NO. _____

In the

Supreme Court of the United States

LLOYDS BANKING GROUP PLC, *et al.*,

Petitioners,

v.

THE BERKSHIRE BANK, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented here is the same one presented in *Lloyds Banking Group plc v. Schwab Short-Term Bond Market Fund*, No. 21-1237 (pet. for cert. filed Mar. 9, 2022):

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

Petitioners, Defendants-Appellees below, are Lloyds Banking Group plc; Lloyds Bank plc, f/k/a Lloyds Bank TSB plc; HBOS plc; The Royal Bank of Scotland Group plc, n/k/a NatWest Group plc; Coöperatieve Rabobank U.A.; The Norinchukin Bank; British Bankers' Association; BBA Enterprises Ltd.; BBA LIBOR Ltd.; Royal Bank of Canada; Portigon AG, f/k/a WestLB AG; and Westdeutsche Immobilien Servicing AG, f/k/a Westdeutsche ImmobilienBank AG.

Respondents, Plaintiffs-Appellants below, are The Berkshire Bank, individually and on behalf of all others similarly situated, and the Government Development Bank for Puerto Rico.

CORPORATE 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. Petitioners HBOS plc and Lloyds Bank plc are wholly owned subsidiaries of Lloyds Banking Group plc; no other publicly held company owns 10% or more of their 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 Coöperatieve Rabobank U.A. has no parent corporation, and no publicly held company owns 10% or more of Coöperatieve Rabobank U.A.

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

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

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.

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 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

The following proceedings are directly related within the meaning of Rule 14(b)(iii):

The Berkshire Bank v. Lloyds Banking Group plc, No. 20-1987 (2d Cir.) (opinion issued and judgment entered Feb. 25, 2022).

The Berkshire Bank v. Bank of Am. Corp., No. 12-cv-5723 (S.D.N.Y.) (final judgment entered May 26, 2020).

In addition, this case is part of the ongoing multidistrict litigation *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 1:11-md-2262 (S.D.N.Y.).

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PETITION FOR WRIT OF CERTIORARI

This petition presents the same question regarding the scope of so-called "conspiracy jurisdiction" that is raised in another pending petition, *Lloyds Banking Group plc v. Schwab Short-Term Bond Market Fund*, No. 21-1237 (filed Mar. 9, 2022). Petitioners here are among the petitioners in No. 21-1237.

The petition in No. 21-1237 seeks review of the Second Circuit's decision in *Schwab Short-Term Bond Market Fund v. Lloyds Banking Group PLC* ("*Schwab II*"), 22 F.4th 103, 110 (2d Cir. 2021). In *Schwab II*, the panel held that a court can exercise personal jurisdiction over a foreign defendant based merely on an alleged third-party co-conspirator's ties to the forum—even if the defendant did not direct, control, or supervise its supposed co-conspirator. That holding deepened a longstanding, entrenched split among federal courts of appeals and state high courts. It also conflicts with this Court's decisions, which make clear 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.

This petition arises out of the same LIBOR multi-district litigation that gave rise to *Schwab II*. In the decision below, the Second Circuit summarily applied its holdings in *Schwab II* to rule that the district court could exercise personal jurisdiction over defendants based on the alleged forum contacts of alleged co-conspirators, regardless of whether defendants exercised any control over the supposed co-conspirators' actions. That decision cannot stand if

Schwab II is reversed. Accordingly, if the Court grants review in No. 21-1237, it should hold this petition and dispose of it in accordance with the ruling in that case.[1]

OPINIONS BELOW

The Second Circuit's opinion is not reported but is available at 2022 WL 569819 and reproduced at App. 1–21. Relevant opinions of the district court are not reported but are available at 2015 WL 6696407, reproduced at App. 105–68, 2016 WL 7378980, reproduced at App. 34–104, and 2017 WL 532465, reproduced at App. 22–33.

JURISDICTION

The Second Circuit issued its opinion on February 25, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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 . . . .

STATEMENT OF THE CASE

1. Plaintiffs allege that certain banks colluded during the 2008 financial crisis to suppress an

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[1] Alternatively, if for some reason the Court were to find the petition in No. 21-1237 an unsuitable vehicle to decide the question presented, then the Court should grant review in this case.

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." *Schwab II*, 22 F.4th at 110. Plaintiffs brought a putative class action on behalf of lending institutions asserting common-law claims under New York law and seeking damages arising from the alleged LIBOR suppression conspiracy. Plaintiffs' suit was consolidated with other LIBOR-related actions 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." *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 ("BBA"), a U.K. trade association. Plaintiffs nevertheless urged that the district court could exercise personal jurisdiction over petitioners here—several foreign banks and the BBA—under a theory of "conspiracy jurisdiction." 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. App. 40. 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 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." App. 64 (addressing personal jurisdiction as to plaintiffs raising antitrust claims); App. 28 (concluding that "the antitrust personal jurisdiction holdings set forth in *LIBOR VI* apply equally to" plaintiffs' claims).

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

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.*

Following *Schwab I*, the district court entered final judgment dismissing plaintiffs' action, and plaintiffs appealed.

3. While plaintiffs' appeal was pending, the Second Circuit issued its decision in *Schwab II*, which applied *Schwab I* and reversed the district court's personal jurisdiction ruling as to the antitrust plaintiffs. The panel "conclude[d] that the district court had specific personal jurisdiction under the conspiracy theory adopted in *Schwab [I]*." 22 F.4th at 121.

