No. 18-5821

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Martin L. Kent,

Plaintiff-Appellant,

v.

Kevin Hennelly,

Defendant-Appellee.

Appeal from the
U.S. District Court for the Eastern District of Tennessee at Greeneville in
Kent v. Hennelly, No. 2:17-cv-00188-PLR-MCLC

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 33 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEE SEEKING AFFIRMANCE

Bruce D. Brown, Esq.
Counsel of Record
Katie Townsend, Esq.
Caitlin Vogus, Esq.
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300

Additional amici counsel listed in Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-5821 Case Name: Kent v. Hennelly

Name of counsel: Bruce D. Brown, Esq.

Pursuant to 6th Cir. R. 26.1, 33 media organizations listed below*
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 5, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Bruce D. Brown
Reporters Committee
1156 15th St. Ste 1020 Washington DC

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

*Reporters Committee for Freedom of the Press
American Society of News Editors
Associated Press Media Editors
Association of Alternative Newsmedia
Boston Globe Media Partners, LLC
Cox Media Group, Inc.
Digital First Media
The E.W. Scripps Company
First Look Media Works, Inc.
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Kentucky Press Association
The McClatchy Company
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Meredith Corp. - Local Media Group
Michigan Press Association
MPA – The Association of Magazine Media
National Newspaper Association
National Press Photographers Association
The New York Times Company
News Media Alliance
Ohio News Media Association
Online News Association
POLITICO LLC
Reveal from The Center for Investigative Reporting
Society of Professional Journalists
Tennessee Association of Broadcasters
Tennessee Press Association
Tribune Publishing Company
Tully Center for Free Speech
Vox Media, Inc.
The Washington Post

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-5821 Case Name: Kent v. Hennelly

Name of counsel: Bruce D. Brown, Esq.

Pursuant to 6th Cir. R. 26.1, Oath Inc.
Name of Party

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Oath Inc. is a wholly owned subsidiary of Verizon.

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s/ Bruce D. Brown
Reporters Committee
1156 15th St. Ste 1020 Washington DC.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of News Editors, Associated Press Media Editors, Association of Alternative Newsmedia, Boston Globe Media Partners, LLC, Cox Media Group, Inc., Digital First Media, The E.W. Scripps Company, First Look Media Works, Inc., International Documentary Assn., Investigative Reporting Workshop at American University, Kentucky Press Association, The McClatchy Company, The Media Institute, Media Law Resource Center, Meredith Corporation, Michigan Press Association, MPA – The Association of Magazine Media, National Newspaper Association, National Press Photographers Association, The New York Times Company, News Media Alliance, Oath Inc., Ohio News Media Association, Online News Association, POLITICO LLC, Reveal from The Center for Investigative Reporting, Society of Professional Journalists, Tennessee Association of Broadcasters, Tennessee Press Association, Tribune Publishing Company, Tully Center for Free Speech, Vox Media, Inc., and The Washington Post (collectively, "*amici*").

Amici file this brief in support of Defendant-Appellee Kevin N. Hennelly ("Hennelly"). As members of the news media, *amici* have an interest in ensuring that entities that engage in online speech, which includes virtually all news organizations today, are not subject to personal jurisdiction in any particular state merely because they mention residents of that state in their news reporting. The

vast majority of news organizations in the United States are local entities that report on national or local stories for their readers or viewers. Moreover, news organizations often communicate and interact with the public through online social media. Comments about out-of-state news or figures, such as those made by Hennelly, are routinely made on the internet. The implications of Plaintiff-Appellant Martin L. Kent's ("Kent") theory of personal jurisdiction, if adopted by this Court, go well beyond the facts of this case and would potentially subject news media organizations to the jurisdiction of courts in states in which they have no substantial contacts. *Amici* have an interest in ensuring that online speakers, including the news media, are not subject to personal jurisdiction across the country without the limits imposed by the Constitution.

SOURCE OF AUTHORITY TO FILE

Counsel for all parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amici state that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than *amici*, their members or their counsel, contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

This case concerns whether, under the boundaries of constitutional due process, a federal court may exercise personal jurisdiction over a defamation defendant who merely posts speech online about a plaintiff who resides within the forum state.[1] Contrary to Supreme Court precedent, Kent urges this Court to expand personal jurisdiction in a manner that would allow a federal court to exercise jurisdiction over essentially any defendant who uses the internet to discuss a resident of the forum state. Under Kent's theory, individuals commenting on public social media accounts, as well as news organizations publishing on their own websites or on social media, would be subject to specific jurisdiction for posting anything online about a resident of the forum state with virtually no limiting factor, contrary to the constraints of the Constitution.

