiction in defamation cases is often determined by long-arm statute analysis, since New York's long-arm statute is more restrictive than due process for defamation claims. *See, e.g.*, Top of Form Penachio v. Benedict, 461 F. App'x 4, 5–6 (2d Cir. 2012).

22. *Revell*, 317 F.3d at 469.

23. *Id.*

24. *See, e.g.*, Phillips v. Prairie Eye Ctr., 530 F.3d 22, 27 (1st Cir. 2008); Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004).

25. *See, e.g.*, *Prairie Eye Ctr.*, 530 F.3d at 27; *Schwarzenegger*, 374 F.3d at 802.

26. *See, e.g.*, *Prairie Eye Ctr.*, 530 F.3d at 28–29; *Schwarzenegger*, 374 F.3d at 802.

27. *See, e.g.*, *Prairie Eye Ctr.*, 530 F.3d at 28–29; *Schwarzenegger*, 374 F.3d at 802.

28. *See, e.g.*, *Prairie Eye Ctr.*, 530 F.3d at 28–29; *Schwarzenegger*, 374 F.3d at 802.

29. *See, e.g.*, *Prairie Eye Ctr.*, 530 F.3d at 29; *Schwarzenegger*, 374 F.3d at 802.

30. *See, e.g.*, *Prairie Eye Ctr.*, 530 F.3d at 29; *Schwarzenegger*, 374 F.3d at 802.

31. *See, e.g.*, *Prairie Eye Ctr.*, 530 F.3d at 27–30.

32. *See, e.g.*, Farquharson v. Metz, No. 13–10200–GAO, 2013 WL 3968018, at *2 (D. Mass. July 30, 2013).

ment."[33] Crucially, these frameworks are not alternatives to minimum contacts analysis.[34] Rather, they are alternative methods of conducting a minimum contacts analysis.[35] The frameworks are: (1) continuing relationships with forum state residents (continuing relationships); (2) deliberate exploitation of the forum state market (market exploitation); (3) "website interactivity"; and (4) harmful effects in the forum state (effects).[36]

First, the continuing relationships framework, articulated in *Burger King Corp. v. Rudzewicz* examines a defendant's "continuing relationships and obligations with [residents] of [the forum state]."[37] The continuing relationships framework is commonly used in contracts-based cases or where commercial relationships are involved.[38]

Second, the market exploitation framework, employed by the Court in the defamation context in *Keeton v. Hustler Magazine*[39] and in "stream of commerce" products liability cases like *J. McIntyre Machinery, Ltd. v. Nicastro,*[40] asks whether the defendant marketed and sold to the forum's residents, or otherwise intentionally exploited the forum state's market.[41] *Keeton's* version of the market exploitation framework finds minimum contacts by a *publisher* when the publication has "regular" and "substantial" circulation in the forum state.[42] Courts engaging in *Keeton* analysis count how many subscribers live in the forum state.[43] But *Keeton* analysis will not show purposeful availment by the *author* whose work was published and circulated—the author and the publisher's contacts are considered separately.[44] For this reason, courts have not used *Keeton* where the author posts defamatory content over social media platforms, which, as noted above, cannot be treated as a "publisher."[45] Arguably, courts could

33. Old Republic Ins. Co. v. Cont'l Motors, Inc., 877 F.3d 895, 905 (10th Cir. 2017).

34. *See* Louis Vuitton Malletier, S.A. v. Mosseri, 736 F.3d 1339, 1357 (11th Cir. 2013) (noting that "[t]he 'effects test,' however, does not supplant the traditional minimum contacts test for purposeful availment"). *But see* C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 622–24 (2006) (noting widespread confusion in application of *Calder*'s effects test as it relates to other tests for personal jurisdiction).

35. *See* Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A., 623 F.3d 440, 445 (7th Cir. 2010) (stating that *Calder*'s "express aiming" test is not an alternative to minimum contacts analysis but "merely one means of satisfying the traditional due process standard set out in *International Shoe* and its familiar progeny").

36. *See Old Republic*, 877 F.3d at 905; Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

37. *Old Republic*, 877 F.3d at 905 (second alteration in original) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475–76 (1985)).

38. *See id.*, 877 F.3d at 905.

39. 465 U.S. 770 (1984).

40. 564 U.S. 873 (2011).

41. *See Nicastro*, 564 U.S. at 879; *Keeton*, 465 U.S. at 781.

42. *See Keeton*, 465 U.S. at 773–74, 781.

43. *See, e.g.*, Fielding v. Hubert Burda Media, Inc., 415 F.3d 419, 426–27 (5th Cir. 2005).

44. *See id.* at 425.

45. *See* 47 U.S.C. § 230(c)(1) (2018); *see, e.g.*, Klayman v. Zuckerberg, 753 F.3d 1354 (D.C. Cir. 2014).

apply *Keeton* to individual posters, tweeters, or sharers–especially "influencers," professional social media users with many thousands or even millions of followers. Courts might reasonably construe influencers as both "authors" and "publishers" of their online content, finding these social media accounts sufficiently like the magazine in *Keeton*. Discussion of this idea is outside the scope of this Comment but merits further exploration.

Third, the website interactivity framework, also referred to as the "*Zippo* sliding scale test," was articulated in *Zippo Manufacturing Company v. Zippo Dot Com, Inc*.[46] This framework considers the degree to which a website is passive, active, or in-between.[47] Courts employing the *Zippo* framework find purposeful availment by a website owner or operator, based purely on contacts between the forum resident and the site, when the site is "active."[48] Active sites solicit detailed information or facilitate online purchases.[49] Conversely, a purely "passive" website that simply places information on the internet for anyone to view does not constitute purposeful availment of a market where the site may be viewed.[50] For sites falling somewhere in-between the active and passive extremes, purposeful availment is found on a case-by-case basis.[51]

Finally, there is the *Calder* harmful effects framework, also referred to as the "expressly aiming" framework, which finds personal jurisdiction where a defendant has "expressly aimed" the conduct at the forum state, causing harm in the forum state.[52] This framework is commonly used in defamation and other intentional tort cases and is discussed in detail below.[53]

Calder, like *Zippo*, is used in the internet context.[54] However, *Calder* and *Zippo* reach different types of internet users. Because *Zippo* looks at structural choices made by a website's owner/operator, such as whether to allow comments or to use interactive forms, *Zippo* is only properly used to determine minimum contacts *by a website's owner or operator*—the party who has made the relevant structural choices.[55] *Calder*, as discussed below, is broader.

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46. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).
47. *Id.* at 1124–25.
48. *See id.* at 1125–26.
49. *Id.* at 1124.
50. *Id.*
51. *Id.*
52. Calder v. Jones, 465 U.S. 783, 788–89 (1984); Old Republic Ins. Co. v. Cont'l Motors, Inc., 877 F.3d 895, 907 (10th Cir. 2017).
53. *See Old Republic*, 877 F.3d at 908.
54. *See* Pacheco v. Padjan, No. 16-3625, 2017 WL 3217160, at *3 (E.D. Pa. July 28, 2017); Hawbecker v. Hall, 88 F. Supp. 3d 723, 727 n.1 (W.D. Tex. 2015).
55. *See* Freeplay Music, Inc. v. Cox Radio, Inc., No. 04 Civ. 5238GEL, 2005 WL 1500896, at *7 (S.D.N.Y. June 23, 2005) (noting where a party's contact with a forum arises through radio broadcasts made available on a website, however, courts recognize that "[a]lthough there may be interactive elements to the website[ ], the simulcasts of the radio broadcasts are [a] passive . . . enterprise[,]" and therefore "cannot serve as a basis for jurisdiction").

For this reason, while some courts have used the *Zippo* analysis alone or in conjunction with *Calder* to find minimum contacts by website users, *Calder*—and not *Zippo*—is the relevant framework in social media defamation cases where the user is not the website owner.[56] For example, while *Zippo* could be used to find personal jurisdiction over Facebook, an internet company that has made structural and technical choices about how much interactivity the site will allow, or over a blog owner who sets up his site to allow e-commerce or comments, *Zippo* would not give jurisdiction over a Facebook user who merely posts on a page provided by Facebook and who has made no such structural interactivity choices for the site.

