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## Internet Jurisdiction and the 21st Century: Zippo, Calder, and the Metaverse

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## Note

### Internet Jurisdiction and the 21st Century: *Zippo, Calder, and the Metaverse*

GRETCHEN YELMINI

*Internet use in the United States continues to increase at a rate that outpaces the legal system. From reliance on outdated precedent, differing long-arm statutes, and emergent technologies, there are unanswered questions of whether existing precedent is sufficient to handle our increasingly borderless society.*

*Many courts still rely on the Zippo test despite the exponential advancements in how we use the internet in the twenty-five years since the Western District of Pennsylvania developed a framework for this issue. The Supreme Court has continued to avoid directly addressing the issue. In 2014, the Court left decisions on virtual presence to “another day,” and nearly a decade after that decision, there is no indication that this day is coming anytime soon.*

*The Court’s avoidance of this issue has led to varying interpretations of whether it is appropriate for courts to exercise specific personal jurisdiction over internet conduct. As a result, some circuits believe that the existing tests are sufficient to address internet-based conduct, while others adhere more rigidly to the Zippo framework. By analyzing defamation across different states and the potential impact of the metaverse, this Note articulates the impact that these differing approaches can have on individuals’ access to justice before proposing solutions to the problem.*

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# Internet Jurisdiction and the 21st Century: *Zippo, Calder, and the Metaverse*

GRETCHEN YELMINI\*

## INTRODUCTION

Nearly thirty years have passed since AOL, CompuServe, and Prodigy mailed CD-ROMs to usher the internet into our lives.<sup>1</sup> While much has changed in the intervening years, as evidenced by the evolution of the phrase “You’ve Got Mail!” from a greeting that welcomed AOL users to the “world wide web”<sup>2</sup> to a blockbuster<sup>3</sup> and, finally, to an afterthought on Tom Hanks’ IMDb page,<sup>4</sup> some things have stayed the same. While internet platforms have come and gone, humans continue to use the internet at increasing rates.<sup>5</sup> In fact, Americans’ internet usage has exploded exponentially since the early 1990s when internet access was billed on a per-minute basis.<sup>6</sup> Moreover, online interactions, and the harms that result from them, have consistently raised questions for courts and legislatures regarding how to balance the exercise of jurisdiction in a digital context.<sup>7</sup> While statutes are enacted, challenged, and amended over time, there has not yet been a clear and satisfactory answer to one of the most basic questions of any lawsuit—where can the suit be brought? After all, the internet is everywhere and nowhere, so the jurisdictional possibilities are endless.

These infinite possibilities also make the issue difficult for courts to

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<sup>1</sup> Phil Edwards, *In Memoriam: AOL CDs, History’s Greatest Junk Mail*, VOX (May 12, 2015, 2:40 PM), <https://www.vox.com/2015/5/12/8594049/aol-free-trial-cds>.

<sup>2</sup> Sean O’Neal, *AOL’s “You’ve Got Mail” Guy Now Welcomes You to His Uber*, AV CLUB (Nov. 7, 2016, 6:07 PM) <https://www.avclub.com/aol-s-you-ve-got-mail-guy-now-welcomes-you-to-his-uber-1798254067>.

<sup>3</sup> *You’ve Got Mail*, ROTTEN TOMATOES, [https://www.rottentomatoes.com/m/you've\\_got\\_mail](https://www.rottentomatoes.com/m/you've_got_mail) (last visited June 10, 2022).

<sup>4</sup> *Tom Hanks*, IMDB, <https://www.imdb.com/name/nm0000158/> (last visited June 10, 2022).

<sup>5</sup> BROOKE AUXIER & MONICA ANDERSON, SOCIAL MEDIA USE IN 2021, PEW RSCH. CTR. 7–8 (2021).

<sup>6</sup> *See id.*

<sup>7</sup> *See* BERTRAND DE LA CHAPPELLE & PAUL FEHLINGER, JURISDICTION ON THE INTERNET: FROM LEGAL ARMS RACE TO TRANSNATIONAL COOPERATION, CTR. INT’L GOVERNANCE INNOVATION & CHATAM HOUSE 9–11 (2016) (discussing the way that local legal decisions have greater impact, sometimes even across international borders).

address. The Supreme Court has not definitively answered this question.<sup>8</sup> The closest they have come to an answer is an acknowledgment of the issue itself, which can be found buried in a footnote in *Walden v. Fiore*.<sup>9</sup> There, the Court noted that a defendant's virtual conduct and "presence" pose "very different questions" best left "for another day."<sup>10</sup> However, in the eight years since this seemingly innocuous footnote first made its way into the Court's opinion, tech companies have continued to innovate at a rate that has far outpaced the legal system.<sup>11</sup>

The Court's reluctance to address virtual jurisdiction can be read to suggest that the Justices believe that existing personal jurisdiction doctrines are readily applicable to internet-based disputes. However, the Court's silence has caused a great deal of discrepancy across the country. Currently, each state has the freedom to define how far their long-arm statute reaches into the digital sphere through the statutes themselves as well as interpretations and applications of existing precedent. As a result, specific personal jurisdiction over internet activity lacks uniformity. Instead of one standard across the country, defendants are at the mercy of fifty-one different interpretations of personal jurisdiction and judges' differing understandings of how the internet itself functions. This raises broader questions of fairness in terms of the burdens on a defendant who may be sued in another state and whether a plaintiff has reasonable access to a remedy.

This Note analyzes some of the various jurisdictional schema as they apply to the internet, with a keen understanding that there has yet to be a perfect solution, nor a clear answer, to this issue. Instead, the hodgepodge of tests and interpretations of existing precedent, when coupled with state personal jurisdiction statutes, have created disparities in how American citizens are treated because of their online conduct. While the Court's recent

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<sup>8</sup> Zainab R. Qureshi, *If the Shoe Fits: Applying Personal Jurisdiction's Stream of Commerce Analysis to E-Commerce—A Value Test*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 727, 728 (2008) ("[T]he Supreme Court has yet to define the parameters of personal jurisdiction vis-à-vis Internet activity."); Christine P. Bartholomew & Anya Bernstein, *Ford's Underlying Controversy*, 99 WASH. L. REV. 1175, 1187 (2022) ("[T]he Court has yet to generate a useable framework for internet-based contacts that reach into a forum, despite their modern-day omnipresence").

<sup>9</sup> The *Walden* Court did not seem eager to address fairness concerns in the digital sphere. Specifically, the Court stated: "Respondents warn that if we decide petitioner lacks minimum contacts in this case, it will bring about unfairness in cases where intentional torts are committed via the Internet or other electronic means . . . . As an initial matter, we reiterate that the "minimum contacts" inquiry principally protects the liberty of the nonresident defendant, not the interests of the plaintiff . . . . In any event, this case does not present the very different questions whether and how a defendant's virtual "presence" and conduct translate into "contacts" with a particular State . . . . We leave questions about virtual contacts for another day." *Walden v. Fiore*, 571 U.S. 277, 291 n.9 (2014) (citing, in part, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 290-92 (1980)).

<sup>10</sup> *Id.*

<sup>11</sup> Mikhail Mitra, *Technologies That Will Disrupt in the Next Five Years*, MANTRA LABS (Oct. 15, 2019), <https://www.mantralabsglobal.com/blog/technologies-that-will-disrupt-in-the-next-5-years/>.

decision in *Ford Motor Co. v. Montana Eighth Judicial District Circuit*<sup>12</sup> may serve as an indication of how the Court will decide this question once they take it up and address it head-on, it likely does not go far enough to address emerging technologies and the potential impact they will have on our everyday lives.

In Part I, this Note discusses the controversial, yet enduring *Zippo* test that serves as an integral part of many courts' personal jurisdiction determinations despite technological advancement that was not imagined in 1997, and recent caselaw that suggests courts have begun to upgrade their applications of virtual jurisdiction. In Part II, this Note analyzes defamation in the context of the internet by examining how courts apply their long arm statutes in Connecticut and New York, California, and Florida. Part III contains a brief overview of the Metaverse and the legal quagmire that might result if it comes to fruition, and Part IV discusses two potential solutions to this problem.

#### I. ZIPPO: IS THE 25-YEAR-OLD TEST FINALLY RUNNING OUT OF LIGHTER FLUID?

For twenty-five years, *Zippo Manufacturing Co v. Zippo Dot Com, Inc.*, has served as the “seminal authority regarding personal jurisdiction based upon the operation of an Internet web site.”<sup>13</sup> This case, decided when at-home internet usage was still in its infancy, provided courts with a “beautifully simple” answer to a complicated problem.<sup>14</sup> *Zippo* assigns websites to one of three categories: (1) clearly commercial websites, (2) passive websites, and (3) interactive websites, and determines jurisdiction accordingly.<sup>15</sup> According to *Zippo*, interactive websites give third parties an opportunity to “exchange information,” and personal jurisdiction depends upon the “level of interactivity and commercial nature of the exchange.”<sup>16</sup> This standard, which provided the justice system with guidance on how to handle emergent technology, rapidly gained popularity and is still in use in several circuits.<sup>17</sup>

However, the internet has evolved in the years since *Zippo*, and it may

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<sup>12</sup> *Ford Motor Co. v. Mont. Eighth Jud. Distr. Ct.*, 141 S. Ct. 1017, 1026 (2021). The Court held that but-for causation was not the appropriate test and, instead, reiterated that jurisdiction attaches when a defendant's conduct arises from or *relates to* the forum state. The decision also reiterated the need for a “connection between a plaintiff's suit and a defendant's activities.” *Id.* As a result, a defendant's internet conduct could result in a lawsuit in an out-of-state court so long as this conduct relates to the forum. So, in a defamation case, for example, the harm is felt in the plaintiff's home state, and thus jurisdiction is proper.

<sup>13</sup> *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003).

<sup>14</sup> Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the “Interwebs,”* 100 CORNELL L. REV. 1129, 1132 (2015).