The district court correctly held that due process requires more than publicly available online comments about a forum resident by Hennelly before he can be haled into its courtroom under specific jurisdiction doctrine.[2] In reaching this conclusion, the district court relied upon the three-part test established in *Southern*

[1] This case arises under the Tennessee long-arm statute. Under the Tennessee long-arm statute, a federal court may exercise jurisdiction over a defendant if such jurisdiction is within the boundaries of constitutional due process. *Chenault v. Walker*, 36 S.W.3d 45, 52–53 (Tenn. 2001).

[2] The district court also correctly found that there is no general jurisdiction over Hennelly in the Eastern District of Tennessee. Mem. Op., R. 17, PageID # 161. Kent does not contest this determination on appeal; accordingly, the issue of general jurisdiction is not before this Court.

Machine Co. v. Mohasco Industries Inc., 401 F.2d 374, 381 (6th Cir. 1968), to determine whether the court may exercise specific jurisdiction over a particular defendant, as well as caselaw from the United States Courts of Appeals for the Third and Fourth Circuits. *See* Mem. Op., R. 17, PageID # 163. While *amici* believe that the district court correctly applied *Southern Machine Co.*, they also urge this Court to confirm that, as the district court held, online speech or conduct must be directed to the forum state, with an intent to target an audience in that state, before a court may exercise specific personal jurisdiction consistent with the Constitution over an out-of-state defendant who places information on the internet. *See Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). Because Hennelly did not direct his online speech to Tennessee or a Tennessee audience, the district court's opinion should be affirmed.

ARGUMENT

The Due Process Clause of the Fourteenth Amendment allows a court to exercise personal jurisdiction over a non-resident defendant only if he or she has "certain minimum contacts . . . such that the maintenance of a suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In *Southern Machine Co. v. Mohasco Industries, Inc.*, the Sixth Circuit established a three-part test for establishing specific jurisdiction: (1) The defendant must purposefully avail him or herself of the privilege of acting in the forum state or causing a consequence in the forum

state; (2) the cause of action arises from the defendant's activities there; and (3) the defendant's actions or consequences have a "substantial enough connection" with the forum state to make the exercise of jurisdiction reasonable. 401 F.2d at 381.

Like other failed libel plaintiffs before him, Kent asks a court to find minimum contacts satisfied and to extend specific jurisdiction to any defendant who makes internet posts that (1) are about a plaintiff within the forum state and (2) are accessible within that forum state. *See* Kent Opening Br., 6 R. 18, PageID ## 11–13 (asserting jurisdiction is proper because Hennelly "specifically connected his libelous statements to Mr. Kent and Bristol, Virginia, when he published them to Facebook and on the online biography of Mr. Kent"). Constitutional due process, however, requires more substantial connections to the forum state before a court may exercise personal jurisdiction, which is why courts across the country have routinely rejected Kent's expansive theory. As the district court correctly concluded, under the "purposefully avail[ment]" prong of this test, a plaintiff must establish that the nonresident defendant "expressly aimed or intentionally targeted his intentional conduct at the forum state" before it could exercise personal jurisdiction, and the mere posting of speech online about a plaintiff in the forum state is not enough. Mem. Op., R. 17, PageID ## 162–63. Because Kent has failed to establish that Hennelly expressly targeted his online speech at Tennessee, the forum state, the district court's decision that it lacked personal jurisdiction over Hennelly should be affirmed.

I. Supreme Court precedent does not support Kent's argument.

In arguing that personal jurisdiction exists over Hennelly in Tennessee, Kent emphasizes his own connections with Tennessee. Kent Opening Br., 6 R. 18, PageID ## 14, 17, 28 ("Mr. Kent's career is centered in the Bristol region, where he works for The United Company and serves on the board of directors for one non-profit and one charity."). But the Supreme Court has expressly rejected Kent's plaintiff-focused inquiry numerous times, most recently in *Walden v. Fiore*. 571 U.S. 277, 284 (2014) (stating that the Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State"); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980) (noting the *defendant's* hardship is the primary concern in considering specific jurisdiction). Rather, the Court has held, due process requires that the *defendant's* suit-related conduct creates a "substantial connection with the forum state." *Walden*, 571 U.S. at 284. The "substantial connections" inquiry examines the defendant's connections with the forum state, not the plaintiff's. *Id.* at 285; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (stating that this connection and cannot be based on the defendant's "random," "fortuitous," or "attenuated" contacts with the state) (citations omitted).