B. The Effects Framework for Finding Purposeful Availment: *Calder v. Jones* (1984) and *Walden v. Fiore* (2014)

Calder v. Jones established the effects framework for minimum contacts.[57] *Calder* involved a defamation suit filed in California federal district court by actress Shirley Jones, a resident of California, against the Florida-based author and Florida-based editor of a scurrilous *National Enquirer* article about Jones and her husband.[58] Neither the editor nor the author traveled to California in the course of preparing the story.[59] The author, however, "frequently travele[d] to [the state] on business, . . . reli[ed] on phone calls to sources in California for the information contained in the article," and made a pre-publication phone call to Jones' husband in California to read him "a draft of the article so as to elicit his comments upon it."[60] The editor had only traveled to California twice, on unrelated errands.[61] For the article in question, "he reviewed and approved the initial evaluation of the subject[,] . . . edited [the article] in its final form. . . . [, and] declined to print a retraction requested by [Jones]."[62] The *Enquirer*, a celebrity gossip magazine, had its largest circulation in California.[63]

The *Calder* court held that the *Enquirer*'s contacts with California (like the circulation found sufficient in *Keeton*, decided the same term) could not be imputed to its employees.[64] Nevertheless, the Court concluded both employees had minimum contacts with California based on a theory of "targeting" and "effects" and a fact-specific analysis.[65] The California court, it found, could exercise personal jurisdiction over both

56. *See Pacheco*, 2017 WL 3217160, at *3; *Hawbecker*, 88 F. Supp. 3d at 727 n.1, 729.
57. *See Calder*, 465 U.S. at 783.
58. *Id.* at 784–85.
59. *Id.* at 785–86.
60. *Id.*
61. *Id.* at 786.
62. *Id.*
63. *Id.* at 785.
64. *See id.* at 790. The *Enquirer* did not challenge personal jurisdiction. *Id.* at 785.
65. *Id.* at 789–90.

employees.[66]

As a threshold matter, the Court noted that the author and the editor were "not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California."[67] The author and the editor "knew [the article] would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation."[68]

Next, the Court listed several relevant facts: First, the article "concerned the California activities of a California resident . . . whose . . . career was centered in California."[69] Second, "[t]he article was drawn from California sources."[70] Third, "the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California."[71]

"In sum," the Court concluded, "California [was] the focal point both of the story and of the harm suffered."[72] For this reason, the author and the editor each should have "'reasonably anticipate[d] being haled into court [in California]' to answer for the truth of the statements made in their article."[73] This holding, the Court stated, was based on the effects the defendants' Florida conduct had in California.[74]

In the decades that followed, *Calder* was criticized. Some found it "mechanical," "inflexible," and insufficiently representative of the effects test from the Restatement (Second) of Conflicts of Laws on which it purportedly was based.[75] Others argued that *Calder* provided inadequate guidance about which (if any) of the several factors it considered were necessary to satisfy personal jurisdiction, or how much weight each factor should be given.[76] Lower courts developed divergent tests for applying *Calder*, considering factors or elements including knowledge, intention, brunt of the harm, effects felt in the forum state, subject of the speech, and location of sources.[77] Despite the criticism, the *Calder* framework was frequently used in both traditional media and internet media defama-

66. *Id.* at 790.
67. *Id.* at 789–90.
68. *Id.*
69. *Id.* at 788.
70. *Id.*
71. *Id.* at 789.
72. *Id.*
73. *Id.* at 790 (quoting World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297).
74. *Id.* at 788–89.
75. *See* Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth with No Exit*, 47 AKRON L. REV. 617, 634 (2014).
76. *See* Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 94 (2004).
77. *See infra* Section III.A; *see also* Lee Goldman, *From* Calder *to* Walden *and Beyond: The Proper Application of the "Effects Test" in Personal Jurisdiction Cases*, 52 SAN DIEGO L. REV. 357, 365–70 (2015) (discussing broad vs. narrow interpretations of *Calder*, pre-*Walden*).

tion cases.[78] Courts also employed the *Calder* framework in cases involving other intentional torts.[79]

The Court clarified *Calder's* requirements in a non-defamation intentional tort context in *Walden v. Fiore*.[80] In *Walden*, a Nevada federal district court dismissed a Nevada resident's claims against a Georgia resident for lack of personal jurisdiction.[81] The case involved a Nevada couple passing through the Atlanta airport en route home to Las Vegas.[82] Walden, a local Georgia law enforcement officer working as a deputized DEA agent at the airport, seized $97,000 cash from the couple's carry-on luggage.[83] Though the couple explained they were professional gamblers and documentation of the money's gambling provenance was subsequently provided by the couple's attorney, Walden filed an affidavit stating he had probable cause to believe the money was drug related and subject to forfeiture.[84] The money was not returned for more than nine months.[85] The couple sued Walden in federal district court in Nevada, alleging he violated their civil rights by his initial search and seizure, and by his subsequent filing of a false affidavit.[86]

On appeal, the Ninth Circuit reversed, applying its *Calder* effects test to the "false probable cause affidavit aspect of the case."[87] Walden, it held, "'expressly aimed' . . . at Nevada by submitting [a false] affidavit with knowledge that it would affect persons with a 'significant connection' to Nevada."[88]

Reversing the Ninth Circuit, the Supreme Court issued three key clarifications to *Calder*.[89] First, the "proper question [in a *Calder* framework analysis] 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."[90] Second, the contacts giving rise to the claim at issue must be ones "that the 'defendant *himself*' creates with the forum State."[91] Third, "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."[92] Clarifying this last point, the court continued, "a defendant's contacts with the forum State may be intertwined with his

78. *See* Belfield, *supra* note 12, at 470 (noting that "*Calder* . . . is especially relevant to defamation cases involving the internet and social media"); *see also* Clemens v. McNamee, 615 F.3d 374, 379 (5th Cir. 2010); Fielding v. Hubert Burda Media, Inc., 415 F.3d 419, 426 (5th Cir. 2005); IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3d Cir. 1998).
79. *See, e.g.*, Walden v. Fiore, 571 U.S. 277, 286 (2014).
80. *Id.* at 283–86.
81. *Id.* at 277.
82. *See id.* at 280.
83. *Id.* at 279–80.
84. *Id.* at 280–81.
85. *Id.* at 281.
86. *Id.*
87. *Id.* at 282.
88. *Id.*
89. *Id.* at 283–91.
90. *Id.* at 290.
91. *Id.* at 284 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)).
92. *Id.*

transactions or interactions with the plaintiff or other parties. But a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction."[93]

Moreover, the *Walden* court distinguished the defamation tort at issue in *Calder* from other intentional torts. "The crux of *Calder*," the *Walden* Court clarified, "was that the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff."[94] Defamation, it emphasized, is unique in its dependence on a reputational impact and because the injury is held to actually occur wherever the injurious content is published.[95] "[B]ecause publication to third persons is a necessary element of libel, the [*Enquirer*] defendants' intentional tort actually occurred in [C]alifornia."[96] Furthermore, "the reputational injury caused by the [*Enquirer*'s] story would not have occurred but for the fact that the defendants wrote an article *for publication in California* that *was read by a large number of California citizens*."[97] In sum, "the 'effects' caused by the defendants' article—*i.e.*, the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct to *California*, not just to a plaintiff who lived there."[98] This, "combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction."[99]

So *Walden* draws a key distinction—the alleged tort in *Walden* did not take place in the plaintiff's home state, while the alleged defamation in *Calder* did. And *Walden* leaves open the question of where the floor lies for effects-based purposeful availment when the tort—as in a defamation case—*does* take place in the forum state.[100] The Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court* does not settle this question, as the intentional tort in that case also occurred outside the chosen forum state.[101]

Thus, this question remains open after *Walden*: When a defamatory act takes place in the plaintiff's home state (because published, read, and understood there) against a forum resident, exactly what kinds of additional facts will satisfy the requirement of minimum contact with the fo-

93. *Id.*
94. *Id.* at 287; *see also* Goldman, *supra* note 77, at 373.
95. *See Walden*, 571 U.S. 287–88.
96. *Id.* at 288.
97. *Id.* at 287–88 (emphasis added).
98. *Id.* at 288.
99. *Id.*
100. *See* Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1443–44 (2018) (arguing that because the *Walden* plaintiffs suffered the intentional tort in the defendant's home state and not their own home state, "[*Walden* does] not compel a more restrictive approach [than *Calder*] to determining whether an out-of-state defendant has established minimum contacts with the forum state in the context of specific jurisdiction"); Julie Cromer Young, *The Online-Contacts Gamble After* Walden v. Fiore, 19 LEWIS & CLARK L. REV. 753, 763–64 (2015) (discussing the fact that courts have continued to apply *Calder*, post-*Walden*, in internet contacts cases).
101. *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1782 (2017) (noting that "as in *Walden*, all the conduct giving rise to the nonresidents' claims occurred elsewhere[,] [i]t follows that the California courts cannot claim specific jurisdiction").

rum state? Courts currently use a variety of interpretations of the *Calder* effects framework, leading to a variety of possible answers.

