No. 16-481

IN THE

Supreme Court of the United States

TV AZTECA, S.A.B. DE C.V., PATRICIA CHAPOY, AND PUBLIMAX, S.A. DE. C.V.,

Petitioners,

v.

GLORIA DE LOS ANGELES TREVINO RUIZ, INDIVIDUALLY AND ON BEHALF OF A MINOR CHILD, A.G.J.T., AND ARMANDO ISMAEL GOMEZ MARTINEZ,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Texas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Texas courts have personal jurisdiction over Mexican broadcasters who defamed a Texas resident in over-the-air broadcasts viewed in Texas, when the broadcasters intentionally exploited Texas markets by, among other things, soliciting millions of dollars in advertising from Texas businesses on the premise that their broadcast signals reached hundreds of thousands of Texas households.

2. Whether certiorari is warranted to address the proper understanding of the "effects test" of *Calder v. Jones*, 465 U.S. 783 (1984), when the court below agreed with petitioners' interpretation of *Calder*, but simply held that this case is governed instead by *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), and petitioners do not ask this Court to resolve which is the applicable precedent on the unusual facts of this case.

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BRIEF IN OPPOSITION

Respondents Gloria de Los Angeles Trevino Ruiz, individually and on behalf of a minor child, A.G.J.T, and Armando Ismael Gomez Martinez ("Respondents") respectfully request that the Petition for a Writ of Certiorari be denied.

STATEMENT OF THE CASE

Petitioners ask this Court to grant certiorari on two questions regarding personal jurisdiction. But neither question arises on the facts of this case and both requests for review are premised on a serious mischaracterization of the decision below.

Specifically, the Texas Supreme Court did not uphold jurisdiction on the basis of "involuntary contacts" with "no causal connection to the plaintiffs' cause of action." Pet. i. Instead, it held that petitioners' defamatory broadcast *in Texas* supported jurisdiction at least on the extremely unusual facts of this case, where petitioners purposefully availed themselves of the Texas media markets by actively soliciting millions of dollars in advertising from Texas businesses based on their signals' reaching hundreds of thousands of Texas households. Moreover, because those in-state broadcasts clearly are the proximate cause of respondents' defamation claims, this Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, No. 16-466, 2017 WL 215687 (U.S. Jan. 19, 2017), will have no bearing on the proper outcome of this case.

With respect to the second Question Presented, the Texas Supreme Court *agreed* with petitioners that jurisdiction would not be supported under the "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984),

but concluded that the case was controlled instead by *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), in which personal jurisdiction was upheld because a publisher sent defamatory articles into the forum state. Petitioners do not ask this Court to decide the splitless, fact-bound question of whether *Keeton* or *Calder* is the better precedent for a cross-border signal spillover case like this. *See* Pet. 30 n.14 (petitioner's only acknowledgment of *Keeton*). Their attempts to pretend that the case is about something else are baseless.

1. Petitioner TV Azteca, S.A.B. de C.V. ("TV Azteca"), is a national television station in Mexico. Pet. App. 69a. It pays petitioner Publimax, S.A.B. de C.V. ("Publimax") to broadcast its shows over the air using antennae that reach audiences in northeastern regions of Mexico and southern Texas. Pet. App. 2a-3a; Pet. App. 70a. In addition to reaching over a million Texas residents through these broadcast signals originating in Mexico, Pet. App. 20a; Pet. App. 57a-62a, TV Azteca has a wholly-owned subsidiary and affiliate, Azteca International Corporation ("AIC"), which distributes TV Azteca programs throughout the United States. Pet. App. 33a-34a; Pet. App. 72a.

Although petitioners deny intentionally broadcasting their programs into the United States, they actively solicited millions of dollars in advertising from Texas businesses on the premise that their signals reach viewers in southern Texas. Pet. App. 32a-33a. For example, Publimax's website included a map for potential advertisers representing its broadcasting coverage area. Pet. App. 32a; Pet. App. 78a-80a. The map showed that Publimax

broadcasts could reach over 1.5 million viewers in south Texas. *Id.* TV Azteca also hired an advertising agent in McAllen, Texas, to sell advertising time specifically to Texas businesses. Pet. App. 33a. Thus, many Texans saw advertisements for Texas businesses through these over-the-air broadcasts by Publimax and TV Azteca. Pet. App. 34a; Pet. App. 82a-83a.

