No.

In the Supreme Court of the United States

MCC (XIANGTAN) HEAVY INDUSTRIAL EQUIPMENT CO., LTD., PETITIONER,

v.

LIEBHERR MINING & CONSTRUCTION EQUIPMENT, INC., D/B/A LIEBHERR MINING EQUIPMENT NEWPORT NEWS CO., A VIRGINIA CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause permits a court to exercise personal jurisdiction over a nonresident defendant based on the contacts of the defendant's alleged co-conspirators with the forum State, as the court below held; or whether the due process analysis looks only to the defendant's own contacts with the forum State and not those of alleged co-conspirators, as the Nebraska and Texas Supreme Courts have held.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. ("MCC") provides the following disclosure statement:

Capital Engineering & Research Incorporation Ltd. ("CERI") owns a majority of MCC's shares. CERI is a wholly owned subsidiary of China Metallurgical Construction Corp., which is wholly owned by the Chinese government's State-owned Assets Supervision and Administration Commission of the State Counsel.

Xiangtan Steel Group Company Ltd. ("Xiangtan Steel") owns a minority of MCC's shares. Xiangtan Steel is a wholly owned subsidiary of Hunan Valin Iron & Steel Group Co., Ltd., which is wholly owned by the Chinese government's State-owned Assets Supervision and Administration Commission of Hunan Province.

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PETITION FOR A WRIT OF CERTIORARI

MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. ("MCC") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia.[1]

OPINIONS BELOW

The Supreme Court of Virginia's orders refusing MCC's petition for appeal (App., *infra*, 1a) and denying MCC's petition for rehearing (App., *infra*, 61a) are unreported. Also unreported are the Circuit Court of the City of Newport News' May 2, 2017 order denying MCC's motion to set aside the court's default judgment (App., *infra*, 2a-3a); its March 27, 2017 letter opinion regarding that motion (App., *infra*, 4a-27a); its May 2, 2016 amended default judgment order (App., *infra*, 28a-36a); and its April 12, 2016 order on damages (App., *infra*, 37a-60a).

JURISDICTION

The Virginia Supreme Court refused MCC's petition for appeal on March 22, 2018, and denied MCC's timely rehearing petition on May 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

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[1] Under Virginia law, the Supreme Court's refusal of MCC's petition for appeal "constitute[d] a decision on the merits" of the issues raised in the petition. *Sheets* v. *Castle*, 559 S.E.2d 616, 619 (Va. 2002); accord *Jackson* v. *Virginia*, 443 U.S. 307, 311 n.4 (1979) ("Each petition for writ of error under [Virginia law] is reviewed on the merits and the effect of a denial is to affirm the judgment * * * on the merits.").

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

Petitioner MCC is a Chinese state-owned entity. It challenges a default judgment a Virginia state trial court entered of $121 million in trebled damages. MCC moved to vacate that judgment, arguing that the court lacked personal jurisdiction over MCC because it has never conducted *any* activities in Virginia.

The trial court denied MCC's motion. In doing so, it invoked a broad conspiracy-based theory of personal jurisdiction. The court reasoned that although MCC itself had never transacted any business in Virginia, the court could exercise jurisdiction over it based entirely on the forum activities of its purported co-conspirators in an alleged scheme to misappropriate trade secrets. Finding "no reversible error" in the trial court's decision, the Virginia Supreme Court refused MCC's petition for appeal, App., *infra*, 1a, a ruling against MCC "on the merits," *Sheets* v. *Castle*, 559 S.E.2d 616, 619 (Va. 2002).

In adopting a conspiracy theory of personal jurisdiction, the Virginia courts here have taken sides in a well-established split among state high courts and federal courts of appeals, and have diverged from the Supreme Courts of Nebraska and Texas, which have squarely (and correctly) rejected the conspiracy theory of personal jurisdiction. See *Ashby* v. *State*, 779 N.W.2d 343, 360-361 (Neb. 2010); *National Indus.*

Sand Ass'n v. *Gibson*, 897 S.W.2d 769, 773 (Tex. 1995); see also, *e.g.*, *Knaus* v. *Guidry*, 906 N.E.2d 644, 660 (Ill. App. Ct. 2009) ("[T]here is a split among the jurisdictions regarding the constitutionality of the conspiracy theory of jurisdiction."). "Courts are divided—and the U.S. Supreme Court has yet to rule—on the question of whether the conspiracy theory of personal jurisdiction is proper under due process requirements." Jack Figura, *No Consensus on Conspiracy Theory of Personal Jurisdiction*, Law360 (Jan. 31, 2018), http://bit.ly/2MUSCmC (Figura, *No Consensus*).

The trial court's decision in this case vividly demonstrates why the conspiracy theory of personal jurisdiction violates fundamental due process principles. The decision here was animated by the trial court's view that "injury has occurred * * * to a resident corporation" in Virginia, and thus the "plaintiff should have * * * access to redress in the courts of th[e] Commonwealth." App., *infra*, 25a. That reasoning, however, squarely conflicts with this Court's settled precedent holding that "mere injury to a forum resident" is insufficient to establish personal jurisdiction over a nonresident defendant, for "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State" sufficient to warrant the exercise of personal jurisdiction. *Walden* v. *Fiore*, 571 U.S. 277, 289-291 (2014). Under *Walden*, an alleged co-conspirator's forum contacts cannot be imputed to a nonresident defendant, at least absent evidence that the defendant had the power to control the third party's "means and method" of performance—a finding that the trial court never

made here. *Stover* v. *O'Connell Assocs., Inc.*, 84 F.3d 132, 135 (4th Cir. 1996).

This Court has repeatedly, and recently, granted review to correct lower courts' violations of defendants' due process rights through expansive exercises of personal jurisdiction. See, *e.g.*, *Bristol-Myers Squibb Co.* v. *Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549 (2017); *Walden*, 571 U.S. 277; *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915 (2011). The Court should do the same here. Indeed, a recent article surveying the split on the conspiracy theory of personal jurisdiction predicted that "[i]n view of the reasoning of *Walden*—and of the U.S. Supreme Court's ongoing project of limiting the reach of theories of personal jurisdiction—it is reasonable to expect that at some point the court will narrow the permissible reach of the conspiracy theory of personal jurisdiction" or "reject the doctrine entirely." Figura, *No Consensus*.