<sup>15</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

<sup>16</sup> *Id.*

<sup>17</sup> Trammell & Bambauer, *supra* note 14, at 1149–50.

be time to retire this framework. Increasingly, critics note the shortcomings of *Zippo* none more bluntly than Professor Eric Goldman, who dubbed the decision, “legendarily bad.”<sup>18</sup> Thus, this Part addresses two main criticisms of *Zippo*: its conflicts with existing precedent and how all modern websites contain within them a level of interactivity that the *Zippo* court could not have reasonably expected. Then, this Part turns to an analysis of a recent Fifth Circuit decision<sup>19</sup> on internet jurisdiction to see if it provides a path forward and a roadmap for abandoning the seemingly antiquated sliding scale framework.

#### A. *Zippo’s Jurisdictional and Precedential Concerns*

Critics are quick to argue that *Zippo’s* sliding scale is misaligned with existing personal jurisdiction doctrines. They claim that *Zippo’s* sliding scale conditions jurisdiction on the type of information shared and not actual activity.<sup>20</sup> Additionally *Zippo* is misaligned with precedent as, outside of the internet, exchanging information, by itself, rarely justifies personal jurisdiction.<sup>21</sup> As one court put it, *Zippo* “effectively removes geographical limitations on personal jurisdiction over entities that have interactive websites.”<sup>22</sup> Despite this, *Zippo* still endures, likely because, as another court noted, the internet remains the “greatest challenge” to personal jurisdiction.<sup>23</sup>

Perhaps in response to this line of criticism, *Zippo* is now rarely invoked by itself. Instead, *Zippo* is typically used as a means of defining the contours of personal jurisdiction, alongside other, more enduring, precedent.<sup>24</sup> This practice supports the proposition that *Zippo*, when used alone, lacks a clear relationship to the “underlying normative principles of personal jurisdiction doctrine and theory.”<sup>25</sup> To that end, the Second Circuit has long recognized that *Zippo* “does not amount to a separate framework for analyzing internet-based jurisdiction.”<sup>26</sup> More recent decisions have gone further, expressly declining to apply *Zippo* even for a limited purpose as, in their view, “[t]he

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<sup>18</sup> Eric Goldman, *Fifth Circuit Issues an Important Online Jurisdiction Ruling—Johnson v. HuffPost, TECH. & MKTG. L. BLOG* (Dec. 28, 2021), <https://blog.ericgoldman.org/archives/2021/12/fifth-circuit-issues-an-important-online-jurisdiction-ruling-johnson-v-huffpost.htm>.

<sup>19</sup> *Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4d 314 (5th Cir. 2021).

<sup>20</sup> Trammell & Baumbauer, *supra* note 14, at 1147.

<sup>21</sup> *Id.* at 1147–48.

<sup>22</sup> *Kindig It Design, Inc. v. Creative Controls, Inc.*, 157 F. Supp. 3d 1167, 1174 (D. Utah 2016).

<sup>23</sup> *CIVIX-DDI, LLC v. Microsoft*, No. 99-B-172, 1999 WL 1020248, at \*2 (D. Colo. Oct. 1, 1999).

<sup>24</sup> *See, e.g., Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242–43, 250–52 (2d Cir. 2014) (first discussing *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); and *Calder v. Jones*, 465 U.S. 783 (1984), among others, before turning to *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)).

<sup>25</sup> Trammell & Baumbauer, *supra* note 14, at 1147.

<sup>26</sup> *Best Van Lines*, 490 F.3d at 252.

traditional tests are readily adaptable to the digital age.”<sup>27</sup> It is easy to see that even when *Zippo* is held up and recognized for its precedential effect, the luster has worn off. Perhaps the main reason why *Zippo* has not yet been overturned, despite significant innovation on how we exist on the internet, is because its sliding scale is now primarily used in conjunction with, and in support of, stronger jurisdictional precedent.

### B. *Interactivity is Everywhere*

Today, nearly all websites have some amount of interactivity. Features like embedded content, IP address collection, geotagging, and footers which contain terms of service agreements can trigger an interactivity analysis.<sup>28</sup> Taken to its extremes, the *Zippo* framework runs the risk of subjecting internet users to multiple jurisdictions any time they open their browsers.<sup>29</sup> This sort of criticism has made its way from academia to courtrooms, with some courts now substantially modifying the *Zippo* analysis.<sup>30</sup> The District of Utah, for example, has held that continued use of *Zippo*’s sliding scale, without more, “essentially eliminate[s] the traditional geographic limitations on personal jurisdiction.”<sup>31</sup> Similarly, the First Circuit now considers not only a website’s interactivity, but also whether the website specifically targets residents in the forum state or results in defendants’ “knowing receipt of substantial revenue from residents.”<sup>32</sup> However, neither court was willing to fully abandon the test in its entirety.

### C. *Huffington Post: Moving Past Zippo and Back Toward Existing Precedent*

The Fifth Circuit, however, has gone further than either the First Circuit or Utah and may provide a path forward to move past the confines of *Zippo*. In December of 2021, the Fifth Circuit was afforded the opportunity to consider the applicability of *Zippo* to today’s internet in *Johnson v. TheHuffingtonpost.com, Inc.* Here, Charles Johnson, a Texas resident, attempted to sue *The Huffington Post*, an online publication without physical ties to Texas, for libel over an article that identified him as a white nationalist and holocaust denier.<sup>33</sup> The Fifth Circuit recognized that Texas adopted

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<sup>27</sup> *Kindig It Design*, 157 F. Supp. 3d at 1175.

<sup>28</sup> Eric Goldman, *Running Geotargeted Advertising Confers Personal Jurisdiction—UMG Recordings v. Kurbanov, TECH. & MKTG. L. BLOG* (June 27, 2020), <https://blog.ericgoldman.org/archives/2020/06/running-geotargeted-advertising-confers-personal-jurisdiction-umg-recordings-v-kurbanov.htm>.

<sup>29</sup> *Id.*

<sup>30</sup> *Kindig It Design*, 157 F. Supp. 3d at 1174.

<sup>31</sup> *Id.*

<sup>32</sup> *Chen v. U.S. Sports Acad., Inc.* 956 F.3d 45, 60 (1st Cir. 2020).

<sup>33</sup> *Johnson v. TheHuffingtonPost.com, Inc.*, 21 F.4th 314, 316–17 (5th Cir. 2021).



*Zippo*'s sliding scale in their 2002 decision *Revell v. Lidov*.<sup>34</sup> However, the Fifth Circuit found that while the website was interactive, interactivity alone is not enough.<sup>35</sup> Much like the Second Circuit held in *Best Van Lines v. Walker*,<sup>36</sup> the *Huffington Post* court held that interactivity serves only to reflect a website's capacity to avail itself of the forum state.<sup>37</sup> In so doing, the Fifth Circuit negated its previous reliance on *Zippo*, acknowledging that the internet has evolved since its early adoption in the late 1990s.

Importantly, the *Huffington Post* decision goes further, holding that "just because a [web]site can exploit a forum does not mean that it has or that its forum contacts produced the plaintiff's claim."<sup>38</sup> As a result, the Fifth Circuit expressly limited its authority over out of state residents. It also used the Supreme Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Circuit* to make a fairness argument. While *Ford* is discussed in more detail in Part IV,<sup>39</sup> the Fifth Circuit expressed concerns that an expansive interpretation of *Zippo* would render jurisdiction over internet conduct limitless and cause "Grannies with cooking blogs" to be subject to lawsuits from Maine to Maui.<sup>40</sup> The decision also notes that *Zippo*'s present application rarely takes internet users own activities into account. Specifically, the Fifth Circuit recognizes that internet users, and not the defendant, are the ones who often create the defendant's contact with the forum state when they type a website into their browser.<sup>41</sup> In recognizing this, the Fifth Circuit reads in a requirement that defendants must specifically target their contacts with the forum for jurisdiction to be proper.<sup>42</sup> In essence, the effect of this opinion is that it neutralizes *Zippo*'s applicability without expressly overturning precedent. Thus, *Huffington Post* provides other jurisdictions a pathway forward to embrace present realities without having to continue to adhere to an outdated standard.

## II. ONLINE DEFAMATION AND JURISDICTIONAL LIMITS IN AN INCREASINGLY BORDERLESS WORLD

The *Zippo* framework is not the only way that courts can exercise jurisdiction over online conduct, nor does it fully address how to handle the "Grannies" that the Fifth Circuit was concerned with.<sup>43</sup> Hypothetically, if one of the Grannies was sued for defamation because she criticized another

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<sup>34</sup> *Id.* at 318.

<sup>35</sup> *Id.* at 319.

<sup>36</sup> *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252 (2d Cir. 2007).

<sup>37</sup> *TheHuffingtonPost.com*, 21 F.4th at 318–19.

<sup>38</sup> *Id.* at 319 (emphasis omitted).

<sup>39</sup> *See infra* Part IV.

<sup>40</sup> *TheHuffingtonpost.com*, 21 F.4th at 320.

<sup>41</sup> *Id.* at 321–22.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 320.

cooking blogger's recipes on her own blog, *Calder v. Jones* might cause her to be sued in another state.<sup>44</sup> *Calder*'s "effects test," which has aided courts in determining the scope of personal jurisdiction in defamation cases for nearly forty years, has gained special relevance in the internet era.<sup>45</sup> In *Calder*, the Court held that California had jurisdiction over *The National Inquirer*, despite being a Florida corporation, due to its national circulation and the fact that the alleged libel concerned the California-based activities of a California resident.<sup>46</sup> The *Calder* Court noted that the defendant's "intentional" actions "expressly" aimed at California were such that *The National Inquirer* could "reasonably anticipate" being sued in California as a result.<sup>47</sup> The relevant inquiry under *Calder* is whether the forum state served as the "focal point" for both the tort and the harm suffered.<sup>48</sup> Hence, the effects of an action, and where these effects are felt, can be enough to establish jurisdiction over a nonresident defendant.<sup>49</sup> While this analysis makes sense for national publications like *The National Inquirer*, who have the means to defend themselves in foreign states, it may not have the same applicability to small-scale content creators who nonetheless might be subject to the same standard.<sup>50</sup> Importantly, courts consider internet speech, and states differ in how they approach defamation in their long-arm statutes, with some applying the traditional defamation analysis and others considering online speech to be *per se* hyperbole.<sup>51</sup> Additionally, *Calder*'s reasonable anticipation standard may not be entirely workable in a virtual setting due to differing norms from the offline world, which raises questions about how to apply it to internet communications.<sup>52</sup> Thus, what was once settled law is now decidedly *unsettled* due to the rise of social media.<sup>53</sup>

#### A. Long-Arm Statutes and Defamation in the Internet Context

Regardless of how courts approach social media and any resulting

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<sup>44</sup> *Calder v. Jones*, 465 U.S. 783, 789 (1984).

