

GROWING OUT OF THE (INTERNATIONAL) SHOE:
MODERNIZING MINIMUM CONTACTS IN
INTERNET COMMERCE

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ABSTRACT

Third-party online sales platforms present a recurring problem with minimum contacts: whether a forum may exercise personal jurisdiction over a non-forum seller whose only forum contact is a single platform-mediated sale to a forum resident. In cases involving internet sales, courts typically apply one or a combination of the *Zippo* “sliding scale” test, the *Calder* “effects” test, and the *Asahi* “stream of commerce” test. While courts generally agree that single platform-mediated sales do not establish personal jurisdiction without “something more,” they have not adopted a uniform test for identifying what that “something more” is. As a result, courts have taken materially different approaches to analyze the same factual problem, producing inconsistent outcomes in platform-mediated sales cases.

This article argues that courts confronting a single platform-mediated sale should move beyond asking whether a website was interactive, whether a product entered the stream of commerce, or whether the buyer felt harm in the forum. Instead, the central inquiry should be whether the seller, through its own deliberate commercial conduct, created a forum contact substantial enough to constitute purposeful availment. In platform-mediated sales cases, that analysis should turn on three considerations: (A) whether the sale was part of the seller’s regular course of business, (B) whether the seller exercised meaningful control over distribution, and (C) whether the seller engaged in deliberate conduct connecting the transaction to the forum. This framework offers a more modern and workable approach to specific jurisdiction in e-commerce cases than continued reliance on the *Zippo* sliding scale test, the *Calder* effects test, or the stream of commerce test alone.

This article also addresses the growing importance of personal jurisdiction in internet-based disputes, particularly in North Dakota, where a substantial number of cases removed from state court to the federal system

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involve disputes over personal jurisdiction. After reviewing North Dakota, Eighth Circuit, and other federal caselaw on internet minimum contacts, this article advocates for a more structured method of identifying when “something more” exists. Drawing from the Ninth Circuit’s holdings in *Herbal Brands v. Photoplaza* and *Briskin v. Shopify*, it proposes a modernized test for evaluating minimum contacts in platform-mediated sales cases.

Adoption of this proposed test by North Dakota and the Eighth Circuit courts would provide judges and practitioners with clearer guidance in determining whether specific personal jurisdiction exists in cases involving platform-mediated sales. In turn, that clarity could reduce the need to litigate jurisdiction as “a case within a case,” saving time, money, and judicial resources.

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I. INTRODUCTION

As e-commerce becomes more popular, establishing personal jurisdiction does not hinge simply on whether commerce crosses state lines, but on whether the seller’s internet conduct supplies the minimum contacts necessary to justify being haled into a forum where the seller does not reside, physically enter, or regularly operate.¹ Online sales platforms like eBay can perform nationwide marketing, receive bids from any forum, and complete the transaction, all without the seller operating the website or selecting the forum market from which the winning bid is received.² However, third-party online sales platforms complicate the minimum contacts analysis because control over the website’s interactivity and marketing—the central factor of the *Zippo* sliding scale test—typically rests with the platform, not the buyer.³

1. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316-18 (1945).

2. See generally *Boschetto v. Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008) (emphasizing “[t]his was a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser happened to reside”); *Metcalf v. Lawson*, 802 A.2d 1221, 1225 (N.H. 2002) (reasoning the seller on an internet auction “had no control over who would ultimately be the winning bidder”); *Karstetter v. Voss*, 184 S.W.3d 396, 405 (Tex. App. 2006) (explaining the internet auction was “random, isolated, and fortuitous” despite there being email correspondence relating to the purchase and the seller seeking some “benefit, advantage, or profit by selling” the vehicle).

3. See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (establishing the *Zippo* “sliding scale” test to infer purposeful availment from website interactivity);

When contacts with the forum involve only a single sale into the forum, courts have to decide whether that contact satisfies purposeful availment, or whether the sale is merely a fortuitous consequence of utilizing a nationwide online sales platform.⁴

II. BRIEF OVERVIEW OF SPECIFIC PERSONAL JURISDICTION AND AGENCY

Personal jurisdiction refers to a court's power to enter a binding judgment over parties in the case.⁵ Personal jurisdiction flows from the Due Process Clause of the Constitution and establishes the territorial limits of the courts' judicial power.⁶ When a judgment is entered against a party without personal jurisdiction, that party's constitutional right is violated, as they have been "depriv[ed] . . . of property without due process of law."⁷ Therefore, courts must have personal jurisdiction over the parties to hear a case and enter a valid and enforceable judgment, but constitutional limitations on the exercise of personal jurisdiction depend on whether a court seeks to exercise general or specific jurisdiction over a non-resident defendant.⁸

A. SPECIFIC PERSONAL JURISDICTION

To evaluate personal jurisdiction, courts distinguish between specific and general jurisdiction.⁹ General jurisdiction allows a state to exercise personal jurisdiction over a defendant in a suit that does not arise out of or relate to the defendant's contacts with the forum.¹⁰ In contrast, specific jurisdiction exists over a non-forum defendant when the plaintiff's injury arises out of or

Curry v. Revolution Lab's, LLC, 949 F.3d 385, 400 (7th Cir. 2020) ("Significant caution is certainly appropriate when assessing a defendant's online contacts with a forum to ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum state." (citation modified)); Sayeedi v. Walser, 835 N.Y.S.2d 840, 845 (N.Y. Civ. Ct. 2007) (stating the *Zippo* sliding scale test "makes little sense in the eBay context since eBay, and not the user, controls the interactivity and marketing efforts of the website").

4. See generally *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (requiring purposeful availment); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (declining to establish personal jurisdiction because the contact was fortuitous); *Walden v. Fiore*, 571 U.S. 277, 284, 291 (2014) (requiring "the defendant's [own] suit-related conduct [to] create a substantial connection with the forum State").

5. *Personal Jurisdiction*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/personal_jurisdiction [<https://perma.cc/FBX8-YA85>] (last visited Mar. 1, 2026).

6. *Constitution Annotated: Amdt14.S1.7.1.1 Overview of Personal Jurisdiction and Due Process*, CONGRESS.GOV, https://constitution.congress.gov/browse/essay/amdt14-S1-7-1-1/ALDE_00000907/ [<https://perma.cc/WG87-HD32>] (last visited Mar. 1, 2026).

7. *Id.*

8. See *id.*; see also *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945).

9. See *Burger King*, 471 U.S. at 472-73, 472 n.15 (distinguishing between specific and general personal jurisdiction).

10. See *id.*

relates to conduct that the defendant *himself* purposefully directed towards forum residents, and the exercise of jurisdiction does not offend traditional notions of “fair play and substantial justice.”¹¹

Regarding specific personal jurisdiction, courts generally use a three-pronged test for determining whether the exercise of personal jurisdiction over a non-resident defendant is appropriate: (1) the defendant must have sufficient “minimum contacts” with the forum state, (2) the claims must “arise out of or relate to” the defendant’s contacts with the forum state, and (3) the exercise of justice must be reasonable.¹² Minimum contacts refers to “[t]he contacts needed for this kind of jurisdiction [and] often go[es] by the name ‘purposeful availment,’” meaning the defendant has taken “some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.”¹³ The “purposeful availment” requirement is meant to ensure that defendants are not “haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts, or of the ‘unilateral activity of another party or a third person.’”¹⁴ The main issue is whether “the contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum State,” such that the defendant can reasonably expect to be haled into court within that forum.¹⁵ Importantly, for specific personal jurisdiction, those contacts must also arise from suit-related conduct.¹⁶

B. IMPUTING AN AGENT’S MINIMUM CONTACTS

The United States Supreme Court has held that auctioneers are presumed to be general agents for the owner of what is being sold.¹⁷ Auctioneers are distinguishable from online sales platforms, however, because auctioneers are defined as “an agent who sells goods at auction,” whereas an online sales platform may be a website sellers use to sell items themselves, or a website an auctioneer uses to sell the seller’s product for them.¹⁸ Since it may be

11. *Id.* at 472-76 (quoting *Int’l Shoe*, 326 U.S. at 320).

12. *See* *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359 (2021); *Burger King*, 471 U.S. at 476-78.

13. *Ford Motor Co.*, 592 U.S. at 359 (last alteration in original) (first quoting *Burger King*, 471 U.S. at 475; and then quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

14. *Burger King*, 471 U.S. at 475 (first citing *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984); then citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980); and then citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984)).

15. *Id.* (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957)); *World-Wide Volkswagen*, 444 U.S. at 297.

16. *See* *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

17. *Veazie v. Williams*, 49 U.S. 134, 152 (1850).

18. *Auctioneer*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/auctioneer> [<https://perma.cc/5UG6-N8QF>] (last visited Mar. 1, 2026). *See generally* *Selling*

unclear whether there is an agency relationship between a seller and a third-party, the question becomes whether the seller gave actual or apparent authority to the third-party platform to act on the seller's behalf.¹⁹

State long-arm personal jurisdiction statutes either explicitly incorporate a provision for establishing personal jurisdiction through agency, or they extend personal jurisdiction to the full extent of the Due Process Clause.²⁰ In cases involving agency, courts have found “a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there.”²¹ Therefore, establishing an agency relationship in cases involving online sales platforms is important because third-party platforms themselves may be primarily responsible for creating forum contacts through listing, advertising, communicating with buyers, payment processing, and shipping.²² When a platform's contacts are treated as the seller's contacts because of an agency relationship, courts must distinguish between suit-related and non-suit-related contacts.²³ Accordingly, agency is one way courts may attribute third-party platform conduct to the seller, but they should not make agency a prerequisite to finding that a seller purposefully availed itself when the seller's own distribution choices deliberately engaged with a forum market.

Through Auctions, EBAY, <https://www.ebay.com/help/selling/listings/selling-auctions?id=4110> [<https://perma.cc/4GMD-DV8H>] (last visited Mar. 1, 2026) (“When you list an item for sale in an eBay auction, you choose a starting price, and interested buyers place bids.”).

19. See generally RESTATEMENT (THIRD) OF TORTS § 1.01, intro. note, cmt. b (A.L.I., Tentative Draft No. 4, 2025) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01 (A.L.I. 2006))).

20. See generally N.D.R.Civ.P. 4(b)(2) (“Personal Jurisdiction Based on Contacts. A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from”); COLO. REV. STAT. § 13-1-124(1) (2024) (“Engaging in any act enumerated in this section by any person, whether or not a resident of the state of Colorado, either in person or by an agent”); CAL. CODE CIV. PROC. § 410.10 (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”).

21. *Daimler AG v. Bauman*, 571 U.S. 117, 160 n.13 (2014); see, e.g., *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 112 (1987) (“defendant’s act of ‘marketing [a] product through a distributor who has agreed to serve as the sales agent in the forum State’ may amount to purposeful availment”); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945) (stating “the commission of some single or occasional acts of the corporate agent in a state” may sometimes “be deemed sufficient to render the corporation liable to suit” on related claims).