The Court should grant review here and now to resolve this entrenched split on whether the exercise of personal jurisdiction can be grounded on the forum contacts of a defendant's alleged co-conspirators. There could scarcely be a better case to illustrate the harms of the theory: A foreign state-owned entity from inland China has had a crippling $121 million default judgment entered in favor of a hometown plaintiff by a court half a world away in Virginia, a place where the foreign company has no contacts supporting personal jurisdiction under any conventional theory. And because MCC had

defaulted, that distant court refused to permit it to challenge the conspiracy allegations supporting jurisdiction, underscoring the dangers of making jurisdiction turn on conspiracy allegations rather than simple-to-establish facts about the defendant's own presence in the jurisdiction. Further review is urgently warranted.

STATEMENT

1. MCC is (through intermediate parent companies) a state-owned entity of the Chinese government, based in the Hunan Province of south central China.[2] An experienced manufacturer of heavy industrial equipment, MCC began exploring the possibility of manufacturing mining trucks in 2009. In 2010, it contracted with Michigan-based Detroit Heavy Truck Engineering, LLC ("DHTE") to assist it with designing and manufacturing such trucks.

Respondent Liebherr Mining & Construction Equipment, Inc. ("Liebherr") is a wholly owned subsidiary of Liebherr-International Aktiengesellschaft, a large multinational holding company based in Switzerland. See Liebherr Group, Annual Report 2017, at 10, 15, http://bit.ly/2uii5Q0. Liebherr-International boasts that it has "over 130 companies in more than 50 countries on every continent,"[3]

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[2] MCC was previously known as CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd., which was separately listed as a defendant in the complaint below. See App., *infra*, 5a. MCC has also at times done business under the name "Elite." See *ibid.*

[3] Liebherr Worldwide, http://bit.ly/2tMSgXJ (last visited Aug. 2, 2018).

including "eight companies in the People's Republic of China," where Liebherr-International "offers its entire product range."[4] The Liebherr-International subsidiary that is the plaintiff in this case manufactures mining trucks in Newport News, Virginia, where—in the words of Mayor McKinley Price—Liebherr is "an important industrial employer."[5]

Liebherr brought suit against petitioner MCC and several other defendants in the state circuit court in its hometown of Newport News.[6] Liebherr alleges that DHTE recruited current and former Liebherr employees and that those individuals misappropriated its trade secrets and other confidential information to benefit DHTE and—by virtue of the companies' contracts—MCC. Liebherr contends that MCC conspired with DHTE and its personnel to misappropriate Liebherr information.

2. In May 2016, the circuit court entered an amended default judgment against MCC for $121,201,292 in trebled damages. Accepting Liebherr's pleaded facts as true,[7] the circuit court

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[4] Liebherr in the People's Republic of China, http://bit.ly/2NjPaTy (last visited Aug. 2, 2018).

[5] Press Release, Liebherr-International AG, Liebherr to Invest $45 Million at Its Newport News Facility (Mar. 23, 2018), https://bit.ly/2LYV6zY.

[6] Liebherr has since voluntarily dismissed its claims against the other defendants in this case.

[7] Under Virginia law, the well-pleaded factual allegations in the plaintiff's complaint are deemed admitted for purposes of a motion to set aside a default judgment for lack of personal jurisdiction. See *Glumina Bank d.d.* v. *D.C. Diamond Corp.*, 527

cited the following factors as purportedly "supporting the exercise of personal jurisdiction" over MCC:

- MCC allegedly "received the benefit of services" from DHTE personnel, some of whom were "Virginia residents." App., *infra*, 30a-31a.
- MCC allegedly "encouraged its agents and representatives"—apparently a reference to DHTE personnel—"to steal and provide Liebherr information." *Id.* at 31a.
- DHTE personnel allegedly provided to MCC—*outside of Virginia*—"confidential and proprietary Liebherr information taken from Liebherr's manufacturing facility in Virginia." *Id.* at 30a-31a.
- MCC allegedly used Liebherr information—*outside of Virginia*. *Id.* at 31a.
- MCC allegedly "conspired" with DHTE and its personnel, "encouraged [them] to take unlawful acts in furtherance of the conspiracy in Virginia," and "knew or should have known that [they] took numerous actions in furtherance of the conspiracy in Virginia." *Id.* at 32a.

S.E.2d 775, 777 (Va. 2000); *St. Paul Mercury Ins. Co.* v. *Nationwide Mut. Ins. Co.*, 161 S.E.2d 694, 697 (Va. 1968). MCC, however, vigorously disputes Liebherr's unsupported allegations that it conspired with DHTE to steal trade secrets. In fact, MCC required DHTE to contractually commit not to infringe others' intellectual property. MCC is confident it could have disproven Liebherr's claims, had Liebherr brought suit in a proper forum, such as Michigan, where MCC had ties establishing jurisdiction.

- MCC allegedly "aided and abetted the breach of fiduciary duties of individuals in Virginia, tortiously interfered with various non-disclosure and confidentiality contracts entered into in Virginia, and directly contracted and communicated with Virginia residents to perform design related services while in possession of Liebherr property and trade secrets." *Ibid.*

The circuit court concluded that these purported contacts with Virginia were "sufficient to establish jurisdiction under * * * Virginia's long-arm statute and to satisfy any constitutional due process requirements." *Id.* at 32a-33a. It also adopted a conspiracy-based theory of personal jurisdiction, concluding that jurisdiction over MCC was "independently established based on the jurisdictional contacts" of MCC's alleged co-conspirators. *Id.* at 33a.

3. Making a special appearance, MCC in October 2016 moved to set aside the default judgment as void for lack of personal jurisdiction.[8] See Va. Code Ann.

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[8] Although Liebherr's broad conspiracy theory of personal jurisdiction intertwined the merits of its claims with the alleged basis for jurisdiction, MCC repeatedly made clear in the lower courts that it was not seeking a merits adjudication. See, *e.g.*, Mot. to Set Aside Default & Default J. 6 (Oct. 25, 2016). In any event, even if MCC *had* made a general appearance by engaging in conduct related to "adjudicating the merits of the case," Va. Code Ann. § 8.01-277.1, the Virginia Supreme Court recently clarified that "a general appearance after the entry of a final judgment that is void ab initio because of the absence of personal jurisdiction does not, by itself, convert the prior void judgment into a valid one." *McCulley* v. *Brooks & Co. Gen. Contractors, Inc.*, No. 171117, 2018 WL 3471203, at *3 (Va. July 19, 2018); see

§ 8.01-428(A)(ii). MCC emphasized that the conspiracy theory of personal jurisdiction is "not well recognized under Virginia law," and "[n]o case cited by Liebherr" supports its application here. Suppl. Reply Br. Supp. Mot. 2 (Jan. 26, 2017); see also *id.* at 7 n.4 ("[P]ermit[ting] a plaintiff to manufacture jurisdiction in Virginia by simply alleging a conspiracy * * * would unconstitutionally deprive MCC of its right not to be haled into court in a forum with which it has had constitutionally insufficient contacts.").