<sup>45</sup> *Id.*; see, e.g., Ellen Smith Yost, Comment, *Tweet, Post, Share . . . Get Haled into Court? Calder Minimum Contacts Analysis in Social Media Defamation Cases*, 73 SMU L. REV. 693, 701 (2020) (analyzing minimum contacts under the *Calder* standard and advocating for this as the sole standard for personal jurisdiction when a plaintiff is defamed in an online forum).

<sup>46</sup> *Calder*, 465 U.S. at 785–86, 788.

<sup>47</sup> *Id.* at 789–90.

<sup>48</sup> *Id.* at 789.

<sup>49</sup> *Id.* at 788–89.

<sup>50</sup> See *id.* at 790 (showing that jurisdiction should be assessed over individuals and employers alike).

<sup>51</sup> See Hadley M. Dreibelbis, Note, *Social Media Defamation: A New Legal Frontier Amid the Internet Wild West*, 16 DUKE J. CONST. L. & PUB. POL'Y 245, 257–69 (2021) (summarizing the two views courts take when deciding whether to apply traditional defamation principles to online posts before suggesting that neither view fully addresses the differing usage and understanding of social media, which hinges on the platform and community standards of its users).

<sup>52</sup> *Id.*

<sup>53</sup> Jaden Edison, *Defamation was Considered a Settled Area of Law. Then Came Social Media*, POYNTER (July 9, 2021), <https://www.poynter.org/reporting-editing/2021/defamation-was-considered-a-well-settled-area-of-law-then-came-social-media/>.

defamation, the biggest inequity regarding defamation is not which test is used, but each state's long-arm statute. These statutes permit courts to obtain personal jurisdiction over a nonresident defendant based on the causes of action outlined in the statute itself. If a statute expressly excludes a specific cause of action from the category of harms under which it falls, or the statute does not name the cause of action at all, then a nonresident may not be sued on that basis in that forum. While plaintiffs must still show that the defendant has the "minimum contacts" with the forum state to sustain a suit, as required by *International Shoe* and reaffirmed in subsequent cases,<sup>54</sup> apply, states have latitude to define what sorts of cases they will, and will not, hear in their courtrooms.<sup>55</sup> Some states, like Connecticut and New York, expressly exclude defamation as an actionable tort under their long-arm statutes, while others, like Florida and California do not.<sup>56</sup> Additionally, the states that recognize defamation as a permissible exercise of personal jurisdiction over nonresidents are split on how to address defamatory internet conduct.<sup>57</sup> These differing interpretations have created scenarios where the litigation risk differs substantially depending on where the harmed party lives.

### 1. *Connecticut and New York: The Exclusionary Model*

In Connecticut, defamation requires that a plaintiff demonstrates: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement.<sup>58</sup> Connecticut excludes defamation from their long-arm statutes.<sup>59</sup> In reading this statute, one could believe that Connecticut courts uniformly decline to hear cases pertaining to defamation involving out of state residents. However, this is not always the case. While both states' long-arm statutes insulate them from navigating many murky issues concerning allegations of defamatory internet conduct, both Connecticut and New York have, on occasion, exercised jurisdiction here.

Connecticut is generally reluctant to exercise jurisdiction over out of state residents on defamation claims due to its long-arm statute.<sup>60</sup> However, the Federal District of Connecticut was unwilling to dismiss a case where an internet user allegedly threatened other internet users because the postings

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<sup>54</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>55</sup> VEDDER, PRICE, KAUFMAN & KAMMOLZ, LONG-ARM STATUTES: A FIFTY STATE SURVEY i, (2003), <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/LongArmSurvey.pdf>.

<sup>56</sup> *Id.* at 18, 22, 32, 89.

<sup>57</sup> Judith M. Mercier, *Bloggers Beware: Florida's Long-Arm Statute Reaches Nonresidents Who Post Material Online*, HOLLAND & KNIGHT (Oct./Nov. 2010), <https://www.hklaw.com/en/insights/publications/2010/09/bloggers-beware-floridarsquos-longarm-statute-reac>.

<sup>58</sup> *Simms v. Seaman*, 69 A.3d 880, 894 (Conn. 2013).

<sup>59</sup> CONN. GEN. STAT. ANN. § 52-59b (West 2023).

<sup>60</sup> *Doe I v. Ciolli*, 611 F. Supp. 2d 216, 223 n.5 (D. Conn. 2009).

were “specifically targeted” toward Connecticut residents.<sup>61</sup> However, the court did observe that defamation remained expressly excluded from Connecticut’s long-arm statute.<sup>62</sup> In some circumstances, Connecticut’s state courts have also been willing to hear defamation suits against out of state residents.<sup>63</sup> This shows that exceptions can be made to the general principle that Connecticut’s long-arm statute excludes defamation claims.

A recent example of Connecticut’s flexible approach to its seemingly rigid carveout for defamation was in the trial of Alex Jones. Jones, who gained notoriety by falsely claiming that the 2012 Sandy Hook Elementary School shooting in Newtown, Connecticut was a hoax, was sued in Connecticut for defamation.<sup>64</sup> In 2018, Jones’ lawyers filed a motion to dismiss for lack of jurisdiction.<sup>65</sup> Here, the Superior Court judge determined that Conn. Gen. Stat. § 52-59b(a)(1) encompassed the defamation claim.<sup>66</sup> This provision allows for Connecticut courts to exercise personal jurisdiction over nonresidents who “transact business within the state,”<sup>67</sup> and, while the Superior Court decision does not contain an explicit justification, it stands to reason that *InfoWars*’ substantial revenue was the basis for this decision.<sup>68</sup> Of course, an argument can be made that the Sandy Hook shooting and the comments made by Alex Jones were so egregious that any attempt to deny jurisdiction would be met with massive international uproar and immediate changes to Connecticut’s long-arm statute, but the *Lafferty* court still serves as an indication that even in the face of seemingly rigid limits on personal jurisdictions, courts exercise a level of flexibility.<sup>69</sup>

Like Connecticut, New York excludes defamation from its long-arm

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<sup>61</sup> *Id.* at 222.

<sup>62</sup> *Id.* at 223 n.5.

<sup>63</sup> See, e.g., *Lafferty v. Jones*, Nos. X06UWYCV186046436S, X06UWYCV186046437S, X06UWYCV186046438S, 2021 Conn. Super. LEXIS 1930, at \*17–\*19 (Conn. Super. Ct. Nov. 18, 2021) (the Waterbury Superior Court exercised jurisdiction over Alex Jones, owner of *InfoWars* due to his false claims that the Sandy Hook shooting was a hoax.).

<sup>64</sup> Frankie Graziano, *Where the CT Case Against Alex Jones Stands as Jury Selection Nears*, CONN. PUB. RADIO (July 27, 2022), <https://ctmirror.org/2022/07/27/ct-case-against-alex-jones-stands-jury-selection-nears-newtown-sandy-hook-infowars/>.

<sup>65</sup> *Lafferty*, No. UWYCV186046436S, 2019 Conn. Super. LEXIS 4682, at \*1 (Conn. Super. Ct. Apr. 29, 2019).

<sup>66</sup> *Id.*

<sup>67</sup> CONN. GEN. STAT. § 52-59b(a)(1).

<sup>68</sup> *Lafferty*, 2019 Conn. Super. LEXIS 4682, at \*1. Jones and his company, *InfoWars*, have made millions off conspiracy theories, many of which are shared over the internet. See, e.g., Alex Seitz-Wald, *Alex Jones: Conspiracy Inc.*, SALON (May 2, 2013, 11:45 AM), [https://www.salon.com/2013/05/02/alex\\_jones\\_conspiracy\\_inc/](https://www.salon.com/2013/05/02/alex_jones_conspiracy_inc/) (detailing how *InfoWars* became a multimillion-dollar enterprise).

<sup>69</sup> It could also be argued that, since *InfoWars* was not only a website but broadcast on radio and television, its reach was different from a run-of-the-mill website. Regardless of which depiction of *InfoWars* one wishes to adopt; it does not negate the fact that Alex Jones was an out-of-state resident who was found guilty of defamation in Connecticut.

statute.<sup>70</sup> However, like Connecticut, New York has adopted similar processes that make defamation less of a bright line exclusionary rule than its long-arm statute might suggest.<sup>71</sup> In New York, defamation cases may still be brought so long as the defendant (1) transacts any business in New York and (2) the cause of action arises from the business transaction.<sup>72</sup> In the case of internet-based defamation claims, this exception is further limited.<sup>73</sup> Here, New York requires more than a showing that a website is accessible in New York in order to meet the “transacting business” standard.<sup>74</sup> Interestingly, *Zippo* is given new life within the Second Circuit, but only insofar as it aids in determining whether an internet defendant “purposefully availed” themselves of the privilege of conducting activities within the forum state, which is meant to help courts navigate the boundaries of New York’s “transacting business” standard.<sup>75</sup> Crucially, the Second Circuit holds that *Zippo* does not amount to a separate framework for jurisdictional analysis.<sup>76</sup> Further, quasi-business-related internet activity, like engaging with New York residents on LinkedIn, are not enough to satisfy the “transacting business” standard.<sup>77</sup> Thus, while *Zippo* may endure in the context of defamation within the Second Circuit, it only does so insofar as it means to recognize that existing precedent remains the centerpiece of any jurisdictional analysis.