In support of his argument, Kent relies on two Supreme Court cases decided prior to *Walden*: *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and

Calder v. Jones, 465 U.S. 783 (1984). *See* Kent Opening Br., 6 R. 18, PageID # 28. This reliance is misplaced.

In *Keeton*, the Supreme Court held that New Hampshire courts could constitutionally exercise personal jurisdiction over Hustler Magazine, which had a national circulation including 10,000 to 15,000 copies circulated in New Hampshire each month. *Keeton*, 465 U.S. at 774, 779, 781. The Court held 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." *Id.* at 773–74.

Amici agree with Hennelly that *Keeton* is readily distinguishable from the instant case. *See* Hennelly Br., 6 R. 20, PageID # 32 n.12. Publishing Facebook comments or other online content to a general internet audience is different from circulating a magazine to subscribers in the forum state. Magazine subscriptions require the publisher to send the magazine to specific subscribers who, often, pay for the content. In contrast, public Facebook pages and many news websites are publicly viewable by anyone who browses the internet. *How Do I Unpublish or Publish my Page?*, FACEBOOK, https://www.facebook.com/help/184605634921611 (last visited Nov. 30, 2018) (explaining how to make Facebook pages public). Unlike magazine subscriptions, public Facebook comments and other websites are available in Tennessee just as much as they are in Texas, Tallahassee, or Tasmania

—or any other out-of-state jurisdiction. Without more, the mere posting of a public Facebook comment or website publication is not aimed toward Tennessee.

Calder similarly differs in key ways from this case. In *Calder*, a California actress brought a libel claim in California state court against the National Enquirer, its distributing company, and a Florida journalist and Florida editor of the National Enquirer. 465 U.S. at 785–86. The journalist and editor moved to quash service of process for lack of personal jurisdiction. *Id.* at 784–85. However, the Court held that these defendants had "expressly aimed" their conduct at California when they acted knowing that the actress has a professional reputation in California and that the National Enquirer's largest circulation, by far, was also in California. *Id.* at 785, 789. Consequently, the Court said, it is proper for a California court to exercise jurisdiction over the out-of-state defendants, since the "effects" of the defendants' conduct were felt in California. *Id.* at 789.

Contrary to Kent's assertion, the *Calder* Court's so-called "effects test" went beyond simply asking whether California was the "focal point" of the stories—it looked to who the magazine's readers were as well. *Id.* (noting that the National Enquirer had its largest circulation in California); *compare with* Kent Opening Br., 6 R. 18, PageID # 29. Kent's approach fails to recognize the inherent differences between publishing a Facebook comment or other internet content to a general, undifferentiated online audience and publishing a printed periodical with a substantial number of known individual subscribers in the forum state. The

defendants in *Calder* had described the plaintiff's California activities, relied on California sources, and knew its largest audience was in California. *See Calder*, 465 U.S. at 785–86. This is a far cry from Hennelly's Facebook comments, which relate to Kent's activities in South Carolina or Virginia and rely on news media reports from *The Washington Post* and South Carolina-based *Island Packet*. *See* Mem. Op., R. 17, PageID ## 156–57. Nor, in any way, did Hennelly attempt to target Tennessee residents or solicit Tennessee sources. *Id.* (citing Hennelly's comment encouraging *South Carolina* voters to vote against a *South Carolina* zoning change); *see also* Hennelly Br., 6 R. 20, PageID # 17.