Petitioners' over-the-air broadcasts also serve to publicize the programs in the United States, thereby increasing AIC's sale of those programs to U.S. companies for rebroadcast in this country. Pet. App. 33a-34a. To that end, petitioners made "substantial and successful efforts to distribute their programs and increase their popularity in Texas." *Id.* Petitioners "physically entered into Texas to produce and promote their broadcasts" on multiple occasions. Pet. App. 32a (internal quotation marks omitted). For example, petitioner Chapoy – host of the popular entertainment news television program *Ventaneando* – travelled to Texas on multiple occasions to promote her books about *Ventaneando* and to host a live broadcast of the show in Dallas. Pet. App. 32a; Pet. App. 73a-77a. These efforts also included a press release on the fifteenth anniversary of *Ventaneando* celebrating its success both in Mexico and the United States, including focusing on Chapoy's celebrity in both countries. Pet. App. 74a-75a.

TV Azteca also had a business office and production studio in south Texas, whereas Publimax hired an employee in Texas during 2006 and 2007 to negotiate a cable distribution deal. Pet. App. 32a-33a.

2. Respondent Gloria de Los Angeles Trevino Ruiz ("Trevino") is a popular recording artist in Mexico, referred to as "Mexico's Madonna." Pet. App. 2a. At the peak of her fame in the late 1990s, she was wrongly accused of various crimes related to the activities of her business manager. *Id.* After spending two years in Brazil awaiting extradition and three years in prison in Mexico awaiting trial, she was acquitted and released in 2004.[1] *Id.* Trevino then moved to McAllen, Texas, where she has attempted to revitalize her career while remaining in the United States under a work visa. *Id.*; Pet. App. 62a. She currently resides in Texas with her minor son and her husband, respondent Armando Ismael Gomez Martinez. *Id.*

This case arises from a *Ventaneando* broadcast in the run up to the ten-year anniversary of the initial charges against Trevino. Pet. App. 2a-3a. In order to gain publicity from this anniversary, *Ventaneando*, and its host, producer, and creator Patricia Chapoy ran a series of "reports" detailing the circumstances of the charges against Trevino. Pet. App. 2a-3a; Pet. App. 60a. During these shows, Chapoy repeated the unsubstantiated charges brought against Trevino, alleged that Trevino was a rapist and a murderer, made baseless claims related to Trevino's detention in Brazil, claimed that Trevino suffered from a

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[1] Petitioners claim that the judge dismissed the case for lack of evidence, Pet. 7, but the Texas Supreme Court stated that "a Mexican judge ultimately found her not guilty and dismissed all charges," and repeatedly referred to it as an "acquittal." Pet. App. 2a.

mental disorder, and questioned the paternity of Trevino's son. Pet. App. 28a-29a.

During the production of the series, employees of TV Azteca and *Ventaneando* attempted to either contact Trevino or surprise her in Texas for interviews for their reports, all of which Trevino declined or avoided. Pet. App. 65a-68a, 98a.

Audiences throughout southern Texas and Mexico saw these reports and heard the defamatory statements.[2] Trevino and her family viewed the *Ventaneando* broadcasts, and the associated defamatory statements, from their homes in McAllen, Texas. Pet. App. 62a-65a. Petitioners subsequently brought defamation and other claims in Texas state court based on the content of the *Ventaneando* reports. Pet. App. 3a & n.2.

3. TV Azteca, Publimax, and Chapoy all entered special appearances challenging the Texas court's personal jurisdiction. Pet. App. 3a. The trial court denied their motions to dismiss. Pet. App. 104a-05a. Petitioners appealed and the Court of Appeals of Texas affirmed.

The Texas Supreme Court then granted review and affirmed as well. Based on an exhaustive examination of this Court's personal jurisdiction decisions and the evidence in this case, the court

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[2] Petitioners' gratuitous repetition of these false allegations in their petition, such as noting that Trevino "gave birth to a daughter who died a few months later under mysterious circumstances," Pet. at 6, does not make those statements any less false or less harmful to Trevino.

