NO. 23-232

In the
Supreme Court of the United States

BASF METALS LIMITED AND ICBC STANDARD BANK PLC,

Petitioners,

v.

KPFF INVESTMENT, INC., *et al.*,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The conspiracy theory of specific personal jurisdiction warrants this Court's attention. It is the subject of a deep, longstanding, and acknowledged split. That theory—which is so capacious it can create personal jurisdiction over a foreign defendant based on the action of a co-conspirator who is entirely unknown to the defendant—violates due process. This Court's precedent limning the due process requirements on specific personal jurisdiction admonish that a plaintiff's claims "must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Both the district court and the court of appeals below recognized the problematic nature of conspiracy jurisdiction. This case presents an excellent vehicle for resolving this issue. Nothing Respondents put forth counsels otherwise.

I. The Second Circuit's Decision Entrenches An Acknowledged And Deep Split.

There is a deep, longstanding, and acknowledged split over whether the conspiracy theory of jurisdiction comports with due process. Respondents' assertion that this split is "manufacture[d]" is risible. BIO.11.

As an initial matter, in claiming there is no split, Respondents flatly ignore the decision below. There, the Second Circuit "acknowledge[d] the debate" over whether the conspiracy theory comports with due process. App.49. They ignore still other courts—including some they themselves cite, *see* BIO.9, 11—that likewise acknowledge "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 "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 split); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) (noting "[s]ome courts have recognized civil conspiracy as a separate basis to support the exercise of jurisdiction" but rejecting that holding).

Respondents claim there is no conflict with the Seventh Circuit, but they are wrong. They attempt to dismiss the Seventh Circuit's decision in *Davis v. A & J Electronics*, 792 F.2d 74 (7th Cir. 1986), by incorrectly claiming that *Davis* merely "rejected the idea that a forum may exercise jurisdiction even when the state's long-arm statute forbids it." BIO.11. The plaintiffs in *Davis*¸ however, did not rely on the state long-arm statute at all, having "disclaimed" reliance on it before the district court, 792 F.2d at 76. Thus, the Seventh Circuit went on to reject conspiracy jurisdiction, finding "there is not" "an independent federal 'civil co-conspirator' theory of personal jurisdiction." *Id.* As the Seventh Circuit explained in a later case, 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).

Nor do the Seventh Circuit's decisions in *Stauffacher v. Bennett*, 969 F.2d 455 (7th Cir. 1992), or *Textor v. Board of Regents of Northern Illinois University*, 711 F.2d 1387 (7th Cir. 1983), rescue Respondents' arguments. To the contrary, in *Stauffacher*, the Seventh Circuit acknowledged courts' "diversity of approaches" to conspiracy jurisdiction, while musing on a conspiracy jurisdiction argument where "plaintiffs ha[d] made no attempt to show that there was a conspiracy." 969 F.2d at 460. And as explained in *Davis*, *Textor* concerned Illinois's state long-arm statute, which only "permits the exercise of personal jurisdiction over a party to civil conspiracy if a co-conspirator acts within Illinois *as the party's agent*," *Davis*, 792 F.2d at 76 (emphasis added) (citing *Textor*, 711 F.2d at 1392-93), not the unbounded, unlimited conspiracy jurisdiction at issue here.

The Second Circuit's decision also conflicts with the Fifth Circuit. According to Respondents, *Delta Brands Inc. v. Danieli Corp.*, 99 F. App'x 1, 6 (5th Cir. 2004) (per curiam), "is not the law of the Fifth Circuit" and *Guidry v. United States Tobacco Co.*, 188 F.3d 619 (5th Cir. 1999), somehow suggests that the Fifth Circuit "would join every other circuit that has considered the issue and hold that personal jurisdiction may be premised on a conspiracy." BIO.12-13. But in *Guidry*, the Fifth Circuit rejected a district court decision embracing the conspiracy theory. It found the district court erred in passing over the "crucial" question whether "each" defendant "had minimum contacts with the forum state." 188 F.3d at 625. Instead, according to the Fifth Circuit, 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.* Then, in *Delta*, the Fifth Circuit 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*, 99 F. App'x at 6—precisely the opposite of what Respondents claim.

Moreover, Respondents' efforts to wish away the split with state courts is an exercise in magical thinking.[1] The Texas and Nebraska Supreme Courts have rejected conspiracy jurisdiction. The Texas Supreme Court did not "merely," as Respondents claim, recognize that conspiring with a Texas resident is insufficient. BIO.13. Instead, the Texas Supreme Court made clear in *M & F Worldwide Corp. v. Pepsi-Cola Metropolitan Bottling Co.*, 512 S.W.3d 878 (Tex. 2017), that "specific personal jurisdiction over a nonresident defendant requires *the defendant's* purposeful availment of the privilege of conducting activities within the forum state" and rejected the plaintiff's attempt to assert conspiracy jurisdiction. *Id.* at 890 (emphasis added); *see Nat'l Indus. Sand Ass'n*, 897 S.W.2d at 773 (rejecting conspiracy theory and "[i]nstead … restrict[ing] our inquiry to whether [the

[1] Far from a "fall[] back" position, BIO.13, the Second Circuit's split from the decisions of state high courts matters. Many state long-arm statutes reach the full extent permitted by the Due Process Clause. *See* John A. Lynch, *Is It Time for A New Maryland Longarm Statute?*, 52 U. Balt. L.F. 1, 59 (2021) (nineteen state-long arm statutes "permit jurisdiction in whatever circumstances … permitted under the Due Process Clause"). And it is black letter law that the Due Process Clause limits the reach of any state long-arm statute.

defendant] itself purposefully established minimum contacts such as would satisfy due process").