Moreover, *amici* agree with Hennelly that Kent's expansive reading of *Calder* has been explicitly rejected by this Court in *Reynolds v. International Amateur Athletic Federation*. 23 F.3d 1110 (6th Cir. 1994). In that case, Reynolds, an Olympic sprinter, brought a defamation claim, as well as other claims, against the London-based International Amateur Athletic Federation ("IAAF") in federal court in Ohio after IAAF issued a press release stating that a Paris laboratory test of Reynolds' urine taken after a meet in Monte Carlo, Monaco, had tested positive for a banned substance. *Id.* at 1112. With respect to the defamation claim, this Court held that specific personal jurisdiction did not extend to the IAAF, even under the Supreme Court's holding in *Calder*. *Id.* at 1120. In addition to the facts that the press release concerned Reynold's activities in Monaco and laboratory testing in France, this Court held that Ohio was not the

"focal point" of the press release, because *even if* the IAAF knew the release "would be circulated and have an effect in Ohio," that was not, in itself, "enough to create personal jurisdiction." *Id.* at 1120; *see also ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 626–27 (4th Cir. 1997) (noting that *Calder* does not stand for the proposition that jurisdiction is always appropriate in a plaintiff's home state just because the plaintiff "*always* feels the impact of the harm there" (emphasis in original)). Accordingly, Sixth Circuit precedent makes clear that *Calder* does not support Kent's argument that Hennelly—who was not even aware that Kent lived in Tennessee, *see* Hennelly Br., 6 R. 20, PageID ## 18–19—is subject to personal jurisdiction in Tennessee.

II. This Court should confirm, as have numerous federal courts of appeal, that defendants must intentionally direct their conduct to the forum state before they may be subject to specific jurisdiction based on their online speech.

In the internet context, numerous federal appellate courts have required a showing that the defendant directly targeted the forum state in order to satisfy the *Calder* "effects test" and demonstrate the existence of personal jurisdiction. These courts have correctly concluded that the fact that online speech can be accessed anywhere, including in the forum state, "does not by itself demonstrate that the [defendant was] intentionally directing their website content to" the forum state. *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002). This Court should now join these other circuits in similarly clarifying that mere accessibility of online content within the forum state is insufficient to show that a defendant

purposefully directed his activity to there, creating a coherent and uniform doctrine of personal jurisdiction across the country.

In the leading case of *Young v. New Haven Advocate*, the United States Court of Appeals for the Fourth Circuit provided a framework for assessing personal jurisdiction over internet defamation cases consistent with constitutional due process. *Id.* at 261. *Young* examined whether a federal court in Virginia could exercise specific personal jurisdiction over two Connecticut-based newspapers for publishing critical articles about Virginia prison conditions. *Id.* In that case, the Virginia prison warden sued the newspaper for defamation, and the newspapers moved to dismiss for lack of personal jurisdiction. *Id.* at 258–59. The district court denied the motion to dismiss, and the newspapers appealed. *Id.*

The Fourth Circuit reversed. *Id.* In reaching its decision, the Fourth Circuit applied a three-part test much like the test articulated in *Southern Machine Co.* to determine the bounds of specific personal jurisdiction: "(1) whether the defendant purposefully availed itself of the privileges of conducting activities in the forum state, (2) whether the plaintiff's claim arises out of the defendant's forum-related activities, and (3) 'whether the exercise of personal jurisdiction over the defendant would be constitutionally reasonable.'" *Id.* at 261 (quoting *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002)).

Relying on *Calder*, the warden argued that a finding of jurisdiction was required "because the newspapers posted articles on their Internet websites that

discussed the warden and his Virginia prison, and he would feel the effects of any libel in Virginia, where he lives and works." *Id.* at 262; *see also* Kent Opening Br., 6 R. 18, PageID # 14 ("Mr. Hennelly published his statements to his Facebook audience, thereby making the representations to untold numbers of people and entities, including those in Bristol, where Mr. Kent lives.").

The Fourth Circuit, however, rejected that argument, holding that "application of *Calder* in the Internet context requires proof that the out-of-state defendant's Internet activity is expressly targeted at or directed to the forum state." *Young*, 315 F.3d at 262–63. Thus specific jurisdiction is appropriate only when the defendant: "(1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts." *Id.* at 263 (citing *ALS Scan, Inc.*, 293 F.3d at 714). In the internet context, parts one and two of the test are combined to ask whether the defendant manifested an intent to direct their online speech substantially targeted and focused on an audience within the forum state. *Id.*