Connecticut’s long arm statute serves as another potential mechanism to exercise jurisdiction.<sup>78</sup> In Connecticut, computer system or network usage within its borders allows for the state to exercise personal jurisdiction over nonresidents.<sup>79</sup> When the Second Circuit examined the scope of this provision in 2012, it interpreted it broadly.<sup>80</sup> The court held that it was immaterial that the defendant was not in Connecticut, only that the computer or network was within Connecticut.<sup>81</sup> The court further interpreted the statute as extending to “persons outside the state who remotely access computers within the state . . . [and] appl[ies] to torts committed by persons not in Connecticut based on conduct not covered” under other provisions of

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<sup>70</sup> N.Y. C.P.L.R. § 302(a)(2) (McKinney 2008).

<sup>71</sup> *Id.*

<sup>72</sup> *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 246 (2d Cir. 2007).

<sup>73</sup> *Id.* at 250.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 252.

<sup>76</sup> *Id.*

<sup>77</sup> *Gilbert v. Indeed, Inc.*, 513 F. Supp. 3d 374, 413 (S.D.N.Y. 2021).

<sup>78</sup> Connecticut, unlike New York, can exercise jurisdiction over nonresidents when they access computers and *computer networks* within their borders. *Compare* N.Y. C.P.L.R. § 302 (McKinney 2008), with CONN. GEN. STAT. § 52-59b(a)(5) (2019).

<sup>79</sup> CONN. GEN. STAT. § 52-59b(a)(5) (2019).

<sup>80</sup> *MacDermid, Inc. v. Deiter*, 702 F.3d 725, 728–29 (2d Cir. 2012).

<sup>81</sup> *Id.* at 729.

its long-arm statute.<sup>82</sup>

But, ten years later, this provision is used infrequently and the definition of what constitutes a computer network<sup>83</sup> is still evolving.<sup>84</sup> Notably, the New Haven Superior Court speculated that, “[m]erely sending emails that are routed over a server located in Connecticut is likely not sufficient for personal jurisdiction under § 52-59b(a)(5).”<sup>85</sup> As social media posts are even more distantly tied to a forum than an email, it is unclear whether this carveout will allow for a broader exercise of jurisdiction in internet-based defamation cases.

Thus, by excluding defamation from their long-arm statutes, Connecticut and New York deny many plaintiffs the ability to sue defendants in their home states. While it is true that some plaintiffs may be able to afford lawsuits in the defendant’s forum, and both Connecticut and New York have found escape valves for the restrictions that their long-arm statutes impose upon access to their court systems, this is not the case for all residents of these states. As a result, change may be necessary to their statutes, due to the lingering questions of fairness that the *Walden* Court was unwilling to entertain in 2014.<sup>86</sup>

## 2. Florida

On the other end of the spectrum, Florida takes an extremely broad view of jurisdiction over internet activity. Unlike Connecticut and New York,<sup>87</sup> Florida does not exclude defamation of character from its long-arm statute, which permits non-domiciled persons to be subject to Florida’s courts.<sup>88</sup> Florida addressed whether its long-arm statute extended to internet conduct in *Internet Solutions Corp. v. Marshall*, and chose a broad approach.<sup>89</sup>

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<sup>82</sup> *Id.* (the Second Circuit also said that use of a computer was not necessary, due to the language contained within Connecticut’s long-arm statute).

<sup>83</sup> CONN. GEN. STAT. ANN. § 52-59b(a)(5) (West 2022202220220192022). The long-arm statute uses the definition of a computer network contained in § 53-451(a)(3), which, defines a computer network as, “a set of related, remotely connected devices and any communications facilities including more than one computer with the capability to transmit data among them through the communications facilities.” *Id.* at § 53-451(a)(3).

<sup>84</sup> See, e.g., *Rocky Hill Eye Assocs., P.C. v. Data Care Pro, LLC*, No. CV196087591S, 2019 Conn. Super. LEXIS 3437, at \*15 (Conn. Super. Ct. Dec. 24, 2019) (holding that remote access of a plaintiff’s computer system established personal jurisdiction). *But see* *Advanced Improvements, LLC v. Londregan*, No. KNLCV186035394, 2019 Conn. Super. LEXIS 1913, at \*16 (Conn. Super. Ct. July 9, 2019) (holding that any defamation claim must result from the defendant’s use of either a computer or computer network within the state and that an employee’s email conduct, while acting outside an agency relationship, was not sufficient to establish vicarious liability for the parent corporation).

<sup>85</sup> *Nolen-Hoeksema v. Maquet Cardiopulmonary Ag*, No. NNH CV-14-6049888 S, 2015 Conn. Super. LEXIS 5055, at \*18 (Conn. Super. Ct. Nov. 9, 2015).

<sup>86</sup> *Walden v. Fiore*, 571 U.S. 277, 290–91 n.9. (2014).

<sup>87</sup> CONN. GEN. STAT. ANN. § 52-59b (West 2019) (explicitly excluding defamation of character as a tort under the long-arm statute, regardless of whether it occurred in or out of state); N.Y. C.P.L.R. § 302 (McKinney 2008) (explicitly excluding defamation of character by nonresidents from the long-arm statute).

<sup>88</sup> FLA. STAT. § 48.193 (2016).

<sup>89</sup> *Internet Sols. Corp. v. Marshall*, 309 So. 3d 1201, 1203 (Fla. 2010).

According to *Internet Solutions*, the exercise of jurisdiction over an out-of-state internet user is proper from the moment that they post any allegedly defamatory content about a Florida resident because internet content is pervasive and can be accessed instantaneously by anyone.<sup>90</sup> As the *Internet Solutions* court explains, a nonresident defendant has subjected themselves to Florida's jurisdiction because they "directed the communication about a Florida resident to readers worldwide, including potential readers within Florida."<sup>91</sup> It is easy to see how the expansive authority granted to Florida courts under *Internet Solutions*' interpretation of its long-arm statute could yield results that are misaligned with Supreme Court precedent.

For example, Floridians' "potential"<sup>92</sup> ability to access content runs contrary to *World-Wide Volkswagen Corp. v. Woodson*.<sup>93</sup> In *World-Wide Volkswagen*, the Court held that merely driving over a state's roads was insufficiently foreseeable to establish personal jurisdiction.<sup>94</sup> Virtual contacts are even less foreseeable than a car traveling from one state to another. A website can be accessed by anyone at any time, however there is no guarantee that any one person will view an individual post. Thus, it seems to follow that access, without more, should not be sufficient to establish minimum contacts with the forum state and to hold otherwise may violate nearly eighty years of Supreme Court precedent.

Florida, however, remains unconcerned with any potential conflicts with precedent. Instead of addressing the risks of a legal challenge inherent in *Internet Solutions*, its courts recently extended the applicability of its holding to social media. In *Lowery v. McBee*, Florida considered the appropriate intrastate venue for a defamation lawsuit concerning a Facebook post.<sup>95</sup> While the parties were both Florida residents, the case's reasoning has implications that extend beyond the Florida's borders. Here, the *Lowery* court held that while a Facebook post cannot be libelous until it is published and accessed, the access prong is essentially irrelevant as, "a posting placed on a public Facebook page is instantaneously accessible throughout Florida."<sup>96</sup> Thus, under this rule, it does not matter whether anyone has *actually* accessed the post or if the post is quickly deleted once cooler heads have prevailed. Instead, under Florida law, access is a foregone conclusion once the poster has clicked "update status" or submitted a comment. Essentially, the *Lowery* court assumed that the defendant "should have known" that social media posts subject them to Florida's legal system, which "makes foreseeability of harm the sole basis for jurisdiction in contravention

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<sup>90</sup> *Id.* at 1214–15.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298–99 (1980).

<sup>94</sup> *Id.*

<sup>95</sup> *Lowery v. McBee*, 322 So. 3d 110, 112 (Fla. Dist. Ct. App. 2021).

<sup>96</sup> *Id.*

of controlling United States Supreme Court precedent.”<sup>97</sup> Additionally, the foreseeability of harm is also suspect in an era where the “Florida Man” has become such a popular meme that it is nearly synonymous with internet culture, so much so that it has reached beyond the internet to inform popular culture as a whole.<sup>98</sup> However, as the case centered upon a venue dispute between two Florida residents who lived approximately two hours from one another,<sup>99</sup> it seems that we will have to wait to see whether expansive statutes like Florida’s will reach critical mass so as to draw notice from the Supreme Court.

### 3. *California*

California serves as an example of how a state can address internet jurisdiction and not run afoul of existing precedent. Like Florida, defamation is a recognized cause of action under its long-arm statute.<sup>100</sup> However, California’s approach is not as broad as it interprets *Calder* as requiring “intentional conduct expressly aimed at or targeting the forum state in addition to the defendant’s knowledge that his intentional conduct would cause harm in the forum.”<sup>101</sup> Here a plaintiff must show (1) the defendant committed an intentional tort, (2) the plaintiff felt the brunt of the harm caused by that tort in the forum state, and (3) the defendant expressly aimed their tortious conduct at the forum state in a manner that rendered it the focal point of the tortious activity.<sup>102</sup>

The third prong of California’s *Calder* interpretation is an important limitation on the reach of internet-based specific personal jurisdiction. While Florida does not consider the “aiming” of tortious conduct relevant for internet-based actions,<sup>103</sup> California does. Thus, defamatory statements posted on the internet are not enough to satisfy the minimum contacts requirement of specific personal jurisdiction, even when the poster knows that they are talking about a California resident.<sup>104</sup> Instead, a plaintiff must show that the nonresident defendant intentionally posted the statements at issue on the internet and the defendant “expressly aim[ed] or specifically direct[ed]” their intentional conduct at the forum, rather than merely at a plaintiff who lives there.<sup>105</sup>

California’s approach to *Calder* reflects an understanding that without

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<sup>97</sup> Pavlovich v. Superior Court, 58 P.3d 2, 13 (Cal. 2002).

