No. 22-15815

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRANDON BRISKIN,
on behalf of himself and those similarly situated,
Plaintiff-Appellant,

v.

SHOPIFY INC., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California, No. 4:21-cv-06269-PJH
Hon. Phyllis J. Hamilton, United States District Judge

PLAINTIFF-APPELLANT BRANDON BRISKIN'S PETITION FOR REHEARING EN BANC

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RULE 35(b)(1) STATEMENT AND INTRODUCTION

The panel opinion in this case announces "core principles" to resolve what the panel recognized as a "novel" jurisdictional issue that this Court and other courts of appeals have "never addressed." Op. 15–16.[1] That issue is whether a state may exercise specific personal jurisdiction over a defendant that deliberately and unlawfully uses its nationally accessible web platform to extract profitable data from in-state consumers. The panel held that a state may do so only if the defendant has "prioritize[d]" the forum state's consumers over those located elsewhere. Op. 31. According to the panel, where a defendant violates consumers' online privacy rights *everywhere*, it does not purposefully direct its activities *anywhere*, and so can constitutionally be sued for its violations only in a forum where it is subject to general jurisdiction. Op. 28.

Thus here, the panel held that a district court in California lacked specific personal jurisdiction over a group of out-of-state online payment processors in a case concerning claims that the processors reached into California during a California-based transaction between a California

[1] Citations to "Op." refer to the panel opinion issued on November 28, 2023 (Dkt. No. 47). Citations to "ER" refer to the Excerpts of Record filed on December 12, 2022 (Dkt. No. 13).

citizen and a California merchant; implanted software on the California consumer's device to track his subsequent activities across the internet; and then extracted, compiled, and used this California consumer's personal data, which the defendants knew to derive from California, for commercial purposes and without the consumer's consent. According to the panel, the Constitution requires this result because the defendants would have engaged in the same conduct and the consumer suffered the same injury had the consumer been located in any other state. Op. 31. That is, because the defendants extend their unlawful commercial activities into *every* state, the panel concluded that injured consumers cannot invoke *any* state's specific jurisdiction and can sue only in fora with general jurisdiction over the defendants. Op. 28. In the case of the primary defendant here—a Canadian company that is headquartered in Canada, *see* ER 95—the panel's holding potentially leaves American consumers without any domestic forum in which to vindicate their rights.

Given the increasing number of nationally accessible online platforms as sites of commerce and recreation, determining the principles that govern a state's ability to exercise jurisdiction over platform operators that reach into the forum state and injure its residents is a

matter of "exceptional importance" that warrants rehearing en banc. Fed. R. App. P. 35(a)(2). Further, the panel opinion's holding that a defendant is not subject to jurisdiction for online activities directed into the forum state unless the plaintiff shows that the defendant prioritized its forum-state activities over its activities elsewhere cannot be reconciled with precedent from the Supreme Court and this Court. *See, e.g.*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (holding that a defendant that "produce[d] a national publication aimed at a nationwide audience" could be called to "answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed"); *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1095 (9th Cir. 2023) (holding that an online retailer can be subject to specific jurisdiction for forum-state sales that "occur in the defendant's regular course of business," no matter how small a percentage of total sales they represent), *cert. petition filed* (No. 23-504, Nov. 14, 2023). Rehearing en banc is needed to harmonize the governing precedent in this area.

STATEMENT OF THE CASE

1. Defendants-Appellees Shopify Inc., Shopify (USA) Inc., and Shopify Payments (USA) Inc. (collectively, "Shopify") together create and

operate web-based sales platforms that an online merchant can embed in its website to enable consumers to purchase the merchant's products online. ER 99–100. When a consumer accesses a Shopify platform through a merchant's website, the consumer appears to be interacting solely with the merchant. It is Shopify, however, and not the merchant, that processes the sales transaction. And Shopify does so by installing software code on the consumer's device and routing the consumer's communications directly to its own servers. ER 99–100, 104. At the same time, Shopify also installs on the consumer's browser a tracking file, or "cookie," which Shopify uses to monitor the consumer's behavior across Shopify's entire network of over one million merchants, even after the initial sales transaction is complete. ER 105; *see* ER 107. Specifically, Shopify uses the data that it collects during the transaction and the data that it later collects through its cookies—including the consumer's shipping and payment information, Internet Protocol (IP) address, and geolocation data—to build a profile of the individual consumer, which it then provides to third parties for commercial gain. ER 106–09.