"conclude[d] the evidence establishes that Petitioners purposefully availed themselves of the benefits of conducting activities in Texas and that Trevino's claims arise from or relate to those purposeful contacts." Pet. App. 7a.

a. *Purposeful Availment*. The court agreed with petitioners that respondents could not establish purposeful availment simply through the facts that Trevino resides in Texas and felt the brunt of the injury there. Pet. App. 18a-19a. In addition, the court held, "the mere fact that the signals through which [Petitioners] broadcast their programs in Mexico travel into Texas is insufficient to support specific jurisdiction because that fact does not establish that Petitioners purposefully directed their activities at Texas." Pet. App. 20a-23a. Finally, the court declined to find specific personal jurisdiction based on petitioners' *knowledge* that their signal reached Texas, reasoning that "foreseeability alone will not support personal jurisdiction." Pet. App. 24a (citation omitted).

Accordingly, the court concluded that if jurisdiction were to be established, it must be based on some *additional* conduct coupled with facts the court had found insufficient in themselves. Pet. App. 26a. It agreed with petitioners that respondents had not pointed to facts sufficient to establish jurisdiction under the "effects test" of *Calder v. Jones*. In *Calder*, the plaintiff brought claims for libel in California state court against the writer and editor (among others) of an article distributed by the National Enquirer. 465 U.S. at 785-86. The writer and editor were residents of Florida, and their only contacts with California involved various unrelated trips to

the state for either work or vacation. *Id.* This Court nevertheless found personal jurisdiction over the writer and editor "based on the 'effects' of their Florida conduct in California." *Id.* at 789. It explained:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California.

Id. at 788-89 (footnote omitted). In short, the Court explained, jurisdiction was appropriate because "California is the focal point both of the story and of the harm suffered." *Id.* at 789.

The Texas Supreme Court agreed with petitioners that "under the *Calder* 'effects' test" Texas must be "the focus of the article[]" and where "the 'brunt' of the injury" occurred. Pet. App. 30a n.11 (quoting *Calder*, 465 U.S. at 788-89); *see also* Pet. i (second Question Presented). The court further agreed with petitioners that "the evidence does not support a finding of purposeful availment under the *Calder* subject-and-sources test sufficient to make Texas 'the focal point' of the broadcasts at issue." Pet. App. 29a.

The court *disagreed*, however, with petitioners' contention that the *Calder* test is the "exclusive method for establishing personal jurisdiction over a

defamation defendant." Pet. App. 30a. It pointed to this Court's decision in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), decided the same day as *Calder*. In that case, Keeton, a New York resident, brought suit in New Hampshire, alleging that Hustler Magazine published and distributed libelous material in its magazine. *Id.* at 772-73. Hustler's only contacts with New Hampshire were its "sale of some 10 to 15,000 copies of *Hustler* magazine in that State each month." *Id.* at 772. The Court concluded that Hustler's "regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine" because "[s]uch regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." *Id.* at 773-74; *see also id.* at 781 ("Where, as in this case, respondent . . . has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine.").

The Texas Supreme Court pointed out that in *Keeton*, "the plaintiff had no relevant contacts with New Hampshire, and the offending articles did not address events related to or drawn from sources within that state." Pet. App. 31a (citing 465 U.S. at 772-73). "Nevertheless, the Court found minimum contacts because the defendant had 'continuously and deliberately exploited the New Hampshire market.'" *Id.* (quoting 465 U.S. at 781).

The Texas court concluded that like the defendant in *Keeton*, petitioners in this case had deliberately exploited the Texas market. Even if they

did not intentionally direct their radio waves across the border, petitioners "made substantial and successful efforts to benefit from the fact that the signals travel into Texas, as well as additional efforts to promote their broadcasts and expand their Texas audience." Pet. App. 31a-32a. Petitioners had "physically entered into Texas to produce and promote their broadcasts." *Id.* at 32a (internal quotation marks omitted). They "derived substantial revenue and other benefits by selling advertising time to Texas businesses," on the premise that their broadcasts were viewed in the state. *Id.*; *see supra* p.2-3. And they "made substantial and successful efforts to distribute their programs and increase their popularity in Texas, including the programs in which they allegedly defamed Trevino." Pet. App. 33a.

The court thus concluded that the "evidence that Petitioners physically 'entered into' Texas to produce and promote their broadcasts, derived substantial revenue and other benefits by selling advertising to Texas businesses, and made substantial efforts to distribute their programs and increase their popularity in Texas supports the trial court's finding that Petitioners 'continuously and deliberately exploited the [Texas] market.'" Pet. App. 37a (alteration in original) (quoting *Keeton*, 465 U.S. at 781).

b. *Relatedness.* After concluding that petitioners had purposefully availed themselves of the forum, the court determined that the case met the "arising from or related to" prong of the personal jurisdiction inquiry. Pet. App. 38a.