<sup>98</sup> Logan Hill, *Is it Okay to Laugh at Florida Man?*, WASH. POST (July 15, 2019) <https://www.washingtonpost.com/news/magazine/wp/2019/07/15/feature/is-it-okay-to-laugh-at-florida-man-2/>; *Florida Man*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/florida-man> (last visited Jan. 23, 2022).

<sup>99</sup> *Lowery*, 322 So. 3d at 112.

<sup>100</sup> CAL. CIV. PROC. CODE § 410.10 (West 2022).

<sup>101</sup> Pavlovich, 29 Cal. 4th at 274.

<sup>102</sup> *Burdick v. Superior Court*, 233 Cal. App. 4th 8, 19–20 (Cal. Ct. App. 2015).

<sup>103</sup> *Lowery*, 322 So. 3d at 112.

<sup>104</sup> *Burdick*, 233 Cal. App. 4th at 13.

<sup>105</sup> *Id.*



these limits, “a ‘person placing information on the Internet would be subject to personal jurisdiction in every State,’ and the traditional due process principles governing a State’s jurisdiction over persons outside of its borders would be subverted.”<sup>106</sup> This is essentially what is happening in Florida, where any Floridian’s instantaneous access to a website is enough to establish personal jurisdiction over nonresident posters.<sup>107</sup> Further, while California’s jurisdictional standards are more permissive than those of New York and Connecticut, as, like Florida, California’s long-arm statute is extremely broad,<sup>108</sup> California is more aligned with existing precedent. This suggests that while states may differ on what sorts of cases they wish to hear, a middle ground may exist regarding how the internet factors into jurisdictional determinations.

#### B. *Differing Application of Calder’s “Reasonable Anticipation” Standard*

Another issue regarding *Calder* is its language requiring defendants’ “reasonabl[e] anticipat[ion]” that they be subject to a lawsuit in the forum state.<sup>109</sup> Ignoring the fact that laypersons are often ignorant of long-arm statutes and their jurisdictional reach, reasonable anticipation is still an amorphous concept. After all, what may seem reasonable to one person may be unreasonable to another, and this is even more true when it comes to conduct that one might consider defamatory in nature. This is especially true on the internet, where individuals from all sorts of backgrounds share thoughts with the click of a button, which, as one website puts it, allows “all users to participate.”<sup>110</sup> These individuals are prompted and encouraged to “engage” with the medium, sharing their thoughts with friends, family, or the world at large, with minimal thought given to the consequences of their actions.<sup>111</sup> Studies have shown that individuals are more likely to express outrage in a digital setting, as they feel that there is less risk involved when compared to the “offline” world.<sup>112</sup> While this lessened perception risk may explain why individuals post content that could cross into libel or defamation, present applications of *Calder* make it unlikely that these differing realities will prevent a lawsuit.

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<sup>106</sup> *Id.* at 21 (quoting *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002)).

<sup>107</sup> *Lowery*, 322 So. 3d at 112.

<sup>108</sup> CAL. CIV. PROC. CODE § 410.10 (West 2022).

<sup>109</sup> *Calder v. Jones*, 465 U.S. 783, 789–90 (1984).

<sup>110</sup> *Why is Social Media Use So Important for Seniors?*, EASY TECH SENIORS, <https://www.easytechseniors.com/social-media-as-an-essential-tool-for-seniors/> (last visited Jan. 24, 2022).

<sup>111</sup> *Id.*; Keach Hagey & Jeff Horwitz, *Facebook Tried to Make its Platform a Healthier Place. It Got Angrier Instead.*, WALL ST. J. (Sept. 15, 2021, 9:26 AM), <https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215>.

<sup>112</sup> Gaia Vince, *Evolution Explains Why We Act Differently Online*, BBC FUTURE (Apr. 3, 2018), <https://www.bbc.com/future/article/20180403-why-do-people-become-trolls-online-and-in-social-media>.

Another limitation to the reasonableness inquiry is the ability of third parties to reshare information. On Twitter, for example, a user's tweets can be retweeted by anyone and have the potential to be shared well outside of what a novice user could have reasonably anticipated. While websites and social media platforms are greatly protected from suit under section 230 of the Communications Decency Act, individuals are not afforded the same levels of statutory protection.<sup>113</sup> Instead, individuals are subject to the limitations of the First Amendment, which means that they can be held liable, especially if they do not post about public figures.<sup>114</sup> Any speech that falls outside First Amendment protections is instead analyzed via judicial inquiries of reasonableness and fairness.<sup>115</sup> As long as the "minimum contacts" are met under that State's interpretation of how the internet functions, and the long-arm statute permits it, jurisdiction is proper.<sup>116</sup> Therefore, the question of whether the defendant could have reasonably anticipated that their internet activity would have touched the State when they posted it is often irrelevant. In essence, individual internet users are at the mercy of fifty different jurisdictions and their long-arm statutes.

Notably, reasonableness inquiries into platforms' content moderation policies have been absent from section 230's statutory requirements.<sup>117</sup> Congressman Devin Nunes has recognized that, at least within the scope of section 230, reasonableness is "vague and unworkable."<sup>118</sup> Even scholars that support the incorporation of a reasonableness inquiry into section 230 have noted that, while courts are "well suited" to address reasonableness, "[t]here is no one-size-fits-all approach" to internet content moderation.<sup>119</sup> If a reasonableness standard for internet content moderation for well-funded platforms is "unworkable," it would seem to follow that reasonableness is similarly inapplicable to internet users.

Individuals, unlike large social media companies, are not currently shielded from reasonableness inquiries regarding their online conduct.<sup>120</sup> As a result, they can find themselves subject to fifty different interpretations of internet-based jurisdiction.<sup>121</sup> This discrepancy is hardly aligned with the norms of "fair play and substantial justice" that served as the basis of

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<sup>113</sup> 47 U.S.C. § 230.

<sup>114</sup> U.S. CONST. amend. I; *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

<sup>115</sup> *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1029 (2021); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 286 (1980) (all detailing the scope of personal jurisdiction and referencing the need for fairness considerations as part of the inquiry).

<sup>116</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>117</sup> Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 71–72.

<sup>118</sup> *Id.* at 71.

<sup>119</sup> *Id.* at 72.

<sup>120</sup> 47 U.S.C. § 230.

<sup>121</sup> VEDDER PRICE, *supra* note 55.

*International Shoe* and subsequent personal jurisdiction jurisprudence.<sup>122</sup> Researchers have recognized that users' social media behavior is influenced by the platform itself, which further undermines the concept of fairness.<sup>123</sup> This is even more apparent when taking into account the fact that social media algorithms affect what users see, and how they see it.<sup>124</sup> Given this reality, it seems incongruous to apply offline standards of reasonableness to a virtual world. It is, after all, the platform that helps shape users' online conduct, and the platform is afforded near limitless protections when doing so. However, individuals who post on these sites are not granted anywhere near the same amount of protection. This suggests that existing reasonableness standards might be *unreasonable* when factoring in that the platforms that help establish, and influence, internet conduct norms are afforded substantial protection. As a result, a broad application of *Calder* could have several negative downstream effects that harm end-users and not the platforms that host allegedly defamatory content.

The most straightforward path toward minimizing the negative impacts of a broad interpretation of *Calder* would be to simply follow the narrow application presently in use. Several jurisdictions have interpreted *Calder* to require a showing of something more than "a finding that the harm caused by the defendant's intentional tort is primarily felt within the forum" for jurisdiction to be proper.<sup>125</sup> Further, courts could adopt the California standard, where mere "awareness" that posting content that is defamatory or otherwise illegal is not, by itself, sufficient to exercise jurisdiction over a foreign defendant.<sup>126</sup> Put another way, more states could require specific evidence that web posters have directed their comments toward in-state audiences in order to exercise jurisdiction.<sup>127</sup> As the Eastern District of Pennsylvania interprets *Calder*, "(a) knowing that the plaintiff is in the forum state, (b) posting negative statements about the plaintiff's forum-related activities, and (c) referring to the forum in one's writing will not suffice to satisfy the *Calder* effects test."<sup>128</sup> This framework adjusts the *Calder* holding in a manner that recognizes our twenty-first century reality. It keeps the spirit of *Calder* untouched while recognizing that the ways we interact with one another have evolved since 1984, and our understanding of

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<sup>122</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>123</sup> Mehrdad Koohikamali & Anna Sidorova, *Information Re-Sharing on Social Networking Sites in the Age of Fake News*, 20 INFO. SCI. 215, 216–17 (2017).

<sup>124</sup> Maria Alessandra Golino, *Algorithms in Social Media Platforms*, INST. FOR INTERNET & JUST SOC'Y (Apr. 24, 2021), <https://www.internetjustsociety.org/algorithms-in-social-media-platforms>.

<sup>125</sup> *Pavlovich v. Superior Court*, 58 P.3d 2, 8 (Cal. 2002) (noting that, "virtually every jurisdiction has held that the *Calder* effects test requires intentional conduct "expressly aimed at or targeting" the forum state in addition to the defendant's knowledge that his intentional conduct would cause harm in the forum.").

<sup>126</sup> *Id.* at 11–13.

<sup>127</sup> *Mercier*, *supra* note 57.

<sup>128</sup> *Gorman v. Jacobs*, 597 F. Supp. 2d 541, 548 (E.D. Pa. 2009).

precedent must take a similar approach.

