No. 21-

IN THE
Supreme Court of the United States

LLOYDS BANKING GROUP PLC, *et al.*,
Petitioners,

v.

SCHWAB SHORT-TERM BOND MARKET FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court may exercise personal jurisdiction over a defendant merely because the defendant's alleged co-conspirator took foreseeable actions in the forum in furtherance of an alleged conspiracy, even though the defendant did not direct, control, or supervise the alleged co-conspirator.

PARTIES TO THE PROCEEDING

Lloyds Banking Group plc; HBOS plc; The Royal Bank of Scotland Group PLC; The Royal Bank of Scotland PLC; Deutsche Bank AG; The Norinchukin Bank; Royal Bank of Canada; RBC Capital Markets LLC; HSBC Bank PLC; HSBC Holdings PLC; Coöperatieve Rabobank U.A., f/k/a Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.; The Bank of Tokyo-Mitsubishi UFJ, Ltd., n/k/a MUFG Bank, Ltd.; Barclays Bank PLC; Portigon AG f/k/a WestLB AG; Westdeutsche Immobilien Servicing AG f/k/a Westdeutsche ImmobilienBank AG; Société Générale; Credit Suisse AG; Credit Suisse International; Credit Suisse (USA), Inc.; Credit Suisse Group AG; UBS AG; British Bankers' Association; BBA Enterprises, Ltd.; and BBA LIBOR, Ltd.; petitioners on review, were defendants-appellees below.

Bank of America, N.A.; Bank of America Corporation; Merrill Lynch, Pierce, Fenner & Smith Incorporated (f/k/a Banc of America Securities, LLC); Citibank, N.A.; Citigroup Inc.; Citigroup Financial Products, Inc.; Citi Swapco Inc.; JPMorgan Chase & Co.; J.P. Morgan Bank Dublin PLC (f/k/a Bear Stearns Bank PLC); JPMorgan Chase Bank, N.A.; Barclays Capital Inc.; HSBC Securities (USA) Inc.; HSBC Bank USA, N.A.; HSBC Finance Corporation; HSBC USA, Inc.; The Hong Kong and Shanghai Banking Corporation Ltd.; Rabobank Group; UBS Limited; UBS Securities LLC; and Credit Suisse Group International; respondents on review, were defendants-appellees below.

Schwab Short-Term Bond Market Fund; Schwab Total Bond Market Fund; Schwab U.S. Dollar Liquid Assets Fund; Schwab Money Market Fund; Schwab

Value Advantage Money Fund; Schwab Retirement Advantage Money Fund; Schwab Investor Money Fund; Schwab Cash Reserves; Schwab Advisor Cash Reserves; Charles Schwab Bank, N.A.; Charles Schwab & Co., Inc.; Schwab YieldPlus Fund; Schwab YieldPlus Fund Liquidation Trust; The Charles Schwab Corporation; City of New Britain; Mayor and City Council of Baltimore; City of Houston; Vistra Energy Corporation; Yale University; Jennie Stuart Medical Center, Inc.; FTC Futures Fund PCC Ltd; National Credit Union Administration Board, as Liquidating Agent of U.S. Central Federal Credit Union, Western Corporate Federal Credit Union, Members United Corporate Federal Credit Union, Southwest Corporate Federal Credit Union, and Constitution Corporate Federal Credit Union; Pennsylvania Intergovernmental Cooperation Authority; City of Philadelphia; Darby Financial Products; Salix Capital US Inc.; Capital Ventures International; Prudential Investment Portfolios 2 (f/k/a Dryden Core Investment Fund), on behalf of Prudential Core Short-Term Bond Fund; Bay Area Toll Authority; California Public Plaintiffs; Linda Zacher; Ellen Gelboim; Gary Francis; Metzler Investment GmbH; 303030 Trading LLC; Atlantic Trading USA, LLC; FTC Futures Fund SICAV; Nathaniel Haynes; County of Sonoma; The San Mateo County Joint Powers Financing Authority; Richmond Joint Powers Financing Authority (Successor Agency to the Richmond Community Redevelopment Agency); Riverside Public Financing Authority; David E. Sundstrom, in his official capacity as Treasurer of the county of Sonoma for and on behalf of the Sonoma County Treasury Pool Investment; East Bay Municipal Utility District; and Regents of the University of

California; respondents on review, were plaintiffs-appellants below.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Lloyds Banking Group plc has no parent corporation; it is a publicly held corporation, and no publicly held company owns 10% or more of its stock. Petitioner HBOS plc is a wholly owned subsidiary of Lloyds Banking Group plc; no other publicly held company owns 10% or more of HBOS plc's stock.

Petitioner Barclays Bank PLC is a wholly owned subsidiary of Barclays PLC, which is a publicly held corporation, and no other publicly traded company owns 10 percent or more of Barclays Bank PLC's stock.