The court found that test satisfied in this case because "the actionable conduct at issue here" – the

defamation – "occurred in Texas." Pet. App. 40a; *see also Keeton*, 465 U.S. at 777 (tort of defamation "is generally held to occur wherever the offending material is circulated"). However, the "fact that the actionable conduct occurred in Texas," the court believed, "is not enough." Pet. App. 41a. The court pointed to this Court's stream-of-commerce cases in which it is insufficient that a product negligently designed in one state "travels into and causes harm in the forum state." *Id.* In those cases, jurisdiction depends on "additional conduct" that indicates "an intent or purpose to serve the market in the forum state," such as advertising in the forum state, marketing the product there, etc. Pet. App. 41a-42a (quoting *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987)). In the same vein, the Texas Supreme Court asked whether petitioners' "additional conduct in Texas (the promotional map, advertising contracts, [the south Texas office,] the promotional tour, etc.) . . . establishes that Petitioners purposefully availed themselves of Texas through their actionable conduct in Texas (the broadcasts)." Pet. App. 41a. The court found that they had. Pet. App. 42a.

c. *Fair Play and Substantial Justice.* Finally, the court found that the assertion of personal jurisdiction over petitioners would not offend traditional notions of fair play and substantial justice. Pet. App. 43a-46a. The court focused on three specific factors: (1) Texas had a special interest in exercising jurisdiction over those who commit torts within its territory; (2) the exercise of jurisdiction would be unlikely to cause retaliation by Mexico because the court did not justify jurisdiction on the basis of passive drift of broadcast

signals into Mexico, instead relying on petitioners' extra efforts to avail themselves of the benefits and protections of the forum state; and (3) other defendants, such as AIC, did not challenge personal jurisdiction and therefore Texas will be adjudicating Trevino's claim, making a single adjudication more efficient. *Id.*

REASONS TO DENY THE WRIT

I. There Is No Reason For The Court To Hold This Petition Pending Its Decision In *Bristol-Myers Squibb*.

After this petition was filed, the Court granted certiorari to resolve the circuit conflict alleged in support of the first question presented by this petition. *See Bristol-Myers Squibb Co. v. Superior Court of Cal.*, No. 16-466, 2017 WL 215687 (U.S. Jan. 19, 2017). However, the Court need not hold the case pending the outcome in *Bristol-Myers Squibb* because the first Question Presented is not in fact presented by this case and because the Court's resolution of the circuit conflict will have no effect on its outcome. In addition, because this case is interlocutory, petitioners will have ample opportunity to raise this Court's decision in *Bristol-Myers Squibb* in the Texas courts when it comes down if it is relevant.

A. The First Question Presented Is Not Presented In This Case.

Petitioners ask this Court to decide whether "a defendant's general business contacts or sporadic and involuntary contacts in the forum state that have no causal connection to the plaintiff's cause of action establish specific personal jurisdiction consistent

with the Due Process Clause." Pet. i. They assert that the Texas Supreme Court answered this question "yes," holding that Texas courts had personal jurisdiction over petitioners because "TV Azteca and Publimax had made some general marketing and other commercial efforts in Texas, wholly unrelated to the broadcasts that gave rise to the defamation lawsuit." Pet. 2. And they claim that if Texas had applied the "arises out of or relates to" standard adopted by other courts, it would have been compelled to find jurisdiction lacking. Pet. 23-27. This argument fails at every step.

1. Petitioners' plea for review is premised on a stark mischaracterization of the Texas Supreme Court's holding and rationale. Most obviously, petitioners elide that the court found the relatedness requirement satisfied principally because petitioners' defamatory broadcasts occurred *in Texas*. *See* Pet. App. 40a ("Here, the actionable conduct is the allegedly defamatory broadcasts. Although the broadcasts originated in Mexico, they were received and viewed – and allegedly caused harm – in Texas."). As this Court explained in *Keeton*, the tort of defamation "is generally held to occur wherever the offending material is circulated." 465 U.S. at 777.

Accordingly, the premise of the first Question Presented – that petitioners' contact had "no causal connection to the plaintiff's cause of action," Pet. i – is simply false. Petitioners' broadcast is the direct and proximate cause of respondents' defamation claim.

