NO. 21-1503

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

PETITIONERS' REPLY BRIEF

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REPLY BRIEF

Contrary to respondents' contentions, the split over whether "conspiracy jurisdiction" accords with due process is well developed and entrenched. It is equally clear that subjecting foreign defendants to personal jurisdiction based on their alleged co-conspirators' forum contacts cannot be squared with this Court's due-process jurisprudence. And none of the illusory vehicle problems respondents posit provide any reason for the Court to defer resolution of this longstanding split. For the reasons set out in the petition, certiorari should be granted.

I. The Second Circuit's Decision Entrenches a Split.

There is a deep, longstanding, and acknowledged split over whether the conspiracy theory of jurisdiction comports with due process. Respondents' assertion (at 3) that this split is "wholly fabricated" blinks reality. Repeatedly, courts have discussed how "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 SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 222 (Del. 1982); *see also Mackey v. Compass Mktg., Inc.*, 892 A.2d 479, 491 n.4 (Md. 2006) (accepting "the conspiracy theory of personal jurisdiction" while acknowledging that "a minority of courts have taken a contrary view"); *Schwartz v. Frankenhoff*, 733 A.2d 74, 80 (Vt. 1999) (acknowledging the split); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) (noting that "[s]ome courts have recognized civil conspiracy as a separate basis to support the exercise of jurisdiction" but rejecting that holding). Even the

very precedent on which respondents rely underscores the courts' "diversity of approaches" to conspiracy jurisdiction. *See Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992). Commentators, too, have recognized the split for decades. *See* Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234, 235–36 (1983). The split's existence is beyond dispute.

Respondents nonetheless contend (at 4, 16) that there is no conflict because these courts rejected a different theory than the one the Second Circuit embraced below. Respondents, for example, seek to distinguish the Texas Supreme Court's decision (at 18) on the ground that it rejected "a much broader theory" of conspiracy jurisdiction that did not require "overt act[s]" in the forum. But *Gibson* described conspiracy jurisdiction as resting "on the concept that *acts* of conspirators in furtherance of the conspiracy are attributable to co-conspirators." 897 S.W.2d at 773 (emphasis added). It then "decline[d]" to adopt that theory of conspiracy jurisdiction and instead held that courts must restrict their inquiry to whether the defendant "itself purposefully established minimum contacts such as would satisfy due process." *Id.*

Respondents similarly assert (at 19) that the theory rejected by the Nebraska Supreme Court "was not the 'overt act' standard but a broader conspiratorial 'effect' standard." *See Ashby v. State*, 779 N.W.2d 343 (2010). But *Ashby* squarely addressed the argument "that although [the defendant] never entered Nebraska, because his alleged coconspirators committed *acts* in furtherance of the conspiracy in

Nebraska, he is subject to the jurisdiction of a Nebraska court." *Id.* at 360 (emphasis added). The court then rejected that argument on the ground that "[d]ue process for personal jurisdiction over a nonresident defendant requires that the plaintiff allege *specific acts by the defendant* which establish that the defendant had the necessary minimum contacts." *Id.* (emphasis added).

Respondents' efforts to dispel the other decisions in the split are just as unpersuasive. Respondents insist (at 16) that the Fifth Circuit has not actually rejected the conspiracy theory of jurisdiction. But in *Guidry v. United States Tobacco Co.*, 188 F.3d 619 (5th Cir. 1999), the Fifth Circuit reviewed a district court decision embracing the conspiracy theory of jurisdiction and flatly rejected it. The Fifth Circuit faulted the district court for passing over the "crucial" question whether "each" defendant "had minimum contacts with the forum state," then explained that the district court should have addressed whether jurisdiction existed "based on a tort committed in the state, *individually and not as part of a conspiracy, by each particular defendant*." *Id.* at 625 (emphasis added). The Fifth Circuit has since cited *Guidry* for the proposition that a plaintiff was "required to demonstrate that [the defendant] individually, and not as part of the conspiracy, had minimum contacts" with the forum state. *Delta Brands Inc. v. Danieli Corp.*, 99 F. App'x 1, 6 (5th Cir. 2004) (per curiam).