The Fourth Circuit explicitly stated that uploading content online is not enough, or else individuals would be subject to personal jurisdiction in every state. *Id.* ("Something more than posting and accessibility is needed to 'indicate that the [newspapers] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state,' Virginia."). Citing *Calder*, the Fourth Circuit

explained that the newspapers "could not have 'reasonably anticipate[d] being haled into court [in Virginia] to answer for the truth of the statements made in their article[s]." *Id.* at 264. Rather, it found that the articles and newspapers were all aimed at a Connecticut audience. *Id.* With no evidence of the defendants' "manifest intent of targeting Virginia readers," the newspapers did not have "sufficient Internet contacts" for the Virginia court to exercise specific jurisdiction. *Id.*

Numerous other federal circuit courts have either relied on *Young* or reached a similar result in holding that a defendant must engage in some targeting of the forum state to confer specific jurisdiction over him or her. For instance, the United States Court of Appeals for the Fifth Circuit has held that an out-of-state defendant who posted an allegedly defamatory article on an internet bulletin board was not subject to personal jurisdiction in Texas because he had not distinguished or targeted forum state readers over general internet readers. *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (noting "the plaintiff's residence in the forum, and suffering of harm there, will not alone support jurisdiction under *Calder*," under Fifth Circuit precedent and that the allegedly defamatory article "contains no reference to Texas, nor does it refer to the Texas activities of [the plaintiff], and it was not directed at Texas readers as distinguished from readers in other states"). In reaching this decision, the Fifth Circuit specifically relied upon this Court's holding in *Reynolds*, as well as the Fourth Circuit's decision in *Young*. *Id.*

Similarly, in *Marten v. Godwin*, the United States Court of Appeals for the Third Circuit dismissed a defamation claim brought by a former student against his professors after he was accused of plagiarism and expelled from an internet-based educational program. 499 F.3d 290, 294 (3d Cir. 2007). The plaintiff, who lived and worked in Pennsylvania, alleged that personal jurisdiction over Kansas-based defendants was appropriate there under *Calder* and the "effects their Kansas conduct had in Pennsylvania." *Id.* at 296–97. However, the district court granted defendants' motion for summary judgment based lack of personal jurisdiction, and the Third Circuit affirmed. *Id.* at 293. The Third Circuit held that the defendants had not expressly aimed their conduct at Pennsylvania, despite the fact that they had communicated with the plaintiff via email, because nothing in the record showed that they made specifically sent defamatory statements to forum state, even if plaintiff felt the brunt of the harm there. *Id.* at 298.

In *Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.* the United States Court of Appeals for the Seventh Circuit held that an email list that targets past customers is not enough to confer jurisdiction in the forum state. 751 F.3d 796, 802–03 (7th Cir. 2014). There, the district court held that personal jurisdiction was proper over a trademark claim because, among other reasons, the defendant (1) knew the plaintiff was based in Indiana and could foresee the defendant being harmed, (2) had sent misleading emails to Indiana residents, (3) had a website that Indiana residents could access, and (4) put all customers,

including those from Indiana, on an email list. *Id.* at 801. The appellate court reversed the district court, stating that the plaintiff's place of business cannot be the sole link that confers jurisdiction over the defendant. *Id.* at 802 (finding that "[a]ny decision that implies otherwise can no longer be considered authoritative" after *Walden*). The court went on to hold that the emails cannot be the basis for specific jurisdiction, as it has no control over who receives the emails—it just includes all past customers. *Id.* at 803. The court held that there was no targeting of Indiana because the online messages were indiscriminately received or sent out. *Id.* ; *see also Tamburo v. Dworkin*, 601 F.3d 693, 707–08 (7th Cir. 2010) (holding that personal jurisdiction exists over out-of-state defendants who intentionally targeted the forum state by posting plaintiff's business address on their public websites and encouraging readers to boycott and harass him, and who contacted the plaintiff by email to threaten him).