Petitioner British Bankers' Association is an unincorporated association and has no corporate parent, and no publicly held corporation owns 10% or more of its stock. Petitioner BBA Enterprises Ltd. is beneficially owned by the British Bankers' Association, an unincorporated association. No publicly held corporation beneficially owns 10% or more of its stock. Petitioner BBA LIBOR Ltd.* is beneficially owned by the British Bankers' Association, an unincorporated association. No publicly held corporation beneficially owns 10% or more of its stock.

Petitioner Credit Suisse Group AG ("CSGAG") is a corporation organized under the laws of the Country of Switzerland, and its shares are publicly traded on the SIX Swiss Exchange and are also listed on the New York Stock Exchange; it has no parent company, and no publicly held company owns 10% or more of its stock. Petitioner Credit Suisse AG ("CSAG") is a wholly owned subsidiary of CSGAG, which has

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* On or about September 23, 2014, BBA LIBOR Ltd. changed its name to BBA Trent Ltd.

publicly registered debt securities and warrants in the United States and elsewhere. Petitioner Credit Suisse International is an indirect wholly owned subsidiary of CSGAG. Petitioner Credit Suisse (USA), Inc. is a wholly owned subsidiary of Credit Suisse Holdings (USA), Inc., which is a wholly owned subsidiary of CSAG.

Petitioner Coöperatieve Rabobank U.A., f/k/a Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. has no parent corporation and no publicly held company owns 10 percent or more of Coöperatieve Rabobank U.A.

Petitioner Deutsche Bank AG is a publicly held corporation organized under the laws of Germany that has no parent corporation, and no publicly held company owns 10% or more of Deutsche Bank AG's stock.

Petitioner HSBC Holdings PLC is a publicly held corporation. It does not have a parent corporation and no publicly held company owns 10% or more of its stock. Petitioner HSBC Bank PLC is a direct, wholly owned subsidiary of HSBC Holdings PLC.

Petitioner MUFG Bank, Ltd. ("MUFG Bank"), f/k/a The Bank of Tokyo-Mitsubishi UFJ, Ltd., is a wholly owned subsidiary of Mitsubishi UFJ Financial Group, Inc. ("MUFG"). MUFG is a publicly held corporation, and no publicly held company owns 10% or more of MUFG's stock.

Petitioner The Norinchukin Bank has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Portigon AG (f/k/a WestLB AG) has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Royal Bank of Canada is a publicly held corporation organized under the laws of Canada. Royal Bank of Canada has no parent company, and no publicly held company owns 10% or more of its stock. RBC Capital Markets, LLC is an indirect, wholly owned subsidiary of Royal Bank of Canada.

Petitioner The Royal Bank of Scotland Group plc (n/k/a NatWest Group plc) ("RBS Group") is a public limited company organized under the laws of the United Kingdom. RBS Group has no parent company, and no publicly held company owns 10% or more of its stock. Petitioner The Royal Bank of Scotland plc (n/k/a NatWest Markets plc) is a wholly owned subsidiary of RBS Group.

Petitioner Société Générale has no parent company, and no publicly held corporation holds 10% or more of its stock.

Petitioner UBS AG is wholly owned by UBS Group AG, a publicly traded corporation. No publicly held corporation holds 10% or more of UBS Group AG's stock.

Petitioner Westdeutsche Immobilien Servicing AG (f/k/a Westdeutsche ImmobilienBank AG) is a wholly-owned subsidiary of Aareal Bank AG, a publicly held corporation organized under the laws of Germany and listed on the Frankfurt Stock Exchange. No publicly held company owns 10% or more of Aareal Bank AG's stock.

RELATED PROCEEDINGS

This petition arises out of the following consolidated cases:

U.S. Court of Appeals for the Second Circuit:

- *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 17-1569 (2d Cir. Dec. 30, 2021) (lead case)
- *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 17-1915 (2d Cir. Dec. 30, 2021) (consolidated)
- *Gelboim* v. *Credit Suisse Group AG*, No. 17-1989 (2d Cir. Dec. 30, 2021) (consolidated)
- *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 17-2056 (2d Cir. Dec. 30, 2021) (consolidated)
- *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 17-2343 (2d Cir. Dec. 30, 2021) (consolidated)
- *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 17-2347 (2d Cir. Dec. 30, 2021) (consolidated)
- *Salix Capital US Inc.* v. *Banc of America Securities LLC*, No. 17-2351 (2d Cir. Dec. 30, 2021) (consolidated)
- *Darby Financial Products* v. *Barclays Bank PLC*, No. 17-2352 (2d Cir. Dec. 30, 2021) (consolidated)
- *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 17-2360 (2d Cir. Dec. 30, 2021) (consolidated)

- *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 17-2376 (2d Cir. Dec. 30, 2021) (consolidated)
- *Salix Capital US Inc.* v. *Banc of America Securities, LLC*, No. 17-2381 (2d Cir. Dec. 30, 2021) (consolidated)
- *National Credit Union* v. *Credit Suisse Group AG*, No. 17-2383 (2d Cir. Dec. 30, 2021) (consolidated)
- *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 17-2413 (2d Cir. Dec. 30, 2021) (consolidated)

These consolidated appeals arise from the following ongoing multi-district litigation (MDL):

U.S. District Court for the Southern District of New York:

- *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 1:11-md-2262-NRB (S.D.N.Y. Dec. 20, 2016)

A list of the individual case dockets encompassed by the Dec. 20, 2016 MDL opinion is available at Pet. App. 115a-121a.