The *Schwab II* panel 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 122 (citation omitted). 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 *Schwab II* panel concluded that the antitrust 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 123. The panel held that these alleged in-forum acts sufficed to "vest[] the district court with personal jurisdiction over each" foreign defendant. *Id.*

The panel rejected the banks' 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 124. 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.* 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.

4. Two months later, another panel of the Second Circuit applied *Schwab II* in a summary order to reverse the dismissal of plaintiffs' claims in this case (*The Berkshire Bank v. Lloyds Banking Group plc*). The *Berkshire* panel found *Schwab II* "instructive" because it "considered the application of conspiracy-based personal jurisdiction" to "another appeal arising out of the [same] LIBOR MDL." App. 11.

The panel recognized that *Schwab II* had determined that certain alleged "communications among the alleged LIBOR co-conspirators" would, if true, "constitute[] overt acts sufficient to confer personal jurisdiction in the United States as a whole." App. 14. Plaintiffs "cite[d] these same allegations in support of their conspiracy-based theory" of personal jurisdiction. App. 14. And although the relevant forum in this case is New York rather than the United States as a whole, "several of the critical communications and actions" the court had "found sufficient to establish personal jurisdiction in *Schwab II* took place in New York." App. 14.

The *Berkshire* panel thus concluded that, "[a]s in *Schwab II*," plaintiffs plausibly alleged "overt acts taken by co-conspirators in New York in furtherance of the conspiracy" and that these allegations "vest[ed] the district court with personal jurisdiction over each" foreign defendant. App. 15.[2]

This petition followed.

REASONS FOR GRANTING THE PETITION

This Court is presently considering whether to grant a petition for certiorari to review the Second Circuit's decision in *Schwab II*. *See* No. 21-1237 (filed Mar. 9, 2022). As that petition explains, and as reiterated below, the "conspiracy jurisdiction" holding in *Schwab II* deepens a longstanding split among federal circuit courts and state courts of last resort, conflicts with decisions of this Court, and presents a critically important question that this Court should resolve. The Court should accordingly grant the petition in *Schwab II* and, because the Second Circuit decided this case through summary application of *Schwab II*, hold this petition pending disposition of that case.

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[2] The *Berkshire* panel also concluded that plaintiffs' allegations satisfied the pleading requirements of personal jurisdiction under New York's long-arm statute, App. 15–18, and that the district court had erred in dismissing certain claims as time-barred under Rule 12(b)(6), App. 18–20. Those holdings are not at issue here.

I. The Second Circuit's Decision Entrenches a Circuit and State High Court Split.

As the *Schwab II* petition explains, 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 *Schwab II*, 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." 22 F.4th at 124.

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 co-conspirators." *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 Tenn. Bank, N.A.*, 489 S.W.3d 369, 394–95 (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 v. Fiore*, 571 U.S. 277 (2014)—which reaffirmed that jurisdiction cannot be based on the conduct of "third parties" over whom the defendant lacks control, *id.* 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, 1392–93 (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, 360–61 (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, 842–43 (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, 235–36 (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.

As the *Schwab II* petition likewise explains, 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 (2017), explaining that the requirements of due process "must be met as to each defendant over whom a state court exercises jurisdiction." *Id.* at 1783 (quoting *Rush*, 444 U.S. at 332).

2. *Schwab II* and the decision below run 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. *Schwab II*, 22 F.4th at 122–25; App. 13. 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." App. 13 (quoting *Schwab II*, 22 F.4th at 124). 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 Second Circuit 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 *Schwab II* 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." 22 F.4th at 122 (emphasis added and quotation marks 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." *Schwab II*, 22 F.4th at 125.

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 Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1343 (2d Cir. 1972). The *Schwab II* panel dismissed this conclusion as "dicta." 22 F.4th at 125. But Judge Friendly's views are in line with bedrock due-process and agency principles.

The *Schwab II* 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 124. 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, 52 Fordham L. Rev. 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 *Schwab II* 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." 22 F.4th at 125. 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," 22 F.4th at 125, 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 Both *Schwab II* and This Case Are Suitable Vehicles.

1. 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, 52 Fordham L. Rev. 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 panels' decisions 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 numerous 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, 52 Fordham L. Rev. 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 291–92 (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).

2. As the *Schwab II* petition explains, that case presents an excellent vehicle for this Court to resolve the longstanding and entrenched split over the question presented here. Petitioners accordingly suggest that the Court grant certiorari in that case and hold this petition.

If a vehicle problem were to be identified in *Schwab II*, this case presents an alternative vehicle to resolve the split over conspiracy jurisdiction. The question presented was squarely passed upon in the decision below, which expressly turns on application of *Schwab II*'s holdings regarding conspiracy jurisdiction. App. 13–15. Petitioners preserved the issue by maintaining that plaintiffs' "conspiracy jurisdiction theory . . . violates due process" because plaintiffs' "allegations do not show that any Defendant exercised direction, control, or supervision over another" and "there is no plausible allegation that any Defendant directed or controlled any tortious in-forum conduct." Appellees' C.A. Response Br. 36–37. And plaintiffs vigorously defended the theory's constitutionality, insisting that "due process does not require demonstrating 'control' over co-conspirators'

New York overt acts." Appellants' C.A. Reply Br. 9 (capitalization omitted).[3]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari in *Schwab II* and hold this petition pending its resolution of that case. Alternatively, the Court should grant the petition for certiorari in this case.

[3] If defendants are correct that plaintiffs' allegations fail to satisfy due process, then the Second Circuit's holding that plaintiffs' allegations satisfied the New York long-arm statute, *see* App. 18, would be irrelevant.

Respectfully submitted,

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