The United States Court of Appeals for the Eighth Circuit has also held that online statements that include the forum state do not create the substantial connection required to confer specific jurisdiction. *Johnson v. Arden*, 614 F.3d 785, 797 (8th Cir. 2010). In *Johnson*, plaintiff cat breeders, based in Missouri, alleged that a rival cat breeder, among others, made online posts that plaintiffs "killed cats, sold infected cats and kittens, brutally killed and tortured unwanted cats and operated a 'kitten mill' *in Unionville Missouri*." *Id.* at 788 (emphasis added). The defendant filed a motion to dismiss for lack of personal jurisdiction,

and the district court dismissed the claim without prejudice. *Id.* at 789. The Eighth Circuit affirmed, holding that while the statements were aimed at the plaintiffs, "the inclusion of Missouri in the posting was incidental and not 'performed for the very purpose of having their consequences' felt in Missouri." *Id.* at 797. Indeed, the Eighth Circuit has explicitly rejected relying on effects within the forum state alone for assessing whether a court may extend personal jurisdiction over internet speech. *Id.* ("We therefore construe the *Calder* effects test narrowly, and hold that, absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction.") (citing *Hicklin Eng'g, Inc. v. Aidco, Inc.*, 959 F.2d 738, 739 (8th Cir. 1992)); *but see Licciardello v. Lovelady*, 544 F.3d 1280, 1288 (11th Cir. 2008) (holding, before *Walden*, that the "effects" of out-of-state defendant's unauthorized use of the plaintiff's mark, face, and apparent endorsement on defendant's website justify extension of personal jurisdiction over defendant in a trademark infringement suit brought under the Lanham Act).

In reaching its decision in the instant case, the district court relied on *Young*, among other cases, for the proposition that the mere posting of information on a website does not confer nationwide personal jurisdiction. Mem. Op., R. 17, PageID # 163. As the district court recognized and this Court should affirm, a defendant who has not intentionally directed his online speech toward a forum state by doing more than simply making an online post that is accessible anywhere

in the world cannot, consistent with the Constitution, be subject to personal jurisdiction in the forum state under the *Calder* "effects test."

III. Kent's theory of personal jurisdiction, if adopted, will chill news organizations and individuals from speaking online.

In addition to being entirely out of step with precedent interpreting the constitutional limits of personal jurisdiction arising out of activity on the internet, the expansive test for personal jurisdiction advocated for by Kent is particularly concerning in the context of online journalism. In the digital age, journalists and the news media increasingly use the internet to publish news stories and communicate with readers and viewers. Amy Mitchell et al., *The Modern News Consumer*, PEW RES. CTR. (July 7, 2016), http://www.journalism.org/2016/07/07/trust-and-accuracy/ (noting that more people are getting their news from online sources). As a result, journalism is no longer a one-way discussion—users can publicly interact with journalists and journalists with their audience. *See, e.g.*, John McDermott, *The NYT Dispatches Reporters to Social Conversation Hotspots*, DIGIDAY (Mar. 19, 2015), https://digiday.com/media/nyt-deploys-journos-interact-readers-platforms/; Katherine Viner, *The Rise of the Reader: Journalism in the Age of the Open Web*, GUARDIAN (Oct. 9, 2013), https://www.theguardian.com/commentisfree/2013/oct/09/the-rise-of-the-reader-katharine-viner-an-smith-lecture.

The vast majority of newspapers have relatively small circulations that cater to their local communities, rather than a national audience. Christopher Ali & Damian Radcliffe, *Small-Market Newspapers in the Digital Age*, COLUM. JOURNALISM REV. (Nov. 15, 2017), https://www.cjr.org/tow_center_reports/local-small-market-newspapers-study.php/. Yet these newspapers frequently maintain an online presence through their own websites and through social media platforms like Facebook and Twitter. *See, e.g.*, CHATTANOOGAN, https://www.chattanoogan.com/Breaking-News/ (last visited Nov. 30, 2018); Courier Journal, FACEBOOK, https://www.facebook.com/courierjournal/ (last visited Nov. 30, 2018); @Tennessean, TWITTER, https://twitter.com/Tennessean (last visited Nov. 30, 2018). These online platforms allow news organizations to serve a critical role in informing communities of both local and national events. *See, e.g.*, @Tennessean, TWITTER (Nov. 30, 2018 1:06 PM), https://twitter.com/Tennessean/status/1067887513254031360 (providing story of a Texas prison inmate admitting to killing more than 90 people, three of them from Tennessee); @Tennessean, TWITTER (Nov. 30, 2018 12:32 PM), https://twitter.com/Tennessean/status/1067878814091493376 (providing pricing and date of Christmas events in Nashville and Eastern Tennessee). Studies have shown that reader-journalist interactions are particularly important for local newspapers to foster relationships with their community. Dave Harte et al., *Reciprocity and the Hyperlocal Journalist*, 11 JOURNALISM PRACTICE 160, 173

(2017), *available at* https://www.tandfonline.com/doi/abs/10.1080/17512786.2016.1219963. Most of these interactions happen on social media and provide local journalists with tips or direction for what the community is interested in. *Id.* at 167–69.