Respondents also maintain (at 17) that the Seventh Circuit approved of conspiracy jurisdiction in *Textor v. Board of Regents of Northern Illinois University*, 711 F.2d 1387 (7th Cir. 1983). But the

Seventh Circuit has rejected that reading of *Textor*, stating: "We did not hold in *Textor* that there is—*and indeed there is not*—an independent federal 'civil co-conspirator' theory of personal jurisdiction." *Davis v. A & J Elecs.*, 792 F.2d 74, 76 (7th Cir. 1986) (emphasis added). Respondents note (at 17) that *Davis* interpreted Federal Rule of Civil Procedure 4(e), but this misses the point. Under Rule 4(e), just like under state long-arm statutes, the exercise of jurisdiction is constrained by due process. A plaintiff cannot hale a defendant into court "simply by alleging a conspiracy" between some defendants who have minimum contacts with the state and others who do not. *Smith v. Jefferson Cnty. Bd. of Educ.*, 378 F. App'x 582, 585–86 (7th Cir. 2010).

None of these decisions can be reconciled with the Second Circuit's approach, which embraces "conspiracy-based personal jurisdiction," App. 11, and holds that the contacts of a co-conspirator may be "imputed to the defendant" for jurisdictional purposes, *see Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC* (*Schwab II*), 22 F.4th 103, 125 (2d Cir. 2021). Nor can these decisions be reconciled with precedent from the other courts on the Second Circuit's side of the split that have squarely embraced conspiracy jurisdiction. *See* Pet. 11–12.

Respondents maintain (at 20) that even if a split exists, "review would be premature" in light of this Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021). But *Ford* addressed the circumstances in which a defendant's *own* "systematic contacts" with a state can subject the defendant to personal jurisdiction, *see* 141

S. Ct. at 1029, and did not address whether courts can exercise jurisdiction over a defendant based on the conduct of *third parties*. This Court addressed that separate question most recently in *Walden v. Fiore*, 571 U.S. 277 (2014). Although *Walden* should have foreclosed conspiracy personal jurisdiction, the split has only deepened since. *See Schwab II*, 22 F.4th at 122 (holding that conspiracy jurisdiction comports with *Walden*); *Raser Techs., Inc. ex rel. Houston Phoenix Grp., LLC v. Morgan Stanley & Co.*, 449 P.3d 150, 166 (Utah 2019) (holding that a conspiracy theory of jurisdiction "can satisfy due process concerns" even under *Walden*). *But see In re Platinum & Palladium Antitrust Litig.*, 449 F. Supp. 3d 290, 326 (S.D.N.Y. 2020) (noting that conspiracy jurisdiction is "in tension with the Supreme Court's holding in *Walden*"). The split will persist until this Court resolves it.

II. The Second Circuit's Theory of Conspiracy Jurisdiction Conflicts With This Court's Cases.

Respondents' attempts to defend conspiracy jurisdiction on the merits are unpersuasive. This Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts" between "third parties[] and the forum State." *Walden*, 571 U.S. at 284. As this Court explained, "it is the defendant, not … third parties, who must create contacts with the forum State." *Id.* at 291. The Second Circuit's conspiracy theory of jurisdiction violates this basic precept by allowing a defendant to be haled into court based on the conduct of third parties over which the defendant had no control.

Respondents cite (at 25–26) this Court's statement in *Walden* that a defendant's contacts with the forum state "through an agent, goods, mail, or some other means" may establish minimum contacts. 571 U.S. at 285. But, as explained at length in a portion of the petition that respondents never address (Pet. 15–16), that is because an agency relationship "demands . . . control (or the right to direct or control)." *Meyer v. Holley*, 537 U.S. 280, 286 (2003). The precedent on which respondents rely (at 23) largely proves the point, making clear that a defendant "can purposefully avail itself of a forum by *directing* its agents or distributors to take action there." *Daimler AG v. Bauman*, 571 U.S. 117, 135 n.13 (2014) (emphasis added). Judge Friendly's conclusion remains true today: "the mere presence of one conspirator" in the forum "does not confer personal jurisdiction over another alleged conspirator," at least not unless 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 Second Circuit's conspiracy theory, by contrast, "does not require a relationship of control, direction, or supervision." *Schwab II*, 22 F.4th at 125. Thus, while the Second Circuit below concluded that certain co-conspirators "acted as agents" of the defendants, it reached that conclusion *only* because "a co-conspirator can be considered an agent," adding that no "showing of control or direction" was required. App. 16–17. And while respondents assert (at 26) that the Second Circuit found that the co-conspirators acted at petitioners' "request," they truncate the relevant quotation; the Second Circuit actually noted