At the same time, the precise standard of required relatedness – the issue in *Bristol-Myers Squibb* – is irrelevant to the outcome of this case. Although the Texas Supreme Court quoted the

State's less demanding "substantial connection" standard, Pet. App. 38a, that standard was irrelevant because in this case the "actionable conduct occurred in Texas," Pet. App. 41a. That holding is in accord with this Court's decision in *Keeton*, which – without defining a specific standard of relatedness – held that a defendant's "regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine." 465 U.S. at 773-74.

2. Petitioners attempt to extricate themselves from this obvious problem in two ways, neither successful.

First, petitioners cite to the Texas Supreme Court's consideration of other general business contacts *in addition to* the defamatory broadcast to Texas homes. Pet. 23-27. But that does not mean, as petitioners imply, that the court held that these other contacts were *sufficient* to establish personal jurisdiction. To the contrary, the Texas Supreme Court unambiguously considered those other contacts *in addition to* the defamatory broadcast, in order to ensure that petitioners "purposefully availed themselves of Texas in connection with their actionable conduct (the allegedly defamatory broadcasts), which occurred and caused harm in Texas." Pet. App. 42a.

Even the cases petitioners embrace do not hold that a plaintiff's cause of action must have a causal relationship with every contact used to establish *purposeful availment*. To the contrary, petitioners' cases hold instead that the "plaintiff's claim must 'arise out of or relate to' ***at least one*** of defendant's contacts with the forum." *Oldfield v. Pueblo de Bahia*

Lora, S.A., 558 F.3d 1210, 1222 (11th Cir. 2009) (emphasis added) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)); *see also O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 318 (3d Cir. 2007) (same); *Robinson v. Harley-Davidson Motor Co.*, 316 P.3d 287, 300 (Or. 2013) (same). That is exactly what happened here.

Second, petitioners suggest that the broadcast of the defamatory program into Texas was an "involuntary contact[]" that cannot be considered in the personal jurisdiction analysis. Pet. i; *see* Pet. 30 n.14 (attempting to distinguish *Keeton* on that ground). That assertion is wrong. *See infra* p.18-21. But more importantly, this Court cannot reach the question petitioners present without first resolving whether petitioners' assertion is right. And petitioners do not claim that the proper jurisdictional treatment of television signal spillover is a question that warrants this Court's review – they do not claim it is the subject of a circuit conflict or that it arises with any frequency (surely it does not).

Nor can petitioners claim that the Court's decision in *Bristol-Myers Squibb* will shed any light on that question. Accordingly, holding and remanding would serve no purpose. The Texas Supreme Court would have no basis for revisiting its conclusion that the broadcasts constitute cognizable in-state conduct. And petitioners would have no basis to contest that this conduct was the proximate cause (or whatever lesser standard this Court may adopt) of respondents' defamation claim.

B. The Texas Courts Can Consider The Effect Of *Bristol-Myers Squibb* Without A Remand.

The interlocutory posture of this case provides another reason to deny certiorari rather than hold the petition. Because the case is ongoing, petitioners will have an opportunity to re-assert their personal jurisdiction defense if the Court's decision in *Bristol-Myers Squibb* changes the governing law in any relevant way. If the case is not resolved in their favor on other grounds, petitioners may also seek certiorari from any final judgment in the case.

II. The Second Question Presented Does Not Warrant Review.

Petitioners' second Question Presented depends again on a mischaracterization of the decision below and is not, in fact, presented on the facts of this case. In reality, the decision below represents a straightforward application of this Court's decision in *Keeton*, arising from unusual facts that are unlikely to recur and implicate no circuit conflict.

A. The Decision Below Implicates No Circuit Conflict Over Whether *Calder*'s "Effects Test" Requires That The Forum State Be The "Focal Point" Of The Defamatory Statements And Injury Suffered.

The petition claims that the Texas Supreme Court's decision exacerbates a "[l]opsided" conflict over "the proper interpretation of the express-aiming component of *Calder*'s 'effects test' in defamation and other intentional tort cases." Pet. 28. In particular,

petitioners say that a vast majority of courts interpret *Calder* to require satisfaction of a so-called "focal point" test. Pet. 31. The only decisions they say conflict with this consensus are the decision in this case and one opinion from the Ninth Circuit. Pet. 31-32.