C. Current Interpretations of the *Calder* Effects Framework

Lower courts employ a variety of approaches for structuring *Calder* effects analyses to consider *Calder*'s multiple requirements. Several circuits interpret *Calder* as requiring three elements, which can be generally described as (1) an intentional act, (2) expressly aimed at the forum state, with (3) knowledge of injury or harm to be felt in the forum state.[102] Other circuits apply a more flexible approach.[103]

Among the circuits using three-part tests, interpretive differences exist. The Eighth Circuit phrases the second element as "uniquely or expressly aimed" at the forum state.[104] The Third, Eighth, Tenth, and Eleventh Circuits all require that the "brunt of the harm" be suffered in the forum state, while the Ninth Circuit has specifically rejected the "brunt of the harm" standard and merely requires "harm" suffered in the forum state.[105] The Third Circuit characterizes these same three requirements as "factors" rather than elements, with "factor two" being the "focal point of the harm" and "factor three" being the "focal point of the tortious activity."[106] However, at least one lower court in the Third Circuit has acknowledged that, post-*Walden*, the "focal point of the tortious activity" must be treated as an element and not a mere factor.[107]

Both in three-part test jurisdictions and flexible jurisdictions, the bulk of *Calder* analysis in internet defamation cases involves the expressly aiming requirement.[108] Part III below synthesizes multiple circuit analyses to identify two dominant paradigms for the expressly aiming requirement. Again, each of these approaches is properly understood as a

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102. *See* Old Republic Ins. Co. v. Cont'l Motors, Inc., 877 F.3d 895, 907 (10th Cir. 2017); Morrill v. Scott Fin. Corp., 873 F.3d 1136, 1152 (9th Cir. 2017); Johnson v. Arden, 614 F.3d 785, 796 (8th Cir. 2010); Tamburo v. Dworkin, 601 F.3d 693, 703 (7th Cir. 2010); IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3d Cir. 1998); *see also* Miller v. Gizmodo Media Grp., LLC, 383 F. Supp. 3d 1365, 1373 (S.D. Fla. 2019).

103. *See, e.g.*, Clemens v. McNamee, 615 F.3d 374, 380 (5th Cir. 2010); Young v. New Haven Advocate, 315 F.3d 256, 261 (4th Cir. 2002).

104. *See* Johnson v. Arden, 614 F.3d 785, 796 (8th Cir. 2010).

105. *See Old Republic*, 877 F.3d at 907; *IMO Indus*., 155 F.3d at 265; *Gizmodo*, 383 F. Supp. 3d at 1373. *But see* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'antisemitisme, 433 F.3d 1199, 1206–07 (9th Cir. 2006). The Seventh Circuit appears to join the Ninth in not requiring the "brunt" of the harm. *See Tamburo*, 601 F.3d at 703.

106. Pacheco v. Padjan, No. 16-3625, 2017 WL 3217160, at *4 (E.D. Pa. July 28, 2017).

107. *Id.* at *3 (quoting *IMO Indus.*, 155 F.3d at 265–66) ("A plaintiff can only satisfy the effects test by pointing 'to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity.' A plaintiff cannot satisfy *Calder* merely by demonstrating that 'the harm caused by the defendant's intentional tort is primarily felt within the forum.'" (quoting *IMO Indus.*, 155 F.3d at 265)).

108. *See, e.g*., Clemens v. McNamee, 615 F.3d 374, 380 (5th Cir. 2010) (flexible approach); Phillips v. Prairie Eye Ctr., 530 F.3d 22, 27 (1st Cir. 2008) (three-element approach); Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004) (three-element approach).

framework for conducting only the expressly aiming prong of a *Calder* analysis, not as a replacement for the full *Calder* analysis. For this reason, the three-part test approach is superior because courts using a more flexible approach may neglect one of the prongs.[109] Such incomplete analysis could result in the public or a practitioner misunderstanding *Calder*'s requirements. It might even lead courts to erroneous results. To help reduce such error and provide clearer notice of what *Calder* requires in social media defamation cases, this Comment attempts next to understand circuits' underlying approaches to *Calder* and to recommend a standardized approach.

III. IDENTIFYING TWO APPROACHES TO *CALDER*'S EXPRESSLY AIMING PRONG: AUDIENCE-FOCUSED AND CONTENT-FOCUSED TESTS

This Part identifies two common expressly aiming paradigms currently in use, drawn from multiple circuits' *Calder* tests. The Comment christens these approaches "audience-focused tests" and "content-focused tests." Neither approach precisely aligns with the standardized approach this Comment recommends in Part IV, though the content-focused approach comes close. Understanding these two approaches and how they diverge reveals key differences in what courts currently consider in *Calder* analysis and how courts using these different approaches may reach different personal jurisdiction conclusions given similar facts.

First is the audience-focused approach, in which courts focus on the communication's intended readers. Audience-focused tests key off *Calder*'s emphasis on the fact that the author and the editor "knew that the brunt of that injury would be felt by respondent in the [forum state]" because that was where the magazine's interested audience was concentrated.[110]

An example of an audience-focused test is the Fourth Circuit's "targeting" test for *Calder* analysis in the internet defamation context. This test was developed in *Young v. New Haven Advocate*.[111] In *Young*, the court held that it did not have personal jurisdiction over local Connecticut newspapers for articles they published on their websites about Connecticut prisoners housed in Virginia prisons, though the articles were accessed and read in Virginia and allegedly defamed a Virginia resident, the prison warden.[112] The crux of the analysis, the court said, was whether the newspaper intended to target an audience in the forum state, not whether the content was available to internet readers in the forum state and caused reputational harm in the forum state.[113] Because the newspa-

109. *See, e.g.*, *Pacheco*, 2017 WL 3217160, at *5 (incorrectly substituting the Fourth Circuit's "targeting" test for a full, three-prong *Calder* analysis).
110. Calder v. Jones, 465 U.S. 783, 784 (1984).
111. 315 F.3d 256 (4th Cir. 2002).
112. *Id.* at 263–64.
113. *Id.*

pers in *Young* were local—focusing on local stories and catering to local subscribers—Connecticut readers and not Virginia readers were the target audience.[114]

The targeting test has been criticized as inconsistent with *Calder*.[115] The criticism is that the test deemphasizes *Calder*'s effects requirement by focusing exclusively on the intended connection between the content and the forum state.[116] But understood as a framework for only the expressly aiming prong of the three-prong *Calder* analysis (requiring an intentional act, expressly aimed at the forum state, with knowledge of injury or harm to be felt in the forum state), there is no inconsistency between *Calder* and the targeting test.[117]

Courts in the First, Third, Eighth, and Ninth Circuits have used similar audience-focused tests or have followed *Young*.[118] At least one lower court in the Third Circuit has specifically approved *Young*.[119] The Eighth Circuit's "Uniquely or Expressly Aiming" requirement functions like the targeting test by focusing on where the interested audience of a website posting was concentrated.[120] Similarly, courts in the First Circuit have emphasized determining where the author "intended [the effect of the statements] to be felt."[121] Like the *Young* test, this puts the focus on the intended recipient of the speech.

Next are content-focused tests, in which courts analyzing *Calder*'s expressly aiming prong focus on the text itself rather than its intended audience.[122] Courts using this approach key into *Calder*'s requirement that the forum state be the "focal point . . . of the story."[123] This type of analysis gives primacy to whether the forum state, or possibly the defendant's

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114. *Id.*

115. *See* Belfield, *supra* note 12, at 476–77; Sarah H. Ludington, *Aiming at the Wrong Target: The "Audience Targeting" Test for Personal Jurisdiction in Internet Defamation Cases*, 73 OHIO ST. L.J. 541, 542–44 (2012).

116. *See* Belfield, *supra* note 12, at 476–77; Ludington, *supra* note 115.

117. Effects should be considered in the injury/harm prong. Unfortunately, the Fourth Circuit's approach in *Young* has sometimes been applied in place of the full *Calder* analysis, rather than as only a framework for the expressly aiming prong. *See, e.g.*, Pacheco v. Padjan, No. 16-3625, 2017 WL 3217160, at *5 (E.D. Pa. July 28, 2017) ("There is no single formula for triggering a personal jurisdiction finding under *Calder*. A plaintiff can demonstrate that an Internet post targeted a specific forum by, for example, demonstrating that (i) that the website itself focused on a specific geographic area or (ii) the content of the post targeted a specific geographic area.").

118. *See* Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797 (9th Cir. 2004); *Pacheco*, 2017 WL 3217160, at *5; Bigfoot on the Strip, LLC v. Winchester, No. 18-3155-CV-S-BP, 2018 WL 3676962, at *3 (W.D. Mo. Aug. 2, 2018); Cohane v. Nat'l Collegiate Athletic Ass'n, No. 14–10494–RGS, 2014 WL 1820782, at *3 (D. Mass. May 8, 2014).

119. *See, e.g.*, *Pacheco*, 2017 WL 3217160, at *5.