22. See generally, e.g., *Private Sales*, SOTHEBY’S, <https://www.sothebys.com/en/buy-sell/private-sales?locale=en> [<https://perma.cc/PN82-FD6Z>] (last visited Mar. 1, 2026) (“Our dedicated galleries, online platform and personalized service offer flexible and convenient alternatives for us to connect your consignment with prospective buyers internationally.”).

23. See *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

III. TESTS FOR DETERMINING MINIMUM CONTACTS OVER THE INTERNET

In *Hanson v. Denckla*, the United States Supreme Court wrote, “[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase.”²⁴ Since then, courts have established various tests for determining whether exercising specific personal jurisdiction is consistent with the Due Process Clause in cases involving internet commerce.²⁵ Depending on the specific claims, courts typically use one or a combination of three tests to assess whether minimum contacts are present: the *Calder* effects test, the stream of commerce test, and the *Zippo* sliding scale test.²⁶

A. THE CALDER EFFECTS TEST

The primary jurisdictional test for claims alleging an intentional tort is the *Calder* effects test.²⁷ In *Calder v. Jones*, a Florida newspaper containing libelous material was subjected to specific personal jurisdiction in California, despite not operating in California, because the newspaper intended to target California and had knowledge that the libelous material would have a large effect in California.²⁸

Courts apply the *Calder* effects test for intentional tort cases involving the internet, including defamation²⁹ and trademark infringement,³⁰ among others. Under this test, “[a] forum State’s exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum.”³¹ Put more simply, the *Calder* effects test requires that a non-forum defendant “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing

24. *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958).

25. See generally *Calder v. Jones*, 465 U.S. 783, 788-90 (1984) (the *Calder* “effects” test); *Asahi Metal Indus.*, 480 U.S. at 112 (the *Asahi* “stream of commerce” test); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (the *Zippo* “sliding scale” test); U.S. CONST. amend. XIV, § 1.

26. See generally Prac. L. Intell. Prop. & Tech., *Trademark Litigation: Personal Jurisdiction*, Practical Law, Westlaw W-038-1382 (last visited Apr. 13, 2026) (discussing the *Zippo* sliding scale test, the *Calder* effects test, and the stream of commerce test to show purposeful direction (or availment) in trademark cases).

27. See generally *Calder*, 465 U.S. at 788-90 (explaining and applying the effects test).

28. See *id.* at 784-86, 791.

29. *Moore v. Cecil*, 109 F.4th 1352, 1362 (11th Cir. 2024) (assessing purposeful availment over defamatory tweets).

30. *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1356 (11th Cir. 2013) (assessing purposeful availment over trademark infringing products).

31. *Walden v. Fiore*, 571 U.S. 277, 286 (2014).

harm that the defendant kn[ew was] likely to be suffered in the forum state.”³² In these cases, mere injury in the forum is insufficient; the defendants’ own suit-related conduct must create a “substantial connection” to the forum.³³

B. THE *ASAHI* STREAM OF COMMERCE TEST

The jurisdictional test for claims arising from products found in commerce is the stream of commerce test.³⁴ When products are placed in the stream of commerce, states may exercise personal jurisdiction when a defendant purposefully serves the forum market.³⁵ In *Asahi Metal Industry Co. v. Superior Court of California*, the United States Supreme Court held that even if a defendant is aware that the stream “may or will sweep the product into the forum State,” “something more” than simply placing “a product into the stream of commerce” is required.³⁶ To meet the “something more” requirement, the majority explained:

[a]dditional conduct of the defendant [that] may indicate an intent or purpose to serve the market in the forum State, [is] for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.³⁷

Although the Supreme Court’s holding in *Asahi* was unanimous, Justice William J. Brennan, Jr. and Justice John Paul Stevens authored concurring opinions proposing different factors that might satisfy the stream of commerce test.³⁸

32. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004) (citation modified).

33. *Walden*, 571 U.S. at 289-90.

34. *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 109-10 (1987).

35. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980).

36. See 480 U.S. at 111-12; see also *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 882 (2011) (“The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.”).

37. *Asahi Metal Indus.*, 480 U.S. at 112; see also *D’Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 104-06 (3d Cir. 2009) (finding no personal jurisdiction when the defendant sold a product without anticipating it ending up in the forum).

38. *Asahi Metal Indus.*, 480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment) (stating jurisdiction should lie where the forum sale is part of “the regular and anticipated flow” of commerce into the State, but not where that sale is only an “edd[y],” i.e., an isolated occurrence); *id.* at 122 (Stevens, J., concurring in part and concurring in the judgment) (indicating “the volume, the value, and the hazardous character” of a good may affect the jurisdictional inquiry and emphasizing *Asahi*’s “regular course of dealing”).

C. THE *ZIPPO* SLIDING SCALE TEST

In 1997, the United States District Court for the Western District of Pennsylvania created a test for determining whether a state may exercise specific personal jurisdiction based on a website's interactivity.³⁹ In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, a California website, Zippo Dot Com ("Zippo"), was subject to personal jurisdiction in Pennsylvania because of its substantial presence in the state.⁴⁰ Zippo's website had approximately 3,000 Pennsylvania residents as paying subscribers, and it entered into agreements with seven Pennsylvania internet providers to provide its services.⁴¹ Zippo Manufacturing Company also alleged that Zippo Dot Com's use of "Zippo" in the domain name and website infringed and diluted the Zippo trademark from Zippo Manufacturing Corporation, a Pennsylvania company.⁴² The Court in *Zippo* declared "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet."⁴³ To measure the nature and quality of commercial activity, the court created a "sliding scale" to measure the likelihood of personal jurisdiction where,

[a]t one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet website that is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.⁴⁴

However, other courts have warned that a "[s]ignificant [amount of] caution is certainly appropriate when assessing a defendant's online contacts

39. See generally *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

40. *Id.* at 1121.

41. *Id.*

42. *Id.*

43. *Id.* at 1124.

44. *Id.* (citations omitted).

with a forum to ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum state.⁴⁵ In line with this thinking, circuit courts have either adopted, modified, or rejected the *Zippo* sliding scale test.⁴⁶ When a seller operates or controls a website used to interact with forum users, circuits that have adopted or modified the *Zippo* sliding scale test often use the test alongside other purposeful availment factors for evaluating the sufficiency of minimum contacts.⁴⁷ Despite most courts adopting or modifying the *Zippo* sliding scale test, the United States Supreme Court has not weighed in on its use.⁴⁸

IV. MINIMUM CONTACTS CASELAW

In many cases involving the internet and personal jurisdiction, the website being used is not controlled by the plaintiff or defendant, but by a separate entity.⁴⁹ Since personal jurisdiction is often decided based on a motion to dismiss, it is essential to plead sufficient facts to survive a Rule 12(b)(2)

45. *Curry v. Revolution Lab's, LLC*, 949 F.3d 385, 400 (7th Cir. 2020) (citation modified); *see, e.g.,* *Boschetto v. Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008) (finding a single eBay sale with no continuing obligations insufficient); *be2, LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011) (“If the defendant merely operates a website, even a ‘highly interactive’ website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution.”); *Sayeedi v. Walser*, 835 N.Y.S.2d 840, 845 (N.Y. Civ. Ct. 2007) (stating the *Zippo* sliding scale test “makes little sense in the eBay context since eBay, and not the user, controls the interactivity and marketing efforts of the website”).

46. *See generally* *Kuan Chen v. U.S. Sports Acad., Inc.*, 956 F.3d 45, 55 n.3 (1st Cir. 2020) (stating “the sliding scale adds nothing of consequence to the specific jurisdiction analysis”); *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252 (2d Cir. 2007) (discussing *Zippo* in a case involving defamation); *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452, 454 (3d Cir. 2003) (discussing *Zippo* in a case involving trademark infringement); *ALS Scan, Inc. v. Digital Serv. Consult., Inc.*, 293 F.3d 707, 713-15 (4th Cir. 2002) (discussing *Zippo* in a case involving copyright infringement); *Revell v. Lidov*, 317 F.3d 467, 470 (5th Cir. 2002) (discussing *Zippo* in a case involving defamation); *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890-92 (6th Cir. 2002) (discussing *Zippo* in a case involving trademark infringement); *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 431 n.3 (7th Cir. 2010) (“When a plaintiff alleges that some of the defendant’s contacts occurred through a website, the interactivity of that website is relevant to, but not dispositive of, the sufficiency of those contacts.”); *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 711-13 (8th Cir. 2003) (discussing *Zippo* in a case involving general and personal jurisdiction); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418-19 (9th Cir. 1997) (discussing *Zippo* in a case involving trademark infringement); *Soma Med. Int’l v. Standard Chartered Bank*, 196 F.3d 1292, 1297-99 (10th Cir. 1999) (discussing *Zippo* and general personal jurisdiction, but not specific personal jurisdiction).

47. *See, e.g.,* *Toys “R” Us*, 318 F.3d at 452 (requiring intent to target forum customers alongside the *Zippo* sliding scale test); *Cybersell*, 130 F.3d at 418 (requiring “‘something more’ [beyond the mere posting of a passive web site] to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state”).

48. *See* Elizabeth Kruse, Note, *Doe v. Geller and Personal Jurisdiction over Internet Activities*, 12 TEX. A&M L. REV. 407, 412 (2024).

49. *Compare* *Doe v. Geller*, 533 F. Supp. 2d 996, 1000 (N.D. Cal. 2008) (discussing the defendant using a third-party website), *with* *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 953-54 (8th Cir. 2022) (explaining a defendant selling products on their own national website without targeting the forum fails to create sufficient contacts with the forum).

motion for lack of personal jurisdiction.⁵⁰ This section summarizes the current specific personal jurisdiction caselaw within North Dakota, the Eighth Circuit, and discusses how federal courts use the *Zippo* sliding scale test, the *Calder* effects test, and the stream of commerce test to assess minimum contacts over the internet.

A. FEDERAL CASELAW OVERVIEW

Courts faced with single-sale disputes arising from third-party online auction platforms do not apply a consistent test. Instead, they begin by asking whether the defendant's own suit-related conduct creates a "substantial connection" to the forum, and then use the *Zippo* sliding scale test, *Calder* effects test, or stream of commerce test to answer the more specific question of whether the seller purposefully created a forum connection.⁵¹

In platform-mediated sales cases, purposeful availment is determined by whether a single platform-mediated sale constitutes the seller's own purposeful forum contacts or is instead a "random," "fortuitous," or "attenuated" consequence of the buyer's location.⁵² To evaluate purposeful availment, courts use (1) the *Zippo* sliding scale test when the seller's online presence, rather than merely the third-party's website, is the contact, or the third-party website is used as a substitute to measure forum targeting over the internet; (2) the *Calder* effects test when the claim involves an intentional tort; or (3) the stream of commerce test when a defendant's product enters the forum.⁵³

50. See generally FED. R. CIV. P. 12(i) ("If a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.").

51. See *Bros. & Sisters in Christ*, 42 F.4th at 953-54, 953 n.3 (using the *Calder* effects test and suggesting "that the operation of an interactive website could factor into the specific jurisdiction analysis"); *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1094 (9th Cir. 2023) (stating the defendant must exercise some level of control over the ultimate distribution of its products beyond simply placing its products into the stream of commerce).

52. See generally *be2, LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011) ("If the defendant merely operates a website, even a 'highly interactive' website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution."); *Boschetto v. Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008) (emphasizing "[t]his was a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser happened to reside").

53. See generally *Bros. & Sisters in Christ*, 42 F.4th at 953-54 (using the *Calder* effects test to evaluate minimum contacts involving a single t-shirt sale); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452, 454 (3d Cir. 2003) (using the *Zippo* sliding scale test to evaluate minimum contacts involving trademark infringement); *Herbal Brands*, 72 F.4th at 1093-94 (using the stream of commerce test to evaluate minimum contacts involving trademark infringement).

1. *The Zippo Sliding Scale Test*

The *Zippo* sliding scale test is used to determine whether the interactivity of a website constitutes purposeful availment.⁵⁴ However, the test was intended to decide whether a website's interactivity constitutes purposeful availment when the defendant itself operates the website.⁵⁵ Thus, in third-party platform disputes, many courts say the *Zippo* sliding scale test is improper because it is the website's owner, not the defendant, who controls the interactivity, marketing, and transaction itself, meaning the platform's interactivity does not necessarily translate to being the defendant's contacts.⁵⁶ Accordingly, since this test misses the mark when third parties operate the website, courts should be hesitant to find a website's interactivity significantly indicates a seller's purposeful availment, since third parties, not the sellers, usually control a website's features that the *Zippo* sliding scale test uses to establish minimum contacts.⁵⁷ Therefore, in cases involving online platforms operated by third parties, the *Zippo* sliding scale test is better suited for preventing a website's interactivity from becoming a shortcut for establishing minimum contacts.

A prominent case involving a third-party online sales platform came from the Ninth Circuit in *Boschetto v. Hansing*, which held that a single eBay sale to a forum resident was a "one-shot affair" and failed to establish

54. See *Toys "R" Us*, 318 F.3d at 453-54 (holding no purposeful availment despite the website being commercial, interactive, and the seller defendant initiating two sales to the forum because the website did not specifically target the forum); *be2, LLC*, 642 F.3d at 559 (holding no purposeful availment despite the interactive website being accessible and having a registered user from the forum because the website did not specifically target the forum).

55. See generally discussion *supra* Section III.C; *Toys "R" Us*, 318 F.3d at 452 (requiring intent to target forum customers alongside the *Zippo* sliding scale test); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999) ("Essentially, AAAA maintains a website that posts information about its products and services. While the website provides users with a printable mail-in order form, AAAA's toll-free telephone number, a mailing address and an electronic mail ('e-mail') address, orders are not taken through AAAA's website. This does not classify the website as anything more than passive advertisement which is not grounds for the exercise of personal jurisdiction."); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (requiring "'something more' [beyond the mere posting of a passive web site] to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state").

56. See, e.g., *Herbal Brands*, 72 F.4th at 1092 ("[I]t is undisputed that Defendants' Amazon storefronts are interactive websites: visitors can exchange information with the host computer by inputting data directly."); *Sayeedi v. Walser*, 835 N.Y.S.2d 840, 845 (N.Y. Civ. Ct. 2007) (explaining the *Zippo* sliding scale test "makes little sense in the eBay context since eBay, and not the user, controls the interactivity and marketing efforts of the Website").

57. See generally *Curry v. Revolution Lab's, LLC*, 949 F.3d 385, 400 (7th Cir. 2020) (stating a "[s]ignificant [amount of] caution is certainly appropriate when assessing a defendant's online contacts with a forum to ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum state" (citation modified)); *be2, LLC*, 642 F.3d at 559 (holding no purposeful availment despite the interactive website being accessible, and having registered users, from the forum because the website did not specifically target the forum).

purposeful availment because the sale only involved the forum, since that is where the buyer happened to reside.⁵⁸ Many courts follow the same logic in *Boschetto*, framing the inquiry as whether the seller's conduct suggests forum targeting of a particular forum, rather than mere participation in a nationwide market that may attract a buyer from any state.⁵⁹ Therefore, when a third party operates a platform, courts generally agree that the appropriate question is not the interactivity of the website, but the seller's intent to target the forum.⁶⁰

2. *The Calder Effects Test*

When a platform-mediated sale involves a counterfeit or fraudulent listing, or another intentional tort, “the Calder effects test asks whether the defendant: (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant kn[ew was] likely to be suffered in the forum state.”⁶¹ Under this test, courts emphasize that the issue does not rest on the forum where the plaintiff resides or feels injury, but rather whether the defendant's own suit-related “conduct connects him to the forum in a meaningful way.”⁶² This is significant because courts must determine

58. 539 F.3d 1011, 1017, 1019 (9th Cir. 2008) (reasoning that “the consummation of the sale via eBay here is a distraction from the core issue: This was a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser happened to reside, but otherwise created no ‘substantial connection’ or ongoing obligations there”); *see also* Winfield Collection, Ltd. v. McCauley, 105 F. Supp. 2d 746, 749 (E.D. Mich. 2000) (reasoning internet auction sales are “random” and “attenuated”); Admar Int'l, Inc. v. Eastrock, LLC, 18 F.4th 783, 787-88, 788 n.1 (5th Cir. 2021) (suggesting the isolated sale of a single product to a forum resident would be insufficient to support the exercise of jurisdiction when the defendant did not solicit business through targeted advertising).

59. *See generally* *Boschetto*, 539 F.3d at 1019 (emphasizing “[t]his was a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser happened to reside”); *Bros. & Sisters in Christ*, 42 F.4th at 953-54 (holding that the defendant's sale of a single t-shirt to a Missouri resident did not create sufficient contacts to support the exercise of jurisdiction); *Mink*, 190 F.3d at 337 (holding “the presence of an electronic mail access, a printable order form, and a toll-free phone number on a website, without more, is insufficient to establish personal jurisdiction. Absent a defendant doing business over the Internet or sufficient interactivity with residents of the forum state, we cannot conclude that personal jurisdiction is appropriate”).

60. *See* *Walden v. Fiore*, 571 U.S. 277, 284, 291 (2014) (“For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State . . . and the mere fact that [defendant's] conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction.”).

61. *Herbal Brands*, 72 F.4th at 1091 (citation modified); *see also* *Walden*, 571 U.S. at 290.

62. *See* *Walden*, 571 U.S. at 289-90 (explaining the plaintiff's inability to access seized funds while in the forum did not create a sufficient forum connection because the injury would have been the same wherever the plaintiff happened to be at the time they tried to access the funds); *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004) (“The ‘express aiming’ analysis depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue.”); *Johnson v. Arden*, 614 F.3d 785, 796-97 (8th Cir. 2010) (holding that an allegedly defamatory statement posted in Colorado that included the name Missouri creates a substantial connection between the defendant and Missouri); *cf.* *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774

whether a seller using a platform was forum-neutral because it engaged in nationwide marketing and sold to the highest bidder, or whether the seller targeted the forum by soliciting business through forum-targeted advertising.⁶³

Recent decisions from the Ninth Circuit illustrate attempts at modernizing how courts evaluate minimum contacts when sellers use an online platform. In *Herbal Brands, Inc. v. Photoplaza, Inc.*, the Ninth Circuit held “that the sales of physical products into a forum via an interactive website can be sufficient to establish that a defendant expressly aimed its conduct at the forum, provided that two key elements are present.”⁶⁴ First, the sale must occur as part of the defendant’s regular course of business instead of being “random, isolated, or fortuitous.”⁶⁵ “Second, the defendant must exercise some level of control over the ultimate distribution of its products beyond simply placing its products into the stream of commerce.”⁶⁶ This approach complements *Boschetto*’s skepticism about a “one-shot affair” by providing a more structured test for evaluating what “something more” might look like in platform-mediated sales disputes.⁶⁷

While sitting en banc during *Briskin v. Shopify*, the Ninth Circuit evaluated purposeful availment by applying a three-part test using the *Calder* effects test.⁶⁸ In *Briskin*, Shopify allegedly used geotracking cookies to know

(1984) (selling between 10,000 and 15,000 copies of a magazine creates a meaningful connection to the state).

63. *See* *be2, LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011) (holding no purposeful availment despite the interactive website being accessible, and having registered users, from the forum because the website did not specifically target the forum); *Admar*, 18 F.4th at 787-88, 788 n.1 (suggesting the seller did not purposefully avail itself of the forum when it made a single sale into the forum without specific forum marketing); *cf.* *Illinois v. Hemi Grp., LLC*, 622 F.3d 754, 758 (7th Cir. 2010) (holding personal jurisdiction proper because the seller fulfilled and shipped products into the forum while advertising it ships to all states besides one, indicating the seller “knew that conducting business with residents of a particular state could subject it to jurisdiction there and also that it knew how to protect itself from being haled into court in any particular state”); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011) (holding personal jurisdiction proper and finding it immaterial whether the seller or third-party advertisers targeted forum residents because the seller sold “space on its website for advertisements” and knew—actively or constructively—that it was exploiting the forum for commercial gain).

64. 72 F.4th at 1094.

65. *Id.* (“When an online sale occurs as part of a defendant’s regular course of business, it arises from the efforts of the seller to serve directly or indirectly the market for its product and the defendant should reasonably anticipate being haled into court where the product is sold.” (citation modified)).

66. *Id.* (first citing *Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 981-82 (9th Cir. 2021) (concluding that the defendant selling products on its own website and third-party websites showed that its forum contacts were deliberate rather than “random, isolated, or fortuitous”); and then citing *Holland Am. Line Inc. v. Wartsila N.A., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007) (“The placement of a product into the stream of commerce, without more, is not an act purposefully directed toward a forum state.”)).

67. *See* cases cited *supra* notes 51-52 and accompanying text.

68. *See* 135 F.4th 739, 755-58 (9th Cir. 2025) (en banc).

if devices were located in California and track consumers' behavior across the platform.⁶⁹ Using this data, Shopify allegedly shared "personal identifying information with other third parties who store, analyze, and market that information to their customers."⁷⁰ The court, rejecting Shopify's argument that it had not expressly targeted California because its operations were nationwide, and held that "an interactive platform 'expressly aims' its wrongful conduct toward a forum state when its contacts are its 'own choice and not random, isolated, or fortuitous,' even if that platform cultivates a 'nationwide audience[] for commercial gain.'"⁷¹

This ruling changed the Ninth Circuit's analysis from asking whether a defendant differentiates among forums for targeting purposes to asking whether minimum contacts are attributable to the defendant's deliberate conduct.⁷² While other courts question whether forum contacts are attributable to the buyer, seller, or a third-party, *Briskin's* "own choice, and not random, isolated, or fortuitous" proposition asks whether the seller made choices that deliberately connected the seller to the forum, like failing to exclude the forum from nationwide advertising or engaging in repeated sales into the forum.⁷³ Additionally, the seller's knowledge of the buyer's forum is now more indicative of whether forum contacts are "random, isolated, or fortuitous" because having nationwide, non-forum-specific marketing is no longer a strong argument against personal jurisdiction when the defendant's business conducts repeated, purposeful forum contacts for commercial gain.⁷⁴

3. *The Asahi Stream of Commerce Test*

Platform-mediated sales disputes present a recurring problem: whether a forum may exercise personal jurisdiction over a non-forum defendant that shipped a single item into the forum using a third-party online sales platform.⁷⁵ However, the stream of commerce tests requires "something more"

69. *Id.* at 747-48.

70. *Id.* at 748.

71. *Id.* at 757-58 (first citing *Ford Motor Co. v. Mont.* Eighth Jud. Dist., 592 U.S. 351, 359 (2021); and then citing *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011)) ("*Mavrix Photo* held that a company's internet activity may subject the company to specific personal jurisdiction in a given forum if the company 'knows—either actually or constructively' about its customer base there and 'exploits that base for commercial gain.'").

72. *See id.* at 759.

73. *See id.* at 758 (citation modified).

74. *Id.* (first citing *Ford Motor Co.*, 592 U.S. at 359; and then citing *Mavrix Photo*, 647 F.3d at 1230 (holding "corporations whose websites exploit a national market" cannot "defeat jurisdiction in states where those websites generate substantial profits from local consumers")).

75. *Compare Metcalf v. Lawson*, 802 A.2d 1221, 1226 (N.H. 2002) (reasoning the seller on an internet auction "had no control over who would ultimately be the winning bidder"); and *Karstetter v. Voss*, 184 S.W.3d 396, 405 (Tex. Ct. App. 2006) (reasoning the internet auction was "random, isolated, and fortuitous" despite there being email correspondence relating to the purchase and the

than foreseeability and some evidence of an intent to serve the forum market.⁷⁶ In regular stream of commerce cases, that “something more” requirement may be satisfied by distribution networks, but in platform-mediated sales cases, the distribution networks are usually the seller, with the sale being buyer-driven, rather than a result of forum targeting by the seller.⁷⁷ This highlights the importance of whether there is an agency relationship, because if the seller controls the distribution network, the question of whether it is foreseeable that the product enters the forum may be outweighed by a seller’s intent to serve the forum market.

Overall, in platform-mediated sales cases, the controlling question is whether the forum contacts are attributable to the seller’s choices rather than the buyer’s location or the platforms’ broad reach.⁷⁸

B. THE EIGHTH CIRCUIT

In the Eighth Circuit, when a “federal statute . . . does not authorize nationwide personal jurisdiction” over a non-forum defendant, “personal jurisdiction depends on the long-arm statute of the forum state and the federal Due Process Clause.”⁷⁹ Under the totality of the circumstances, courts use a five-factor test to determine whether personal jurisdiction exists and evaluate: “(1) the nature and quality of defendant’s contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the

seller seeking some “benefit, advantage, or profit by selling” the vehicle); *and* *United Cutlery Corp. v. NFZ, Inc.*, No. Civ. CCB-03-1723, 2003 WL 22851946, at *4 (D. Md. Dec. 1, 2003) (reasoning the “manifested intent was to sell to the highest bidder, regardless of the state in which the bidder resided.”); *and* *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 953-54 (8th Cir. 2022) (holding that the defendant’s sale of a single t-shirt to a Missouri resident did not create sufficient contacts to support the exercise of jurisdiction); *and* *Admar Int’l, Inc. v. Eastrock, LLC*, 18 F.4th 783, 787-88, 788 n.1 (5th Cir. 2021) (suggesting that the isolated sale of a single product to a forum resident would be insufficient to support the exercise of jurisdiction when the defendant did not solicit business through targeted advertising), *with* *NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 624 (7th Cir. 2022) (finding purposeful availment because the defendant “established an online store, using a third-party retailer, Amazon.com, . . . asserted a willingness to ship goods to [the forum],” and once “an order was placed, it filled the order, [and] intentionally shipp[ed]” the product to the forum).

76. See cases cited *supra* note 37.

77. *How Buying Works on eBay*, EBAY, <https://www.ebay.com/help/buying/buy-now/buy-now?id=4002> [<https://perma.cc/K4ZW-A675>] (last visited Mar. 1, 2026) (“On eBay, sellers create listings for their items which include the item description, photos, and payment and shipping options. Some listings are auctions where the highest bidder wins the item.”); *Shipping Policy*, EBAY, <https://www.ebay.com/help/policies/listing-policies/shipping-policy> [<https://perma.cc/D868-4QRR>] (last visited Mar. 1, 2026) (explaining the policy for sellers to ship to buyers).

78. See generally *be2, LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011) (stating “[i]f the defendant merely operates a website, even a ‘highly interactive’ website, that is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution”).

79. *Bros. & Sisters in Christ*, 42 F.4th at 951; U.S. CONST. amend. XIV, § 1; FED. R. CIV. P. 4(k)(1)(A).

contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) convenience of the parties.”⁸⁰

For cases involving the internet and alleged “acts . . . performed for the very purpose of having their consequences felt in the forum state,” the Eighth Circuit uses the *Zippo* sliding scale test to examine “whether a website could provide sufficient contacts for specific personal jurisdiction” and the *Calder* effects test “as an additional factor to consider when evaluating a defendant’s relevant contacts with the forum state.”⁸¹ In *Johnson v. Arden*, the Eighth Circuit held that a Missouri resident did not have personal jurisdiction over a Colorado defendant who posted “Sue Johnson and Cozy Kittens operated from Unionville, Missouri, where they killed cats, sold infected cats and kittens, brutally killed and tortured unwanted cats and operated a ‘kitten mill’ in Unionville, Missouri.”⁸²

Under the *Zippo* sliding scale test, the court reasoned the website’s accessibility alone fails to establish personal jurisdiction because “[t]here is no interaction between users and a host computer; the site merely makes information available to other people,” so it was at the “‘mere posting’ end of the [sliding] scale.”⁸³ Further, using the *Calder* effects test as an additional factor, the court stated Missouri still lacked personal jurisdiction over the Colorado defendant because the non-forum post was aimed at the Johnsons, and not “uniquely or expressly aimed at Missouri,” so “the inclusion of ‘Missouri’ in the posting was incidental and not ‘performed for the very purpose of having their consequences’ felt in Missouri.”⁸⁴ Therefore, the court held that “[p]osting on the internet from Colorado an allegedly defamatory statement including the name ‘Missouri’ in its factual assertion does not create the type of substantial connection between [the Colorado defendant] and Missouri necessary to confer specific personal jurisdiction.”⁸⁵ The Eighth Circuit also considers the stream of commerce test and whether “something more” can establish minimum contacts.⁸⁶ In *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co.*, the Eighth Circuit held that “scattered e-mails, phone calls, and a wire transfer of money” from a German company to a Missouri

80. *Bros. & Sisters in Christ*, 42 F.4th at 952 (quoting *Whaley v. Esebag*, 946 F.3d 447, 452 (8th Cir. 2020)).

81. *Johnson v. Arden*, 614 F.3d 785, 796-97 (8th Cir. 2010) (stating the *Calder* effects test is construed narrowly and, “absent additional contacts, mere effect in the forum state are insufficient to confer personal jurisdiction”); see also *Bros. & Sisters in Christ*, 42 F.4th at 954; *Calder v. Jones*, 465 U.S. 783, 788-90 (1984).

82. 614 F.3d at 796.

83. *Id.*

84. *Id.* at 797-98.

85. *Id.* at 797.

86. See generally *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co.*, 646 F.3d 589, 592-597 (8th Cir. 2011) (discussing specific and general personal jurisdiction).

company failed to establish minimum contacts.⁸⁷ In this case, a Missouri company “contracted to manufacture base units for . . . a Swedish company,” with the Swedish company then prompting the Missouri company to purchase cooling fans from a German company that was ultimately defective and cost \$5,000,000 to replace.⁸⁸ The court reasoned Missouri lacked personal jurisdiction over the German company because these were “isolated connections [that] are just the sort of random, fortuitous, and attenuated contacts” that “do not constitute a ‘deliberate’ and ‘substantial connection’ with Missouri.”⁸⁹

Moreover, when determining the sufficiency of minimum contacts, the Eighth Circuit evaluates a non-forum defendant’s minimum contacts “through the acts of its agent.”⁹⁰ In *Kendall Hunt Publishing Co. v. Learning Tree Publishing Corp.*, the Eighth Circuit held that former employees of an Iowa publisher who now worked for a California-based website and sold copyrighted material to university students in Iowa through the California website did not confer personal jurisdiction.⁹¹ The court reasoned that Iowa does not have personal jurisdiction over a California company that “maintained a nationally-available website through which an Iowa resident purchased the allegedly infringing work.”⁹² Specifically, the court said that the conduct is not “‘uniquely or expressly aimed at’ Iowa” because the defendant “did not advertise in Iowa and its litigation-anticipated sale to [the plaintiff’s] employee occurred in Iowa.”⁹³ The court also rejected imputing the former employee’s conduct onto the California company to establish minimum contacts.⁹⁴ The court reasoned that even if the former employees knew about the contract between the California and Iowa companies from their Iowa contacts, and they had access to the copyrighted materials because of those contacts, minimum contacts are not established because the “alleged wrongful conduct . . . took place in California.”⁹⁵

87. *See id.* at 594.

88. *See id.* at 592.

89. *See id.* at 594; *see also id.* at 597-98 (declining to use the stream of commerce test to evaluate general personal jurisdiction and reasoning that a seller using a distributor with the expectation that its product will reach a specific multistate market is too limited to establish general jurisdiction).

90. *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 953-54 (8th Cir. 2022) (holding the single sale of a trademark-infringing t-shirt into the forum through the defendant’s national website fails to create sufficient contacts to support specific personal jurisdiction because the defendant did not target the forum).

91. 74 F.4th 928, 931 (8th Cir. 2023).

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

C. NORTH DAKOTA

To exercise personal jurisdiction from minimum contacts, North Dakota's long-arm statute provides that North Dakota courts "may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's having such contact with this state."⁹⁶ Application of North Dakota's long-arm statute must confer jurisdiction over the non-forum defendant to exercise personal jurisdiction, and, if it does, jurisdiction must still satisfy the Due Process Clause.⁹⁷

North Dakota's long-arm statute explicitly allows the state to "exercise personal jurisdiction over a person who acts . . . *by an agent* as to any claim for relief arising from the person's having such contact with this state."⁹⁸ In *Auction Effertz, Ltd. v. Schecher*, the North Dakota Supreme Court held that personal jurisdiction was proper over a non-forum defendant that "initiated contact by phone call to a North Dakota business and ultimately reached a contractual agreement to have the business provide agency services on his behalf, with some of the agency activity to be conducted within this state."⁹⁹ In *Auction Effertz*, the non-forum defendant initiated an "agency contract by placing a phone call to Auction Effertz, Ltd., in Bismarck," where "Effertz would facilitate the sale of Schecher's cattle by locating potential buyers and negotiating the terms of sale with the ultimate buyer."¹⁰⁰ The court explained, "[f]rom the nature of the contract, one can infer much of that activity would be performed in North Dakota and some of it did, in fact, occur in North Dakota," and the defendant accepted the terms of the agreement and "while in North Dakota, [the defendant] made payment toward Effertz's commission."¹⁰¹

Further, the court reasoned that "[u]nder analogous circumstances, other courts have found sufficient contact for personal jurisdiction over a nonresident party who had initiated a business transaction by telephone or other electronic medium within the forum state."¹⁰² Therefore, "[b]y contacting

96. N.D.R.Civ.P. 4(b)(2).

97. *See* *Beaudoin v. S. Tex. Blood & Tissue Ctr.*, 2005 ND 120, ¶ 9, 699 N.W.2d 421, 425-26.

98. N.D.R.Civ.P. 4(b)(2) (emphasis added); *see also* N.D. CENT. CODE § 3-01-01 (1943) (defining agency as "the relationship which results when one person, called the principal, authorizes another, called the agent, to act for the principal in dealing with third persons").

99. 2000 ND 109, ¶ 9, 611 N.W.2d 173, 177 ("An authorization for a party to sell the property of another creates an agency relationship."). *See generally* *Veazie v. Williams*, 49 U.S. 134, 152 (1850) ("That an auctioneer is a general agent for the owner [of property being sold] usually . . . cannot be doubtful").

100. *Auction Effertz*, 2000 ND 109, ¶ 7, 611 N.W.2d 173.

101. *Id.*

102. *Id.* (first citing *Neways, Inc. v. McCausland*, 950 P.2d 420, 424 (Utah 1997); then citing *Beechem v. Pippin*, 686 S.W.2d 356, 363 (Tex. Ct. App. 1985); then citing *Mendelson v.*

Auction Effertz, Ltd., to be his sale's agent, by allowing negotiations in North Dakota with potential buyers, and by making commission payments in this state for the agent's negotiating efforts," the defendant had sufficient minimum contacts with North Dakota.¹⁰³

In *Beaudoin v. South Texas Blood & Tissue Center*, the North Dakota Supreme Court stated "a North Dakota court may exercise specific personal jurisdiction over nonresident defendants only if they purposefully directed their activities towards North Dakota."¹⁰⁴ In *Beaudoin*, the court held that a South Texas company "purposefully directed its activities" toward North Dakota because it "made the choice to serve the North Dakota medical market 21 times, resulting in the shipment of 28 patella tendons during the two years preceding Beaudoin's surgery."¹⁰⁵ Although the defendant said that all of its North Dakota contacts resulted from the unilateral activities of third parties, the court found that argument unpersuasive.¹⁰⁶ The court said the defendant did not "blindly ship tissue components to its autonomous distributors with no awareness or expectation of where these components will ultimately come to rest" since it "typically maintains physical control of its components until they are directly shipped to the patient's location."¹⁰⁷ Despite relying on a third party "to help initially structure and facilitate the transaction, it was [the defendant] that chose to consummate the deal by shipping the patella tendon to North Dakota, an affirmative, active, and direct contract with the State."¹⁰⁸

The court further discussed that the industry requiring "Tissue Order form and Patient Usage Feedback Request form" to be included in the shipped order "raises the specter of a continuing relationship" between the defendant and the forum state because the defendant "held itself out to the end users of its products."¹⁰⁹ Lastly, the court said that even if the defendant "'delivered' its products into the stream of commerce through its distributors, [it] cannot argue it did not 'expect' its products would be purchased by North Dakota consumers because [it] had actual knowledge its products were headed to North Dakota before any shipments were made."¹¹⁰

Fleischmann, 386 F. Supp. 436, 438 (S.D.N.Y. 1973); and then citing *CompuServe, Inc. v. Patter-son*, 89 F.3d 1257, 1268-69 (6th Cir. 1996)).

103. *Id.* ¶ 8.

104. 2005 ND 120, ¶ 11, 699 N.W.2d 421, 426 (citation modified).

105. *Id.* ¶¶ 20-21 ("A North Dakota lawsuit arising out of or, at the very least, relating to these shipments of patella tendons does not offend traditional notions of fair play and substantial justice.").

106. *Id.* ¶ 18.

107. *Id.*

108. *Id.* ¶¶ 18-19.

109. *Id.* ¶ 21.

110. *Id.* ¶ 28 (stating the defendant "purposefully directed its activities toward North Dakota when it made the conscious decision to serve the North Dakota market for patella tendons").

V. THE ISSUES WITH THE CURRENT PERSONAL JURISDICTION DOCTRINE

Beyond the facts, a hypothetical single-sale transaction conducted through a third-party online sales platform illustrates the difficulty courts face in determining whether specific personal jurisdiction exists over a non-forum defendant. The relevant facts are straightforward.¹¹¹ A non-profit seller used a third-party, nationwide online sales platform to list a high-value vehicle. The platform managed the listing, advertising, bidder communications, payment processing, and shipping logistics. The seller provided the vehicle specifications and set a reserve price, but did not directly control the website's operations.

A forum-state buyer viewed the listing, created an account, and ultimately negotiated the purchase through the platform after the auction concluded without meeting the reserve price. All communications between the buyer and seller occurred through the platform. The seller drafted the purchase agreement, which included terms passing title and risk of loss in the seller's state, and disclaiming warranties. After payment, the vehicle was shipped to the buyer's state at the buyer's request, and the title was mailed there. Upon delivery, the buyer discovered material misrepresentations regarding the vehicle's condition and sought rescission. When the seller refused, the buyer filed suit in the forum state alleging breach of contract and fraudulent misrepresentation.

These facts raise the central question of whether a single, platform-mediated sale into the forum is sufficient to establish minimum contacts. The answer varies depending on the doctrinal test applied.

A. AGENCY AND ATTRIBUTION OF CONTACTS

One threshold issue is whether the platform's contacts with the forum may be imputed to the seller. The buyer would argue that an implied agency relationship exists because the platform exercised broad authority over the transaction, including marketing, communications, and logistics—functions traditionally associated with an agent. The seller, by contrast, would emphasize the platform's express disclaimer of agency and argue that the platform acted as an independent intermediary. The resolution of this issue is critical because, absent attribution, many of the forum-directed contacts originate with the platform rather than the seller.

111. The relevant facts provided here are drawn from the fictional dispute I researched and wrote for the 2025 University of North Dakota School of Law Internal Moot Court Competition. Liam S. Waugh, *University of North Dakota School of Law Internal Moot Court Competition Problem*, (2025) (Record, University of North Dakota School of Law) (on file with author).

Ultimately, this agency issue highlights one of the main problems with the current personal jurisdiction doctrine for platform-mediated sales over the internet. When a third-party platform is responsible for listing, advertising, processing payment, and coordinating shipping, the question of whether those contacts are attributable to the seller is critical. Yet, the current framework does not provide a clear or consistent rule to resolve this issue. As a result, whether minimum contacts exist may turn less on the seller's deliberate participation in interstate commerce and more on distinctions regarding the platform's role in the transaction. This uncertainty supports adopting a clearer test that focuses more directly on the seller's own conduct and the extent to which the seller deliberately engaged in forum-connected commerce.

B. APPLICATION OF THE *ZIPPO* SLIDING SCALE TEST

Under the *Zippo* framework, courts assess a website's interactivity to determine whether a seller has purposefully availed itself of the forum.¹¹² Here, the buyer would contend that the transaction occurred through a highly interactive commercial platform that facilitated a completed sale. The seller, however, would argue that *Zippo* is ill-suited to this context because the relevant website was operated by a third party. Without imputing the platform's conduct, the seller's own use of the website may be too attenuated to qualify as purposeful availment.

The *Zippo* sliding scale test further illustrates the limits of the current doctrine in cases involving third-party websites. Since the test focuses on the interactivity of the website, it risks treating the website's conduct as if it were the seller's own, even when the seller does not control the website's design, marketing, or how the transaction is completed. In this way, the test can overstate the significance of a website's interactivity while understating the importance of the seller's own deliberate conduct.¹¹³ For modern internet commerce, the more appropriate question is not whether the website was interactive, but whether the seller used the website's tools in a way that deliberately created meaningful contacts with the forum.

C. APPLICATION OF THE *CALDER* EFFECTS TEST

Under the *Calder* effects test, the buyer would assert that the seller committed an intentional tort by misrepresenting the vehicle and that the conduct was expressly aimed at the forum because the seller entered into a contract

112. See discussion *supra* Sections III.C, IV.A.1.

113. See discussion *supra* Section III.C.

with a forum resident and shipped the product there.¹¹⁴ Additionally, the seller could reasonably foresee that the harm would be felt in the forum state. The seller, in response, would argue that the listing was part of a nationwide marketing effort rather than conduct expressly targeting the forum, and that any connection to the forum was incidental to the buyer's location. Courts applying *Calder* often struggle to distinguish between generalized nationwide conduct and forum-directed activity in cases involving online transactions.

The *Calder* effects test is also limited in this situation because, although it emphasizes intentional conduct and suit-related contacts, it does not provide a clear framework for distinguishing between nationwide commercial conduct and conduct directed at a specific forum.¹¹⁵ For sales over the internet, this creates the recurring problem: sellers may deliberately participate in nationwide marketing and gain commercial benefit from sales into every state, but still argue that no state was specifically targeted enough to support exercising personal jurisdiction. As a result, if sellers do not target any specific forum or exclude specific forums from their marketing efforts, the current *Calder* effects test allows those sellers to get the benefit of engaging in a nationwide business model while minimizing their exposure to suits in forums where the effects of their conduct are ultimately felt.

D. APPLICATION OF THE *ASAHI* STREAM OF COMMERCE TEST

Finally, under the stream of commerce theory, the buyer would argue that the seller placed the product into the stream of commerce with the expectation that it could be purchased nationwide, and that additional conduct—such as negotiating the sale and approving shipment to the forum—satisfies the “something more” requirement.¹¹⁶ The seller would counter that a single, isolated sale does not constitute purposeful availment and that foreseeability alone is insufficient. This framework is particularly indeterminate in single-sale cases, where courts disagree on what qualifies as meaningful additional conduct.

The stream of commerce test likewise fails to provide a clear answer for cases involving single internet sales using third-party websites. Although the test requires “something more” than merely placing a product into the stream of commerce, courts have not consistently explained what qualifies as that additional conduct in the context of platform-mediated sales.¹¹⁷ This is

114. See discussion *supra* Sections III.A, IV.A.2.

115. See discussion *supra* Section III.A.

116. See discussion *supra* Sections III.B, IV.A.3.

117. See discussion *supra* Section III.B.

especially difficult in internet sales because the website often performs functions normally associated with distribution, while the seller may still retain enough control over the transaction to suggest purposeful availment. Accordingly, the stream of commerce test remains unclear and does not adequately resolve when a seller's online commercial conduct justifies exercising specific personal jurisdiction.

E. THE UNCERTAINTY OF MINIMUM CONTACTS IN INTERNET COMMERCE HIGHLIGHTED

Taken together, these competing tests demonstrate that the current minimum contacts analysis is not well-suited for modern internet commerce. Analyzing these facts across multiple doctrinal tests reveals a persistent inconsistency in the minimum contacts inquiry. Agency principles, the *Zippo* sliding scale test, the *Calder* effects test, and the stream of commerce test all focus on different aspects of the same transaction, but no single test provides a consistent method for resolving whether a single platform-mediated sale into the forum is sufficient to establish purposeful availment. Each framework emphasizes different aspects of the transaction, and none provides a clear answer in the context of a one-off, platform-mediated sale. As a result, similar fact patterns can yield divergent outcomes, underscoring the need for a more coherent approach to specific personal jurisdiction in the digital marketplace. This uncertainty highlights the need for a clearer approach that focuses on the seller's own deliberate commercial conduct, rather than forcing courts to fit modern platform-mediated sales into a doctrinal framework developed for an older commercial environment.

VI. MODERNIZING THE MINIMUM CONTACTS ANALYSIS FOR INTERNET COMMERCE

The United States Supreme Court has said that "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis," but there needs to be a uniform test to help with this analysis.¹¹⁸ The lack of a specific test when analyzing whether a platform-mediated sale into the forum satisfies minimum contacts has led the circuit courts to adopt materially different approaches to analyze the same factual problem, producing inconsistent outcomes.¹¹⁹ Courts generally agree that a single platform-mediated sale,

118. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011).

119. *See, e.g.*, *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 165, 171-72 (2d Cir. 2010) (finding purposeful availment when the seller used its website to market products to forum residents and shipped at least one product into the forum); *Admar Int'l, Inc. v. Eastrock, LLC*, 18 F.4th 783, 787-88, 788 n.1 (5th Cir. 2021) (suggesting no purposeful availment because the seller made a single sale into the forum without specific forum marketing); *NBA Props., Inc. v. HANWJH*,

standing alone, is insufficient to establish minimum contacts.¹²⁰ Where courts begin to deviate is what qualifies as “something more” and whether conduct by online sales platforms may constitute the seller’s contacts.¹²¹

Currently, the clearest test for evaluating whether a court may exercise personal jurisdiction over a non-forum defendant that makes a sale into the forum using a third-party online sales platform flows from the Ninth Circuit holdings in *Herbal Brands, Inc. v. Photoplaza, Inc.*, and *Briskin v. Shopify*.¹²² First, the test from *Herbal Brands* uses the *Calder* effects test but treats a website’s interactivity as significant while not differentiating who operates or controls the website.¹²³ This is better suited for modern cases because it imputes the interactivity of websites onto the seller without the buyer having to establish an agency relationship between the seller and the website. Therefore, the test modernizes the *Calder* effects test to include sellers using websites like Amazon, eBay, or other online sales platforms.

Second, the test helps establish the “something more” requirement by adopting versions of the *Calder* effects test and the stream of commerce test. This is because the test reframes the “express aiming” requirement to ask whether the seller’s deliberate conduct involved a forum-linked transaction, rather than asking whether the seller’s deliberate conduct targeted the forum

46 F.4th 614, 624 (7th Cir. 2022) (finding purposeful availment when the defendant used a website to sell a single product to the buyer’s agent who was located in the forum); *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 953-55 (8th Cir. 2022) (holding the single sale of a trademark-infringing t-shirt into the forum through the defendant’s national website fails to create sufficient contacts to support specific personal jurisdiction because the defendant did not target the forum); *Boschetto v. Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008) (holding a contract to sell a single good into the forum was not purposeful availment because it only involved the forum since that is where the buyer happened to reside).

120. See generally, e.g., *Boschetto*, 539 F.3d at 1019 (emphasizing “[t]his was a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser happened to reside”); *Bros. & Sisters in Christ*, 42 F.4th at 953-54 (holding the single sale of a trademark-infringing t-shirt into the forum through the defendant’s national website fails to create sufficient contacts to support specific personal jurisdiction because the defendant did not target the forum); *Admar*, 18 F.4th at 787-88, 788 n.1 (suggesting the defendant did not purposefully avail itself of the forum when it made a single sale into the forum without specific forum marketing).

121. See generally *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 111-12, 117, 122 (1987); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (requiring “‘something more’ [beyond the mere posting of a passive web site] to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state”).

122. *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085 (9th Cir. 2023); *Briskin v. Shopify, Inc.*, 135 F.4th 739 (9th Cir. 2025); see also *supra* notes 64-74 and accompanying text.

123. See *Herbal Brands*, 72 F.4th at 1093-94 (considering the interactivity of the website when the seller used Amazon storefront as their business); see also *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011) (finding personal jurisdiction proper and stating it is immaterial whether the defendant or third-party advertisers targeted forum residents because the defendant sold “space on its web-site for advertisements” and knew—actively or constructively—that it was exploiting the forum for commercial gain).

itself.¹²⁴ For cases involving a sale occurring during the seller's regular course of business, the test uses a modified stream of commerce test, where the seller must "exercise some level of control over the ultimate distribution of its products beyond simply placing its products into the stream of commerce."¹²⁵ The court reasoned this factor is satisfied when a seller "create[s] and maintain[s] a distribution network that reache[s] the relevant forum by choosing to operate on a universally accessible website that accepts orders from residents of all fifty states and delivers products to all fifty states."¹²⁶ Under the test, this factor can be satisfied even if the seller does not conduct forum-specific marketing or forum-targeted business operations.¹²⁷

Alternatively, for cases involving intentional torts, *Briskin* uses a modified *Calder* effects test by removing the requirement for forum-specific conduct.¹²⁸ In *Briskin*, the Ninth Circuit held that "an interactive platform expressly aims its wrongful conduct toward a forum state when its contacts are its own choice and not random, isolated, or fortuitous, even if that platform cultivates a nationwide audience for commercial gain."¹²⁹ The court reasoned that requiring forum-specific targeting would allow businesses engaged in nationwide activities to escape personal jurisdiction in each state while retaining the benefit of a nationwide business.¹³⁰

Taken together, *Herbal Brands* and *Briskin* clarify that the analysis for sellers engaging in nationwide commerce is whether the seller's own business model made forum contacts a predictable and intended consequence of its conduct, rather than a merely fortuitous result of the buyer's location.¹³¹ The "express aiming" requirement can now be satisfied if the seller exercised some control when distributing a physical product into the forum during the seller's regular course of business, or when an alleged tortfeasor's contacts with the forum are "its own choice and not random, isolated, or fortuitous."¹³²

A review of relevant caselaw reveals that, in cases involving an internet sale, courts normally focus their minimum contacts analysis on the following

124. See *Herbal Brands*, 72 F.4th at 1094.

125. *Id.*

126. *Id.* at 1094-95.

127. See *id.*

128. See *Briskin v. Shopify, Inc.*, 135 F.4th 739, 757-58 (9th Cir. 2025).

129. *Id.* at 758 (citation modified).

130. See *id.*

131. See *Herbal Brands*, 72 F.4th at 1094; *Briskin*, 135 F.4th at 758.

132. See *Briskin*, 135 F.4th at 758 (citation modified).

factors: (1) whether the seller was a business or consumer, (2) the regularity, quantity, and value of goods sold into the forum, (3) whether the seller controlled product distribution, (4) when the seller learned of the buyer's forum, (5) whether marketing and communications were nationwide or forum-specific, (6) whether the buyer or seller initiated the transaction, (7) whether the seller engaged in post-sale forum conduct directed at the forum, and if so, to what extent, and (8) whether the website was interactive.¹³³

Considering the Ninth Circuit's holdings in *Herbal Brands* and *Briskin*, and the main factors courts look at when analyzing the sufficiency of minimum contacts, the Eighth Circuit and North Dakota should adopt this proposed test to clarify and streamline the minimum contacts analysis, which focuses on (A) whether the sale was part of the seller's regular course of business; (B) whether the seller exercised meaningful control over distribution; and (C) whether the seller engaged in deliberate conduct connecting the transaction to the forum.

133. See generally *Herbal Brands*, 72 F.4th at 1094 (identifying the seller's identity, total sales, variety of products, and online advertising as relevant factors); *Boschetto v. Hansing*, 539 F.3d 1011, 1018-19 (9th Cir. 2008) (holding a one-time eBay sale did not create purposeful availment, reasoning the seller was not alleged to be a regular eBay seller and the sale only involved the forum because "that is where the [buyer] happened to reside"); *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 122 (1987) (Stevens, J., concurring in part and concurring in the judgment) (indicating "the volume, the value, and the hazardous character" of a good may affect the jurisdictional inquiry); *Beaudoin v. S. Tex. Blood & Tissue Ctr.*, 2005 ND 120, ¶¶ 18-19, 21, 699 N.W.2d 421, 428-29 (finding purposeful direction and reasoning the seller controlled shipping, knew the goods were being shipped to the specific forum before shipping them, and created "the specter of a continuing relationship" with forum end users); *Admar Int'l, Inc. v. Eastrock, LLC*, 18 F.4th 783, 787-88, 788 n.1 (5th Cir. 2021) (suggesting the isolated sale of a single product to a forum resident would be insufficient to support the exercise of jurisdiction when the seller did not solicit business through targeted advertising); *Metcalf v. Lawson*, 802 A.2d 1221, 1226 (N.H. 2002) (reasoning the seller using an internet auction website "had no control over who would ultimately be the winning bidder"); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 453-54 (3d Cir. 2003) (holding that a commercial, interactive website used by the seller to initiate two sales into the forum did not establish purposeful availment because the website did not specifically target the forum); *Sayeedi v. Walser*, 835 N.Y.S.2d 840, 845 (N.Y. Civ. Ct. 2007) (emphasizing the seller intended to sell to the highest bidder, regardless of the buyer's identity or forum, and the "interactivity and marketing efforts of the Website" are controlled by eBay, not the seller); *Illinois v. Hemi Grp., LLC*, 622 F.3d 754, 758 (7th Cir. 2010) (holding personal jurisdiction proper because the seller fulfilled and shipped products into the forum while advertising it ships to all states besides one, indicating the seller "knew that conducting business with residents of a particular state could subject it to jurisdiction there and also that it knew how to protect itself from being haled into court in any particular state"); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1230 (9th Cir. 2011) (holding personal jurisdiction proper and finding it immaterial whether the seller or third-party advertisers targeted forum residents because the seller sold "space on its website for advertisements" and knew—actively or constructively—that it was exploiting the forum for commercial gain).

A. WHETHER THE SALE WAS A PART OF THE SELLER'S REGULAR COURSE OF BUSINESS

The first consideration is whether the sale occurs within the seller's regular course of business. Courts have declined to adopt a bright-line rule for the quantity and value of goods sold into the forum as a basis for establishing specific personal jurisdiction.¹³⁴ However, courts are more likely to find purposeful availment when the sale occurs as part of the seller's business, compared to a consumer-to-consumer transaction.¹³⁵ When a seller repeatedly makes sales into the forum using a website, forum sales appear less "random, isolated, or fortuitous" and more like deliberate commercial conduct.¹³⁶

To determine whether a sale occurs as part of a seller's regular course of business, the Ninth Circuit has recognized that it is

a case-specific question that may turn on factors such as the seller's identity (individual or a business entity), the nature of the website used, the defendant's total volume of online sales, including sales outside the forum, the number or variety of products offered on the defendant's website, and the defendant's online advertising.¹³⁷

These factors are significant because they help courts determine whether the forum sale was accidental or part of an established business model aimed at cultivating repeat sales through online channels. Further, when the record shows the seller is a high-volume or repeat seller, even a single forum sale can be understood as part of a deliberate course of conduct rather than "random, isolated, or fortuitous."¹³⁸ Accordingly, this factor should ask whether

134. See generally *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485 (1985) (rejecting "any talismanic jurisdictional formulas" for determining specific personal jurisdiction); *Herbal Brands*, 72 F.4th at 1095 (rejecting a bright-line rule establishing the number of forum sales needed to satisfy express aiming).

135. See *Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 981-82 (9th Cir. 2021) (discussing the ongoing contract for the sale of goods); *Herbal Brands*, 72 F.4th at 1094 ("When an online sale occurs as part of a defendant's regular course of business, it arises from the efforts of the seller to serve directly or indirectly the market for its product and the defendant should reasonably anticipate being haled into court where the product is sold." (citation modified)); cf. *Boschetto*, 539 F.3d at 1019 (emphasizing "[t]his was a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser happened to reside"); *Admar*, 18 F.4th at 787-88, 788 n.1 (suggesting the isolated sale of a single product to a forum resident would be insufficient to support the exercise of jurisdiction when the defendant did not solicit business through targeted advertising).

136. See *Briskin*, 135 F.4th at 758.

137. *Herbal Brands*, 72 F.4th at 1094.

138. See, e.g., *Asahi Metal Indus.*, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in the judgment) (indicating that "the volume, the value, and the hazardous character" of a good may affect the jurisdictional inquiry and emphasizing Asahi's "regular course of dealing"); *Herbal Brands*, 72 F.4th at 1094-95 (stating defendants expressly aimed their conduct at the forum because they "sold products to [forum] residents via an interactive website in their regular course of business and caused those products to be delivered to the forum"); *Briskin*, 135 F.4th at 758 (stating "an

the seller's forum sale is better understood as being a part of an ongoing market-serving business model rather than an isolated sale.

B. WHETHER THE SELLER EXERCISED MEANINGFUL CONTROL OVER DISTRIBUTION

The second consideration is whether the seller exercises meaningful control over distribution into the forum, because purposeful availment is strongest when the forum contacts result from the seller's own distribution choices rather than the unilateral actions of the platform or buyer. The seller's control over distribution is significant for evaluating purposeful availment because it distinguishes a seller's intent to serve the forum market from the unilateral choices of the buyer or platform, or the buyer merely residing in the forum.¹³⁹ Sellers with some control over the ultimate distribution of products are more likely to have purposefully availed themselves.¹⁴⁰ Exploiting the forum market and controlling distribution also indicates purposeful availment because the seller "chose to consummate the deal" by shipping into the forum with awareness and control.¹⁴¹

interactive platform expressly aims its wrongful conduct toward a forum state when its contacts are its own choice and not random isolated, or fortuitous, even if that platform cultivates a nationwide audience for commercial gain" (citation modified)); *Beaudoin*, 2005 ND 120, ¶ 26, 699 N.W.2d 421 (stating "it was [the defendant] that chose to consummate the deal by shipping the patella tendon to North Dakota, an affirmative, active, and direct contract with the State"); cf. *Boschetto*, 539 F.3d at 1017, 1019 (holding that "the lone transaction for the sale of one item" did not create personal jurisdiction over the defendants in California because there were no allegations that the seller was a regular user of eBay to sell cars or "as a broader vehicle for commercial activity").

139. See, e.g., *NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 624 (7th Cir. 2022) (finding purposeful availment because the defendant "established an online store, using a third-party retailer, Amazon.com, . . . asserted a willingness to ship goods to [the forum]," and once "an order was placed, it filled the order, [and] intentionally shipp[ed]" the product to the forum); *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 822 (D. Mich. 2006) (exercising personal jurisdiction over non-forum eBay sellers who held two auctions for paintings sold into the forum, because the sellers ran an ongoing online business and were "highly sophisticated sellers with an extensive offering of merchandise and a volume of business that require[d] a warehouse"); cf. *United Cutlery Corp. v. NFZ, Inc.*, No. Civ. CCB-03-1723, 2003 WL 22851946, at *13 (D. Md. Dec. 1, 2003) (reasoning the "manifested intent was to sell to the highest bidder, regardless of the state in which the bidder resided"); *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp. 2d 746, 749 (E.D. Mich. 2000) (reasoning internet auction sales are "random" and "attenuated").

140. See, e.g., *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 165-69 (2d Cir. 2010) (imputing the online business's contacts onto the seller because the seller exercised some control over the online business that was engaging in purposeful activities in the state); *Illinois v. Hemi Grp., LLC*, 622 F.3d 754, 758 (7th Cir. 2010) (finding jurisdiction proper where the seller shipped products into the forum and advertised that it ships to all fifty states except one, showing the seller knew that forum-directed sales "could subject it to jurisdiction there and also that it knew how to protect itself" from personal jurisdiction in that forum).

141. See *Beaudoin*, 2005 ND 120, ¶ 26, 699 N.W.2d 421 (stating "it was [the defendant] that chose to consummate the deal by shipping the patella tendon to North Dakota, an affirmative, active, and direct contract with the State"); *Herbal Brands*, 72 F.4th at 1094 (stating the defendant must exercise some level of control over the ultimate distribution of its products beyond simply placing its products into the stream of commerce).

Accordingly, this factor should ask whether the seller made a distribution-related choice that tied the transaction to the forum in a meaningful way. If the record shows the seller's own distribution choices deliberately connected the transaction to the forum, the seller should not need to have engaged in forum-specific conduct. Relevant facts may include whether the seller accepted orders from forum residents through a nationwide distribution, and retained control over shipment into the forum, or structured the transaction so that delivery into the forum was the result of the seller's own commercial choices rather than the unilateral act of the buyer or platform.¹⁴² These are relevant because they help demonstrate that the seller, through its own deliberate conduct, opened the forum as part of its distribution network.

Agency is also particularly important here because if an online platform acts as a seller's agent by carrying out forum-directed distribution, the platform's conduct may be attributable to the seller.¹⁴³ Even then, the question remains whether the seller's own choices authorized, directed, or relied on that conduct such that the forum conduct was truly the seller's and not that of another party.

C. WHETHER THE SELLER ENGAGED IN DELIBERATE CONDUCT CONNECTING THE TRANSACTION TO THE FORUM

The third consideration is whether the seller engages in deliberate conduct connecting the transaction to the forum, because purposeful availment is strongest when the forum contact reflects the seller's deliberate choices rather than the forum being where the buyer happens to reside. In internet commerce cases, the relevant question is whether the seller did more than place a good into a nationwide marketplace and wait for an unknown buyer to purchase it. There is currently a circuit split regarding whether nationwide marketing satisfies purposeful availment when the seller does not directly target the forum market but commercially exploits it.¹⁴⁴ That question

142. See *supra* text accompanying notes 108, 126.

143. See *Chloe*, 616 F.3d at 165-69 (imputing the online business's contacts onto the seller because the seller exercised some control over the online business that was engaging in purposeful activities in the state); *Asahi Metal Indus.*, 480 U.S. at 112 (stating the seller's act of "marketing [a] product through a distributor who has agreed to serve as the sales agent in the forum State" may amount to purposeful availment); *Auction Effertz, Ltd. v. Schecher*, 2000 ND 109, ¶9, 611 N.W.2d 173, 177 ("An authorization for a party to sell the property of another creates an agency relationship.").

144. See *Briskin v. Shopify, Inc.*, 135 F.4th 739, 757-58 (9th Cir. 2025) ("*Mavrix Photo* held that a company's internet activity may subject the company to specific personal jurisdiction in a given forum if the company 'knows—either actually or constructively' about its customer base there and 'exploits that base for commercial gain.'" (quoting *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011))); *Hemi Grp.*, 622 F.3d at 758 (holding personal jurisdiction proper because the seller fulfilled and shipped products into the forum while advertising it ships to all states besides one, indicating the seller "knew that conducting business with residents of a particular state

becomes even more difficult when a seller has broad marketing but excludes one or more states, because this conduct may suggest both an effort to exploit a nationwide market and some degree of forum selectivity.¹⁴⁵ In cases involving online sales, the question should be whether the seller knowingly accepted or cultivated a forum connection as part of the transaction.

One relevant sub-factor is when the seller learns of the buyer's forum, because knowledge of the buyer's forum is significant when accompanied by other deliberate forum choices.¹⁴⁶ The sooner the seller knows the buyer's forum, the more likely it becomes that courts will find purposeful availment, especially when that knowledge is combined with subsequent deliberate conduct, such as continuing the transaction after learning of the forum, negotiating terms, proceeding with shipping, or engaging in post-transaction forum conduct.¹⁴⁷ The timing of when the seller learns the buyer's forum matters because a seller who knows the buyer's forum before shipping goods or before committing an alleged intentional tort but proceeds with the transaction is more easily characterized as having deliberately accepted the forum connection compared to a seller who does not know the buyer's forum until after the transaction is complete.

could subject it to jurisdiction there and also that it knew how to protect itself from being haled into court in any particular state"); *cf.* *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884-87 (2011) (holding the forum lacked personal jurisdiction over a non-forum defendant that used a U.S. distributor to market and sell its product to the U.S. market because the U.S. distributor marketed and sold products to the U.S. market as a whole, without targeting any specific state's market, so the defendant did not purposefully avail itself of the forum state's market); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 453-54 (3d Cir. 2003) (holding no purposeful availment because the website did not specifically target the forum, despite the website being commercial, interactive, and the seller initiating two sales into the forum); *be2, LLC v. Ivanov*, 642 F.3d 555, 559 (7th Cir. 2011) (holding no purposeful availment because the website did not specifically target the forum, despite the interactive website being accessible, and having registered users from the forum); *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997) (finding a lack of personal jurisdiction because the company's sales activities focused "generally on customers located throughout the United States and Canada without focusing on and targeting" the forum state).

145. *See Hemi Grp.*, 622 F.3d at 760 ("[The seller] wants to have its cake and eat it, too: it wants the benefit of a nationwide business model with none of the exposure.").

146. *See generally* *Kuan Chen v. U.S. Sports Acad., Inc.*, 956 F.3d 45, 62 (1st Cir. 2020) (citing *Phillips v. Prairie Eye Ctr.*, 530 F.3d 22, 28-29 (1st Cir. 2008)) (holding the defendant did not purposefully avail itself of the forum despite knowing the plaintiff lived there, mailed a contract there, and knowing the plaintiff was in the forum when sending follow-up emails).

147. *See generally id.* at 61-62 ("A defendant cannot be said to have purposefully availed itself of the benefits of a forum with respect to a given plaintiff when it has neither initiated any in-forum activity involving that plaintiff nor dealt with him knowing that he was located in the forum."); *Curry v. Revolution Lab'ys, LLC*, 949 F.3d 385, 399 (7th Cir. 2020) (stating the defendant's actions could be fairly "described as purposeful[ly]" directed where it "created an interactive website and explicitly provided that Illinois residents could purchase its products through that website," "arranged for the sale of its products through third-party websites," "sent written confirmation to the Illinois customers acknowledging their sale and including their Illinois shipping address," and then, "shipped [the product] to its customers who were in Illinois").