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SCHWAB SHORT-TERM BOND MARKET FUND, *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion is reported at 22 F.4th 103. Pet. App. 1a-51a. The district court's motion-to-dismiss opinion is not reported, but is available at 2016 WL 7378980. Pet. App. 52a-121a.

JURISDICTION

The Second Circuit entered judgment on December 30, 2021. Pet. App. 8a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment, U.S. Const. amend. V, provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

Federal Rule of Civil Procedure 4(k) provides:

> (k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE.
>
> (1) *In General*. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
>
> (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
>
> (B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or
>
> (C) when authorized by a federal statute.

INTRODUCTION

In case after case, this Court has held that a court may not exercise personal jurisdiction over a defendant consistent with due process unless the *defendant itself* has minimum contacts with the forum. A defendant's connection to a *third party* that has minimum contacts with the forum does not count.

A split of authority has emerged over whether a plaintiff can circumvent this basic due-process rule by alleging that the defendant participated in a conspiracy. Two federal courts of appeals and two state high courts have appropriately held that a court cannot exercise personal jurisdiction over a nonresident

defendant merely because a plaintiff alleges that the defendant participated in a conspiracy with someone else who is subject to jurisdiction. But in the decision below, the Second Circuit cast its lot with one other circuit court and ten state high courts on the other side. The Second Circuit held that an alleged third-party co-conspirator's ties to the forum allow a court to exercise personal jurisdiction over a defendant—even if the defendant did not direct, control, or supervise its supposed co-conspirator.

The Second Circuit's broad theory of "conspiracy jurisdiction" badly misconstrues the due-process limits on personal jurisdiction. The panel's decision is even more jarring because it breaks with the longstanding view of conspiracy jurisdiction voiced by Judge Friendly, who made unequivocally clear that "the mere presence of one conspirator" in a forum does not suffice to "confer personal jurisdiction over another alleged conspirator." *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1343 (2d Cir. 1972).

This Court should step in. The split that the Second Circuit has joined is deep, entrenched, and acknowledged. The break with this Court's cases is equally clear. This Court has held that personal jurisdiction must be based on the defendant's own contacts with the forum and that foreseeable acts by others are not enough; the Second Circuit says personal jurisdiction can be based on an alleged co-conspirator's foreseeable acts. The question presented tends to defy appellate review, making this case an especially strong candidate for certiorari. And the question is tremendously important. The Second Circuit is the venue for many complex financial cases like this one that allege wide-ranging conspiracies. The decision below is likely to

be wielded against non-U.S. corporations and entities like petitioners here, creating international friction. And plaintiffs seek exorbitant damages (in the range of many billions of dollars), making the question of which court decides the merits of these claims all the more important.

The petition should be granted.

STATEMENT

1. Plaintiffs allege that certain banks colluded during the 2008 financial crisis to suppress an interest rate benchmark known as the London Interbank Offered Rate for U.S. Dollars, or LIBOR. "LIBOR is a widely used benchmark that approximates the average rate at which a group of designated banks can borrow money." Pet. App. 11a. Plaintiffs brought numerous actions seeking damages arising from the alleged LIBOR suppression conspiracy. These suits were consolidated for pretrial proceedings in a multi-district litigation (MDL) in the Southern District of New York.

LIBOR "serves as an index for a variety of financial instruments, including bonds, interest rate swaps, commercial paper, and exchange-traded derivatives." *Id.* As the Second Circuit observed in a prior appeal, because LIBOR is used as a benchmark in so many financial instruments, the "transactions that are the subject of investigation and suit are countless" and the consequences of the suit are "beyond conception." *Gelboim* v. *Bank of Am. Corp.*, 823 F.3d 759, 780 (2d Cir. 2016).

During the relevant time period, LIBOR was set every business day in London by 16 participating banks, all but three of them foreign, and was administered by the British Bankers' Association, a U.K. trade association. Plaintiffs nonetheless urged that

the district court could exercise personal jurisdiction over the 13 foreign banks and the British Bankers' Association, petitioners here, under a theory of "conspiracy jurisdiction." Pet. App. 58a. Under this theory, personal jurisdiction over all the participant banks would be proper if the court had "specific personal jurisdiction over at least one" bank involved in the alleged conspiracy. *Id.* Plaintiffs thus maintained that even if the district court lacked personal jurisdiction over petitioners based on their own acts, the court could nonetheless exercise jurisdiction based on the in-forum acts of petitioners' alleged co-conspirators.

The district court concluded that the plaintiffs failed to plausibly allege that *any* defendant committed an act in furtherance of the alleged conspiracy in the United States and that "conspiracy jurisdiction does not apply here." *Id.* at 82a. Plaintiffs appealed.