None of the three Shopify entities is headquartered or incorporated in California. ER 95–98. Together, though, they contract to provide

payment-processing services to tens of thousands of California merchants, some of which are Shopify's largest customers. ER 95–96; *see* ER 97. Shopify Inc., moreover, maintains a physical store in Los Angeles to attract new California merchants and to build relationships with existing ones. ER 95–96. As Shopify Inc.'s vice president has explained, "[I]t made sense for us to debut in the Los Angeles market as the region is one of our densest in customer base." ER 96. And on at least one occasion, Shopify actively solicited California consumers on behalf of one of its California merchants by creating and running a pop-up store for the merchant in California. ER 33–36.

2. In 2019, Plaintiff-Appellant Brandon Briskin, a California resident, made an online purchase from a California-based merchant that employed the Shopify platform. ER 113; *see* ER 95. Shopify routed Briskin's personal data out of California and onto Shopify's computer network, and it sent Shopify's tracking cookies into California and onto Briskin's device. ER 114. Shopify then stored, analyzed, and processed Briskin's identifiably California-derived data, and it used the data to send Briskin unsolicited marketing messages and to create a profile of Briskin that it shared with third parties. ER 114–16. At the time of his

purchase, Briskin was unaware that Shopify played any role in the transaction. ER 114–15.

After becoming aware of Shopify's activities with regard to his data, Briskin filed this lawsuit raising six California state-law claims against Shopify on behalf of himself and other California consumers who had submitted payment information from California via Shopify's platforms. ER 116; *see* ER 119–38. Shopify moved to dismiss, arguing, among other things, that it would violate constitutional due process for California to exercise personal jurisdiction over Shopify on the claims alleged. *See* ER 8. The district court accepted Shopify's jurisdictional arguments and dismissed the case without leave to amend.[2] ER 13.

3. A panel of this Court affirmed. Op. 34. It accepted that the operative complaint sufficiently alleged that Shopify had committed "intentional acts" by "generating payment forms, executing code on consumers' devices, creating consumer profiles, processing consumer

[2] The district court also held that the operative complaint failed to comply with Federal Rule of Civil Procedure 8(a) because many of its allegations referred collectively to "Shopify" rather than to one of the three specific Shopify defendants. ER 9–10. The court, however, made clear that this supposed defect would not have justified dismissal without leave to amend. ER 13. Briskin appealed the district court's Rule 8(a) holding, but the panel did not reach the issue. Op. 34.

information, installing cookies, and sharing payment information" and that these acts "caused privacy-related harm that [Shopify] knew was likely to be suffered" in California. Op. 11. Nonetheless, the panel held that Shopify's extraction of Briskin's data was not "expressly aim[ed]" at California because Shopify was "indifferent" to Briskin's location. Op. 4. Despite the fact that Shopify *did* reach into California to extract data from an online transaction occurring there, the panel found it significant that Shopify would have reached into a different state in exactly the same way had the transaction occurred elsewhere. *See* Op. 31.

The panel explained that, in its view, the jurisdictional issue it was resolving was a "novel" one that this Court and other courts of appeals had "never addressed" before. Op. 15–16. Looking to derive principles from "cases involving claims against out-of-state interactive websites," Op. 16, the panel focused on copyright cases in which a defendant had posted allegedly infringing content online. In that context, where a defendant's actionable conduct consists of making content visible on the internet, this Court has rejected a rule that would "allow personal jurisdiction anywhere that [the content] can be accessed." Op. 19. Extrapolating from the copyright cases, the panel concluded that

plaintiffs in cases like this one, which allege that a defendant has used an interactive web platform to draw protected data out of the forum state (among other states) for commercial purposes, must show "some prioritization of the forum state, some differentiation of the forum state from other locations, or some focused dedication to the forum state." Op. 25. The panel acknowledged "differences between an interactive web platform that predominantly offers content," as in copyright cases, "and one that processes consumer transactions," as in this case, but dismissed the differences because the platforms' "nationwide availability … provides a common denominator" among the cases. Op. 28.