Expanding specific jurisdiction to subject online speakers to suit in virtually any forum based on the fact that they maintain an online presence will chill both local papers from reporting and commenting on national events on the internet and community members from interacting with their local reporter. Fearful that they may be forced to defend themselves from a lawsuit in a distant jurisdiction in which a potential plaintiff resides, local news organizations may refrain from publishing stories of local import. Kent's claim that the mere *accessibility* of a Facebook comment or news article in the plaintiff's court-of-choice satisfies due process is even more dubious when the national and international nature of the internet is considered. *See* Kent Opening Br., 6 R. 18., PageID ## 12–13 ("While the biography may have been published in a South Carolina newspaper, it was published and available online to anyone in Mr. Kent's community."). Effectively, this would mean that defendants who publish content online could be haled into any court in any state, including defendants based outside the United States. An online newspaper from France would fall within the jurisdiction of Tennessee courts for simply for publishing an allegedly defamatory news story aimed at its

local audience as long as the story was also posted on its website or social media page and the news outlet knew where the plaintiff lives.

Not only is this approach irreconcilable with federal circuit court precedent, but it is also contrary to the policy underlying the Securing the Protection of Our Enduring and Established Constitutional Heritage Act ("SPEECH Act"), which prohibits foreign libel judgments from being enforced in United States courts unless the foreign judgment conformed with constitutional due process requirements. 28 U.S.C. § 4102(b)(1) (added Aug. 10, 2010). Congress passed the SPEECH Act in response to an increase in "libel tourism," a practice where often wealthy litigants would file libel actions against critics in plaintiff-friendly countries that do not have comparable First Amendment rights, even if the plaintiff and publication had few ties to forum country. *See, e.g.*, Emily C. Barbour, *The SPEECH Act: The Federal Response to "Libel Tourism"*, CRS Rpt. For Congress, R41417 (2010); Eric Pfanner, *Britain to Seek Curbs to 'Libel Tourism'*, N.Y. TIMES (May 9, 2012), https://nyti.ms/2RyJJle. In a few prominent examples, British courts asserted jurisdiction over these defamation suits because the content was read by a few British readers or the content was simply available online. *See, e.g.*, King v. Lewis, [2004] EWCA Civ. 1329 [¶ 31] (appeal taken from Wales) (noting that asserting jurisdiction over a U.S. plaintiff and U.S. defendant is proper given the defendant's choice of publishing online); Sarah Staveley-O'Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First*

Amendment?, 4 N.Y.U. J.L. & LIBERTY 252, 261–63 (2009) (discussing cases of British courts asserting jurisdiction over cases with few ties to the United Kingdom). Both chambers of Congress expressed concern about foreign countries asserting jurisdiction over American defendants because of online publications. *See* H.R. Rep. No. 111–154, at 3 (2009) ("Consequently, concerns have been raised that the Internet has rendered American authors and publishers especially vulnerable to libel suits in Britain."); S. Rep. No. 111-224, at 2 (2010) ("The prevalence of these foreign libel lawsuits is significantly chilling American free speech and restricting both domestic and worldwide access to important information."). These concerns echo those raised by Kent's expansive approach to personal jurisdiction.

Local papers and audiences interact online every day, discussing everything from the local Little League baseball team to national news. Not all of these discussions target a larger audience. Yet Kent claims that this conduct—merely talking about national events or individuals who reside out of state online with your local community—"create[s] a substantial connection with the forum State" to assert jurisdiction. *Walden*, 571 U.S. at 284. The district court correctly rejected this contention, and this Court should affirm and adopt the reasoning of *Young v. New Haven Advocate*.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the district court.

Dated: December 5, 2018

Respectfully submitted,

/s/ Bruce D. Brown

Bruce D. Brown
Counsel of Record
Katie Townsend, Esq.
Caitlin Vogus, Esq.
Daniel Jeon, Esq.
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th Street NW, Suite 10250
Washington, DC 20005
bbrown@rcfp.org
(202) 795-9300

*Additional counsel for *amici* are listed in Appendix A.