2. While the appeal was pending, the Second Circuit in *Charles Schwab Corp.* v. *Bank of America Corp.*, 883 F.3d 68, 86-88 (2d Cir. 2018) ("*Schwab I*"), adopted the conspiracy theory of jurisdiction.

Schwab I acknowledged that neither the Second Circuit "nor the Supreme Court has delineated when one conspirator's minimum contacts allow for personal jurisdiction over a co-conspirator." *Id.* at 86. But the court concluded that a decision by the Fourth Circuit "sets forth the appropriate test for alleging a conspiracy theory of jurisdiction." *Id.* at 87 (citing *Unspam Techs., Inc.* v. *Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013)). Under that test, "the plaintiff must allege that (1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient

contacts with a state to subject that co-conspirator to jurisdiction in that state." *Id.*

3. The panel below then applied *Schwab I* and reversed the district court's personal jurisdiction ruling. The panel "conclude[d] that the district court had specific personal jurisdiction under the conspiracy theory adopted in *Schwab* [*I*]." Pet. App. 34a.[1]

The panel accepted the premise—undisputed by any party for purposes of this petition—that the "relevant forum for the assessment of minimum contacts is the United States as a whole." *Id.* at 36a (quoting *id.* at 71a). The panel further acknowledged that, under this Court's precedents, minimum contacts in the United States "must be created by the 'defendant itself,' rather than from the 'unilateral activity of another party or a third person.'" *Id.* at 37a (alteration omitted) (quoting *Walden* v. *Fiore*, 571 U.S. 277, 284 (2014)). But, applying *Schwab I*, the panel concluded that a foreign defendant may be subjected to jurisdiction in the United States through acts "taken by a co-conspirator in the forum." *Id.*

Applying this theory, the panel concluded that plaintiffs' allegations, if true, would establish the existence of "overt acts taken by" some alleged co-conspirator banks in the United States "in furtherance of" the alleged LIBOR suppression conspiracy. *Id.* at 40a. The panel held that these alleged in-forum acts sufficed to "vest[] the district court with personal jurisdiction over each" foreign defendant. *Id.*

[1] The panel also concluded that certain plaintiffs lacked antitrust standing to press their claims. *See* Pet. App. 20a-34a. That holding is not at issue here.

The panel rejected petitioners' argument that conspiracy jurisdiction does not satisfy due process unless the foreign defendants "directed, controlled, and/or supervised the co-conspirator who carried out the overt acts in the forum." *Id.* at 42a. The panel stated that *Schwab I*'s test does "not demand a relationship of control before one defendant's minimum contacts are imputed to its co-conspirator." *Id.* at 42a-43a. Dismissing an earlier Second Circuit decision holding that "the mere presence of one conspirator" does not suffice to "confer personal jurisdiction over another alleged conspirator," *id.* at 43a (quoting *Leasco*, 468 F.2d at 1343 (Friendly, J.)), the panel concluded that neither Second Circuit precedent "nor due process principles require more than that a defendant purposefully availed itself of the forum through the overt acts of its co-conspirator." *Id.* at 42a. Thus, according to the panel, a foreign defendant may be subjected to jurisdiction in the United States based on the acts of an alleged third-party co-conspirator the defendant could not control.

The only limitation the panel placed on its expansive theory was to state that it "could not get off the ground if a defendant were altogether blindsided by its co-conspirator's contacts with the forum." *Id.* at 43a. But the panel concluded that as long as the co-conspirator's in-forum acts were "foreseeable," jurisdiction would be proper. *Id.* at 44a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISION ENTRENCHES A CIRCUIT AND STATE HIGH COURT SPLIT.

An entrenched, longstanding, and acknowledged split has developed in the federal courts of appeals and state high courts over whether conspiracy jurisdiction comports with due process. Two courts of appeals and ten state high courts accept the theory. Two courts of appeals and two state high courts reject it. This Court's review is needed to resolve the disagreement.

1. In *Schwab I*, the Second Circuit joined one side in an entrenched split over the conspiracy theory of personal jurisdiction. Then, applying the theory in the decision below, the Second Circuit extended conspiracy jurisdiction, holding that due process does "not demand a relationship of control before one defendant's minimum contacts are imputed to its co-conspirator." Pet. App. 42a-43a.

The Second Circuit borrowed its theory from the Fourth Circuit, *see Schwab I*, 883 F.3d at 87, which also recognizes a "conspiracy theory of jurisdiction," *Unspam Techs*., 716 F.3d at 329. In the Fourth Circuit, as in the Second Circuit, out-of-forum defendants can be "imputed with constitutionally sufficient contacts" with the forum "through the actions of their alleged coconspirators." *Id.*

Maryland, too, recognizes a "conspiracy theory" of jurisdiction under which "an out-of-state party involved in a conspiracy who would lack sufficient, personal, 'minimum contacts' with the forum state if only the party's individual conduct were considered nevertheless may be subject to suit in the forum jurisdiction

based upon a co-conspirator's contacts with the forum state." *Mackey* v. *Compass Mktg., Inc.*, 892 A.2d 479, 484 (Md. 2006). The Maryland high court explained that conspiracy jurisdiction "permits certain actions done in furtherance of a conspiracy by one co-conspirator to be attributed to other co-conspirators for jurisdictional purposes." *Id.*