that respondents had alleged that the co-conspirators acted "at the request of *or* on behalf of" petitioners. App. 17 (emphasis added). Again, that conclusion was based on respondents' conspiracy allegations, not any suggestion that petitioners controlled, directed, or even requested their co-conspirators' acts.

Because it allows defendants to be haled into court based on the conduct of any alleged co-conspirator even absent a relationship of supervision or control, the Second Circuit's theory of "conspiracy jurisdiction is extraordinarily broad." *In re Platinum*, 449 F. Supp. 3d at 326. Respondents dispute this (at 27) by noting the Second Circuit's caveat 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." *Schwab II*, 22 F.4th at 125. But this Court held decades ago that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). Respondents maintain (at 27) that foreseeability is an appropriate consideration for evaluating "contacts, not injury." But the relevant foreseeability analysis turns on "the *defendant's* conduct and connection with the forum State"—not the conduct and connection of third parties. *World-Wide Volkswagen*, 444 U.S. at 295 (emphasis added).

Respondents note (at 24) that one co-conspirator can be held "criminally liable for the acts of another" and argue that the same rule should apply to personal jurisdiction. That contention not only improperly conflates the jurisdictional and merits inquiries

(Pet. 17), but ignores that courts can impute one co-conspirator's acts to another for liability purposes only upon a finding that a conspiracy *in fact exists*. In the criminal context, that finding must be made beyond a reasonable doubt. *See Smith v. United States*, 568 U.S. 106, 110 (2013). The conspiracy theory of jurisdiction, by contrast, permits the exercise of jurisdiction over a foreign defendant in a civil case based on the *mere allegation* of a conspiracy. It thus undermines the basic 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. For that reason, even the (abrogated) precedent upon which respondents rely recognizes that conspiracy jurisdiction improperly "merges the jurisdictional issue with the merits" and creates a risk that "plaintiffs could drag defendants to remote forums for protracted proceedings even though there were grave reasons for questioning whether the defendant was actually suable in those forums." *Stauffacher*, 969 F.2d at 459–60.

Respondents are quite wrong to assert (at 26) that rejecting conspiracy jurisdiction "would preclude all personal jurisdiction over any out-of-forum co-conspirators." To the contrary, minimum contacts can arise from the defendant's own acts in the forum state or from the acts of a third party that the defendant directed, supervised, or controlled. But they cannot arise from the acts of third parties based on the mere allegation of a conspiracy.

III. Conspiracy Jurisdiction's Viability Is an Important Issue, and This Case Is an Excellent Vehicle to Resolve It.

Respondents do not meaningfully dispute that the question presented is particularly important in ensuring that courts' exercise of personal jurisdiction does not exceed constitutional limits. Pet. 18–21. Instead, they argue that this case is a poor vehicle for considering the question. They are mistaken.

First, respondents advance (at 11) the non sequitur that because the Court denied the petition in *Schwab II*, it should deny this petition too. But three Justices were recused in *Schwab II*, a case that involved dozens of parties. *See Lloyds Banking Grp. PLC v. Schwab Short-Term Bond Mkt. Fund*, 142 S. Ct. 2852 (2022) (mem.). This case, with a streamlined group of participants on both sides, is less likely to present similar complications. That is indeed why the petition noted (at 21) that "[i]f a vehicle problem were to be identified in *Schwab II*, this case presents an alternative vehicle to resolve the split over conspiracy jurisdiction."