But petitioners themselves all but confess that this is a mischaracterization of the decision below. They admit that "the Texas Supreme Court acknowledged that *Calder* established a 'focal point' test" and that if applicable, "the 'focal point' test was not satisfied" in this case. Pet. 29. In other words, the Texas Supreme Court *accepted* the majority view of what *Calder* requires *when it applies*. It simply held that *Calder* does not provide the exclusive method for establishing personal jurisdiction in defamation cases. Pet. App. 30a. Instead, the court explained that:

> a plaintiff can establish specific jurisdiction over a defamation defendant by showing *either* "(1) a publication with adequate circulation in the state" under *Keeton*, *or* "(2) an author or publisher who 'aims' a story at the state knowing that the 'effects' of the story will be felt there" under *Calder*.

Id. (emphasis in original) (quoting *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 425 (5th Cir. 2005)).

Petitioners do not contest that if *Keeton* applies, the Texas Supreme Court properly applied it. Nor do they ask this Court to decide which case governs defamation cases arising from cross-border television signal bleed, no doubt because they know that question is not certworthy.

Instead, petitioners simply pretend that the Texas Supreme Court decided that *Calder* applies, but then rejected its "focal point" test. They say, for example, that the Texas Supreme Court "disagree[d]' that the 'focal point' test is the 'exclusive method' for establishing specific personal jurisdiction **under *Calder* and *Walden***." Pet. 30 (first alteration in original) (emphasis added) (quoting Pet. App. 30a). That is not only clearly wrong – as just explained, the Texas Supreme Court did not dispute that the focal point test is required under *Calder* and *Walden v. Fiore*, 134 S. Ct. 1115 (2014), when those cases apply – but also constitutes a grossly misleading paraphrase of what the court actually wrote. *See* Pet. App. 30a ("Even if the Fifth Circuit recognized the subject-and-sources test as the exclusive method for establishing personal jurisdiction ***over a defamation defendant***, we would disagree." (emphasis added)).[3] The difference between the false paraphrase and the actual quote is the difference between a decision "creat[ing] a split of authority," Pet. 28, and one making clear that the alleged split is irrelevant to this particular case.

This case thus presents no vehicle for resolving any alleged split between the Ninth Circuit and other courts over the meaning of *Calder*. If the second Question Presented is sufficiently recurrent to warrant review, surely the Court can await a case that does not require slogging through such a fact-bound, unusual, and splitless controversy over

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[3] This misleading paraphrase is no accident – it is repeated throughout the brief. *See* Pet. 9, 31.

whether *Calder* even applies in order to reach the question presented.

B. There Is No Reason For This Court To Decide Whether *Calder* Or Instead *Keeton* Applies To The Unusual Facts Of This Case.

Even if petitioners had more straightforwardly asked this Court to decide whether *Calder* or *Keeton* applies to this case, the petition would not warrant review.

First, the Texas Supreme Court properly applied *Keeton* to this case rather than *Calder*.

In *Keeton*, this Court analyzed the personal jurisdiction of the New Hampshire courts over a publisher and distributor of allegedly libelous material against a New York resident. 465 U.S. at 772-73. The Court held that the publisher's "regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine." *Id*. at 773-74. "Such regular monthly sales of thousands of magazines," the Court observed, "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." *Id.* at 774. The Court held that where a publisher "has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine." *Id.* at 781.

The plaintiff in *Calder*, on the other hand, could make no such argument because the defendants were a reporter and editor, not the publication itself. This Court recognized that the publication's employees

"are not responsible for the circulation of the article in California" and that "their contacts with California are not to be judged according to their employer's activities." 465 U.S. at 789, 790. The Court nonetheless upheld jurisdiction on the ground that the *article* they had written and edited established sufficient contact to support jurisdiction given that "California is the focal point both of the story and of the harm suffered." *Id*. at 789.

This case is more like *Keeton* than *Calder*. Indeed, this case is nearly on all fours with *Keeton*, except that the defamatory publication was delivered by radio waves rather than trucks full of magazines. Petitioners' only ground for distinguishing *Keeton* is their claim that petitioners did not "deliberately broadcast TV Azteca programs into Texas." Pet. 30 n.14. That may be true in the sense that once a broadcaster sets up a transmission station near a border, it cannot stop the signals from crossing into another forum. But the Texas Supreme Court took that into account, acknowledging that *Keeton* would not control if the transmission into Texas was wholly fortuitous and therefore less analogous to the shipments of magazine into a state. *See* Pet. App. 31a-36a. At the same time, the court rightly decided that when a defendant acts no differently than a broadcaster intent on serving the forum's market – when it not only takes actions that it *knows* will cause its signals to enter the forum, but then goes about soliciting advertising *in* the forum based on the signal's *reaching* the forum – the basic fairness principles at the core of the Due Process analysis

justify treating the defendant as having intentionally availed itself of the forum's markets.[4]