Maryland's decision expressly followed other state high courts, including an early decision by the Delaware Supreme Court, holding that the conspiracy theory of jurisdiction "withstands due process scrutiny." *Istituto Bancario Italiano SpA* v. *Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982). The Delaware Supreme Court has repeatedly reaffirmed that holding. *E.g.*, *Matthew* v. *Fläkt Woods Grp. SA*, 56 A.3d 1023, 1027 (Del. 2012) (Delaware has "adopted what is known as the conspiracy theory of personal jurisdiction" that "is based on the legal principle that one conspirator's acts are attributable to the other conspirators").

The Supreme Courts in Arkansas, Florida, Georgia, Minnesota, South Carolina, and Tennessee have held similarly. *See First Cmty. Bank, N.A.* v. *First Tennessee Bank, N.A.*, 489 S.W.3d 369, 394-395 (Tenn. 2015) ("an out-of-state defendant involved in a conspiracy who lacks sufficient 'minimum contacts' with the forum state may nevertheless be subject to jurisdiction because of a co-conspirator's contacts with the forum" (quoting *Chenault* v. *Walker*, 36 S.W.3d 45, 51 (Tenn. 2001))); *Stubblefield* v. *Stubblefield*, 769 S.E.2d 78, 82 n.4 (Ga. 2015) ("under conspiracy jurisdiction, the acts of one conspirator can be attributed to a nonresident co-conspirator" for jurisdictional purposes (citation omitted)); *Gibbs* v. *PrimeLending*, 381 S.W.3d 829, 834 (Ark. 2011) ("We conclude that jurisdiction based

on the conspiracy theory does not violate due process."); *Execu-Tech Bus. Sys., Inc.* v. *New Oji Paper Co.*, 752 So. 2d 582, 586 (Fla. 2000) (conspiracy "may now be used by Floridians to establish a jurisdictional basis for recouping their losses in a court of law"); *Hammond* v. *Butler, Means, Evins & Brown*, 388 S.E.2d 796, 798 (S.C. 1990) (jurisdiction existed "on the theory that [a] co-conspirator conducted activities in a particular state pursuant to the conspiracy"); *Hunt* v. *Nevada State Bank*, 172 N.W.2d 292, 311 (Minn. 1969) ("Once participation in a tortious conspiracy * * * is sufficiently established, actual physical presence of each of the alleged conspirators is not essential to a valid assertion of jurisdiction.").

Even after *Walden*—which reaffirmed that jurisdiction cannot be based on the conduct of "third parties" over whom the defendant lacks control, 571 U.S. at 284—courts have continued to embrace the conspiracy theory of jurisdiction. The Utah Supreme Court recently "adopt[ed] a conspiracy theory of jurisdiction that focuses on whether the defendant could have reasonably anticipated being subject to jurisdiction in the forum state because of her participation in the conspiracy." *Raser Techs., Inc. ex rel. Houston Phoenix Grp., LLC* v. *Morgan Stanley & Co.*, 449 P.3d 150, 170 (Utah 2019). The court "conclude[d] that a conspiracy theory of jurisdiction can satisfy due process concerns," even under *Walden*. *Id.* at 166.

The Nevada Supreme Court similarly held that "*Walden* did not overrule" its case law recognizing "a conspiracy-based theory of personal jurisdiction." *Tricarichi* v. *Coop. Rabobank, U.A.*, 440 P.3d 645, 647 (Nev. 2019). The court reaffirmed its precedent holding that "a nonresident defendant who lacks sufficient

minimum contacts with the forum may be subject to personal jurisdiction based on a co-conspirator's contacts with the forum." *Id.* at 653.

2. The Fifth Circuit, the Seventh Circuit, and the Texas and Nebraska Supreme Courts have correctly rejected the conspiracy theory of personal jurisdiction.

In *Guidry* v. *United States Tobacco Co*., 188 F.3d 619 (5th Cir. 1999), the Fifth Circuit rejected conspiracy jurisdiction, faulting the district court for failing to "determine whether the plaintiffs had made a prima facie case of specific personal jurisdiction * * * individually and not as part of a conspiracy, by each particular defendant." *Id.* at 625; *see also Delta Brands Inc.* v. *Danieli Corp.*, 99 F. App'x 1, 6 (5th Cir. 2004) (per curiam) ("To establish its prima facie case of specific personal jurisdiction, [plaintiff] was required to demonstrate that [defendant] individually, and not as part of the conspiracy, had minimum contacts with Texas.").