Second, respondents are wrong to assert (at 12) that certiorari should be denied because the decision below is nonprecedential. *Schwab II* was precedential, and as respondents acknowledge (at 9), the decision below simply "applied *Schwab II*" to the virtually indistinguishable record here. *See* App. 13–15. This case is thus an excellent vehicle for the Court to review *Schwab II*'s conspiracy-jurisdiction holding without that case's recusal issues. This Court regularly reviews unpublished and nonprecedential decisions that apply legal standards articulated in precedential

decisions. *See, e.g.*, *Terry v. United States*, 141 S. Ct. 1858, 1862 (2021); *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018); *see also* Stephen M. Shapiro et al., Supreme Court Practice 4-35 (11th ed. 2019).

Third, contrary to respondents' suggestion (at 12), no state-law issues complicate the question presented. The petition asks whether the Second Circuit's theory of conspiracy jurisdiction comports with due process under the U.S. Constitution; it does not challenge the holding regarding New York's long-arm statute. Pet. 7 n.2. Neither the decision below nor *Schwab II*, considered state law when analyzing the constitutional issue. *See* App. 12–15; *Schwab II*, 22 F.4th at 121–22. And respondents do not explain state law's supposed relevance to the due-process analysis. The authority they cite (at 12–13) says only that state law controls the interpretation of a state long-arm statute.

Fourth, respondents contend (at 13) that they might still prevail on alternative grounds. But an alternative argument not passed on below is not a vehicle problem. This Court frequently grants certiorari to review the legal grounds on which a lower court's decision rested even where the respondent believes that it might win on other grounds on remand. *See, e.g.*, *Ruan v. United States*, 142 S. Ct. 2370, 2382 (2022); *Nance v. Ward*, 142 S. Ct. 2214, 2226 (2022).

In any event, respondents' alternative arguments are meritless. They suggest (at 13) that conspiracy jurisdiction might exist even under a test that required direction, control, or supervision; but they

correctly conceded below that their allegations would not satisfy that standard. *See* Oral Arg. 5:49–6:39, *available at* https://tinyurl.com/yc4uer7a.[1] They also suggest (at 13–14) that the "effects test" might provide an independent basis for personal jurisdiction in New York. But the Second Circuit has already rejected a similar argument for jurisdiction in California, holding that alleged manipulation of the global LIBOR benchmark was not "expressly aimed" at California even though many defendants sold financial instruments there. *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 82, 88 (2d Cir. 2018); *see Calder v. Jones*, 465 U.S. 783, 789 (1984). Respondents identify no reason why the Second Circuit would reach a different conclusion regarding New York.

Fifth, respondents contend (at 14–15) that the case is unripe because the decision below is "interlocutory." But this Court regularly grants review where, as here, an appellate court vacated or reversed a dismissal and remanded for further proceedings. *E.g.*, *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1168, 1173 (2021); *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594 (2020). Such review is especially appropriate for threshold questions like personal jurisdiction. Indeed, every one of this Court's modern personal-jurisdiction cases

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[1] "THE COURT: You would concede though, if direction or control is required, there are no allegations that would satisfy that standard, right? . . . COUNSEL: Right. . . . With respect to whether a co-conspirator in LIBOR controlled another co-conspirator, there aren't allegations, except for they controlled their own actions. As far as the other co-conspirators, that's not the case."

arrived at the Court with a lower court having found personal jurisdiction and set the case for further proceedings. *See, e.g.*, *Ford*, 141 S. Ct. at 1023; *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1778–79 (2017); *Walden*, 571 U.S. at 281–82; *Daimler*, 571 U.S. at 124–25.

Respondents also offer no reason to believe that merits discovery will alter the jurisdictional analysis. Respondents' claim (at 15) that the district court did not permit "jurisdictional discovery" ignores that the court ordered extensive *class-certification* discovery, pursuant to which petitioners produced millions of pages of emails, tens of thousands of audio files, and extensive transaction data.

Respondents' observation (at 15) that some "defendants have settled" further underscores the propriety of granting certiorari now. If petitioners are not subject to personal jurisdiction in New York, then requiring them to choose between the expense of settling and the expense of litigating in New York is particularly unfair. The better course is to grant certiorari and to resolve this important issue sooner rather than later.

CONCLUSION

For the foregoing reasons and those in the petition, certiorari should be granted.

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