APPENDIX A

ADDITIONAL COUNSEL FOR *AMICI CURIAE*

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors
Counsel for Association of Alternative Newsmedia

Dan Krockmalnic
Boston Globe Media Partners, LLC
1 Exchange Place
Boston, MA 02109
617-929-7157

Heidi Eddy-Dorn
Cox Media Group, Inc.
6205 Peachtree Dunwoody Road
Atlanta, GA 30328

Marshall W. Anstandig
Senior Vice President, General Counsel and Secretary
Digital First Media
4 North 2nd Street, Suite 800
San Jose, CA 95113
manstandig@bayareanewsgroup.com
1-408-920-5784
James Chadwick
Counsel for Digital First Media LLC
Sheppard Mullin Richter & Hampton LLP
379 Lytton Avenue
Palo Alto, CA 94301-1479
jchadwick@sheppardmullin.com
1-650-815-2600

David M. Giles
Vice President/
Deputy General Counsel
The E.W. Scripps Company
312 Walnut St., Suite 2800
Cincinnati, OH 45202

David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

Jon Fleischaker
Michael P. Abate
Kaplan Johnson Abate & Bird LLP
710 W. Main St., 4th Floor
Louisville, KY 40202
(502) 416-1630
jfleischaker@kaplanjohnsonlaw.com
mabate@kaplanjohnsonlaw.com
Counsel for Kentucky Press Association

Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

Kurt Wimmer
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
Counsel for The Media Institute

George Freeman
Media Law Resource Center
520 Eighth Avenue
North Tower, 20th Floor
New York, NY 10018
Telephone: (212) 337-0200
Telecopier: (212) 337-9893
Email: gfreeman@medialaw.org

Joshua N. Pila
General Counsel - Local Media Group
Meredith Corporation
425 14th Street NW
Atlanta, GA 30318

James Cregan
Executive Vice President
MPA – The Association of Magazine Media
1211 Connecticut Ave. NW Suite 610
Washington, DC 20036

Tonda F. Rush
Counsel to National Newspaper Association
CNLC, LLC
200 Little Falls Street, Suite 405
Falls Church, VA 22046
(703) 237-9801 (p)
(703) 237-9808 (fax)
tonda@nna.org

Mickey H. Osterreicher
200 Delaware Avenue
Buffalo, NY14202
Counsel for National Press Photographers Association

David McCraw
V.P./Assistant General Counsel
The New York Times Company
620 Eighth Avenue
New York, NY 10018

Kurt Wimmer
Covington & Burling LLP
850 10th Street NW
Washington, DC 20001
Counsel for the News Media Alliance

Laura R. Handman
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
Thomas R. Burke
Davis Wright Tremaine LLP
Suite 800
500 Montgomery Street
San Francisco, CA 94111
Counsel for Online News Association

Elizabeth C. Koch
Ballard Spahr LLP
1909 K Street, NW
12th Floor
Washington, DC 20006-1157
Counsel for POLITICO LLC

D. Victoria Baranetsky
General Counsel
Reveal from The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, California 94608

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

Douglas R. Pierce
King & Ballow
1100 Union Street Plaza
315 Union Street
Nashville, TN 37201
(615) 259-3456
Counsel for Tennessee Association of Broadcasters

Richard L. Hollow
Hollow & Hollow, LLC
P. O. Box 11166
Knoxville, TN 37939
865-769-1709
rhollow@hollowlaw.com
Counsel to the Tennessee Press Association

Karen H. Flax
VP/Deputy General Counsel
Tribune Publishing Company
160 North Stetson Avenue
Chicago, Illinois 60601

Lauren Fisher
Chief Legal Officer
Vox Media, Inc.
1201 Connecticut Ave. NW, Floor 11
Washington, DC 20036

John B. Kennedy
James A. McLaughlin
Kalea S. Clark
The Washington Post
One Franklin Square
Washington, D.C. 20071
Tel: (202) 334-6000
Fax: (202) 334-5075

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief of *amici curiae* complies with:

1) the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,096 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-processing system used to prepare the brief; and

2) the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

/s/ Bruce D. Brown
Bruce D. Brown, Esq.
Counsel of Record
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

Dated: December 5, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing Brief of *Amici Curiae* electronically with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system on December 5, 2018.

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/s/ Bruce D. Brown
Bruce D. Brown
Counsel of Record
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS