No. 17-1530

IN THE

Supreme Court of the United States

BANCA UBAE, S.P.A.,

Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

UGO COLELLA
Counsel of Record
CULHANE MEADOWS PLLC
4200 Wisconsin Avenue, NW,
#106-305
Washington, DC 20016
(202) 247-5005
ucolella@cm.law

Counsel for Petitioner

293318

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

The U.S. Solicitor General ("SG") takes the extraordinary position that the Second Circuit had discretion to resolve merits issues on appeal before satisfying itself that it had personal jurisdiction over Petitioner Banca UBAE, S.p.A. ("UBAE")—an Italian bank with no U.S. contacts generally and no U.S. contacts specific to Respondent's claims. Like the Second Circuit, the SG endorses the practice among several of the Circuit Courts that ignores fully-briefed and argued challenges to personal jurisdiction and, instead, proceeds to the merits by exercising "hypothetical [personal] jurisdiction." That is a violation of due process and inconsistent with jurisdictional principles that empower federal courts to decide cases. More than a decade ago, this Court banned the practice of "hypothetical jurisdiction" in the context of subject matter jurisdiction. This Court should now grant Petitioner's Petition for Certiorari and declare that the practice of assuming personal jurisdiction to reach the merits is likewise prohibited.

1. There is no serious dispute that the Second Circuit decided merits issues before satisfying itself that it could exercise personal jurisdiction over UBAE. The Second Circuit revived and remanded Respondents' fraud and turnover causes of action against UBAE without ever addressing UBAE's personal jurisdiction challenge—an issue that was fully briefed and argued on a full record. Pet. for a Writ of Certiorari ("Cert. Pet."), at 30a-35a. The Second Circuit instead assumed that it had personal jurisdiction over UBAE to decide the appeal, and then, only after UBAE petitioned for rehearing on the ground that it completely overlooked UBAE's personal

jurisdiction challenge, did the court address the issue. Instead of deciding personal jursdiction, the Second Circuit left it for the District Court to do so in the "first instance." *Id.* at 107a.

2. The SG acknowledges that the Second Circuit overlooked UBAE's personal jurisdiction defense and revived previously dismissed claims against the bank. *See* Brief for the United States as Amicus Curiae ("SG Br."), at 7-8. The SG's position is that the Second Circuit's decision to ignore UBAE's personal jurisdiction defense and reach the merits was "an appropriate exercise of the court's discretion." *Id.* at 9; *see also id.* at 11-12. The SG's position cannot be sustained.

3. The doctrine of "hypothetical [personal] jurisdiction" applied by the Second Circuit and endorsed by the SG is inconsistent with this Court's decision in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-101 (1998) ("*Steel Co.*"), which banned the practice in the context of subject matter jurisdiction. Hypothetical jurisdiction "carries courts beyond the bounds of authorized judicial action" and "produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Id.* at 94, 101. This rule must of course apply to federal appellate courts. "Every federal appellate court," this Court has said, "has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review[.]'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). And "jurisdiction" must include both subject matter ***and*** personal. *See Sinochem Int'l Corp. v. Malaysia Int'l Shipping Corp.*,

549 U.S. 422, 510 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)"); *Ruhrgas AG v. Marathon Oil*, 526 U.S. 574, 584 (1999) (personal jurisdiction "'is an essential element,' . . . without with the court is 'powerless to proceed to an adjudication.'").

4. Here, the Second Circuit endorsed the very sort of "hypothetical jurisdiction" that *Steel Co.* rejected. Although *Steel Co.* dealt with subject matter jurisdiction, there is no material difference between an appellate court leap frogging subject matter jurisdiction to decide merits issues and an appellate court—as here—leap frogging personal jurisdiction to decide merits issues by reviving causes of action that were previously dismissed. In both situations, the court is assuming power over a defendant when jurisdiction remains in question. Perhaps Justice Thomas (then, a circuit judge) put it best when he said:

> The truistic constraint on the federal judicial power, then, is this: A federal court may not decide cases when it cannot decide cases, and must determine whether it can, before it may. The majority here changes this fundamental precept to read, in effect, that under certain circumstances, a federal court should decide cases regardless of whether it can, and need not determine whether it can, before it does.

Cross-Sound Ferry Servs., Inc. v. I.C.C., 394 F.2d 327, 340 (D.C. Cir. 1991) (Thomas, J., concurring) (referring to subject matter jurisdiction).

5. To be sure, this Court has not provided clear guidance on when an appellate court is required, as a matter of due process, to decide personal jurisdiction where, as here, the record on jurisdiction is complete and the issue is ripe for decision. As UBAE pointed out in its Petition for Certiorari, the Circuit Courts are divided on the question, taking inconsistent positions. *See* Cert. Pet., at 12-13 nn.2-4. That is precisely why this Court's review is warranted so that appellate courts—and foreign defendants hailed into U.S. courts—will have greater certainty about the process by which questions of personal jurisdiction are resolved.

6. Contrary to the SG's suggestion that there is no "substantial division of authority" in this area, *see* SG Br., at 13, the practice of assuming personal jurisdiction and deciding merits issues is alive and well in some Circuit Courts but not others. *See, e.g.*, *Republic of Pan v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 941 (11th Cir. 1997) ("[C]ourts have held that it is permissible in some circumstances to bypass the issue of personal jurisdiction if a decision on the merits would favor the party challenging jurisdiction and the jurisdictional issue is difficult.") (citing *Lee v. City of Beaumont*, 12 F.3d 933, 937-38 (9th Cir. 1993) ("In previous cases, this court has assumed [personal] jurisdiction in order to reach the merits of the case and rule in favor of the defendant."), *overruled on other grounds*, *California Dep't of Water Resources v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008)); *Feinstein v. RTC*, 942 F.2d 34, 40-41 (1st Cir. 1991) (same); *see also ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 498 n.6 (2d Cir. 2013) (the practice of deciding personal jurisdiction first is "prudential and does not reflect a restriction on the power of the courts to address legal

issues"); *Ford Robinson P'ship v. Wells Fargo Clearing Servs., LLC*, No. 8:18cv9, 2018 WL 14004258, at *2 (D. Neb. Mar. 20, 2018) ("[D]ue to the confusing and opaque nature of the Second Amended Complaint . . . the Court will assume only for the purpose of the pending Motion that jurisdiction exists, and will proceed to analyze the clearer issue—whether Ford Robinson has stated a claim against Wells Fargo."); *Grynberg v. Total Compagnie Des Petroles*, 891 F. Supp. 2d 663, 678 (D. Del. 2012) ("[T]he Court concludes that the most appropriate course of action is to proceed to review the issues presented in Defendants' 12(b)(6) motions to dismiss. Before the Court could make a determination on the merits as to personal jurisdiction, it would be necessary first to permit Plaintiffs to take jurisdictional discovery, as the Court concludes that Plaintiffs have failed to make out a prima facie case of personal jurisdiction at this time."), *vacated on other grounds*, *Grynberg v. Total Compagnie Des Petroles*, C.A. No. 10-1088-LPS, 2013 WL 5459913 (D. Del. Sept. 30, 2013); *but see Kaplan v. Central Bank of the Islamic Republic of Iran*, 896 F.3d 501, 510 (D.C. Cir. 2018) ("After *Sinochem*, it is clear that, when personal jurisdiction is in question, a court must first determine that it possesses personal jurisdiction over the defendants before it can address the merits of a claim.").

7. The confusion among the Circuit Courts is on full display in *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333 (2d Cir. 2018). There, although the majority properly considered personal jurisdiction before merits issues, Judge Calabresi—in a rather bold concurrence—expressed a different view: "I believe the better course, in circumstances like those before us, is to assume personal jurisdiction arguendo and direct a dismissal with

prejudice for failure to state a claim. ***Our prior case law allows us to do so.***" *Id.* at 346 (Calabresi, J. concurring) (emphasis added); *accord Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 n.17 (2d Cir. 2012) ("[I]n cases such as this one with multiple defendants—over some of whom the court indisputably has personal jurisdiction—in which all defendants collectively challenge the legal sufficiency of plaintiff's cause of action, we may address first the facial challenge to the underlying cause of action and, if we dismiss the claim in its entirety, decline to address the personal jurisdictional claims made by some defendants."); *United States v. Vazquez*, 145 F.3d 74, 80 (2d Cir. 1998) ("Because the merits of the case against Attorney General Blumenthal are easily resolved, we assume, without deciding, that he is a proper party to this action."); *In re DES Litig.*, 7 F.3d 20, 24 (2d Cir. 1993) (stating courts may assume personal "jurisdiction to adjudicate the merits in favor of a defendant"). In his view, *Steel Co.* did not apply to, and did not control, issues of personal jurisdiction. *Id.*

8. The SG cannot escape the confusion in this area by suggesting that the record on personal jurisdiction was not complete or that this Court's review will not facilitate a decision on UBAE's personal jurisdiction defense. SG Br., at 12. First, the SG misstates the factual record by suggesting that the record below was incomplete. *Id.* In the District Court and on appeal, Respondents ***never*** challenged the completeness of the record.[1] As the SG

1. In the District Court and on appeal, Respondents relied entirely on the allegations in their complaint to make their case that jurisdiction over UBAE was proper. Cert. Pet., at 7. Respondent's and the SG's suggestion that jurisdictional discovery was necessary to properly adjudicate UBAE's personal jurisdiction defense puts the proverbial cart before the horse. It has long been established

recognizes, Respondents raised jurisdictional discovery for the first time when it was too late—in response to UBAE's Petition for Rehearing. SG Br., at 12 (citing "Resp. to Pet. for Reh'g"); *compare Singleton v. Wolff*, 428 U.S. 106, 120 (1976) (the rule "'is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.'" (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). Second, the SG incorrectly says that "Petitioner nowhere suggests that this Court should decide the personal-jurisdiction issue in the first instance." *Id.* The question presented asks whether a "federal appellate court" must decide personal jurisdiction when presented with a full record, *see* Cert. Pet., at i, and this Court, of course, is a federal appellate court. In any event, this Court certainly can decide the question or remand it to the Second Circuit to do so. Under either option, UBAE's almost-six-year-old-but-still-undecided personal jurisdiction defense will be decided more expeditiously than having to start from square one in the District Court.

9. Moreover, the SG appears to have abandoned its previous concerns about the impact on international

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that jurisdictional discovery is permitted only if Respondents had established a *prima facie* case of jurisdiction over UBAE. *See Central States v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000) ("At a minimum, the plaintiff must establish a colorable or prima facie showing of personal jurisdiction before discovery should be permitted."); *accord Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 434 (5th Cir. 2014) (same); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (same). The whole point of UBAE's years-long, undecided challenge to jurisdiction is that Respondents never made that case.

trade of unpredictable rules of personal jurisdiction. For example, in *Bristol-Myers Squibb Co. v. Superior Court of CA*, 137 S. Ct. 1773, 1781 (2017) ("*Bristol*"), the SG recognized that the United States "has an interest in ensuring the existence of fair and efficient forums to adjudicate claims against foreign and domestic companies, including claims that the United States itself brings in federal court under federal statutes." Brief for the United States as Amicus Curiae Supporting Petitioner, *Bristol-Myers Squibb Co. v. Superior Court of CA*, 137 S. Ct. 1773, 1781 (2017), at 1 ("*Bristol* SG Brief"). The SG stressed that

> [t]he United States . . . has an interest in avoiding state exercises of jurisdiction that are unduly expansive or unpredictable, because those exercises of jurisdiction pose risks for foreign and interstate commerce. Some companies may be reluctant to undertake or expand commercial activity within the United States when they cannot predict the jurisdictional consequences of their commercial or investment activity. In addition, some enterprises may be reluctant to invest or do business in particular States if participation requires them to answer in the State for conduct that occurs outside the State's boundaries.