The circuit court denied MCC's motion. In its decision, the court once again invoked the "conspiracy theory of jurisdiction" as a basis for exercising personal jurisdiction over MCC. App., *infra*, 16a. The court also expressed its view that "injury has occurred and has continued to occur to a resident corporation"—i.e., Liebherr—in Virginia, and thus Liebherr "should have and does have access to redress in the courts of this Commonwealth." *Id.* at 25a.

4. MCC filed a petition for appeal with the Virginia Supreme Court. In the petition, MCC argued, among other things, that the circuit court's "broad conspiracy theory of [personal] jurisdiction" conflicted "with *Walden* and fundamental principles of due process." Pet. for Appeal 28-32.

5. The Virginia Supreme Court refused MCC's petition for appeal, stating that "the Court is of the opinion there is no reversible error in the judgment."

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also App., *infra*, 5a-6a (declining to find that MCC waived objection to personal jurisdiction).

App., *infra*, 1a. The court denied MCC's rehearing petition on May 11, 2018. *Id.* at 61a.

REASONS FOR GRANTING THE PETITION

I. This Case Implicates An Acknowledged Split Among Federal And State Appellate Courts On Whether A Conspiracy-Based Theory Of Personal Jurisdiction Comports With Due Process

A. The Trial Court Relied On A Conspiracy-Based Theory Of Personal Jurisdiction

Virginia law recognizes that a default judgment against a defendant over which the court lacks personal jurisdiction is void and thus may be set aside at any time. See Va. Code Ann. § 8.01-428(A)(ii); Va. S. Ct. R. 3:19(d)(2); see also *Lifestar Response of Md., Inc.* v. *Vegosen*, 594 S.E.2d 589, 592 (Va. 2004); *O'Connell* v. *Bean*, 556 S.E.2d 741, 742 (Va. 2002); *Glumina Bank d.d.* v. *D.C. Diamond Corp.*, 527 S.E.2d 775, 777 (Va. 2000); *Dennis* v. *Jones*, 393 S.E.2d 390, 394 (Va. 1990).

Because Liebherr does not allege, and the state circuit court did not find, that MCC has a "continuous and systematic" affiliation with Virginia sufficient to create general personal jurisdiction, *BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (quoting *Daimler AG* v. *Bauman*, 571 U.S. 117, 127 (2014)), it is undisputed that the question here is whether the Due

Process Clause permitted the circuit court to exercise "specific jurisdiction" over MCC.[9]

For the Virginia court to have had specific jurisdiction over MCC, the company must have had "minimum contacts" with Virginia "such that the maintenance of the suit d[id] not offend traditional notions of fair play and substantial justice," and those contacts must have "give[n] rise to the liabilities sued on," *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-317 (1945) (internal quotation marks omitted)—i.e., the cause of action must have "aris[en] out of or related to [MCC's] contacts with the forum," *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984). To satisfy that standard, Liebherr had to show that MCC "purposefully avail[ed] itself of the privilege of conducting activities" within Virginia. *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

The circuit court could not exercise personal jurisdiction over MCC based on MCC's *own* forum contacts because MCC has never directly conducted any activities in Virginia. Liebherr does not allege that MCC has ever had any offices, employees, or agents for service of process in Virginia, or that MCC ever entered into any contract with any Virginia

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[9] The Virginia Supreme Court has indicated that Virginia's long-arm statute, Va. Code Ann. § 8.01-328.1, authorizes Virginia courts "to assert jurisdiction over nonresidents who engage in some purposeful activity in Virginia, to the extent permissible under the Due Process Clause." *Glumina Bank*, 527 S.E.2d at 777 (citation omitted).

resident,[10] sold any products in Virginia, or owned any property in Virginia. Nor do any of the "factors" on which the circuit court purported to base its exercise of personal jurisdiction involve any conduct by MCC in Virginia. App., *infra*, 30a-33a. The circuit court did not find, nor does Liebherr allege, that MCC itself ever "received the benefit of services," "encouraged" wrongful conduct, obtained or used Liebherr information, "conspired" with DHTE, or interfered with contracts or fiduciary duties *while in Virginia*. *Ibid.* Indeed, Liebherr does not allege that MCC has ever taken *any* action in Virginia.

Nor could the forum activities of DHTE's personnel be imputed to MCC based on an agency theory, because MCC lacked the power to control the "means and method" of performance of DHTE's personnel. *Stover* v. *O'Connell Assocs., Inc.*, 84 F.3d 132, 135 (4th Cir. 1996) (holding that a Maryland district court could not rely on an "agency theory" to impute to the New York defendant the forum contacts of a Maryland investigative firm because there was "no evidence that [the defendant] controlled" the Maryland firm's

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[10] The circuit court's passing suggestion that MCC "contracted *** with Virginia residents" is demonstrably wrong. App., *infra*, 32a. It is undisputed that MCC's contract was with *DHTE*, a Michigan company. 3d Am. Compl. ¶ 5 (Feb. 5, 2013). But even if MCC had contracted with Virginia residents, contracting with forum residents does not "automatically establish sufficient minimum contacts" with the forum. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 478 (1985); see also *Bristol-Myers Squibb Co.* v. *Super. Ct. of Cal.*, 137 S. Ct. 1773, 1783 (2017) ("The bare fact that [the defendant] contracted with a California distributor is not enough to establish personal jurisdiction in the State.").