120. *See Bigfoot on the Strip*, 2018 WL 3676962, at *3.

121. *See, e.g.*, *Cohane*, 2014 WL 1820782, at *3 ("In the context of a defamation claim, 'purposeful availment' is determined by where the effects of the defamatory statements are intended to be felt." (quoting Calder v. Jones, 456 U.S. 783, 788–90 (1984))); Plixer Int'l, Inc. v. Scrutinizer GmbH, 293 F. Supp. 3d 232, 238 (D. Me. 2017), *aff'd*, 905 F.3d 1 (1st Cir. 2018) ("[T]he focus is on the defendant's intentions." (internal quotation omitted)).

122. *See, e.g.*, Clemens v. McNamee, 615 F.3d 374, 380 (5th Cir. 2010); Fielding v. Hubert Burda Media, Inc., 415 F.3d 419, 426 (5th Cir. 2005).

123. *See, e.g.*, *Fielding*, 415 F.3d at 426–27. *See generally Calder*, 465 U.S. at 789.

activities in the forum state, is the actual focus of the text.[124] It considers whether the forum state is mentioned or discussed—and if so, how prominently.[125] Content-focused courts may consider the intended audience of the speech in *Calder*'s effects prong.[126]

An example of this approach is the Fifth Circuit's "subject and sources" test.[127] While this test technically has two parts, courts emphasize the subject prong.[128] Furthermore, in social media cases (unlike traditional internet media cases), the informal nature of the medium means a person who tweets, posts, or shares is unlikely to conduct interviews and research before doing so and there will commonly be no "sources" to consider.[129] For this reason, in social media defamation cases, this test turns entirely on the "subject" prong.[130]

The Fifth Circuit applied this content-based test in *Clemens v. McNamee*.[131] *Clemens* involved a defamation claim brought by professional baseball player Roger Clemens against Brian McNamee, his former trainer.[132] McNamee told federal authorities and a government commission investigating the use of performance enhancing drugs in baseball that, on three occasions, he had injected Clemens with performance enhancing drugs.[133] McNamee's statements were published in a Congressional report and reprinted by "every national news service" in the country "as well as every major newspaper in Texas."[134] McNamee also repeated his statements to a reporter for *Sports Illustrated*'s website, SI.com, which carried the story.[135] McNamee made the statements in New York City.[136] The alleged injections took place in Toronto and New York.[137] Clemens was a well-known resident of Houston, Texas, and brought suit in Texas.[138]

Considering "whether these defamatory remarks constituted purposeful availment such that McNamee could have reasonably anticipated being haled into a Texas court as a result of his statements," the court found they did not.[139] McNamee's statements, the court found, were not

124. *See, e.g.*, *Fielding*, 415 F.3d at 426–27.
125. *See* Robert J. Condlin, *supra* note 76, at 143 n.566.
126. *See Clemens*, 615 F.3d at 380.
127. *See Fielding*, 415 F.3d at 426 ("[T]o exercise specific jurisdiction in a libel action, the 'aim' of the plaintiff under the *Calder* test must be demonstrated by showing that (1) the subject matter of and (2) the sources relied upon for the article were in the forum state."); *see also* Alexandra Wilson Albright, *Personal Jurisdiction*, 30 APP. ADVOC. 9, 38 n.118 (2017) (using the "subject and sources" nomenclature).
128. *See Clemens*, 615 F.3d at 380.
129. *See* Hawbecker v. Hall, 88 F. Supp. 3d 723, 728 (W.D. Tex. 2015).
130. *See id.*
131. 615 F.3d at 376.
132. *Id.* at 377.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 379–80.

focused on Texas.[140] "[T]he statements did not concern activity in Texas; nor were they made in Texas or directed to Texas residents any more than residents of any state."[141] Specifically, the court emphasized, they "concerned non-Texas activities—the delivery of performance-enhancing drugs to Clemens in New York and Canada."[142]

At bottom, for the *Clemens* court, the key question was where the activities described in the text took place.[143] If the activities discussed did not take place in the forum state, the forum state was not the article's subject.[144] This turns therefore not on *who* the author intended to read the content, but *what words* the author chose to include—what activities the author *described*. Therefore, the test is content based.

Naturally, courts using these two approaches do not consider only audience *or* content in their *Calder* analyses. Courts also mix in consideration of the other factors.[145] However, courts appear to give greater weight to different factors under each approach.[146] Understanding the audience-based and content-based approaches to the expressly aiming prong of the *Calder* analysis helps courts and practitioners grasp which factors may weigh most heavily in the court's analysis. Even more helpful would be adopting a standardized approach to the analysis, as the next Part proposes.

IV. STANDARDIZING *CALDER* ANALYSIS IN SOCIAL MEDIA DEFAMATION CASES TO INCREASE CONSISTENCY AND SERVE JUDICIAL ECONOMY

This Comment has identified two essential differences between the audience-based and content-based analyses described above: (1) the degree to which each requires courts to consider an author's subjective intent, and (2) the degree to which each allows for the possibility of exercising jurisdiction based on an unintended but, in fact, interested audience. These differences almost certainly lead to divergent outcomes in cases with similar facts. To avoid outcome variability and to resolve this circuit split, courts should adopt a unified interpretation of *Calder*'s expressly aiming prong. For the same reasons, courts should also adopt a unified standard for the effects prong. This Part presents suggestions for standardizing the *Calder* analysis in these two key areas.

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140. *Id.* at 380.
141. *Id.*
142. *Id.*
143. *See id.*
144. *See id.*
145. *See, e.g.*, *id.* at 380; Young v. New Haven Advocate, 315 F.3d 256, 263 (4th Cir. 2002).
146. *Compare Clemens*, 615 F.3d at 376–80 (focusing on the location of the activities described and mentioning only briefly that the statements at issue were not "directed to residents of Texas"); *with Young*, 315 F.3d at 262–64 (focusing on the location of the intended audience and mentioning only briefly that the statements at issue "discuss[ed] conditions in a Virginia prison").

A. Adopt a "Content-based" Approach to the Expressly Aiming Prong

First, courts should adopt a unified approach to the expressly aiming prong, using a content-based approach. The content-based approach is objective, promotes judicial economy, improves outcome consistency, and satisfies the "purposeful availment" that is at the heart of minimum contacts due process analysis.[147]

The first reason for adopting a uniform, textual, and content-based *Calder* analysis is that this standard will be objective and clear. This Comment proposes that courts find 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.

Significant discussion means that the text discussed either the forum state itself (e.g. Texas) or an identifiable geographic location within that state (e.g. Dallas). Significant discussion need not mean exclusive discussion. For example, a social media post that discusses the Washington, D.C.-based lobbying efforts of a California businessman, on behalf of his Silicon Valley company and the Silicon Valley community, might make "significant mention" of both California and Washington, D.C., even if three-fourths of the post discussed D.C. while only one-fourth discussed Silicon Valley.

Significant discussion is not, however, only a passing or incidental mention. For example, an article that discusses the exploits of a couple at their home in Germany and mentions only in passing that the wife was a "former Mrs. Texas" does not "significantly discuss" Texas.[148] Similarly, a social media post that discusses the DC-based lobbying efforts of a "California businessman," that label being the only mention of California, would not "significantly discuss" California.

If an author does not discuss a specific state or place by name, but discusses an industry, community, or entity that is exclusively and widely understood to be centered in that state, the state is still a focus of the content under this proposed test.[149] Examples could be the national political and lobbying industry (Washington, D.C.), Hollywood (California, as in *Calder*), and perhaps the gambling industry (Nevada), or the leadership of the Church of Jesus Christ of the Latter Day Saints (Utah). These industries or entities are so widely understood to have a connection to the forum state that significant discussion of the industry has the same effect as significant discussion of the state itself for expressly aiming analysis. However, discussing industries or entities that lack common identification with a single state, or which might be identified with several possible

147. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475–76 (1985).
148. *See* Fielding v. Hubert Burda Media, Inc., 415 F.3d 419, 427 (5th Cir. 2005).
149. *See* Calder v. Jones, 465 U.S. 783, 788 (1984) (example of Hollywood as an industry commonly understood to be centered in California).

states, would not satisfy the expressly aiming requirement. The standard should be high so that courts will err on the side of not finding personal jurisdiction where an author has chosen not to discuss the forum state by name. Nor should courts be asked to discern whether the particular author of the content at issue would have known to associate the industry with the forum state, as that would require excessive judicial inquiry at the personal jurisdiction stage. But if an average American could reasonably be expected to know of the association, this would meet the standard.