In conducting its analysis, the panel declined to apply the reasoning of this Court's *Herbal Brands* decision, which held that "in the case of the online sale of physical goods, 'the express aiming inquiry does not require a showing that the defendant targeted its advertising or operations at the forum.'" Op. 29 (quoting *Herbal Brands*, 72 F.4th at 1094). In the panel's view, "the sale of physical items through the internet is simply different from other forms of internet activity, based on long-held understandings about the jurisdictional significance of physical shipments into a forum." Op. 30. And the panel found it insignificant that Shopify contracts with

tens of thousands of California merchants and has sometimes attempted to drum up business on their behalf. Op. 11–12. According to the panel, Briskin's claims do not "'relate to' Shopify's broader business activities in California outside of its extraction and retention of [his] data." Op. 13.

ARGUMENT

I. The panel opinion announces new principles that govern the important question of how to assess personal jurisdiction in cases involving online misconduct.

The Supreme Court has long acknowledged—but not resolved—the uncertainty of how traditional principles of personal jurisdiction apply to the questions "whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' with a particular State." *Walden v. Fiore*, 571 U.S. 277, 290 n.9 (2014); *see Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1028 n.4 (2021) (declining to address "doctrinal questions" relating to personal jurisdiction with respect to "internet transactions"). As this Court has recognized, such jurisdictional questions can be "dizzyingly complex." *Herbal Brands*, 72 F.4th at 1093.

The panel opinion in this case announces "core principles" that will bind this Court in resolving these questions going forward. Op. 16. In doing so, the opinion draws a hard line between, on the one hand, cases

involving "online sales of physical products," in which a defendant can be subject to specific jurisdiction in any state where its products are sold if it operates "a universally accessible website that accepts orders from residents of all fifty states and delivers products to all fifty states," Op. 29–30 (second quoting *Herbal Brands*, 72 F.4th at 1094–95), and, on the other hand, cases involving all "other internet-related activities," Op. 30, in which a defendant with nationwide online business operations is relieved of specific jurisdiction everywhere except the states that it has somehow "proritiz[ed]" over or "differentiat[ed]" from others, Op. 25. As a result, a plaintiff seeking to hold a defendant accountable for the portion of a uniform, nationwide course of online conduct that occurs within a state in this Circuit will now often be unable to file suit anywhere except the jurisdiction in which the defendant is "incorporated or based" and is therefore subject to general jurisdiction. Op. 28. And in the case of a foreign defendant like Shopify Inc., *see* ER 95, a plaintiff may be unable to turn to any domestic forum at all.

The new principles stated in the panel opinion also compromise vital state interests. As the Supreme Court has recognized, "it is beyond dispute" that states "ha[ve] a significant interest in redressing injuries

that actually occur within the State." *Keeton*, 465 U.S. at 776. But the panel's holding will impede states in this Circuit from enforcing their laws against out-of-state actors whose online interactions with the state's citizens inside the state's borders flout those laws. Indeed, under the panel's reasoning, the most prolific online tortfeasors will be relieved of the duty to answer in a forum state's courts for the harms they inflict on forum citizens inside the forum. A small online company based in Nevada that does business only in Nevada and California may be said to have "prioritiz[ed]" California, Op. 25, such that it could be subject to specific jurisdiction in California on the sorts of claims raised here. But a national operation like Shopify, which serves tens of thousands of California retailers and millions of California end consumers, *see* ER 96–98, would *not* be subject to suit in California's courts, solely because the vast sweep of its unlawful activities extends into many other jurisdictions. This perverse result strips a state of jurisdiction over the very defendants that, by virtue of their scale, direct the greatest amount of unlawful activity into the state and inflict the greatest amount of harm there.