Another relevant sub-factor is how the seller uses the website's tools in the transaction. A seller who posts a passive listing shows less purposeful availment than one who uses a promoted listing, targeted advertising, buyer outreach, or other features that deliberately facilitate transactions with forum residents.¹⁴⁸ The takeaway is not that the seller needs to engage in forum-specific targeting, but rather the seller's use of the website may show whether the forum contact was passive and accidental or, instead, the result of deliberate forum conduct.

Courts should also consider who initiates the transaction and whether the seller engages in post-sale conduct. When the seller initiates the transaction, engages in extensive negotiations with the buyer, or creates continuing obligations in the forum, these facts support the conclusion that the seller deliberately connected itself with the forum.¹⁴⁹

Lastly, when a single sale into the forum is not part of the seller's regular course of business, minimum contacts are still more likely to exist if the seller learned the buyer's forum before shipping the product, deliberately shipped the good into the forum state, used a website to affirmatively facilitate forum sales, and then either committed an intentional tort or engaged in substantial post-sale conduct directed at the forum.¹⁵⁰ Accordingly, this factor should ask whether the seller's conduct demonstrates deliberately accepting or cultivating the forum connection. Relevant facts may include whether the seller learned the buyer's forum before shipping and proceeded anyway, whether the seller initiated or materially advanced the transaction, whether the seller used the website's tools in a way that facilitated forum sales, whether the seller engaged in significant negotiations with the forum buyer, and whether the seller engaged in post-sale conduct connecting itself to the forum.¹⁵¹

Overall, this proposed test retains the most useful insights from the *Zippo* sliding scale test, *Calder* effects test, and stream of commerce test to restructure the minimum contacts analysis for sellers using an interactive platform to sell a physical product in the forum. This test also complements the Eighth

148. *ALS Scan v. Digit. Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002) (incorporating an "intentionality" requirement to test personal jurisdiction in the context of the internet, where a state may exercise personal jurisdiction over a non-forum party when that person "(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"); see *supra* note 99 and accompanying text; see also *Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 915 (10th Cir. 2017) ("Factors suggesting purposeful direction based on forum state market exploitation include: (a) high sales volume and large customer base and revenues, and (b) extensive nationwide advertising or ads targeting the forum state.").

149. See sources cited *supra* notes 98, 148 and accompanying text.

150. See sources cited *supra* notes 108, 126 and accompanying text.

151. See sources cited *supra* notes 141, 143, 146 and accompanying text.

Circuit’s current specific personal jurisdiction test. In *Lakin v. Prudential Securities, Inc.*, the court stated that *Zippo* is appropriate to determine “the nature and quality of the contacts, and their source and connection to the cause of action,” when evaluating specific personal jurisdiction.¹⁵² The test also aligns with the Eighth Circuit’s use of the *Calder* effects test as an additional factor in *Johnson v. Arden*.¹⁵³ Lastly, it incorporates the North Dakota Supreme Court’s minimum contacts analysis by placing weight on which party initiated the contact.¹⁵⁴ Although a single sale by a non-forum seller is normally insufficient to establish personal jurisdiction, a single sale may support jurisdiction under this framework when it is accompanied by broader, deliberate, suit-related conduct showing that the seller affirmatively engaged the forum as a market.

VII. STREAMLINING PERSONAL JURISDICTION IN NORTH DAKOTA

Streamlining the ability to establish personal jurisdiction in North Dakota is important because litigating disputes over personal jurisdiction costs valuable time, money, and legal resources. In North Dakota, 35,643 cases were filed in state district court in 2024, an 8.8% increase from 2023.¹⁵⁵ In the federal district court for the District of North Dakota, there were 830 total case filings, 772 terminations, and 960 pending cases in the twelve months leading up to March 31, 2025.¹⁵⁶ Additionally, the median time from filing to disposition of civil cases was 9.9 months in the District of North Dakota.¹⁵⁷

North Dakota is also experiencing an increasing shortage of lawyers. In 2024, North Dakota had only 1.94 attorneys per 1,000 residents—nearly half the national average of 3.86.¹⁵⁸ Additionally, as of March 2026, the average hourly rate for civil litigation attorneys in North Dakota is \$319, \$34 less per hour than the average national hourly rate of \$353 for civil litigation

152. 348 F.3d 704, 712 (8th Cir. 2003) (citation modified).

153. *See generally* 614 F.3d 785, 796-97 (8th Cir. 2010) (stating the *Calder* effects test is construed narrowly and, “absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction”); *supra* notes 81-85 and accompanying text.

154. *See supra* note 99 and accompanying text.

155. N.D. CT. SYS., 2024 ANNUAL REPORT 22 (2024), <https://www.ndcourts.gov/Media/Default/Court%20Administration/Annual-Report/ar2024.pdf> [<https://perma.cc/7GSR-VGNV>].

156. U.S. CTS., UNITED STATES DISTRICT COURT — JUDICIAL CASELOAD PROFILE (2025), https://www.uscourts.gov/sites/default/files/document/fcms_na_distprofile0331.2025.pdf [<https://perma.cc/6C9Y-CNL6>] (North Dakota Profile for Mar. 31, 2025).

157. *Id.*

158. *Meeting Minutes of the Lawyer Licensing Task Force Materials*, N.D. CTS. 6 (May 22, 2024), <https://www.ndcourts.gov/Media/Default/Users/lanaz/Lawyer%20Licensing%20Task%20Force/Material-1.pdf> [<https://perma.cc/PD9D-PN8S>].

attorneys.¹⁵⁹ In 2024, a survey conducted by the American Bar Association Center for Bar Leadership, North Dakota attorneys reported having a median of 1,650 annual billable hours, and ninety-six percent of the attorneys that responded to the survey billed using an hourly rate, sixty-six percent billed on a fixed or flat fee, and forty-one percent billed on a contingency fee.¹⁶⁰ In this context, disputes over personal jurisdiction create more than a legal headache; they lead to increased costs for parties and require attorneys to spend more time on cases in a state with fewer attorneys than the average.

The issue of litigating personal jurisdiction is also not hypothetical. Fifty-eight percent of the cases removed from North Dakota State court to the District Court of North Dakota involved a dispute over whether the court had personal jurisdiction.¹⁶¹ This shows that interstate disputes are not infrequent and occur enough to justify requiring a more predictable and efficient framework.

Briefing a Rule 12(b)(2) motion to dismiss is also fact-intensive.¹⁶² Cases involving platform-mediated sales over the internet usually demand a fact-intensive inquiry, potentially requiring discovery and litigation over the seller's relationship with the website, the seller's knowledge of the buyer's forum, the path the product took to get into the forum, and whether any pre-sale or post-sale conduct can establish purposeful availment. Put another way, disputes over personal jurisdiction begin to resemble "a case within a case," costing both parties time and money before the plaintiff's claims are heard before the court.

As discussed above, the current tests for personal jurisdiction ask modern courts to apply outdated tests with overlapping factors that do not always fit sales over the internet. Defendants engaging in interstate sales often do not control the website they use or target a specific forum, but the *Zippo* sliding

159. *How Much Should I Charge as a Lawyer?*, CLIO (Mar. 2026), <https://www.clio.com/resources/legal-trends/compare-lawyer-rates/> [<https://perma.cc/MW22-45SJ>].

160. See CTR. FOR BAR LEADERSHIP, A.B.A., 2024 ECONOMICS OF PRACTICE SURVEY: STATE BAR ASSOCIATION OF NORTH DAKOTA 8, 25 (2024), https://cdn.ymaws.com/www.sband.org/resource/resmgr/docs/for_lawyers/economics_of_practice_survey/economic_survey_results.pdf [<https://perma.cc/TWD7-9SS>].

161. See Author's Review of Civil Docket, U.S. District Court for the District of North Dakota (Dec. 31, 2014 to Dec. 31, 2025) (on file with the author) (identifying 67 cases were removed from North Dakota State Court to the U.S. District Court for the District of North Dakota based on diversity jurisdiction, and 39 cases from the District Court of North Dakota State Court involved a dispute over whether the court had personal jurisdiction over the defendant); 28 U.S.C. § 1332(a) (granting federal courts jurisdiction over civil disputes when the parties are diverse and the amount in controversy exceeds \$75,000); FED. R. CIV. P. 12(b)(2) (allowing a court to dismiss a case for lack of personal jurisdiction).

162. See *Daimler AG v. Bauman*, 571 U.S. 117, 147 (2014) (Sotomayor, J., concurring in the judgment) (explaining that the parties were not asked to brief the issue of whether the defendant has sufficient minimum contacts to support personal jurisdiction, which is a complex and fact intensive issue (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 40 (2013))).

scale test, *Calder* effects test, and the stream of commerce test guide courts to ask questions better suited for the old commercial environment. This has resulted in a body of caselaw agreeing that sales over the internet require “something more,” but disagreeing about what constitutes “something more” or when it has been satisfied.

North Dakota and the Eighth Circuit should adopt this conduct-based test for determining whether a single platform-mediated sale supports specific personal jurisdiction. A single sale to a forum resident standing alone is normally insufficient to establish purposeful availment, but a single sale may support jurisdiction when the seller’s own deliberate business model made forum contacts a predictable and intended consequence of its conduct. By adopting the proposed test discussed in Section VI above, attorneys in North Dakota and the Eighth Circuit would have more guidance on whether they can establish specific personal jurisdiction for cases involving platform-mediated sales and help avoid litigating “a case within a case,” saving time, money, and judicial resources.

VIII. CONCLUSION

Platform-mediated sales disputes expose a gap in traditional internet minimum contacts tests. Circuit courts, particularly the Ninth Circuit, suggest moving away from the *Zippo* sliding scale test and toward a more concrete test of whether the seller’s forum contact was deliberate, controlled, and part of an established business model. This article dissected the *Zippo* sliding scale test, *Calder* effects test, and stream of commerce test to determine what factors meet the “something more” requirement to establish purposeful availment in platform-mediated sales cases.

After reviewing North Dakota, Eighth Circuit, and other federal caselaw on internet minimum contacts, this article advocates for a more structured method of identifying when “something more” exists. Drawing from the Ninth Circuit’s holdings in *Herbal Brands v. Photoplaza* and *Briskin v. Shopify*, it proposes a modernized test for evaluating minimum contacts in platform-mediated sales cases. In this proposed test, courts should evaluate whether a non-forum seller’s single platform-mediated sale establishes purposeful availment by asking: (A) whether the sale was part of the seller’s regular course of business rather than an isolated sale, (B) whether the seller exercised meaningful control over the product’s distribution, including control over shipping and fulfillment arrangements, and (C) whether the seller engaged in deliberate conduct connecting the transaction to the forum, like knowingly accepting forum-bound orders, forum-specific communications, repeated sales into the forum, post-sale obligations directed at the forum, or

other conduct showing the forum contact was the seller's own choice rather than the unilateral act of the buyer or platform.

Adoption of this proposed test by North Dakota and the Eighth Circuit courts could provide judges and practitioners with clearer guidance in determining whether specific personal jurisdiction exists in cases involving platform-mediated sales. In turn, that clarity could reduce the need to litigate jurisdiction as "a case within a case," saving time, money, and judicial resources.