Second, petitioners may disagree with the Texas Supreme Court's reliance on *Keeton*, but they do not claim that there is any circuit conflict over whether *Calder* or *Keeton* applies to cases like this one. To the extent they attempt to *imply* to the contrary, *see* Pet. 30-31 & nn. 15-16, that implication is unsupported. For example, petitioners claim a conflict with *Clemens v. McNamee*, 615 F.3d 374, 377 (5th Cir. 2010). *See* Pet. 30-31. But the defendant there was an out-of-state resident quoted in news stories circulated by others in the forum, 615 F.3d at 377, making *Calder* the only possible basis for personal jurisdiction. Nor do any of the cases cited in petitioners' footnotes address the choice between *Calder* and *Keeton*, much less on facts comparable to those here. *See* Pet. 31 nn. 15-16.

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[4] Petitioners claim that any attempt to obtain financial benefit from the spill-over cannot establish purposeful availment, citing *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000). *GTE*, however, is distinguishable – it involved an attempt to assert personal jurisdiction over defendants who had "no physical contact with the forum," simply due to the existence of defendants' website and its accessibility in the District of Columbia. *Id.* at 1345, 1349. The Texas Supreme Court *agreed* with the *GTE* court's holding: passively making a website or broadcast signal available for others to access does not demonstrate purposeful availment. It was petitioners' forum-specific solicitation of business in the market in combination with the broadcast, and not simply the broadcast of the signal itself, that subjected them to personal jurisdiction.

Third, to the extent petitioners suggest that *Calder* has somehow eclipsed *Keeton*, there is no substance to that claim or reason for this Court to review it.

This Court has continued to view *Keeton* and *Calder* as separate, non-exclusive pathways to proving personal jurisdiction. In *Daimler AG v. Bauman*, 134 S. Ct. 746, 755 n.7 (2014), for example, the Court listed both *Keeton* and *Calder* as examples of the Court's specific personal jurisdiction jurisprudence. And in its most recent discussion of specific personal jurisdiction, *Walden*, the Court cited both *Keeton* and *Calder* favorably. *See, e.g.*, *Walden*, 134 S. Ct. at 1121 (quoting *Keeton* in explaining that the purposeful availment inquiry "focuses on the relationship among the defendant, the forum, and the litigation"). Indeed, the Court identified *Keeton* as an archetypal example of a defendant that "'deliberately exploit[ed]' a market in the forum State." *Id.* at 1122 (quoting *Keeton*, 465 U.S. at 781).

C. The Unusual Facts Of This Case Do Not Implicate Any Broader Questions Of National Importance.

Finally, petitioners and their amici claim that the decision below involves an issue of national importance because of its potential to cause significant harm to broadcasters and publishers in a variety of media. Pet. 32-34. That concern, however, is baseless.

The Texas Supreme Court specifically disavowed creating any precedent relating to the internet. Pet. App. 21a n.8. Nor would the holding in this case easily translate to that very different medium.

Unlike information placed online, which can be viewed literally anywhere in the United States or much of the world, petitioners' signal has inherently limited reach, extending only to Mexico and parts of Texas. And in this case, there was evidence that petitioners intentionally sought to exploit the full geographic scope of the broadcast signals, giving rise to none of the thorny questions arising from internet-based jurisdiction. If the Court seeks to address personal jurisdiction concerns for internet publications, it should wait for a vehicle that actually raises those concerns and not rely on one with the odd and increasingly rare set of facts presented here.

Petitioners also claim that the Texas Supreme Court's decision somehow eliminated the distinction between specific and general jurisdiction, thereby rendering broadcasters subject to jurisdiction anywhere their signal could reach, including internationally. Pet. 32. That argument, however, ignores the scope of the opinion below. The Texas Supreme Court specifically held that signal spill-over was *insufficient* to justify personal jurisdiction, and that it was petitioners' additional contacts with Texas that justified the court's personal jurisdiction. The Texas Supreme Court's holding, as it recognized, was quite narrow and fact-specific.

CONCLUSION

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

Respectfully submitted,

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