Moreover, the panel's requirement that a plaintiff establish a defendant's uniquely "focused dedication to the forum state" will apply to

all online conduct that does not culminate in the defendant's shipment of a physical good into the state. Op. 25. The opinion's consequences thus will not be limited to cases like this one. For example, if California cannot exercise jurisdiction over Shopify when Shopify's geographically indiscriminate efforts to capture and use personal data for commercial gain reach into California, it presumably cannot exercise jurisdiction over individuals who engage in similar conduct for purposes of personal enrichment. *See, e.g.*, Brooke Nelson, *The FBI Warns Against This Online Shopping Scam*, Reader's Digest (Dec. 14, 2023), http://tinyurl.com/yxtpsjsa (explaining how cybercriminals can "break into a retailer's online store, hide malware on the website's checkout page, and then use that malware to gather financial data from customers on the compromised site"); Josh Meyer, *The "Barbie" Movie Is Making Everyone Think Pink. It May Also Give You a Computer Virus*, USA Today (July 26, 2023), http://tinyurl.com/y8c5xpdu (describing cybercriminals' "global" efforts to "siphon personal data, login details and other key information from [the] devices, web browsers, cryptocurrency wallets, and popular applications" of individuals who click links on fake websites). And if California cannot hold Shopify accountable for the sale of personal

financial data that it has taken from Californians located in California, California could also be constitutionally barred from holding a defendant accountable for collecting Californians' photographs or voice recordings off the internet as part of a nationwide course of conduct and selling them to third parties without consent. *See, e.g.*, Ryan Mac & Kashmir Hill, *Clearview AI Settles Suit and Agrees to Limit Sales of Facial Recognition Database*, N.Y. Times (May 9, 2022), http://tinyurl.com/jt3d8pp (describing a company that sold access to a database of "more than 20 billion facial photos" that it had created by "scraping photos from the web and popular sites"); Max Zahn, *Collection of Voice Data for Profit Raises Privacy Fears*, ABC News (Jan. 18, 2023), http://tinyurl.com/y3kexykk (reporting on the increasing numbers of companies that store voice recordings of consumers and use them to "profit off of utterances made at home or work").

The effects of the panel's holding, meanwhile, could well radiate beyond this Circuit. This case, after all, is hardly an outlier. Countless companies are now monetizing their online interactions with consumers in ways that allegedly violate state data-privacy laws, and consumers are accordingly seeking to vindicate their rights in the states where their

privacy was breached. *See, e.g.*, *Jones v. Papa John's Int'l, Inc.*, 2023 WL 7155562 (E.D. Mo. Oct. 31, 2023), *appeal pending* (8th Cir. No. 23-3606); *Curd v. Papa John's Int'l, Inc.*, — F. Supp. 3d —, 2023 WL 6121152 (D. Md. Sept. 19, 2023); *Rosenthal v. Bloomingdale's, Inc.*, — F. Supp. 3d —, 2023 WL 5179506 (D. Mass. Aug. 11, 2023), *appeal pending* (1st Cir. No. 23-1683); *Hasson v. FullStory, Inc.*, 2023 WL 4745961 (W.D. Pa. July 25, 2023), *appeal pending* (3d Cir. No. 23-2535); *Alves v. Goodyear Tire & Rubber Co.*, — F. Supp. 3d —, 2023 WL 4706585 (D. Mass. July 24, 2023). As the first appellate decision regarding the jurisdictional implications of a nationwide data-extraction scheme, the panel opinion may be persuasive authority for courts of appeals across the country that are wrestling with similar issues.

With ever more commercial and social activities taking place over the internet, states have an increasingly strong sovereign interest in protecting their citizens against unlawful online conduct that reaches into the state's borders. Because the jurisdictional rules announced in the panel opinion substantially compromise this vital interest, the case presents exceptionally important issues and merits rehearing en banc.

II. The principles announced in the panel opinion run counter to precedents of this Court and the Supreme Court.

This case merits en banc review for the additional reason that the panel's reasoning conflicts with precedent *rejecting* the notion that a state may exercise specific jurisdiction over an out-of-state defendant based on a nationwide course of conduct only if the defendant prioritizes or singles out the forum state in some way.