"means and method of * * * investigation"); see also, *e.g.*, *Daimler*, 571 U.S. at 135 n.13 (stating in dicta that a "corporation can purposefully avail itself of a forum by *directing* its agents or distributors to take action there" (emphasis added)); *Trois* v. *Apple Tree Auction Ctr., Inc.*, 882 F.3d 485, 490 (5th Cir. 2018) (refusing to impute jurisdictional contacts based on agency theory where alleged principal did not have "both the right[] (1) to assign the agent's task; and (2) to *control* the means and details of the process by which the agent [would] accomplish that task" (citation omitted)); *Williams* v. *Yamaha Motor Co. Ltd.*, 851 F.3d 1015, 1024-1025 (9th Cir. 2017) ("[U]nder any standard for finding an agency relationship, the [purported principal] must have the right to substantially control its [alleged agent's] activities."). DHTE's employees or independent contractors were at most agents of *DHTE*, not of MCC. Illustrating that DHTE and its personnel acted independently and were not agents through which MCC misappropriated trade secrets, Liebherr alleges that DHTE used the information its personnel allegedly misappropriated to *assist a competitor of MCC* after MCC terminated its relationship with DHTE. See 3d Am. Compl. ¶¶ 303-311 (Feb. 5, 2013). If the individuals who allegedly misappropriated Liebherr information were acting as MCC's agents, presumably MCC would not have allowed them to use the misappropriated information to benefit a competitor.

Therefore, although the circuit court cited multiple "factors" that allegedly supported its exercise of personal jurisdiction, the court's decision ultimately,

and necessarily, relied on a broad conspiracy theory of jurisdiction, under which personal jurisdiction over MCC was "established based on the jurisdictional contacts of the other defendants"—i.e., MCC's alleged co-conspirators at DHTE. App., *infra*, 30a-33a. Tellingly, the circuit court's brief discussion of personal jurisdiction in its letter opinion denying MCC's motion to set aside the default judgment focused almost exclusively on the conspiracy theory of personal jurisdiction, confirming that the theory was the basis for the circuit court's exercise of personal jurisdiction. See App., *infra*, 16a-18a.

B. Appellate Courts Are Split On Whether The Conspiracy Theory Of Personal Jurisdiction Comports With Due Process

"[T]here is a split among [lower courts] regarding the constitutionality of the conspiracy theory of [personal] jurisdiction." *Knaus* v. *Guidry*, 906 N.E.2d 644, 660 (Ill. App. Ct. 2009); accord *Chenault* v. *Walker*, 36 S.W.3d 45, 54 (Tenn. 2001) ("[T]here is a difference of opinion in the case law."); *Istituto Bancario Italiano SpA* v. *Hunter Eng'g Co.*, 449 A.2d 210, 222 (Del. 1982) (noting "clear divergence of authority"); Alex Carver, Note, *Rethinking Conspiracy Jurisdiction in Light of Stream of Commerce and Effects-Based Jurisdictional Principles*, 71 Vand. L. Rev. 1333, 1335 (2018) ("state courts of last resort disagree" on question presented). "[S]ubstantial disagreement" exists "as to the validity of the conspiracy theory of personal jurisdiction as a general proposition and the requirements for invoking it." *Gognat* v. *Ellsworth*, 224 P.3d 1039, 1054 n.3 (Colo. App. 2009), aff'd, 259 P.3d 497 (Colo. 2011). As a

result, "[t]here is a great deal of doubt surrounding the legitimacy of th[e] conspiracy theory of personal jurisdiction." *Chirila* v. *Conforte*, 47 F. App'x 838, 842 (9th Cir 2002); see also *Edmond* v. *U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 428 n.2 (D.C. Cir. 1991) (Silberman, J., concurring in part and dissenting in part) (noting "increasing concern by judges and commentators about [conspiracy theory's] constitutionality"); *Santa Fe Techs., Inc.* v. *Argus Networks, Inc.*, 42 P.3d 1221, 1233 (N.M. Ct. App. 2001) ("The issue of whether conspiracy provides an adequate constitutional foundation for personal jurisdiction has challenged courts throughout the country, with differing results.").

1. The Supreme Courts of Nebraska and Texas have squarely rejected the conspiracy theory of personal jurisdiction, in direct conflict with the Virginia courts here and with the decisions of other state high courts and federal courts of appeals that have embraced the theory. See *Ashby* v. *State*, 779 N.W.2d 343, 360-361 (Neb. 2010); *National Indus. Sand Ass'n* v. *Gibson*, 897 S.W.2d 769, 773 (Tex. 1995); see also, *e.g.*, *Gibbs* v. *PrimeLending*, 381 S.W.3d 829, 832 n.1 (Ark. 2011) (recognizing that Texas and Nebraska "have rejected the conspiracy theory of jurisdiction, concluding that it is inconsistent with due process").

In *National Industrial Sand Association*, the Texas Supreme Court recognized that "[c]onspiracy as an independent basis for jurisdiction" distracts "from the ultimate due process inquiry: whether the out-of-state defendant's contact with the forum was such that it should reasonably anticipate being haled into

a court in the forum state." 897 S.W.2d at 773. The court explained that "[t]o comport with due process, the exercise of long-arm jurisdiction over a defendant must rest not on a conceptual device," like conspiracy theory, but instead "on a finding that the non-resident, through his relationship with another, has purposefully avail[ed] itself of the privilege of conducting activities with the forum state." *Ibid.* (citation omitted). The court thus "decline[d] to recognize the assertion of personal jurisdiction over a nonresident defendant based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state." *Ibid.*; accord, *e.g.*, *Old Republic Nat'l Title Ins. Co.* v. *Bell*, No. 17-0245, 2018 WL 2449360, at *4 (Tex. June 1, 2018) ("The mere existence or allegation of a conspiracy directed at Texas is not sufficient to confer jurisdiction."); *M & F Worldwide Corp.* v. *Pepsi-Cola Metro. Bottling Co.*, 512 S.W.3d 878, 887 (Tex. 2017) ("[A] nonresident's alleged conspiracy with a Texas resident does not confer personal jurisdiction over the nonresident in Texas."). Restricting its "inquiry to whether [the defendant] *itself* purposefully established minimum contacts such as would satisfy due process," the court held that personal jurisdiction did not exist, even though the defendant had allegedly conspired with a Texas corporation and harmed Texas residents. *National Indus. Sand Ass'n*, 897 S.W.2d at 771-773, 776 (emphasis added).

Similarly, the Nebraska Supreme Court in *Ashby* rejected the conspiracy theory of personal jurisdiction because it inappropriately "merges the jurisdiction issue with the merits of the case." 779 N.W.2d at 361.