The Seventh Circuit has held similarly. In *Davis* v. *A & J Electronics*, 792 F.2d 74, 75 (7th Cir. 1986), the court faulted the district court for relying "upon a federal civil-conspiracy theory of personal jurisdiction supposedly adopted by this court" in a prior case, *Textor* v. *Board of Regents*, 711 F.2d 1387, 1392-1393 (7th Cir. 1983). The court explained that the district court "misread our decision in *Textor*," and made clear that "[w]e did not hold in *Textor* that there is—*and indeed there is not*—an independent federal 'civil co-conspirator' theory of personal jurisdiction." *Davis*, 792 F.2d at 75-76 (emphasis added).

The Texas Supreme Court likewise has "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." *Nat'l Indus. Sand Ass'n* v. *Gibson*, 897 S.W.2d 769, 773 (Tex. 1995). After recognizing that other courts "have used [a conspiracy] theory to assert jurisdiction over those whom jurisdiction would otherwise be lacking," the court rejected that approach. *Id.* (alteration and quotation marks omitted). Instead, "[t]o comport with due process," "it is the contacts of the defendant himself that are determinative." *Id.* (quotation marks omitted).

The Supreme Court of Nebraska similarly has refused to adopt a conspiracy theory of jurisdiction. *Ashby* v. *State*, 779 N.W.2d 343, 360-361 (Neb. 2010). Accepting conspiracy jurisdiction, the court held, would violate the defendant's "right to due process." *Id.* And other courts have criticized the theory without formally rejecting it. *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 this conspiracy theory of personal jurisdiction."); *Schwartz* v. *Frankenhoff*, 733 A.2d 74, 80 (Vt. 1999) (noting that this Court's decisions "strongly suggest" that "conspiracy participation is not enough" to establish personal jurisdiction).

3. The split's existence is beyond dispute. Numerous courts have recognized that "there is a clear divergence of authority on whether participation in a conspiracy will give rise to jurisdiction over the nonresident co-conspirator." *Istituto Bancario Italiano*, 449 A.2d at 222; *see Mackey*, 892 A.2d at 491 n.4 (noting that "a minority of courts have taken a contrary view" of conspiracy jurisdiction); *see also Gibson*, 897 S.W.2d at 773 (refusing to follow the courts that "have used [a conspiracy] theory to assert jurisdiction"); *Schwartz*,

733 A.2d at 80 (acknowledging the split). Commentators have similarly noted that courts have approached conspiracy jurisdiction "in a variety of ways, ranging from unexamined acceptance to complete rejection." Ann Althouse, *The Use of Conspiracy Theory to Establish in Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234, 235-236 (1983) (footnotes omitted).

This split is longstanding and entrenched. And it has only deepened since *Walden*, which confirms that the courts that have embraced the theory will not change their positions without this Court's intervention.

II. THE SECOND CIRCUIT'S THEORY OF CONSPIRACY JURISDICTION CONFLICTS WITH THIS COURT'S CASES.

The Second Circuit's decision conflicts with this Court's repeated admonitions that personal jurisdiction may be exercised consistent with due process *only* based on a defendant's own purposeful contacts with the forum.

1. Decades ago, this Court explained that, under the Due Process Clause, "[e]ach defendant's contacts with the forum State must be assessed *individually*." *Keeton* v. *Hustler Mag., Inc.*, 465 U.S. 770, 781 n.13 (1984) (emphasis added) (citing *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980)). The "unilateral activity of * * * a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 417 (1984).

The Court confirmed these principles more recently in *Walden*, explaining that a defendant's relationship

with a "third party" is an insufficient basis for jurisdiction because "it is the defendant, not * * * *third parties*, who must create contacts with the forum State." 571 U.S. at 291 (emphasis added). The Court noted that it has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between * * * third parties * * * and the forum State." *Id.* at 284. Instead, "[d]ue process requires that a defendant be haled into court in a forum State based on *his own affiliation* with the State," and not based on "contacts he makes by interacting with other persons affiliated with the State." *Id.* at 286 (emphasis added). The Court repeated its holding again in *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1783 (2017), explaining that the requirements of due process "must be met as to each defendant over whom a state court exercises jurisdiction." (quoting *Rush*, 444 U.S. at 332).

2. The decision below runs roughshod over this Court's consistent holdings. The Second Circuit's conspiracy jurisdiction theory requires the plaintiff to plausibly allege merely that a conspiracy existed; that the defendant participated in the conspiracy; and that a third-party co-conspirator's acts in furtherance of the conspiracy sufficed to subject *the third party* to jurisdiction. Pet. App. 38a. The plaintiff need not allege that the foreign defendants "directed, controlled, and/or supervised the co-conspirator who carried out the overt acts in the forum." *Id.* at 42a. The Second Circuit thus allows a court to exercise jurisdiction over a defendant based on the conduct of a third party over whom the defendant had no control.