In *Keeton*, for example, the Supreme Court held that an out-of-state publication with a nationwide circulation could be subject to suit in New Hampshire on an out-of-state plaintiff's libel claim based on the defendant's "regular circulation of magazines in the forum State." 465 U.S. at 773. This was so, the Court held, even though "only a small portion" of the publication's sales took place in New Hampshire, *id.* at 775, because the defendant was "carrying on a 'part of its general business' in New Hampshire, and that [was] sufficient to support jurisdiction when the cause of action ar[ose] out of the very activity being conducted, in part, in New Hampshire," *id.* at 780.

Recently, this Court applied *Keeton* to hold that a defendant's "sales of physical products into a forum via an interactive website can be sufficient to establish that [the] defendant expressly aimed its conduct at

the forum," provided that the sales "occur as part of the defendant's regular course of business" and the defendant "exercise[s] some level of control over the ultimate distribution of its products." *Herbal Brands*, 72 F.4th at 1094. The Court held that jurisdiction "d[id] not depend on the number of sales made to customers in the forum" or "sales to the forum as a percentage of [the] defendant's total sales." *Id.* at 1095. What mattered was the fact that the defendant's profitable in-state activity represented "a genuine attempt to serve the market." *Id.*; *see Keeton*, 465 U.S. at 781 (observing that where a defendant "has continuously and deliberately exploited the [forum-state] market, it must reasonably anticipate being haled into court there" on claims related to its commercial activities).

In this case, the panel acknowledged these precedents but found them inapplicable because, unlike this case, they involve "physical shipments into a forum." Op. 30. The opinion, though, does not explain why this distinction makes a difference. If a national chain installed unlawful surveillance devices at cash registers in its brick-and-mortar stores throughout the nation, the panel opinion appears to accept that—consistent with *Keeton* and *Herbal Brands*—a customer whose data was

captured at a California store could sue the chain in California, *see* Op. 32, irrespective of whether the person "would have suffered the same injury" had he or she shopped in a different state, Op. 31. The panel fails to explain why the outcome should be different where the defendant manages to cause the same injury to the same person in the same state, albeit without the aid of a "physical device." Op. 32. It should not be. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." (quoting *Keeton*, 465 U.S. at 774)).

Rather than applying *Keeton* and *Herbal Brands*, the panel opinion analogizes this case to copyright cases in which a defendant's challenged conduct consists solely of placing infringing material online where web users everywhere can see it. *See* Op. 21–24; *see supra* at 7–8. Unlike those cases, however, this case involves direct, bidirectional contact between the defendant and a forum resident located in the forum state, as well as the defendant's intentional extraction of valuable intangible property that it knows is coming directly out of the forum state and that it

subsequently uses for its own financial gain. *See CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1076–79 (9th Cir. 2011) (holding that an out-of-state defendant purposefully directed its activities into the forum state where it downloaded materials from an in-state competitor's website to make unlawful commercial use of them). As the panel pointed out, the "nationwide" reach of the defendants' commercial presence is a "common denominator" between this case and the cited copyright cases. Op. 28. But that common denominator is present as well in *Keeton* and *Herbal Brands*. The panel failed to explain why that commonality, and not the many distinctions, between this case and the cited copyright cases dictates the result here, especially in light of *Keeton* and *Herbal Brands*.

Accordingly, the Court should grant en banc review to ensure coherence among the precedents that govern the jurisdictional analysis that applies in cases like this one.

CONCLUSION

This Court should grant the petition for rehearing en banc.

Respectfully submitted,

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January 11, 2024

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2)(A) and Ninth Circuit Rules 35-4(a) and 40-1(a) because, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f) and the Rules of this Court, it contains 3,696 words.

This petition also complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(c)(2) and Ninth Circuit Rules 35-4(a) and 40-1(a), and the type-style requirements of Federal Rules of Appellate Procedure 32(a)(6) and 32(c)(2) and Ninth Circuit Rules 35-4(a) and 40-1(a) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on January 11, 2024, using the Appellate Electronic Filing system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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