The court thus held that Nebraska lacked personal jurisdiction over an Alabama attorney who allegedly conspired to deprive a Nebraska father of custodial rights because the attorney did not personally have sufficient contacts with Nebraska. *Id.* at 359-361.

The Ninth Circuit and at least two other state high courts also have expressed deep concern about the conspiracy theory of personal jurisdiction.[11] See *Chirila* v. *Conforte*, 47 F. App'x 838, 842-843 (9th Cir. 2002) ("There is a great deal of doubt surrounding the legitimacy of th[e] conspiracy theory of personal jurisdiction."); *Schwartz* v. *Frankenhoff*, 733 A.2d 74, 80 (Vt. 1999) ("[The Supreme Court's personal jurisdiction] decisions strongly suggest * * * that conspiracy participation is not enough [to establish jurisdiction]."); *Green* v. *Advance Ross Elecs. Corp.*, 427 N.E.2d 1203, 1208 (Ill. 1981) ("The idea of jurisdiction based on the acts of co-conspirators has been questioned.").

2. By contrast, several state high courts and federal courts of appeals have taken the same approach Virginia followed here by adopting the conspiracy theory of personal jurisdiction. See *Charles Schwab Corp.* v. *Bank of Am. Corp.*, 883 F.3d 68, 86-87 (2d Cir. 2018); *Unspam Techs., Inc.* v.

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[11] Several intermediate state appellate court decisions also reject the conspiracy theory. See, *e.g.*, *Mansour* v. *Super. Ct.*, 46 Cal. Rptr. 2d 191, 197-198 (Cal. Ct. App. 1995) ("[W]e reject the use of a conspiracy theory to exert personal jurisdiction."); *Knaus* v. *Guidry*, 906 N.E.2d 644, 661 (Ill. App. Ct. 2009) (refusing "to adopt the conspiracy theory"); *Hewitt* v. *Hewitt*, 896 P.2d 1312, 1316 (Wash. Ct. App. 1995) ("[I]mputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction.").

Chernuk, 716 F.3d 322, 329 (4th Cir. 2013); *Textor* v. *Bd. of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1392-1393 (7th Cir. 1983);[12] *Ex Parte Reindel*, 963 So. 2d 614, 621-625 (Ala. 2007); *Gibbs* v. *PrimeLending*, 381 S.W.3d 829, 834 (Ark. 2011); *Istituto Bancario Italiano SpA* v. *Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982); *Execu-Tech Bus. Sys., Inc.* v. *New Oji Paper Co.*, 752 So. 2d 582, 583-586 (Fla. 2000); *Merriman* v. *Crompton Corp.*, 146 P.3d 162, 181, 185-187 (Kan. 2006); *Mackey* v. *Compass Mktg., Inc.*, 892 A.2d 479, 486-492 (Md. 2006); *Hunt* v. *Nev. State Bank*, 172 N.W.2d 292, 311 (Minn. 1969); *Hammond* v. *Butler, Means, Evins & Brown*, 388 S.E.2d 796, 798 (S.C. 1990); *Chenault* v. *Walker*, 36 S.W.3d 45, 53-55 (Tenn. 2001); see also *Melea, Ltd.* v. *Jawer SA*, 511 F.3d 1060, 1069-1070 (10th Cir. 2007) (stating in dicta that "[t]he existence of a conspiracy and acts of a co-conspirator within the forum may, in some cases, subject another co-conspirator to the forum's jurisdiction," but also recognizing that "hold[ing] that one co-conspirator's presence in the forum creates jurisdiction over other co-conspirators threatens to confuse the standards applicable to personal jurisdiction and those applicable to liability"); *J & M Assocs., Inc.* v. *Romero*, 488 F. App'x 373, 375-376 (11th Cir. 2012) (affirming exercise of personal jurisdiction based on conspiracy theory).

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[12] Despite *Textor*, the Seventh Circuit has since cautioned against expansively applying the conspiracy theory of personal jurisdiction because its consistency with "federal due process * * * is already marginal at best." *Smith* v. *Jefferson Cty. Bd. of Educ.*, 378 F. App'x 582, 585-586 (7th Cir. 2010) (per curiam).

3. This longstanding, intractable split has been noted by several commentators, and the conspiracy theory of personal jurisdiction has generated significant academic commentary that is largely critical of the theory. See, *e.g.*, Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234 (1983); Stephen A. Wood & James M. Reiland, *Goodbye to the "Conspiracy" Theory of Personal Jurisdiction?*, 99 Ill. B.J. 28 (2011); Stuart M. Riback, Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 Colum. L. Rev. 506 (1984); Carver, 71 Vand. L. Rev. 1333; Figura, *No Consensus*. Years after the Texas Supreme Court's decision in *National Industrial Sand Association*, the split persists. The disagreement can only be resolved by this Court.

II. Exercising Personal Jurisdiction Over A Foreign Defendant Based On The Jurisdictional Contacts Of The Defendant's Alleged Co-Conspirators Violates Due Process

The broad conspiracy theory of personal jurisdiction that the circuit court adopted here "is seriously flawed" and violates fundamental due process principles. Riback, 84 Colum. L. Rev. at 510. It thus has "no place in constitutional analysis." *Id.* at 531.

1. It is well established that "[t]he requirements of *International Shoe* * * * must be met as to each defendant." *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980). There is no transitive property of personal

jurisdiction: "Each defendant's contacts with the forum State must be assessed individually." *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984). The conspiracy theory of personal jurisdiction, however, "allow[s] the exercise of personal jurisdiction over a nonresident defendant who ha[s] no minimum contacts with the forum state." *Ploense* v. *Electrolux Home Prods., Inc.*, 882 N.E.2d 653, 667 (Ill. App. Ct. 2007); see also, *e.g.*, *Ashby*, 779 N.W.2d at 360-361 (rejecting conspiracy theory before *Walden* v. *Fiore*, 571 U.S. 277 (2014)); *National Indus. Sand Ass'n*, 897 S.W.2d at 773 (same). The circuit court's decision here allows plaintiffs to sidestep the defendant-specific nature of the personal-jurisdiction inquiry through conclusory allegations of conspiracy, permitting plaintiffs to impute alleged co-conspirators' forum contacts to each member of the alleged conspiracy.