The panel below barely attempted to explain how this result could comport with *Walden*'s requirement

"that a defendant be haled into court in a forum State based on his own affiliation with the State." 571 U.S. at 286. The panel observed by analogy that "'a defendant can purposefully avail itself of a forum' through the action of a third party by '*directing* its agents or distributors to take action there.'" Pet. App. 37a (emphasis added and quotation marks and citation omitted). True enough. This Court has held as far back as *International Shoe Co.* v. *Washington*, 326 U.S. 310, 323 (1945), that personal jurisdiction can be exercised based on in-forum actions "done by agents of a corporation organized and having its headquarters elsewhere." But an agency relationship "demands * * * control (or the right to direct or control)." *Meyer* v. *Holley*, 537 U.S. 280, 286 (2003); *see also Restatement (Third) of Agency* § 1.01 (2006) ("[a]gency" requires that the principal "manifest[ ] assent to" the agent "that the agent shall act on the principal's behalf and subject to the principal's control"); *Restatement (Second) of Agency* § 1 (1958) (similar). The Second Circuit's conspiracy theory, by contrast, "does not require a relationship of control, direction, or supervision." Pet. App. 43a.

The Second Circuit's test thus allows personal jurisdiction to be exercised even when "the traditional indicia of agency"—"a fiduciary relationship and effective control by the principal"—are absent. *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 34 (2004). In fact, the Second Circuit's test allows a court to "exercise personal jurisdiction over a defendant based on the actions of a co-conspirator who is entirely unknown to that defendant." *In re Platinum & Palladium Antitrust Litig.*, 449 F. Supp. 3d 290, 326 (S.D.N.Y. 2020).

Judge Friendly recognized that this approach to personal jurisdiction is untenable. He explained that "the mere presence of one conspirator * * * does not confer personal jurisdiction over another alleged conspirator," while adding that "the matter could be viewed differently" if the defendant has "delegated" a task to a co-conspirator over whom he "retains general supervision." *Leasco*, 468 F.2d at 1343. The panel dismissed this conclusion as "dicta." Pet. App. 43a. But Judge Friendly's views are in line with bedrock due-process and agency principles. They should have prevailed below.

The panel further declared that due-process principles require only that "a defendant purposefully availed itself of the forum through the overt acts of its co-conspirator." *Id.* at 42a. That is entirely circular. *Walden* and the agency precedents together hold that courts *cannot* impute to a defendant the contacts of a third party the defendant does not control or supervise. The Second Circuit's decision thus permits precisely what *Walden* forbids. And whether an alleged co-conspirator's acts can be imputed to the defendant for *liability* purposes is an entirely different merits question. Whether one alleged conspirator's acts can be imputed to another for liability purposes "should not, by automatic operation of law, permit the attribution of one party's forum contacts to another." Althouse, *supra*, at 252. "Automatic attribution of contacts" where the plaintiff alleges a conspiracy "avoids consideration of the individual defendant's contact with the forum state—the very essence of jurisdiction." *Id.* at 253.

The panel attempted to limit its holding by conceding that "the conspiracy theory could not get off the

ground if a defendant were altogether blindsided by its co-conspirator's contacts with the forum," because the co-conspirator's acts would not be "foreseeable." Pet. App. 43a-44a. But this supposed limitation, too, runs counter to this Court's case law. The Court has explained that " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295 (1980); *see also Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985) ("Although it has been argued that foreseeability of causing injury in another State should be sufficient to establish [minimum] contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." (citation, footnote, and emphasis omitted)). Instead, "it is the defendant's actions, not his expectations," that permit a court to exercise jurisdiction. *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 883 (2011) (plurality op.). In subjecting foreign defendants to jurisdiction unless they were "altogether blindsided," Pet. App. 43a, the Second Circuit contravened due-process limits that this Court has reiterated time and again.

III. CONSPIRACY JURISDICTION'S VIABILITY IS AN IMPORTANT ISSUE, AND THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE IT.

A. The Question Presented Is Critically Important.

The Second Circuit's conspiracy jurisdiction theory has upended the law of personal jurisdiction in numerous respects.

First, the conspiracy theory of jurisdiction threatens to erode all limits on personal jurisdiction. It 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." Althouse, *supra*, at 248. By allowing courts to exercise jurisdiction over foreign defendants based on the conduct of third parties the defendant does not and could not control, the panel's decision will dramatically expand the scope of personal jurisdiction in the Second Circuit.

This risk is not merely speculative. The conspiracy jurisdiction theory has had time to percolate in the Second Circuit, and the results highlight the theory's startling overbreadth. *Schwab I* has been cited in nearly 150 district court decisions in the Second Circuit in the four years since it was decided. This proliferation of cases derives in part from the fact that the Second Circuit's theory of "conspiracy jurisdiction is extraordinarily broad." *In re Platinum*, 449 F. Supp. 3d at 326. Indeed, the theory has been interpreted to allow courts to "exercise personal jurisdiction over a defendant based on the actions of a co-conspirator who is entirely unknown to that defendant," on the theory that "two co-conspirators—even co-conspirators who were unaware of the existence of the other—may be viewed as a single entity for purposes of conspiracy jurisdiction." *Id.* at 326 & n.28; *see PharmacyChecker.com, LLC* v. *Nat'l Ass'n of Bds. of Pharmacy*, 530 F. Supp. 3d 301, 325 n.9 (S.D.N.Y. 2021) (the theory does not require the defendant to have "any connection with co-conspirator acts in the forum state"). At least one district court has noted that the theory is "in tension with the Supreme Court's holding in *Walden*." *In re Platinum*, 449 F. Supp. 3d at 326. Given that so many complex financial conspiracy suits

are brought in the Second Circuit, this broad theory of jurisdiction is particularly disruptive there.

Second, the damage done by conspiracy jurisdiction is not cured even if the defendant ultimately defeats the conspiracy allegations on the merits. The Second Circuit's theory allows cases that would otherwise be dismissed for lack of personal jurisdiction to proceed to expensive discovery. Proceeding "to the discovery stage on the jurisdiction issue represents an assertion of jurisdiction to some extent that may be extremely burdensome in conspiracy cases." Althouse, *supra*, at 250 (internal quotation marks and footnote omitted). Defendants may prefer to settle even plainly meritless cases rather than bear these burdens, such that the exercise of jurisdiction will often be outcome-determinative. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975) (American-style discovery "permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value"). Conspiracy jurisdiction thus undermines 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*, 444 U.S. at 291-292 (emphasis added).

Third, conspiracy jurisdiction will lead to gamesmanship. Plaintiffs may use conspiracy jurisdiction to subject foreign defendants to uniquely invasive and expensive American discovery, and then, even if the suit is dismissed, use the fruits of discovery to file a second suit in an appropriate forum. Even for domestic defendants, conspiracy jurisdiction may lead to forum shopping, with plaintiffs seeking to pursue

complex suits in what they perceive to be the most favorable forum with *any* plausible connection to the claims.

Fourth, because the Second Circuit's theory of conspiracy jurisdiction is often invoked against foreign defendants like petitioners, the theory poses serious "risks to international comity." *Daimler AG* v. *Bauman*, 571 U.S. 117, 141 (2014). Just as in *Bauman*, "[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case." *Id.* Foreign companies may accordingly be deterred from partnering with American companies if any act by their American counterpart could subject them to personal jurisdiction—and discovery—in American courts. These "[c]onsiderations of international rapport" underscore the conclusion that conspiracy jurisdiction does "not accord with the fair play and substantial justice due process demands." *Id.* at 142 (internal quotation marks omitted).

B. This Case Is An Excellent Vehicle.

The validity of conspiracy jurisdiction is an issue that petitioners preserved below and is primed for this Court's review. Petitioners maintained below that "conspiracy jurisdiction is fundamentally inconsistent with due process." Appellees' C.A. Pers. Jurisdiction Response Br. 53 (capitalization omitted). Plaintiffs, for their part, vigorously defended its constitutionality, insisting that because "at least one defendant committed" in-forum acts in furtherance of the conspiracy, that was "enough to support conspiracy jurisdiction over all the co-conspirators." Appellants' C.A. Pers. Jurisdiction Opening Br. 59-61. There is accordingly no question that the question presented was

pressed below. *Cf. Fitch Ratings, Inc.* v. *First Cmty. Bank, N.A.*, 136 S. Ct. 2511 (2016) (denying a petition presenting a similar question where petitioners did not preserve their argument below).

The conspiracy jurisdiction issue was also squarely passed upon below. The Second Circuit addressed petitioners' challenge to the theory head-on, holding in a published opinion that due process does "not demand a relationship of control before one defendant's minimum contacts are imputed to its co-conspirator." Pet. App. 42a-43a. And this holding was dispositive because the panel declined to address whether personal jurisdiction would exist on any other basis. *Id.* at 44a n.10.

This case is an especially strong vehicle because the constitutionality of conspiracy jurisdiction tends to defy appellate review. "[A]n order denying a motion to dismiss for lack of personal jurisdiction is *not* an immediately appealable collateral order." *Atlantica Holdings, Inc.* v. *Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 116 (2d Cir. 2016). By the time a defendant is in a position to appeal the exercise of conspiracy jurisdiction, the merits of the plaintiff's conspiracy claim will typically already be developed and decided. If discovery fails to substantiate the claims, the defendant will have no right to appeal a final judgment in its favor. The question is presented in this case only because it arises in a relatively unusual posture—where the district court first dismissed for lack of personal jurisdiction and the court of appeals reversed. This case thus presents a rare opportunity to take up the issue of whether conspiracy jurisdiction comports with due process—and to do so before it is too late for the result to make a difference.

The stakes here are high. The Second Circuit has observed that the plaintiffs in this "sprawling MDL" press claims implicating "trillions of dollars' worth of financial transactions" that could "bankrupt 16 of the world's most important financial institutions." *Gelboim*, 823 F.3d at 767, 779 (quotation marks omitted). By subjecting foreign defendants to jurisdiction in this already sprawling suit based on conduct that the defendants are not even alleged to have supervised or controlled, the Second Circuit has provided a stark illustration of the dangers its broad theory poses.

In the end, the Second Circuit adopted its theory because this Court has not "delineated when one conspirator's minimum contacts allow for personal jurisdiction over a co-conspirator." *Schwab I*, 883 F.3d at 86. This Court should take this opportunity to resolve the important and recurring question presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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