### III. THE METAVERSE: AN EMERGING JURISDICTIONAL PROBLEM

Defamation, while more well known, is only one way that technology is upending settled law.<sup>129</sup> In the wake of the pandemic, much has been made of the metaverse, with Facebook going so far as to rebrand its parent company to Meta in 2021.<sup>130</sup> However, very little is known about what it is, or its future viability, as the concept is still evolving, and tech companies have yet to settle on its scope or workable definitions.<sup>131</sup> At a base level, the metaverse would serve as a means to bridge virtual worlds with our current one.<sup>132</sup> Currently, “the metaverse is generally made up of somewhat-immersive XR spaces in which interactions take place among humans and automated entities.”<sup>133</sup> However, the metaverse “could raise significant threats to human agency and human rights as ‘surveillance capitalism’ expands and authoritarian governments take advantage of these new technologies.”<sup>134</sup>

Experts are split on whether the metaverse will truly be an immersive experience.<sup>135</sup> But, there is certainly a lot of money behind the concept.<sup>136</sup> Companies that have bought into the metaverse are drawn to the idea of a digital economy, which, at its most ambitious, would allow users “to take virtual items like clothes or cars from one platform to another . . . .”<sup>137</sup> Venture capitalists are investing in the hopes that the metaverse will “revolutionize not just the infrastructure layer of the digital world, but also much of the physical one . . . .”<sup>138</sup> To that end, platforms are building new methods of commerce on the back of Web 3.0 technologies, like cryptocurrency and non-fungible tokens (NFTs) that would bridge the physical and virtual worlds.<sup>139</sup>

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<sup>129</sup> Jaden Edison, *Defamation was Considered a Well-Settled Area of Law. Then Came Social Media*, POYNTER (July 9, 2021), <https://www.poynter.org/reporting-editing/2021/defamation-was-considered-a-well-settled-area-of-law-then-came-social-media/>.

<sup>130</sup> Eric Ravenscraft, *What is the Metaverse, Exactly?*, WIRED (Apr. 25, 2022, 7:00 AM), <https://www.wired.com/story/what-is-the-metaverse/>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> JANNA ANDERSON & LEE RAINIE, *THE METAVERSE IN 2040*, PEW RSCH. CTR. 5 (2022).

<sup>134</sup> *Id.* at 7.

<sup>135</sup> *Id.* at 6 (54% of experts believe that the metaverse will be an immersive aspect of our daily lives by 2040, while 46% do not).

<sup>136</sup> Martin Peers, *On Metaverse Spending, Zuckerberg Doesn't Care What Critics Say*, THE INFO. (Oct. 26, 2022, 5:00 PM), <https://www.theinformation.com/articles/on-metaverse-spending-zuckerberg-doesn-t-care-what-critics-say> (noting that Meta Platforms has an annualized investment of nearly \$15 billion in the metaverse).

<sup>137</sup> Ravenscraft, *supra* note 130.

<sup>138</sup> Matthew Ball, *The Metaverse: What It Is, Where to Find It, and Who Will Build It*, MATTHEWBALL.VC (Jan. 13, 2020), <https://www.matthewball.vc/all/themetaverse>.

<sup>139</sup> Tom Ara et al., *Exploring the Metaverse: What Laws Will Apply?*, DLA PIPER (Feb. 22, 2022), <https://www.dlapiper.com/en-us/insights/publications/2022/02/exploring-the-metaverse>.

A guiding principle of the metaverse is that it is borderless.<sup>140</sup> While this may be an appealing marketing campaign, it necessarily raises questions regarding how the legal system should tackle the issue. Given the risks involved, it necessitates early action to ensure that legal rights are protected.<sup>141</sup> The first cases, which center on NFTs, are just beginning, and it could be years before courts determine how to exercise jurisdiction over metaverse-based disputes, should the concept take shape.<sup>142</sup> Some scholars are pushing for universal jurisdiction over the metaverse as the sole solution to this problem, due to its reach,<sup>143</sup> however, this is unlikely to occur. Although much of the metaverse is still mere fantasy, firms are preparing for future litigation over metaverse controversies as they anticipate future litigation should the metaverse concept come to fruition.<sup>144</sup>

Others do not believe that personal jurisdiction will be fully upended by the metaverse.<sup>145</sup> They doubt that countries will cede jurisdiction to other nations, and that, instead, the forum selection clauses contained in terms and conditions will establish the confines of the appropriate venue.<sup>146</sup> These forum clauses are already in place in some cases.<sup>147</sup> Moreover, it is likely that, at least in the United States, Section 230 protections will extend to the metaverse and insulate platforms from most lawsuits that result from what their users do on them.<sup>148</sup> However, some courts have justified the exercise of personal jurisdiction over platform owners due to the structure of their

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<sup>140</sup> Pin Lean Lau, *The Metaverse: Three Legal Issues We Need to Address*, THE CONVERSATION (Feb. 1, 2022, 9:44 AM), <https://theconversation.com/the-metaverse-three-legal-issues-we-need-to-address-175891>.

<sup>141</sup> ANDERSON & RAINIE, *supra* note 133, at 7.

<sup>142</sup> Jessica Rizzo, *The Future of NFTs Lies with the Courts*, WIRED (Apr. 3, 2022, 7:00 AM), <https://www.wired.com/story/nfts-cryptocurrency-law-copyright/>.

<sup>143</sup> James Cooper, Opinion, *Why We Need 'Meta Jurisdiction' for the Metaverse*, THE HILL (Dec. 2, 2021, 3:30 PM), <https://thehill.com/opinion/technology/583529-why-we-need-meta-jurisdiction-for-the-metaverse/>.

<sup>144</sup> Christine Schiffner, *Plaintiffs Firms Eye Metaverse as Growth Target for Litigation*, NAT'L L.J. (June 6, 2022, 10:00 AM), <https://www.law.com/nationallawjournal/2022/06/06/plaintiffs-firms-eye-metaverse-as-growth-target-for-litigation/>.

<sup>145</sup> Cassandre Coyer, *Virtual Limits: Lawyers Expect Jurisdictional Boundaries to Still Apply in Metaverse*, LEGAL TECH NEWS (Sept. 1, 2022), <https://www.law.com/legaltechnews/2022/09/01/virtual-limits-lawyers-expect-jurisdictional-boundaries-to-still-apply-in-metaverse/>.

<sup>146</sup> *Id.*

<sup>147</sup> See, e.g., *Touchcast Terms of Use and Agreement to Terms of Use*, TOUCHCAST (June 5, 2022), <https://touchcast.com/metaverse-terms> (“If for any reason, a Dispute proceeds in court rather than arbitration, the Dispute shall be commenced or prosecuted in the state and federal courts located in New York, NY, and the Parties hereby consent to, and waive all defenses of lack of personal jurisdiction, and forum non conveniens with respect to venue and jurisdiction in such state and federal courts.”).

<sup>148</sup> 47 U.S.C. § 230(c)(1); Brian Levy, *Will Section 230 and DMCA Translate to the Metaverse?*, JD SUPRA (July 19, 2022), <https://www.jdsupra.com/legalnews/will-section-230-and-dmca-translate-to-4424066/>.

metaverse-like websites, which house virtual worlds.<sup>149</sup> Regardless of whether a court finds that Section 230 insulates platforms from metaverse-based lawsuits or not, it is clear that neither Section 230 nor forum selection clauses extend to disputes between users of the platforms themselves. Therefore, determining where a metaverse-based dispute between individuals or individual corporations should be litigated once again falls to interpretations of virtual contacts and the reach of state long-arm statutes.

It is possible that some courts may use a computer server-based approach to help establish jurisdiction. In Connecticut, this framework already exists.<sup>150</sup> However, this jurisdictional hook would only work if the servers are within a state's borders and the defendant's contact was significant enough with those servers to satisfy due process.<sup>151</sup> Connecticut courts have noted that sending an email may not be significant enough contact with an in-state server,<sup>152</sup> so it could follow that incidental contact with a metaverse server housed in Connecticut is similarly insufficient to establish jurisdiction by itself. Additionally, corporations with a large stake in the metaverse might avoid setting up computer systems and servers in Connecticut and other states with similar language in their long-arm statutes. Although likely protected by Section 230, these corporations may still wish to avoid states, like Connecticut, entirely, under a belief that in doing so, they could encourage others to adopt the metaverse concept and the idea of a borderless society.<sup>153</sup>

This structure would make it more likely that Connecticut residents would have to travel to defendant-friendly forums. In those forums, the defendant corporations would be considered "essentially at home" and all-purpose, or general, personal jurisdiction would be proper, but it would also follow that the laws in those states would be more favorable to those corporations. This problem is exacerbated if, for example, Connecticut has a data privacy statute, but that state does not. Thus, the ability to seek a remedy for metaverse-based harms remains a concern that needs to be

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<sup>149</sup> *Bragg v. Linden Rsch., Inc.*, 487 F. Supp. 2d 593, 597 (E.D. Pa. 2007) (holding that the owner of Second Life, a virtual reality game, made representations that "were made as part of a national campaign to induce persons . . . to visit Second Life and purchase virtual property [and these representations] constitute[d] sufficient contacts to exercise specific personal jurisdiction . . ."). See also Paul Riley, Note, *Litigating Second Life Land Disputes: A Consumer Protection Approach*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 877, 897–99 (2009) (describing *Bragg* and the reasons why the Eastern District of Pennsylvania found specific personal jurisdiction in this dispute).

<sup>150</sup> CONN. GEN. STAT. § 52-59b(a)(5) (2019).

<sup>151</sup> In a recent decision in Ohio state court, virtual communication and payments were not found to be enough minimum contacts to satisfy due process. *Magnum Asset Acquisition, LLC v. Green Energy Techs., LLC*, No. 29789, 2022 Ohio Ct. App. LEXIS 2109, at \*11–\*12, \*16–\*17 (Ohio. App. June 30, 2022).

<sup>152</sup> *Nolen-Hoeksema v. Maquet Cardiopulmonary Ag.*, No. NNH CV-14-6049888 S, 2015 Conn. Super. LEXIS 5055, at \*16 (Conn. Super. Ct. Nov. 9, 2015).