That violates the "fundamental principle * * * that each defendant's contacts with a forum must be analyzed individually" because it "bas[es] jurisdiction over a defendant, not * * * upon his contacts with the forum, but upon the contacts of others." *Knaus*, 906 N.E.2d at 660. The conspiracy theory of jurisdiction is thus "seriously flawed" because it "looks to the contacts of the conspiracy with the forum, rather than to the contacts of each conspirator." *Ploense*, 882 N.E.2d at 667 (quoting Riback, 84 Colum. L. Rev. at 510). It "avoids consideration of the individual defendant's contact with the forum state—the very essence of jurisdiction." *Id.* (quoting Althouse, 52 Fordham L. Rev. at 253).

That approach is irreconcilable with this Court's 2014 decision in *Walden*, which expressly held that

third parties' contacts *cannot* be used to establish personal jurisdiction over a defendant. 571 U.S. at 284, 291. In *Walden*, a law-enforcement officer working at the airport in Atlanta, Georgia, seized cash from two professional gamblers who resided in Nevada and were preparing to board a flight to Las Vegas. *Id.* at 279-280. The gamblers filed suit against the officer in the U.S. District Court for the District of Nevada. *Id.* at 281. On appeal from the district court's dismissal of the suit for lack of personal jurisdiction, the Ninth Circuit held that the district court could exercise personal jurisdiction over the officer with respect to the plaintiffs' claim that the officer had knowingly submitted a false affidavit to support forfeiture of the seized cash. *Id.* at 281-282. The Ninth Circuit concluded that the Nevada district court's exercise of jurisdiction over the nonresident defendant was constitutionally permissible because the defendant had "'expressly aimed' his submission of the allegedly false affidavit at Nevada by submitting the affidavit with knowledge that it would affect persons with a 'significant connection' to Nevada." *Id.* at 282 (quoting *Fiore* v. *Walden*, 688 F.3d 558, 581 (9th Cir. 2012)).

This Court reversed. *Id.* at 291. The Court explained that the Ninth Circuit's decision violated the "[w]ell-established principle[]" that "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State" for purposes of establishing personal jurisdiction. *Ibid.*; *accord id.* at 284 ("We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the

plaintiff (or third parties) and the forum State."). This principle is based on the bedrock precept that "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Id.* at 284. Accordingly, personal jurisdiction can *only* "arise out of contacts that the 'defendant *himself*' creates with the forum State." *Ibid.* (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 (1985)). The Nevada district court in *Walden* thus lacked jurisdiction over the defendant officer because—although he knew that his wrongful seizure of funds "would affect persons with a significant connection to Nevada," *id.* at 282 (internal quotation marks omitted)—"no part of [his] course of conduct occurred in Nevada," *id.* at 288.

For the same reason, Virginia courts could not exercise personal jurisdiction over MCC because the company has never conducted any activities in Virginia. Liebherr's allegation that MCC's purported co-conspirators committed allegedly tortious acts in Virginia does not change the result. Under *Walden*, Liebherr cannot satisfy "the defendant-focused 'minimum contacts'" test based on the forum contacts of "third parties." *Id.* at 284. Demonstrating the square conflict with *Walden*, the circuit court here reasoned that its exercise of personal jurisdiction over MCC was warranted because "injury has occurred * * * to a resident corporation in the Commonwealth of Virginia." App., *infra*, 25a; see also *id.* at 16a ("A co-conspirator could reasonably expect to be haled into court where their conspiratorial acts inflicted the greatest harm."). That reasoning violates *Walden*'s

holding that "mere injury to a forum resident" is insufficient to establish personal jurisdiction over a foreign defendant. 571 U.S. at 289-290; see also *id.* at 289 & n.8 (rejecting argument that a nonresident defendant "creates sufficient minimum contacts with a forum when he (1) intentionally targets (2) a known resident of the forum (3) for imposition of an injury (4) to be suffered by the plaintiff while she is residing in the forum state" (citation omitted)).

Since *Walden*, the "mov[ement] away from" the "conspiracy theory of personal jurisdiction" has only accelerated. *Martin* v. *Eide Bailly LLP*, No. 15-cv-1202, 2016 WL 4496570, at *4 (S.D. Ind. Aug. 26, 2016). "Many"—but not all[13]—"courts that have considered the viability of vicarious conspiracy jurisdiction post-*Walden* have rejected it, holding that participation in a conspiracy cannot 'provide a standalone basis for jurisdiction.'" *Id.* at *3 (quoting *In re Aluminum Warehousing Antitrust Litig.*, 90 F. Supp. 3d 219, 227 (S.D.N.Y. 2015)). These decisions recognize that "allegations of conspiracy should not change the jurisdictional analysis" because the Due Process Clause prohibits "imputing the actions of one defendant to another in analyzing jurisdiction." *Ibid.* (quoting *In re Auto. Parts Antitrust Litig.*, No. 12-md-02311, 2015 WL 4508938, at *4 (E.D. Mich. July 24, 2015)); see also *Neumann* v. *Lincoln Gen. Ins. Co.*, No. 14-cv-1285, 2016 WL 4257446, at *3 (S.D. Cal. May 16, 2016) ("[T]he existence of a joint venture or conspiracy does not eliminate the requirement that

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[13] See, *e.g.*, *Charles Schwab Corp.* v. *Bank of Am. Corp.*, 883 F.3d 68, 86-87 (2d Cir. 2018); App., *infra*, 16a-17a, 33a.

the existence of personal jurisdiction 'must arise out of contacts that the "defendant *himself*" creates with the forum State.'" (quoting *Walden*, 571 U.S. at 284)); *Cebulske* v. *Johnson & Johnson*, No. 14-cv-627, 2015 WL 1403148, at *3 (S.D. Ill. Mar. 25, 2015) (rejecting "plaintiff's reliance on the conspiracy theory of personal jurisdiction"); *Hanna* v. *Blanchette*, No. H-13-3119, 2014 WL 4185816, at *5 (S.D. Tex. Aug. 21, 2014) ("[B]ecause the focus is on each individual defendant's contacts with the state, personal jurisdiction does not arise from a co-conspirator's acts directed at Texas.").