Id. at 2. The SG persuasively (and successfully) argued that a state's expansive approach to specific personal jurisdiction could impair U.S. trade interests "by creating disincentives to commercial activity on the part of foreign companies." *Id.* at 14. As such, it urged this Court to reject the California Supreme Court's "sliding scale" approach to personal jurisdiction because such a rule "would

substantially reduce the ability of businesses to predict the jurisdictional consequences of their activities." *Id.* at 13.

10 Likewise, in *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), the SG asserted that "the United States has an interest in the due-process limitations on state court exercises of personal jurisdiction over out-of-state corporations because of the potential effects of such rules on interstate and foreign commerce." Brief for the United States as Amicus Curiae in Support of Petitioner, *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017), at 2. And, in *Daimler AG v. Bauman*, 571 U.S. 117 (2014) ("*Daimler*"), the SG stressed the foreign policy implications of unpredictable jurisdictional rules:

> From an economic perspective, the inability to predict the jurisdictional consequences of commercial or investment activity may be a disincentive to that activity. Likewise, an enterprise may be reluctant to invest or do business in a forum for all of its conduct worldwide. The uncertain threat of litigation in the United States courts, especially for conduct with no significant connection to the United States, could therefore discourage foreign commercial enterprises from establishing channels for the distribution of their goods and services in the United States, or otherwise making investments in the United States.

Brief for the United States as Amicus Curiae in Support of Petitioner, *Daimler AG v. Bauman*, 571 U.S. 117 (2014), at 2 ("*Daimler* SG Brief"). The *Daimler* Court agreed and expressed concern over U.S. courts' expansive view

of general jurisdiction and how that view was inconsistent with the views of other nations. "Other nations," this Court said, "do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case." *Daimler*, 571 U.S. at 140. This Court credited the SG's view that "foreign governments' objection to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Id.* at 141-42 (internal citations omitted).

11 The question here—whether an appellate court must decide personal jurisdiction when it is presented with a complete record—presents even more fundamental issues of efficiency and predictability than were at issue in *Bristol*, *BNSF*, and *Daimler*. A federal appellate court with a complete record that does not decide personal jurisdiction as a threshold matter presents a foreign corporation with two levels of uncertainty. First, courts will leave a foreign corporation like UBAE in the dark about the applicable due process rules. And second, foreign corporations like UBAE will be without any discernible timetable for a decision on the question of personal jurisdiction.

12. Those concerns are squarely presented in this case. UBAE has been (falsely) accused of conspiring to prevent victims of terrorism from being compensated. Despite this false and inflammatory allegation, UBAE remains party to this case because its personal jurisdiction arguments have been largely ignored for almost six years in a jurisdictional ping-pong match between the District Court and the Second Circuit. As such, the Second Circuit's approach here prevents foreign corporations like

UBAE from "predict[ing] the jurisdictional consequences of commercial or investment activity . . . ." *Bristol* SG Brief, at 2.

CONCLUSION

The Circuit Courts do not have discretion to assume personal jurisdiction and decide merits issues when a defendant asserts lack of personal jurisdiction and the record on appeal is complete. Because the Second Circuit in this case and Circuit Courts in other cases have endorsed the inappropriate doctrine of "hypothetical [personal] jurisdiction," certiorari is warranted.

Respectfully submitted,

Ugo Colella
Counsel of Record
Culhane Meadows PLLC
4200 Wisconsin Avenue, NW,
#106-305
Washington, DC 20016
(202) 247-5005
ucolella@cm.law

Counsel for Petitioner