Crucially, an objective, content-based standard should *not* ask whether an article is focused on the plaintiff's activities in the forum state, as the Fifth Circuit's subject and sources test currently does.[150] Imagine, in a jurisdiction employing the Fifth Circuit's test, that a Facebook post discusses this activity of a Texas resident plaintiff: sending e-mails to a resident of New York. Imagine further that the author's article never mentions Texas or the plaintiff's residence there, but it does mention California, where the email's recipient lives. The plaintiff wishes to sue in Texas, her home state. The defendant argues that the post makes no mention of Texas but only describes e-mailing, an activity with no natural geographic locus. In response, the plaintiff argues that the activities the post discussed (her emailing) *actually did occur in the forum state*.

The Fifth Circuit's current content-based standard could lead to an absurd result in this scenario—the conclusion that a state that is never mentioned in the article, is unidentifiable from the article, and *which the author might have had no notice was even connected with the conduct he wrote about*—is the "focus" of this content. At the very least, this possibility is not completely foreclosed by the text of the Fifth Circuit's current test. So a court might struggle finding the correct result. If instead, the textual, content-based test proposed above is used, the correct result is clear, and courts need not struggle. There would be no jurisdiction in the forum state based on this hypothetical post.

Second, this textual content-based standard will serve judicial economy. The textual, content-based test proposed here would be easy for a court to administer. The court must simply ask whether the forum state is significantly discussed or whether there is significant discussion of an industry that everyone understands to be associated with the forum state. The audience-based test, by contrast, requires more complicated analysis, potentially drawing inferences of subjective intent, and may be impossible to administer when the intended audience is national.

For example, in a local media website case like *Young*, determining the locus of the intended audience is easy.[151] Courts can reasonably presume a local newspaper intends to serve its local audience.[152] But if the *Young* article (focusing on the Virginia activities of the Virginia resident prison

150. *See Clemens*, 615 F.3d at 379.
151. *See* Young v. New Haven Advocate, 315 F.3d 256, 262–64 (4th Cir. 2002).
152. *See id.* at 263.

warden) had been posted on Facebook, the audience question is less clear. Twitter, Facebook, Instagram, YouTube, and other social media platforms have national or international user bases. An individual user's "friends" or "followers" will often be geographically diverse. Under these facts, it will be difficult for courts to objectively determine what, if any, forum state's audience was the intended recipient.[153] A textual, content-based analysis avoids this thorny inquiry in the expressly aiming prong.

Third, adopting a textual, content-based test will improve consistency in judicial outcomes. At present, the two expressly aiming approaches outlined above—content-based and audience-based—can yield dramatically different results. The article at issue in *Young*, for example, discussed a Virginia prison warden's activities at a Virginia prison housing Connecticut inmates.[154] The article was written by a Connecticut-based local newspaper and posted on that newspaper's website.[155] Applying its audience-based targeting test, the *Young* court found no personal jurisdiction in Virginia, since the paper intended its article to be read by Connecticut subscribers.[156] Under the Fifth Circuit's content-based subject and sources test, by contrast, the Virginia court would likely have been able to exercise personal jurisdiction, since activities at a Virginia prison were discussed in the article.[157] Under the textual, content-based test proposed by this article, jurisdiction would be proper in Virginia—Virginia was significantly discussed in the article—and in Connecticut, which was also significantly discussed.

Finally, an objective textual content-based standard for *Calder*'s expressly aiming prong clearly shows purposeful availment, which is key to finding the minimum contacts needed for due process. As the *Young* example directly above shows, the content-based test proposed by this Comment potentially expands the number of states where personal jurisdiction would be proper. But the number of states that could exercise personal jurisdiction—at least based on the expressly aiming prong of the *Calder* analysis—would be limited by a clear, easy to determine rule that is consistent with notice and purposeful availment. As *Walden* instructs, this proposed test finds minimum contacts (based on expressly aiming) only when the defendant choses to create them.[158] The defendant's choice to discuss a state—or an industry commonly associated with that state, as the defendant would or should know—firmly limits the places where he should reasonably expect to be haled into court. Textual choices will determine the author's amenability to suit in a remote forum state.

153. *See, e.g.*, Farquharson v. Metz, No. 13–10200–GAO, 2013 WL 3968018, at *2 (D. Mass. July 30, 2013).
154. *Young*, 315 F.3d at 263–64.
155. *Id.* at 263.
156. *See id.* at 264.
157. *See* Clemens v. McNamee, 615 F.3d 374, 379 (5th Cir. 2010).
158. Walden v. Fiore, 571 U.S. 277, 284 (2014).

B. Require "Significant Harm"—Not "Brunt of the Harm"—in the Effects Prong

Though this Comment focuses on the expressly aiming prong of a *Calder* analysis, a standardized approach to full *Calder* analysis in the social media defamation context is also needed. As briefly discussed in Part II, courts currently differ in whether they require that the "brunt of the harm" be suffered in the forum state or merely require that "harm" was suffered in the forum state.[159] The Third, Eighth, Tenth, and Eleventh Circuits follow the "brunt of the harm" standard.[160] In contrast, the Ninth Circuit specifically rejects a "brunt of the harm" requirement, stating that, "[i]f a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state."[161] The Ninth Circuit, making this determination, stated that it was "following *Keeton*, decided the same day as *Calder*, in which the Court sustained the exercise of personal jurisdiction in New Hampshire even though [i]t [wa]s undoubtedly true that the bulk of the harm done to petitioner occurred outside New Hampshire."[162]

This difference, like the approach taken to the expressly aiming requirement, can be dispositive. For this reason, this circuit split must be resolved. The best resolution will be to adopt a "significant harm" standard for the effect or harm prong of a *Calder* analysis. Showing significant harm at this stage, this Comment proposes, requires the victim to credibly allege an actual, not hypothetical, injury arising from the alleged defamation.

Sufficient harm, not brunt of the harm, is what due process requires for personal jurisdiction in defamation cases.[163] While *Calder* noted that Shirley Jones felt the "brunt of the harm" in California, the Court did not hold in that case that the brunt of the harm was essential.[164] And as the Ninth Circuit pointed out in *La League Contre Le Racisme*, *Keeton*'s purposeful availment requirement, announced the same day as *Calder*, did not compare *Hustler Magazine*'s New Hampshire contacts with the magazine's contacts in other states or require the brunt of the harm in New Hampshire.[165] Using a substantial harm standard thus reconciles *Calder* with *Keeton*.

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159. *See* Old Republic Ins. Co. v. Cont'l Motors, Inc., 877 F.3d 895, 907 (10th Cir. 2017); IMO Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3d Cir. 1998); Miller v. Gizmodo Media Grp., LLC, 383 F. Supp. 3d 1365, 1373 (S.D. Fla. 2019). *But see* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'antisemitisme, 433 F.3d 1199, 1206 (9th Cir. 2006). The Seventh Circuit appears to join the Ninth in not requiring the "brunt" of the harm. *See* Tamburo v. Dworkin, 601 F.3d 693, 703 (7th Cir. 2010).

160. *See Old Republic*, 877 F.3d at 907; Louis Vuitton Malletier, S.A. v. Mosseri, 736 F.3d 1339, 1356 (11th Cir. 2013); Johnson v. Arden, 614 F.3d 785, 796 (8th Cir. 2010); *IMO Indus*., 155 F.3d at 265.

161. *See Yahoo! Inc.*, 433 F.3d at 1207.

162. *Id.* (internal quotation omitted).

163. *See id.* at 1205–08.

164. *See* Calder v. Jones, 465 U.S. 783, 789–91 (1984).

165. *See Yahoo! Inc.*, 433 F.3d at 1207.

Some might argue that the brunt of the harm standard serves to limit potentially boundless jurisdiction when internet contacts are involved. However, jurisdictional reach is already firmly limited by both current audience-based and content-based approaches to expressly aiming.[166] And importantly, as the *Keeton* court noted, a person suffers cognizable harm when her reputation is harmed in the forum state, even if the reputational harm is greater in another state.[167] Also, the state itself has valid interests in protecting its citizens from being misled by falsehoods.[168] Because the state's interest does not depend on the number of persons injured in other states, this too supports the use of the sufficient-harm standard rather than the brunt of the harm standard.[169]

In sum, to serve legal values of judicial economy, predictability, and consistency, courts should adopt an objective, textual, and content-based approach to the expressly aiming prong of a *Calder* effects-based personal jurisdiction analysis. Likewise, courts should adopt a uniform significant harm standard in the effects prong of this analysis, resolving the present circuit split.

Looking ahead, whether the current approaches continue, courts adopt a standard approach as recommended by this article, or some other standard approach prevails, as social media use continues to grow, courts will increasingly apply *Calder* in social media defamation cases. Whatever approach is used, finding personal jurisdiction based solely on social media contacts is a tall order. Recognizing this reality, Part V considers application of the *Calder* effects framework in cases this article identifies as "pure" social media defamation cases. Pure social media defamation cases are those where the only relevant contacts between the defendant and the forum state are created by the social media posting itself. This Comment identifies, for the first time, specific markers that may signal constitutionally sufficient minimum contacts in pure social media cases.

V. MARKERS OF SOCIAL MEDIA ACTIVITY SUFFICIENT TO HALE A USER INTO COURT IN PURE SOCIAL MEDIA DEFAMATION CASES

Several courts have recently applied *Calder*'s "effects" framework to claims of social media defamation.[170] This rule emerges from those cases:

166. Exercise of jurisdiction is already narrowly limited by courts' restrictive interpretations of the expressly aiming prong in internet cases. *See* discussion *supra* Part III, Section IV.A.

167. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 (1984).

168. *Id.*

169. *See id.*

170. *E.g.*, Miller v. Gizmodo Media Grp., LLC, 383 F. Supp. 3d 1365, 1373 (S.D. Fla. 2019) (Twitter); Gilmore v. Jones, 370 F. Supp. 3d 630, 658 (W.D. Va. 2019), *motion to certify appeal granted*, No. 3:18-CV-00017, 2019 WL 4417490 (W.D. Va. Sept. 16, 2019) (YouTube); Edwards v. Schwartz, 378 F. Supp. 3d 468, 494–95 (W.D. Va. 2019) (Facebook, Twitter, YouTube); Vangheluwe v. Got News, LLC, 365 F. Supp. 3d 850, 857 (E.D. Mich. 2019) (Twitter); Farquharson v. Metz, No. 13–10200–GAO, 2013 WL 3968018, at *2 (D. Mass. July 30, 2013) (Facebook).

"[M]erely posting a defamatory statement about the plaintiff [on social media] 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*."[171]

Often, the required additional conduct is supplied by non-social media contacts with the forum state, like e-mails, letters, visits, or ongoing business relationships.[172] These can be thought of as "mixed" social media cases. For example, had *Calder* occurred in the internet age and via a social media posting rather than print publication, it would have been a mixed case—in addition to publishing the article itself, the article's author made phone calls to third persons in California to interview sources and share his draft, pre-publication.[173]

In contrast, pure social media cases have no other relevant contacts with the forum state. These cases present harder questions of personal jurisdiction than do mixed cases. Pure social media cases are not squarely addressed by *Calder*, where the contacts considered were varied and numerous, or by *Walden*, where the relevant contact was singular but (unlike defamation) did not occur in the plaintiff's home state.[174] Perhaps because neither *Calder* nor *Walden* suggests exactly what *minimum* contacts are in a pure social media defamation context,[175] courts have been reluctant to find personal jurisdiction based solely on tweets, posts, and similar communications.[176] Seeking to adequately protect a defendant's due process, courts err on the side of not exercising personal jurisdiction.[177]

It is clear that merely mentioning the forum state in the text of the post when another state is also mentioned is not, alone, sufficient to establish minimum contacts.[178] This result is consistent with the textual content-based approach proposed in Part IV (which suggests substantial discussion of the forum state, but not passing mention, satisfies expressly aiming at the forum state). Admittedly, it may be difficult to determine what constitutes "substantial" discussion in text as brief as a tweet. Twitter now allows users to post up to 280 characters, though most tweets use fewer

171. *Vangheluwe*, 365 F. Supp. 3d at 857 (emphasis added).

172. *E.g.*, *Edwards*, 378 F. Supp. 3d at 495–96.

173. *See* Calder v. Jones, 465 U.S. 783, 785–86 (1984).

174. *See id.* at 788–90; Walden v. Fiore, 571 U.S. 277, 287–88 (2014).

175. *See generally* Cromer Young, *supra* note 100, at 763–65.

176. *E.g.*, Miller v. Gizmodo Media Grp., LLC, 383 F. Supp. 3d 1365, 1373–74 (S.D. Fla. 2019) (finding no jurisdiction over nonresident defendant based on a Tweet); *Edwards*, 378 F. Supp. 3d at 494–95 (no jurisdiction based on the social media contacts); *Vangheluwe*, 365 F. Supp. 3d at 857 (no jurisdiction over two of three defendants).

177. *See Walden*, 571 U.S. at 284 ("Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties.").

178. *See Edwards*, 378 F. Supp. 3d. at 494 (finding no jurisdiction in Virginia based on a social media post that mentioned Virginia when the post's main focus was the Flint Water Crisis); *Vangheluwe*, 365 F. Supp. 3d at 857 (finding no jurisdiction in Michigan when a Tweet mentioned Virginia, Michigan, and Ohio).

than 140.[179] If mentioning a state uses four to twelve of those characters, that could be both a substantial portion of the text and a passing mention. In these situations, courts will have to use their common sense and look at whether the mention of the forum state is critical to the meaning of the tweet, or merely incidental.

Nonetheless, finding personal jurisdiction in pure social media cases is possible.[180] In pure social media defamation cases the key question is this: What "additional" content *within the social media post itself* is sufficient "contact with the forum state" to satisfy *Calder*? One court has suggested that, "[f]or instance, the [social media] posting might be of more interest to people in the plaintiff's state than nationally. Or . . . the post might be of no special interest to those in the plaintiff's state but the poster makes special effort to publicize the post there."[181]

Unfortunately, these suggestions are vague and essentially restate the audience-based and content-based expressly aiming tests already in use.[182] For example, a warning that users who post content of special interest to people in the forum state doesn't provide those users fair notice—which due process requires—of the specific conduct based on which the user should expect to be haled into court in that state. Individuals need more specific guidance. Courts also need guidance so they can apply *Calder* consistently and correctly in the social media context.

To more specifically answer this question and answer this need, this Comment identifies, for the first time, social media "markers" that may indicate express aiming at the forum state. Courts can look for these markers to indicate the rare circumstances in which social media contacts alone will support exercise of personal jurisdiction. While an individualized, full *Calder* analysis will always be required, the presence of one or more markers may indicate a court is more likely to find it can exercise personal jurisdiction.

A. Doxing

A first marker showing constitutionally sufficient minimum contacts is "doxing." Doxing, the malicious online sharing of a person's identifying information, can be social media content sufficiently "focused" on the victim's home state for that state to hale the out-of-state social media user into court.[183] Doxing differs from other exposures of personal information online in two key ways.[184] First, doxing discloses physical, real world

179. Aliza Rosen & Ikuhiro Ihara, *Giving You More Characters to Express Yourself*, Twitter: Blog (Sept. 26, 2017), https://blog.twitter.com/en_us/topics/product/2017/Giving-you-more-characters-to-express-yourself.html [https://perma.cc/CTU3-WD7S].

180. *Vangheluwe*, 365 F. Supp. 3d at 857 (finding personal jurisdiction based solely on a Tweet).

181. *Id.* at 857–58.

182. *See supra* Part III.

183. *See Vangheluwe*, 365 F. Supp. 3d at 858–59. For additional information on doxing, alternatively spelled "doxxing" or "d0xing," see David M. Douglas, *Doxing: A Conceptual Analysis*, 18 Ethics Info. Tech. 199, 199–05 (2016).

184. *See* Douglas, *supra* note 183, at 200–01.

contact information, like an address or school/work location, not email or online contact information.[185] Second, doxing discloses current and specific identifying information, so that persons nearby wishing to take action against the exposed individual can presently locate them.[186]

For example, in *Vangheluwe v. Got News, LLC*, the court considered defamation claims brought by an individual who was briefly misidentified by internet activists as the driver who killed Charlottesville, Virginia protestor Heather Heyer on August 12, 2017.[187] In the frenzied minutes following Heyer's murder, online news outlets and activists searched public records for the car that struck Heyer.[188] Based on records listing the car's previous owner, internet sources publicly identified Joel Vangheluwe, a twenty-year-old Michigan resident, as the driver; however, he was, in fact, unconnected to the Charlottesville protests.[189] "By the evening of the attack," the court noted, "James Alex Fields Jr. was [correctly] identified as the driver of the Challenger," the car that killed Heyer and wounded 19 others.[190] However, "a few hours is a long time in today's world of . . . social media."[191] That afternoon, Joel and his family received "countless anonymous threats."[192] "Michigan State police were notified and the family was warned to leave their home."[193] Numerous users "took to Facebook and Twitter," some doxing Joel and his family.[194] Once the chaos died down, Joel sued several of these users for defamation, filing in Michigan.[195]

Three nonresident defendants challenged whether the Michigan court could exercise personal jurisdiction over them based solely on their social media posts.[196] Each defendant tweeted about Joel, his father, or an online news story identifying Joel as the killer.[197] Each was a resident of another state and had no other relevant contacts with the state of Michigan.[198] So these were pure social media cases.

The court found that two defendants could not be haled into court based on their tweets or their posts.[199] For one defendant, the court noted the tweet at issue was merely a link to an online news article claiming Joel was the killer.[200] The tweet was thus "one step (or one hyperlink) re-

185. *See Vangheluwe*, 365 F. Supp. 3d at 860.
186. *See id*.
187. *Id.* at 853.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 855.
193. *Id.*
194. *Id.* at 854.
195. *Id.* at 855–56.
196. *Id.* at 856.
197. *Id.* at 855.
198. *Id.* at 856.
199. *Id.* at 864.
200. *Id.* at 863.

moved from" the allegedly defamatory article.[201] This indirect content, the court found, was not sufficiently directed at Michigan residents.[202] The second defendant's tweet is discussed in Section V.B and also did not justify personal jurisdiction.

By contrast, a third defendant *could* be haled into court based on a tweet that *directly doxed* Joel Vangheluwe. Her tweet, unlike other users' tweets that merely identified Joel as the killer or that shared or retweeted other posts that included such information, directly (though not exclusively) posted Joel's family's "home address (street number, street, city, state, and zip code)."[203] Clarifying that it was not holding "that all doxing amounts to constitutionally minimum contacts with the forum state," the court drew a distinction between doxing that "disclos[es] a person's *online* information (e.g., their Facebook username)" and that which discloses a "physical, not virtual, address."[204] Disclosure of online identity, it noted, plausibly aims to facilitate "some sort of cyberattack (e.g., plastering [the victim's] Facebook wall with hateful comments)."[205] Disclosure of physical address location, however, more likely envisions a localized response. "True," the court noted, "people from across the nation (indeed, world) could have used the physical address to say, send the Vangheluwes hate mail. But who could most readily visit Vangheluwes' residence? Michiganders.[206] Consistent with that possibility," the court continued, "Michigan State police were notified [of threats] and the family was warned to leave their home."[207] In sum, the court found, "it [was] plausible that [this user] intended to pique Michiganders' interest with her tweet."[208] Because her tweet was expressly aimed at Michigan, she could be haled into court in that state based only on that contact.[209]

As this case shows, not all doxing justifies personal jurisdiction under the *Calder* effects framework.[210] To begin, the post must be direct—not a secondhand link or "share"—to show requisite intentional targeting by the poster.[211] Next, only doxing tending to elicit a local, on-the-ground response in the forum state (as opposed to a purely online response) creates sufficient contacts with the forum state under the *Calder* effects framework.[212] Nevertheless, doxing is clearly a strong marker that shows that social media content has been expressly aimed at residents of the forum state, creating constitutionally sufficient minimum contacts.[213]

201. *Id.*
202. *Id.*
203. *Id.* at 859.
204. *Id.* at 860.
205. *Id.*
206. *Id.*
207. *Id.* (alteration in original).
208. *Id.*
209. *Id.* at 861.
210. *See id.* at 860.
211. *See id.*
212. *See id.*
213. *See id.* at 863.

B. Tagging, Hashtags, or Shoutouts Related to the Forum State

A second, more common marker of expressly aiming in social media cases is use of the symbols "@" and "#" to create state-focused tagging and hashtags. Plaintiffs commonly argue that because they live in the forum state and have the bulk of their friends, business, and reputation in that state, content discussing them personally is expressly aimed at an audience in their home state.[214] Courts reject this argument when the content in question is not geographically focused, specifically discusses activities or issues focused on other states, and does not specifically focus on plaintiff's home state.[215] Tagging and hashtags that *do* address the plaintiff's home state can change the analysis.

First, courts can look for the presence of tagging or mentions, which are indicated by use of the "@" symbol. Social media platforms allow users to tag or mention—specially direct comments at—other users through use of @ followed by another user or page's name.[216] As one social media professional puts it: "Using the @ tag signifies to someone that you're talking about them, giving them a head's up about something, and/or would like them to respond. . . . If you're at an event and you hear someone using your name or they call out to you, that's equivalent to using an @ tag."[217] Where a user tags or mentions other users or accounts *associated with the forum state* the content is expressly aimed.

Second, courts can look for the presence of forum state related hashtags or shoutouts. Hashtags, represented by # followed by a string of unbroken words or characters, allow social media users to connect their individual content to a larger topic or theme.[218] A user appends a hashtag and the hashtagged post can then be viewed in a single feed with all other identically tagged posts.[219] Using hashtags has been described as "indicat[ing] that you want to participate in a larger, ongoing conversation—[about] for example, a conference . . . or a popular subject."[220] Shoutouts

214. *E.g.*, Clemens v. McNamee, 615 F.3d 374, 380 (5th Cir. 2010) (explaining plaintiff was a well-known resident of Texas and defendant knew of his Texas residence); Farquharson v. Metz, No. 13-10200-GAO, 2013 WL 3968018, at *2 (D. Mass. July 30, 2013) (explaining defendant knew plaintiff's state of residence and should expect her Facebook post about him would be of special interest to Facebook friends in that state).

215. *See, e.g.*, *Clemens*, 615 F.3d at 380; Edwards v. Schwartz, 378 F. Supp. 3d. 468, 494 (W.D. Va. 2019); *Vangheluwe*, 365 F. Supp. 3d at 860.

216. *See What Is Tagging and How Does It Work?*, Facebook: Help Center, https://www.facebook.com/help/124970597582337 [https://perma.cc/Q2GS-2FB6]; *About Mentions and Replies*, Twitter: Help Center, https://help.twitter.com/en/using-twitter/mentions-and-replies [https://perma.cc/PY2K-2RV8].

217. Courtney Hunt, *Understanding and Using # Tags and @ Tags*, Social Media Today (July 6, 2015), https://www.socialmediatoday.com/social-networks/courtney-hunt/2015-07-06/understanding-and-using-tags-and-tags [https://perma.cc/7MTJ-WVER].

218. *Id.*

219. *See, e.g.*, #Shoutout Search Results, Twitter, https://twitter.com/search?q=shoutout&src=typed_query [https://perma.cc/JKK8-TA9P]; *How Do I Use Hashtags on Instagram?*, Instagram: Help Center, https://help.instagram.com/351460621611097 [https://perma.cc/8NES-W4CT].

220. Hunt, *supra* note 217.

do the same in promotion of another user or business.[221] While using a hashtag related to the forum state would not as directly address the content to an audience in the forum state as would tagging, it would show that there is a likelihood that a user is "making specific efforts to promote the post" in that state.[222]

An example of a case where hashtags or tagging could have made a difference for personal jurisdiction based on social media contacts is *Edwards v. Schwartz*.[223] In this case, a Virginia Tech professor speaking out about the Flint, Michigan, lead-contaminated water crisis brought a defamation suit against a group of Flint residents and academics working with these residents.[224] The residents had complained online about his techniques and sought to end his involvement with the issue.[225] The Flint residents and academics tweeted and posted Facebook messages critical of the professor and his work in Flint.[226] The court applied the Fourth Circuit's targeting test, finding that there was no evidence that the specific, individual tweets and posts were specifically intended for an audience in Virginia.[227] Though the Flint residents' overall goal was to influence the professor's colleagues, many of whom lived and worked in Virginia, the individual posts considered by the court lacked that specific focus.[228] Furthermore, the "focus" of the social media comments the court considered was the professor's work on the Flint water crisis.[229] The posts, the court found, were thus focused on Michigan, not Virginia.[230] Even though one post mentioned Virginia by name, the court found it could not exercise personal jurisdiction for these defamation claims.[231]

However, in a hypothetical scenario based on *Edwards*, had the allegedly defamatory live tweets or posts about the professor's Flint water crisis work included "@VirginiaTech" or "@ViriginaChemicalEngineers" tags, for example, the content would likely have been expressly aimed at a Virginia audience.[232] Hypothetical hashtags, based on the *Edwards* case, showing efforts to promote posts in Virginia might include "#VirginiaIsForScience" or "#VirginiansStandWithFlint." Virginia-fo-

221. *See* #*Shoutout Search Results*, TWITTER, https://twitter.com/search?q=shoutout&src=typed_query [https://perma.cc/JKK8-TA9P].
222. *See* Vangheluwe v. Got News, LLC, 365 F. Supp. 3d 850, 864 (E.D. Mich. 2019).
223. *See* 378 F. Supp. 3d 468, 478–79 (W.D. Va. 2019).
224. *Id.*
225. *Id.*
226. *Id.* at 489, 495.
227. *See id*. at 494–95. Interestingly, *Edwards* is both a pure social media case and a case in the *Calder* mode of mixed contacts. In *Edwards*, social media posts *and* additional contacts with the forum state—including a letter sent by Flint activists to the president of Virginia Tech—were at issue. *See id.* at 479. The court, however, considered each individual contact separately to find whether the court could exercise personal jurisdiction for defamation claims based on each. *Id.* at 494–98. The social media statements, therefore, were considered in isolation—making *Edwards* a pure social media case in relevant part.
228. *See id.* at 494–95.
229. *See id.*
230. *See id.*
231. *Id.* at 494.
232. *See id.* at 494–95.

cused tagging, hashtags, or shoutouts could have provided the "something more" the court needed to determine that Virginia was a focus of the content and that it could exercise personal jurisdiction based on the tweets.

Hashtags, shoutouts, or tagging will not be determinative if they point toward multiple states or, of course, where they point *away* from the plaintiff's home state.[233] But where they are the only significant geographic marker present in a tweet or post and point to the plaintiff's home state, they may tip the balance of an analysis.[234] In *Vangheluwe*, for example, the second defendant over whom the Michigan court found it could not exercise personal jurisdiction tweeted this: "Joel Vangheluwe from Romero, Michigan Car OHIO LICENSE PLATE # GVF 1111 2010 GRAY DODGE CHALLENGER #Charlottesville was the attacker."[235] Analyzing this content, the court noted, "[a]ll that is 'Michigan' about that tweet is the statement that Joel is from Romero, Michigan."[236] And "a reader of the tweet is immediately pulled from Michigan to Ohio (the license plate number) to Virginia ('#Charlottesville')."[237] That, the court found, did not justify requiring the defendant to defend suit in Michigan.[238]

Imagine, instead, that the tweet in question read: "Joel Vangheluwe Car LICENSE PLATE # GVF 1111 2010 GRAY DODGE CHALLENGER #Charlottesville was the attacker." Such a tweet would likely establish personal jurisdiction in a Virginia court, with the hashtag serving as a convenient marker for the reviewing court.

Hashtags, tagging, and other similar practices, while weaker markers than doxing, may show the difference between content that is generally aimed and content that is expressly aimed at the forum state, creating minimum contacts.

C. Social Media Platforms with Inherent Geographic Focus: TripAdvisor, Yelp, or Nextdoor

Finally, courts can look at whether a social media user posted on a platform with an inherent local geographic focus, like TripAdvisor, Yelp, or Nextdoor. Because these platforms specifically focus on destinations, cities, or neighborhoods, their use may be a marker of express aiming sufficient to justify personal jurisdiction in a pure social media defamation case. This possibility was previewed in *Bigfoot on the Strip, LLC v. Winchester*.[239] In that case, a federal district court in Missouri concluded that it could exercise personal jurisdiction over Kansas resident Emily Winchester, who allegedly posted defamatory comments on the plaintiff's

233. *See id.*
234. *See id.*
235. Vangheluwe v. Got News, LLC, 365 F. Supp. 3d 850, 855 (E.D. Mich. 2019).
236. *Id.* at 864.
237. *Id.*
238. *Id.*
239. No. 18-3155-CV-S-BP, 2018 WL 3676962, at *3–4 (W.D. Mo. Aug. 2, 2018).

page on TripAdvisor.com.[240] Emily had visited the plaintiff's Branson, Missouri, "Bigfoot Safari Tour" and posted a mildly negative review about her experience.[241]

Applying the *Calder* framework, the *Bigfoot on the Strip* court found that Emily's online comments

> were intentionally aimed at Missouri because they were posted on [the Bigfoot Tour's] page on TripAdvisor[,] . . . review[ed] . . . the services provided [at the Tour's] sole business location in Missouri[,] . . . [and] potential visitors consulting TripAdvisor about the Tour would look at the page devoted exclusively to the Tour. Therefore, these intentional statements were 'uniquely or expressly aimed' at Missouri.[242]

Bigfoot on the Strip is neither a social media case[243] nor a pure internet contacts case,[244] but it suggests interesting questions about the use of social media with an inherent geographic focus. In 2018, TripAdvisor added a social media component.[245] What would happen if a person posting defamatory comments on TripAdvisor's social media arm had not visited the attraction themselves but instead relied on secondhand information given to them by a friend or family member? What if a friend using that platform saw Emily's review and shared it to her own network, adding her own allegedly defamatory comment? Has this friend expressly aimed defamatory content at Missouri? The "direct" (posting) vs. "indirect" (sharing) distinction made by the court in *Vangheluwe* suggests such comments made on most social media platforms would not suffice.[246] But the *Bigfoot* court found that the inherent geographic focus of TripAdvisor made content posted there more expressly aimed at the state than would be the same content posted in a general forum.[247] This suggests courts applying an audience-based express aiming test might uphold personal jurisdiction for "locally oriented" social media posts on platforms like Yelp, TripAdvisor, or Nextdoor, when they would not find jurisdiction justified by the same content on Facebook, Twitter, or YouTube.[248] For this reason, courts using an audience-focused approach can use a post's

240. *Id.* at *4

241. *Id.* at *1–2.

242. *Id.* at *3.

243. *See id.* at *3–4. Emily Winchester posted her review on the attraction's TripAdvisor page rather than sharing it on social media. *Id.* at *3.

244. *See id.* at *3 ("Emily is [also] alleged to have traveled to Missouri and visited the Tour.").

245. *The New TripAdvisor Goes Social, Gets Personal*, TripAdvisor (Sept. 17, 2018), http://ir.tripadvisor.com/news-releases/news-release-details/new-tripadvisor-goes-social-gets-personal [https://perma.cc/9JT9-3GZG].

246. *See* Vangheluwe v. Got News, LLC, 365 F. Supp. 3d 850, 863 (E.D. Mich. 2019).

247. *See Bigfoot on the Strip*, 2018 WL 3676962, at *4.

248. *See* Edwards v. Schwartz, 378 F. Supp. 3d 468, 495 (W.D. Va. 2019) (suggesting a different analysis where social media platforms have specific geographic focus) ("Neither the statements themselves nor the social media platforms from which they were published uniquely target Virginia or would have inherently included a substantial number of Virginia residents or businesses.").

location on TripAdvisor, Yelp, Nextdoor, or similar sites as a marker of potential personal jurisdiction.

VI. CONCLUSION

In the end, what are your forum options if you, like Joel Vangheluwe, are a victim of social media defamation? You can always sue in the defendant's home state.[249] But this may be inconvenient for the injured plaintiff. While concerns about unbounded forum exposure due to the diffuse "effects" of internet speech will ensure that courts continue to take a restrictive approach to haling out-of-state defendants into their courts based on internet speech, courts can clarify and standardize their interpretations of *Calder* to maximize clarity for system participants and make sure that effects-based personal jurisdiction properly fulfils due process requirements.

Due process requires that a person have fair notice of the conduct that is likely to result in her being haled into a distant court.[250] Moreover, due process requires that the defendant's own actions, not the unilateral actions of another, create the minimum contacts sufficient for personal jurisdiction.[251] Adopting an objective, *textual*, and content-based standard for the expressly aiming prong of a *Calder* analysis and a significant harm standard for the effects prong in social media defamation cases serves these due process requirements. Unlike current audience-based approaches like the Fourth Circuit's, the text-based content test proposed by this Comment eliminates the need for tricky and subjective audience-intent determinations, which are especially unclear for content posted to a general social media site like Twitter. And unlike the Fifth Circuit's current content-based test, under which an author of allegedly defamatory content could be subject to personal jurisdiction in a place that she had no idea she was creating minimum contacts with, the proposed text-based test finds minimum contacts only where the defendant herself has purposefully created them.

Furthermore—and whichever version of the *Calder* effects framework courts ultimately apply—a personal jurisdiction analysis guided by specific markers like doxing, tagging, hashtags, or geographically focused platforms will also serve due process by giving social media users fair notice of what specific online conduct might create minimum contacts.

In the end, to provide certainty for plaintiffs wondering if they can sue in their home forum state, and to assist lower courts struggling to apply unclear and contradictory interpretations of *Calder*, the Supreme Court should watch for an appropriate vehicle in which to define the "floor" of *Calder* jurisdiction.[252] Given the ubiquity of social media today and social

249. *See supra* notes 13–14 and accompanying text.
250. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
251. *See, e.g.*, Walden v. Fiore, 571 U.S. 277, 285–86 (2014).
252. *See generally* Petition for Writ of Certiorari, K.G.S. v. Facebook, Inc., 294 So.3d 122 (Ala. 2019) (No. 19-910), *cert. denied*, 2020 WL 2105265, at *1 (May 4, 2020).

media's importance in modern communication, such a case shouldn't be long in coming. Clarifying *Calder*'s minimum requirements in pure social media cases will give social media users fair notice of when their choices to tweet, post, or share content may justify haling them into a defamation victim's home court.