Before the Virginia Supreme Court, Liebherr cited *Calder* v. *Jones*, 465 U.S. 783 (1984), to support the circuit court's exercise of personal jurisdiction. But *Walden* makes clear that *Calder* turned largely on the unique "nature of the libel tort" alleged there. 571 U.S. at 287. The *Calder* defendants used information from California sources to write a defamatory article about the plaintiff's activities in California for a publication that sold *600,000 copies* in California. *Id.* at 286-288 & n.7. The defendants knew that article distributed in California was likely to affect the California public's view of the plaintiff's character, meaning that the defendants' conduct had a direct connection to California *itself*, not just to a plaintiff who happened to live there. See *id.* at 287-288. "Indeed, because publication * * * is a necessary element of libel," the defendants' tort "actually occurred *in* California." *Id.* at 288. Because MCC has no analogous ties to Virginia, *Calder* does not support the circuit court's exercise of personal jurisdiction over MCC. To the extent that Liebherr might

continue to rely on *Calder*, that only favors granting certiorari, because this case offers an opportunity for the Court to provide much needed guidance on the proper interpretation of a precedent that is a common source of confusion. See, *e.g.*, *United States* v. *Swiss Am. Bank, Ltd.*, 274 F.3d 610, 624 & n.7 (1st Cir. 2001) (noting that lower courts have "struggled" with *Calder* and "several circuits do not appear to agree as to how to read *Calder*" (quoting *Bancroft & Masters, Inc.* v. *Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000))); see also Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 Cath. U. L. Rev. 53, 95 (2004) (*Calder* "has proved particularly troublesome in the lower federal and state courts").

2. The "diametrically opposed purposes of the law of civil conspiracy and the law of in personam jurisdiction" further militate against adopting the conspiracy theory of personal jurisdiction. Riback, 84 Colum. L. Rev. at 530. Civil conspiracy law seeks to "broaden[] the pool of resources to which an injured plaintiff may look for recovery." *Ibid.* Due process restrictions on the exercise of personal jurisdiction, by contrast, "protect the defendant's liberty interest in planning his affairs." *Ibid.* By conflating the remedy-expanding principles of civil conspiracy law with the liberty-protecting principles of this Court's personal-jurisdiction precedents, the conspiracy theory of personal jurisdiction can yield "a confused and often unconstitutional result." *Id.* at 527; accord Brief of Amicus Curiae New England Legal Foundation in Support of Petitioner at 15, *Fitch Ratings, Inc.* v. *First*

Community Bank, N.A., No. 15-1151 (Apr. 15, 2016), http://bit.ly/2KxKcVz (conspiracy theory "impermissibly conflates the common law requirements for the imposition of vicarious *liability* under civil conspiracy law—a broad device to assist the plaintiff's recovery—with the strict constitutional requirements for the exercise" of personal jurisdiction over a nonresident defendant); see also *Melea*, 511 F.3d at 1070 (warning against "confus[ing] the standards applicable to personal jurisdiction and those applicable to liability").

3. Rejecting the conspiracy theory of personal jurisdiction would also bring personal-jurisdiction case law in line with this Court's rejection of the analogous conspiracy theory of venue, which this Court has dismissed as "frivolous." *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953); see also Riback, 84 Colum. L. Rev. at 531-536. The conspiracy theory of personal jurisdiction is even more tenuous than the theory of vicarious venue because unlike venue, which is generally governed by statute, see, *e.g.*, 28 U.S.C. § 1391, the exercise of personal jurisdiction "is governed by strict constitutional standards," *Kipperman* v. *McCone*, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976).

4. The U.S. Department of Justice has recognized that exercising personal jurisdiction over nonresident federal officials based on the conspiracy theory of jurisdiction "offends due process principles." Brief for Appellees at 6, *Deutsch* v. *U.S. Dep't of Justice*, 93 F.3d 986 (D.C. Cir. 1996) (No. 95-5122), 1995 WL 17204591. Although this Court can (and should) grant certiorari now, given the Department of

Justice's stated position, the Court at minimum should seek the views of the United States on whether this petition should be granted.

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The conspiracy theory of personal jurisdiction cannot be squared with the proper due process inquiry, which focuses on whether *the defendant*—not some third party—"purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Hanson*, 357 U.S. at 253. The Court should grant review to correct lower courts' use of this erroneous theory for exercising personal jurisdiction.

III. This Case Provides An Excellent Vehicle For Resolving A Recurring Federal Question Of Substantial Importance That This Court Has Had Few Opportunities To Address

1. As the decisions cited above demonstrate, the viability of the conspiracy theory of personal jurisdiction is a regularly recurring—and vigorously disputed—question of increasing importance in today's global economy. Indeed, in an April 2016 *amicus* brief urging this Court to review the constitutionality of the conspiracy theory of personal jurisdiction, the Chamber of Commerce of the United States of America noted that a "conservative canvas of publicly available judicial decisions revealed over 600 opinions in state and federal courts discussing the application of conspiracy jurisdiction in civil cases." Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America in Support of Petitioner at 5, *Fitch Ratings, Inc.* v. *First Community Bank,*

N.A., No. 15-1151 (Apr. 15, 2016), http://bit.ly/2lRMGPN (Chamber Br.). The number of decisions has only grown in the intervening years.

Because the concept of "conspiracy" is notoriously "vague" and "chameleon-like," *Krulewitch* v. *United States*, 336 U.S. 440, 446-447 (1949) (Jackson, J., concurring), a shrewd plaintiff will frequently be able to concoct an allegation that a foreign defendant "conspired" with someone with forum contacts, especially in today's highly interconnected world. See Althouse, 52 Fordham L. Rev. at 248 ("[I]t is all too easy for a plaintiff to append a bald allegation of conspiracy to the allegation that one of several co-defendants has acted in the forum state."). Indeed, "[a]ny fact pattern involving an agreement that ultimately causes injury to others can be used as a basis of jurisdiction under the conspiracy theory." Riback, 84 Colum. L. Rev. at 508. The theory is thus a "powerful and manipulable" tool for plaintiff's counsel. *Id.* at 509.