<sup>153</sup> Cathy Li, *Who Will Govern the Metaverse?*, WORLD ECON. F. (May 25, 2022), <https://www.weforum.org/agenda/2022/05/metaverse-governance/>.

addressed in the emerging technological landscape.

#### IV. SOLUTIONS TO THE PERSONAL JURISDICTION PROBLEM

Every day, Americans spend more of their time online.<sup>154</sup> This has only increased in the wake of the pandemic.<sup>155</sup> It seems inevitable that the “day”<sup>156</sup> that the *Walden* Court was waiting on to address the extent of virtual jurisdiction is coming soon due to the present discrepancies amongst the fifty states. However, judges, scholars, and practitioners have speculated on the next phase of personal jurisdiction for years, without sweeping change.<sup>157</sup> While some courts have held that the present caselaw is sufficient to encompass our increasingly digital world, this may not always be reasonable. Thus, this Part makes the case for a flexible approach to the technological problems that face questions of personal jurisdiction. For most disputes, existing caselaw, and not *Zippo*, should guide the determinations of internet-based conducts. However, for larger and more international technologies, the United States needs to be more proactive by not only enacting national data privacy laws, but also working with foreign countries to proactively address emergent technologies, like the metaverse.

##### A. *Let Ford and Existing Precedent Define the Boundaries of Most Internet Conduct*

The Supreme Court shared its most recent interpretation of jurisdictional reach in 2021 with *Ford Motor Co. v. Montana Eighth Judicial District Circuit*. There, the Ford Motor Company argued that while they availed themselves of conducting activities within the forum states of Montana and Minnesota, their forum conduct must have a causal relationship for jurisdiction to be proper.<sup>158</sup> Although not expressly mentioned in the Court’s opinion, as the case was not concerned with defamation, Ford’s argument,<sup>159</sup> which rests heavily on the language of the Court’s opinion in *Bristol*

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<sup>154</sup> Colleen McClain et al., *The Internet and the Pandemic*, PEW RSCH. CTR. (Sept. 1, 2021), <https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/>.

<sup>155</sup> *Id.*

<sup>156</sup> *Walden v. Fiore*, 571 U.S. 277, 290–91 n.9 (2014).

<sup>157</sup> *Sioux Transp., Inc. v. XPO Logistics, LLC*, No. 5:15-CV-05265, 2015 U.S. Dist. LEXIS 171801, at \*20 n.7 (W.D. Ark. Dec. 22, 2015); Mark Sableman, *Will the Zippo Sliding Scale for Internet Jurisdiction Slide into Oblivion?*, THOMPSON COBURN LLP (Jan. 12, 2016), <https://www.thompsoncoburn.com/insights/blogs/internet-law-twists-turns/post/2016-01-12/will-the-zippo-sliding-scale-for-internet-jurisdiction-slide-into-oblivion->.

<sup>158</sup> *Ford Motor Co. v. Mont. Eighth Jud. Distr. Ct.*, 141 S. Ct. 1017, 1026 (2021).

<sup>159</sup> *See id.* at 1021, 1026 (communicating that Ford’s argument rests upon interpretations of *Bristol-Myers Squibb Co. v. Super. Ct. Cal.*, 137 S. Ct. 1773 (2017) and *Walden*, which, in Ford’s view, support a causal approach to personal jurisdiction).

*Myers*,<sup>160</sup> also seems to be an attempt to expand the *Calder* “effects test” to all types of personal jurisdiction analysis.<sup>161</sup> Had the Court adopted Ford’s argument that a causal chain is necessary to establish personal jurisdiction over nonresidents, personal jurisdiction would be a question of cause and effect. While this would have narrowed jurisdiction for corporations like Ford, it would have had disastrous consequences for personal jurisdiction over the internet. As the internet is technically everywhere that it is accessed, effects could be felt anywhere. Thus, the expansive jurisdictional reach over internet postings presently employed by Florida could have become the norm, barring explicit statutory exclusion.<sup>162</sup>

However, the Court took a different approach. In *Ford*, Justice Kagan, writing for the majority, reiterated that jurisdiction attaches when the suit arises out of, or relates to, the defendant’s contacts with the forum.<sup>163</sup> At first glance, supporters of a more “flexible,” and thus broader approach, to personal jurisdiction might be pleased with the *Ford* decision, but this ignores the wrinkles within the opinion itself.<sup>164</sup> While *Ford* certainly endorses the existing, and broader, scope of permissible specific personal jurisdiction in the offline context, it arguably narrows the scope of jurisdiction over the internet. Applying *Ford* to an allegedly defamatory internet post, it appears that the posting must either arise out of, or relate to, the forum state to establish the minimum contacts necessary to hale a nonresident poster into court.<sup>165</sup> A post or comment alone does not seem to be enough. Thus, the *Ford* Court’s adherence to this standard suggests that California and other states that require a showing that the defendant poster targeted the forum state<sup>166</sup> to exercise jurisdiction over nonresident posters have the better reasoning when it comes to addressing defamation over the internet within the confines of existing precedent. Thus, it is unlikely that “nonresidents who allegedly defamed a resident online [have] expressly directed their statements to audiences in those states and therefore meet the

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<sup>160</sup> See *id.* at 1026–27 (arguing that “[j]urisdiction attaches ‘only if the defendant’s forum conduct gave rise to the plaintiff’s claims.’” While unsuccessful, this argument is simply the other half of the causal connection articulated in *Calder*, concerning itself not with the effect, but the cause at issue in a particular lawsuit) (quoting Brief for Petitioner at 13, *Ford Motor Co.*, 142 S. Ct. 1773 (No. 19-368)).

<sup>161</sup> *Calder v. Jones*, 465 U.S. 783, 788–90 (1984).

<sup>162</sup> *Internet Sols. Corp. v. Marshall*, 39 So. 3d 1201, 1214–15 (Fla. 2010); see *supra* Part II.

<sup>163</sup> *Ford Motor Co.*, 141 S. Ct. at 1026.

<sup>164</sup> See Zoe Niesel, #*Personal Jurisdiction: A New Age of Digital Minimum Contacts*, 94 IND. L.J. 103, 140–43 (2019) (arguing in support of the proposition that the sole test to exercise jurisdiction over internet activity be a defendant directing activity into the forum and that a plaintiff’s use of social media sites amounts to “taking advantage” or availing themselves of the forum).

<sup>165</sup> *Id.*

<sup>166</sup> *Burdick v. Superior Court*, 233 Cal. App. 8, 19–20 (Cal. Ct. App. 2015); Mercier, *supra* note 57.



minimum contacts standard”<sup>167</sup> simply due to residents’ ability access a posting on the internet alone remains sufficient under *Ford*.<sup>168</sup>

Additionally, *Ford* reaffirmed that defendants must have “fair warning” that their activities would subject them to jurisdiction in another forum state.<sup>169</sup> This language further supports the idea that a limited interpretation of *Calder* be applied to nonresident internet posters. It also signals another way out of the stranglehold *Zippo* has maintained on courts despite an evolving internet. As interactivity is only expected to increase as we transition to Web 3.0, which is intended to be more connective and intertwined than ever, the sliding scale test seems incongruous with *Ford*’s fair warning requirement.<sup>170</sup> Thus, while some jurisdictions and scholars may wish to see far-flung defendants subject to jurisdiction wherever their posts may roam, the Court likely does not.

*Ford* has already had begun to make its mark on this issue. In *Huffington Post*, for example, the Fifth Circuit used *Ford* to help explain why it chose to decline to exercise jurisdiction over the website.<sup>171</sup> There, the Fifth Circuit took care to identify fairness to defendants as a core tenant of personal jurisdiction, which requires a defendant to have fair warning and that they must have an ability to avoid exposure to the courts of a particular state.<sup>172</sup> These requirements do not permit a state to use a defendant’s contacts to “invent jurisdiction” when the claims at issue do not arise from, or relate to, these contacts.<sup>173</sup> Should this trend continue, it would limit the jurisdictional reach of *Calder* in most instances and reinforce the idea that existing precedent can, and does, translate to digital activities without the need to develop new frameworks for virtual conduct.

#### B. *Congressional Action and International Collaboration to Address Larger Technological Advancement*

While *Ford* serves as a first salvo to curb the trend in some states toward jurisdictional overreach, it may not go far enough. The metaverse, if it comes to fruition, raises novel legal questions about the proper forum for these primarily virtual disputes.<sup>174</sup> Thus, the fair warning principles espoused in *Ford* and extended to the internet by the Fifth Circuit in *Huffington Post* may not always be the best path to determining the proper venue. If the intent is

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<sup>167</sup> Mercier, *supra* note 57.

<sup>168</sup> Internet Sols. Corp. v. Marshall, 39 So. 3d 1201, 1214–15 (Fla. 2010).

<sup>169</sup> Ford Motor Co. v. Mont. Eighth Jud. Distr. Ct., 141 S. Ct. 1017, 1025 (2021).

<sup>170</sup> Niesel, *supra* note 164, at 137–38.

<sup>171</sup> Johnson v. TheHuffingtonPost.com, Inc., 21 F.4th 314, 320 (5th Cir. 2021).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Ara et al., *supra* note 139; Sheila A. Millar & Tracy P. Marshall, *The State of U.S. State Privacy Laws: A Comparison*, NAT’L L. REV. (May 24, 2022), <https://www.natlawreview.com/article/state-us-state-privacy-laws-comparison>.

for the metaverse's virtual reality to exist alongside our present reality, where state statutes and traditional notions about due process define the scope of their court systems reach, this may undermine the entire borderless concept. Without change, one could argue that every state's laws apply, which would then force tech companies to comply with a number different statutory schema. On the other hand, the "meta jurisdiction" framework proposed by some scholars, if applied broadly undermines fairness for individual disputes.<sup>175</sup>

Perhaps the best solution, at least for now, is a flexible one. Under this model, Congress would enact federal data privacy and internet conduct laws and grant the FCC, or a new administrative agency, authority to regulate the digital platforms and adjudicate disputes that occur in a digital world, while allowing existing precedent to guide all other forms of internet-based disputes. While it might make more sense to vest all adjudicatory authority in a federal agency, this would quickly become overwhelming. Moreover, the Court's reframing of personal jurisdiction in *Ford* has the potential to eliminate many of the differing approaches that exist in various states, as it focuses on the underlying controversy and the defendant's contacts, and not various tests.<sup>176</sup> Furthermore, there are practical reasons for this approach, given that, unlike the metaverse, litigation over internet conduct has existed for several decades at this point, and states may be more resistant to further encroachment into their authority as a result.

While some states, including Connecticut,<sup>177</sup> have begun to make steps in this direction, these efforts are more focused on data privacy than any metaverse concept. In addition to not fully addressing the metaverse itself,<sup>178</sup> state-level data privacy protections run the risk of creating fifty disparate regulatory schemes as the current laws differ and lack uniformity.<sup>179</sup> As a first step, Congress should enact nationwide laws that not only address data privacy in a manner that largely mirrors the General Data Protection

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<sup>175</sup> Cooper, *supra* note 143.

<sup>176</sup> *Ford*, 141 S. Ct. at 1025; TheHuffingtonPost.com, 21 F.4th at 320; Bartholomew & Bernstein, *supra* note **Error! Bookmark not defined.**, at 1223–24 ("Rather than trying to create ad hoc tests to address technological and social developments, courts can stay focused on the underlying controversy that gives rise to litigation and the purposeful availment that connects a defendant to the forum state. Defining a plaintiff's claim with reference to the underlying transactions, occurrences, and events gives courts a firm and consistent position from which to determine which of a defendant's state contacts to consider when evaluating jurisdiction.").

<sup>177</sup> An Act Concerning Personal Data Privacy & Online Monitoring, 2022 Conn. Pub. Acts No. 22-15.

<sup>178</sup> Jenny L. Colgate & Caitlin M. Wilmot, *Data Protection Laws and Regulations Brave New (Virtual) World*, INT'L COMPARATIVE LEGAL GUIDES (Aug. 7, 2022), <https://iclg.com/practice-areas/data-protection-laws-and-regulations/4-brave-new-virtual-world>.

<sup>179</sup> Millar & Marshall, *supra* note 174; Saryu Nayyar, *Is it Time for a U.S. Version of GDPR?*, FORBES (Feb 1, 2022, 10:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2022/02/01/is-it-time-for-a-us-version-of-gdpr/?sh=c17691d637a3>.

Regulation (“GDPR”).<sup>180</sup> This law was passed by the European Union in 2016 and went into effect in 2018,<sup>181</sup> and most multinational corporations are already subject to its requirements.<sup>182</sup> This would provide federal oversight over data privacy and one uniform structure for compliance.

However, Congress should go further than merely adopting its own version of the GDPR. In many ways the laws are already out of date and fail to encompass the metaverse.<sup>183</sup> To that end, Congress should create an administrative body to oversee the metaverse and other internet-based worlds. Proactive federal oversight over the metaverse, or any other virtual world, can prevent several eventual harms. Although a scheme like this one is not without cost, the potential risks are significant enough that it is better to be involved from the beginning.<sup>184</sup> As scholars note, the metaverse and its supporters tend to reject regulation,<sup>185</sup> but a lawless society is not practical when the infrastructure is built by multibillion dollar companies, who, without strong governmental oversight, will create virtual worlds that benefits them.<sup>186</sup> This is especially true when there are multiple metaverses that are competing with one another to serve as the leader of whatever this concept truly becomes whenever it is realized.<sup>187</sup>

Proactive action has additional benefits that are more practical than theoretical. Not only does proactive regulation prevent a need for legislation to regulate after harm occurs, but it also allows for Congress, and not simply corporations, to be part of the development process at the outset. Developers typically find it easier to work within parameters at the outset than retrofit

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<sup>180</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119/59) 1, 65.

<sup>181</sup> *Id.*; Meg Leta Jones & Margot E. Kaminski, *An American’s Guide to the GDPR*, 98 DENV. L. REV. 93, 94 (2021).

<sup>182</sup> Jones & Kaminski, *supra* note 181, at 101–06.

<sup>183</sup> See Colgate & Wilmot, *supra* note 178 (noting that the GDPR and other existing data privacy laws are already outdated because they assume that data is collected and transferred between nations, data localization is necessary for a system to function, data can be appropriately distinguished between personal and non-personal, and there are text-driven gateways between virtual spaces).

<sup>184</sup> ANDERSON & RAINEE, *supra* note 133, at 7; Landry Signé & Hanna Dooley, *A Proactive Approach Toward Addressing the Challenges of the Metaverse*, BROOKINGS: TECH STREAM (July 21, 2022), <https://www.brookings.edu/techstream/a-proactive-approach-toward-addressing-the-challenges-of-the-metaverse/> (“The effects of the metaverse transcend borders and include risks to safety, privacy, work, resources, and inequality.”)

<sup>185</sup> Michael D. Murray, *Ready Lawyer One: Lawyering in the Metaverse* (manuscript at 4), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4082648](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4082648).

<sup>186</sup> John Mac Ghlionn, *How Meta*, AM. MIND (Dec 28, 2021), <https://americanmind.org/salvo/how-meta/>. For a specific example of how a platform creator can attempt to abuse their authority, see Riley *supra* note 149, at 897–98 (describing how, after a user was able to purchase virtual land at a discount due to a glitch, the platform owner shut down the user’s account and took all the property associated with it).

<sup>187</sup> Colgate & Wilmot, *supra* note 178.

things to later compliance, and this is also true for technology-based laws.<sup>188</sup> It is also likely that by working with platforms at the outset, common ground can be struck on these issues and there may be less unregulated behavior or threats of pulling out of foreign countries due to laws that these companies do not find beneficial to their business models.<sup>189</sup>

The United States should also work with other nations to develop another body like ICANN (Internet Corporation for Assigned Names and Numbers), which oversees domain registration, to monitor the Metaverse and grant licenses to entities that wish to do business within its virtual reality.<sup>190</sup> This would encourage international cooperation regarding disputes within the Metaverse and allow for administrative agencies to gain specialized knowledge over emergent technologies and the harms that they may cause. It would also allow for a more uniform understanding of what types of conduct are, and are not, permissible within the metaverse, and a firm understanding of what laws apply and when.

By taking these steps, the framework for handling disputes within the metaverse can run parallel to other internet-based conduct. Individual disputes would still be litigated in a manner that aligns with existing precedent, while more complex disputes and the jurisdictional framework of the metaverse itself, can be addressed in ways that are best suited to the realities of this virtual and interconnected platform. While this approach would allow for the Courts to further wait for “another day”<sup>191</sup> to determine when and how to apply personal jurisdiction over the internet, it would preemptively address emergent technologies. This also ensures that the United States government, alongside other nations, has oversight over conduct within the metaverse and this is not, instead, largely left to private corporations who have interests that may not always align with the ideals espoused in the Constitution.

## CONCLUSION

In 2006, former Senator Ted Stevens garnered near-universal ridicule when he described the internet as, “a series of tubes.”<sup>192</sup> A decade and a half later, Senator Richard Blumenthal’s questions to Mark Zuckerberg about “finsta” accounts joined the so-called “Hall of Fame” of terrible comments

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<sup>188</sup> *Id.*

<sup>189</sup> See META PLATFORMS, INC., ANNUAL REPORT (FORM 10-K) at 9 (Feb. 3, 2022) <https://investor.fb.com/financials/default.aspx> (claiming that if Meta is not permitted to transfer data on European Union users to the United States, they may have to shut down access to Facebook and Instagram in Europe).

<sup>190</sup> ICANN, <https://www.icann.org> (last visited June 3, 2022).

<sup>191</sup> *Walden v. Fiore*, 571 U.S. 277, 291 n.9. (2014).

<sup>192</sup> Jim Puzanghera, *A Brief, Strange History of Net Neutrality (Including a ‘Series of Tubes,’ a Dingo and James Harden)*, L.A. TIMES (May 3, 2017, 7:00 AM), <http://latimes.com/business/la-fi-net-neutrality-timeline-20170502-htmlstory.html>.

by legislators who misunderstand the internet.<sup>193</sup> These comments, while momentarily amusing, highlight some of the dangers of what can happen when laws regarding the internet are left to be addressed by public officials on a piecemeal basis. In examining how courts apply *Zippo*, *Calder*, and *Ford* to the internet, discrepancies exist. These discrepancies have resulted in defendants being treated differently depending upon where the alleged harm took place and limit plaintiffs' ability to access the judicial system. While larger tech companies and businesses may be able to handle lawsuits in foreign jurisdictions, individuals may not. Thus, while *Ford* may signal an end to expansive personal jurisdiction over internet interactions, it still requires courts to interpret and apply this precedent in a uniform manner. It remains to be seen whether this will occur on a widespread basis. Additionally, the existing frameworks for the proper exercise of personal jurisdiction may not grant all harmed plaintiffs convenient access to the legal system nor do they fully address emergent technologies and shifts in how Americans interact virtuality. Therefore, to mitigate delays and further discrepancies on this issue, Congress should enact federal privacy laws and grant oversight of the metaverse to an administrative agency, while courts should continue to be guided by traditional notions of fairness and due process when extending existing precedent to other internet conduct.

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<sup>193</sup> Benjamin Hart, *Senator Asks Hall of Fame Terrible Tech Question*, N.Y. MAG.: INTELLIGENCER (Sept. 30, 2021), <https://nymag.com/intelligencer/2021/09/richard-blumenthal-asks-about-ending-finsta.html>. A "finsta" is short for a fake Instagram account, which some users create, in addition to their more public Instagram account, to interact with close friends more privately. It is not a separate product under the Facebook umbrella, despite what Senator Blumenthal believed. *What Does Finsta Mean?*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/what-does-finsta-mean-fake-instagram> (last visited Jun. 12, 2022).