Under the circuit court's decision below, the mere allegation of conspiracy could permit plaintiffs to proceed to take burdensome and costly discovery in a distant jurisdiction to which the defendant has no connection. Although this discovery would nominally be "jurisdictional" in nature, it would inevitably overlap with the merits of the plaintiff's claims, as the closely intertwined merits and jurisdictional theories that Liebherr presented here demonstrate. See *Stauffacher* v. *Bennett*, 969 F.2d 455, 459 (7th Cir. 1992) (noting that conspiracy theory "merges the jurisdictional issue with the merits"), superseded by rule as recognized in *Central States, Se. & Sw. Areas*

Pension Fund v. *Reimer Express World Corp.*, 230 F.3d 934, 941 (7th Cir. 2000); accord *Ashby*, 779 N.W.2d at 361; see also Althouse, 52 Fordham L. Rev. at 250 ("When conspiracy theory underlies the jurisdiction issue, * * * discovery may be coextensive with the discovery on the merits and may involve hotly contested issues central to the plaintiff's cause of action."). It is "particularly offensive" to subject a nonresident defendant to the burden and expense of what amounts to full merits discovery in a foreign forum based on nothing more than a simple allegation of conspiracy. Althouse, 52 Fordham L. Rev. at 250.

Furthermore, the practical harms of recognizing the conspiracy theory of personal jurisdiction are not limited to discovery. To determine whether the evidence supports a conspiracy allegation for purposes of jurisdiction, the trial court would need "to conduct an evidentiary hearing as extensive as, and in fact duplicative of, the trial on the merits." *Stauffacher*, 969 F.2d at 459. Both the discovery and the litigation burdens associated with the conspiracy theory undermine the very purpose of due process limitations on personal jurisdiction: to "protect[] the defendant against *the burdens of litigating* in a distant or inconvenient forum." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980) (emphasis added). Even worse, in jurisdictions such as Virginia where a defaulting defendant cannot challenge the well-pleaded factual allegations in the complaint, the conspiracy theory of personal jurisdiction can provide a vehicle for a plaintiff to effectively immunize a default judgment from subsequent vacatur through

tenuous allegations of conspiracy. Indeed, that is precisely what happened here. See note 7, *supra*.

By providing a tool for creative plaintiffs to bring suit in distant forums, the conspiracy theory of personal jurisdiction also undermines the bedrock principle that potential defendants should be able "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. The conspiracy theory threatens to deter foreign entities from engaging in valuable economic activity with persons in the United States, out of fear that the interactions might provide a basis for jurisdiction-creating allegations of conspiracy.

2. Despite the issue's importance, this Court has been presented with few opportunities to address the question. MCC is aware of only one certiorari petition since *Walden* that focused on the conspiracy theory of personal jurisdiction. See Petition for a Writ of Certiorari, *Fitch Ratings, Inc.* v. *First Community Bank, N.A.*, 136 S. Ct. 2511 (2016) (No. 15-1151), http://bit.ly/2KSXmfH (*Fitch* Pet.).[14] That petition was a poor vehicle for at least two reasons. First, the defendant appears not to have challenged the

[14] As the Chamber of Commerce noted in its *amicus* brief in *Fitch Ratings*, the relative dearth of certiorari petitions on the question presented here is not particularly surprising. Although lower courts frequently confront the question presented, "[t]hreshold questions of personal jurisdiction are particularly susceptible to evading appellate review" because "subsequent events may obfuscate the issue later in the litigation." Chamber Br. 14; accord Althouse, 52 Fordham L. Rev. at 250-251 (question presented "tends to defy appellate review").

constitutionality of the conspiracy theory of personal jurisdiction in the court below. See Brief in Opposition to Petition for a Writ of Certiorari at 12-24, *Fitch Ratings, Inc.* v. *First Community Bank, N.A.*, No. 15-1151 (May 23, 2016), http://bit.ly/2KGL9Ka. Second, the defendant's certiorari petition challenging the Tennessee Supreme Court's application of the conspiracy theory of personal jurisdiction was in an interlocutory posture. See *id.* at 25-31; *Fitch* Pet. 7 n.2. Indeed, the Tennessee Supreme Court had held that the plaintiff had "failed to establish a prima facie case that personal jurisdiction exists under the conspiracy theory"; the defendant sought certiorari only because the court had remanded to provide the trial court an opportunity to decide whether to allow the plaintiff to conduct jurisdictional discovery to support its conspiracy allegation. *First Cmty. Bank, N.A.* v. *First Tenn. Bank, N.A.*, 489 S.W.3d 369, 400, 407-408 (Tenn. 2015). A decision from the trial court denying discovery would have mooted the parties' dispute.

MCC, by contrast, squarely raised its challenge to the circuit court's adoption of the conspiracy theory of personal jurisdiction in its petition for appeal to the Virginia Supreme Court.[15] See Pet. for Appeal 28-33.

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[15] MCC also preserved its challenge to the conspiracy theory of personal jurisdiction in the circuit court. See, *e.g.*, Suppl. Reply Br. Supp. Mot. 2 (theory is "not well recognized under Virginia law," and "[n]o case cited by Liebherr" supports its application here); *id.* at 7 n.4 ("[P]ermit[ting] a plaintiff to manufacture jurisdiction in Virginia by simply alleging a conspiracy * * * would unconstitutionally deprive MCC of its right not to be haled into court in a forum with which it has had constitutionally

Furthermore, MCC's appeal is not interlocutory: MCC has appealed the circuit court's final order denying its motion to set aside the court's default judgment. The advantages of this case's unique, non-interlocutory posture make the case an excellent vehicle for addressing the question presented. There is no risk here that further proceedings before the lower courts might moot MCC's certiorari petition or might develop facts that could cast the legal issue presented in a different light.

Granting review here is particularly warranted because the Virginia court's *$121 million* treble-damages judgment against a Chinese state-owned entity—and in favor of a hometown plaintiff—raises serious concerns of international comity. As this Court has explained, "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Indus. Co.* v. *Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987) (citation omitted); see also *Daimler*, 571 U.S. at 140 ("transnational context * * * bears attention"). "[P]articular caution" is warranted where, as here, the defendant is a foreign state-owned entity because courts should be hesitant to unnecessarily place themselves in the position of reviewing the acts of foreign sovereigns. *Kramer Motors, Inc.* v. *British Leyland, Ltd.*, 628 F.2d 1175, 1178 (9th Cir. 1980) (per

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insufficient contacts."); cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992). In any event, because the circuit court unquestionably decided that the conspiracy theory comports with due process, see App., *infra*, 16a-17a, 32a-33a, this Court may review that issue. See, *e.g.*, *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 667 (1991); *Orr* v. *Orr*, 440 U.S. 268, 274-278 (1979).

curiam) (holding that no personal jurisdiction existed over foreign company in which British government had 95% ownership interest). The expansive exercise of personal jurisdiction here conflicts with that admonition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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