Nor is the Nebraska Supreme Court's decision in *Ashby v. State*, 779 N.W.2d 343 (Neb. 2010), "unclear," as Respondents claim. BIO.13. In *Ashby*, the Nebraska Supreme Court squarely rejected conspiracy jurisdiction. There, the plaintiffs offered a single theory for jurisdiction for one of the defendants: conspiracy. The court refused to countenance that theory and instead looked only to that defendant's own "involvement with any of the proceedings in Nebraska." 779 N.W.2d at 361.

It is Respondents who erroneously manufacture agreement, pointing to cases from the Sixth, Tenth, and Ninth Circuits that do not express any holding on conspiracy jurisdiction. *See* BIO.8-9. In *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430 (6th Cir. 2012), the Sixth Circuit found specific personal jurisdiction based on the "alter-ego theory of personal jurisdiction," *id.* at 450, not conspiracy. Similarly, in *Newsome v. Gallacher*, 722 F.3d 1257 (10th Cir. 2013), the Tenth Circuit concluded "*the individual defendants* … cultivated sufficient contacts with Oklahoma to justify suit there." *Id.* at 1262 (emphasis added). And the Ninth Circuit did not adopt a conspiracy theory of specific personal jurisdiction in *In re Western States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d 716 (9th Cir. 2013), *aff'd sub nom. Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015), finding instead plaintiffs established minimum contacts by alleging intentional acts by the defendants that were "directed at the forum state." *Id.* at 744 (citation omitted).

Respondents have no answer for the fact that even the courts that adopt a conspiracy theory cannot agree on a standard for its application. Instead, Respondents fatuously claim that these differing standards are just "different words to describe different cases." BIO.9. As a matter of law and logic there is an enormous difference between looking to the effects in a forum as some courts do, or a defendant's actual knowledge as other courts do, or what a defendant reasonably expected as still other courts do. *See* Pet.19-20. Put simply, words matter. Respondents thus offer nothing to quell the very real concern that under the current state of the law defendants' due process rights depend on the jurisdiction in which they are sued.

The split is thus beyond dispute. This Court's intervention is necessary.

II. The Second Circuit's Test Conflicts With This Court's Precedent In Many Ways.

Respondents do not dispute that due process requires that personal jurisdiction must be based on the defendant's own conduct or that predictability is required or that international comity must be considered, as Petitioners explained in their petition. *See* Pet.21-29. Nor could they. These are bedrock principles of due process, and conspiracy jurisdiction violates them all.

Unable to dispute that the minimum contacts must be a defendant's own, Respondents assert that a co-conspirator's contacts are the defendant's contacts. BIO.20. But the very question here is whether due process permits a court to impute an alleged co-conspirator's forum contacts to a defendant.

Respondents are thus just question begging. Of course, at the same time that they urge that a co-conspirator's contacts are the defendant's own, they take issue with Petitioners' very real concern that a defendant can be haled into court for the unknown conduct of an unknown co-conspirator, by asserting it would never happen because "the whole point of the inquiry is to determine whether *the defendant* has, through the conspiracy, purposefully availed itself of the forum." BIO.21 (emphasis added). In so doing, Respondents essentially concede that due process demands looking at a defendant's own conduct, not a co-conspirator's.

Respondents also try to confuse matters by blurring the distinction between principal-agent relationships and co-conspirator relationships, by referring to conspirators as agents of one another. *See* BIO.19-20. In a conspiracy, however, a conspirator may have some control, full control, or no control at all over a co-conspirator. A co-conspirator may even have no knowledge at all of a particular co-conspirator. *See Blumenthal v. United States*, 332 U.S. 539, 556-58 (1947). This stands in marked contrast with an actual principal-agent relationship. There, a principal controls or has the right to direct or control the agent. Pet.24. This critical difference is precisely what permits a foreign defendant to be subject to personal jurisdiction based on an unknown co-conspirator's unknown forum contacts. Respondents simply have no

answer for how that could be consistent with the Due Process Clause because it is not.[2]

Knowing that such a theory is unconstitutional, Respondents claim that the Second Circuit limited conspiracy jurisdiction's reach to when it is foreseeable to the defendant. *See* BIO.21-23. It did not. Petitioners argued below that they "could not have reasonably anticipated being haled into court in the United States" based on the alleged conspiracy. App.45. The Second Circuit dismissed that concern because it concluded that under circuit precedent the co-conspirator's contacts satisfied that requirement. *See* App.45-46. At bottom, conspiracy jurisdiction violates the Due Process Clause and contravenes this Court's precedent.

III. Conspiracy Jurisdiction Poses Important And Recurring Questions, And This Case Is An Excellent Vehicle To Address Them.

Far from being a rare issue, as Respondents weakly assert, BIO.13, the issue has been raised numerous times *in the Second Circuit alone* since that court adopted conspiracy jurisdiction, *see* Pet.31. Moreover, the significant real-world effects are indisputable. Conspiracy jurisdiction frequently arises in large, complex cases that cross borders and involve substantial amounts of claimed damages. *See* Pet.30. Indeed, Respondents do not even try to suggest otherwise. Nor do they have any answer for the lack of

[2] Respondents point to criminal cases in arguing that the decision below comports with due process. *See* BIO.20-21. This is just more of their same inability to grapple with the due process principles this Court has established for governing specific personal jurisdiction, and those criminal cases are of no moment.

predictability that conspiracy jurisdiction entails and the likely consequences resulting from that lack of predictability. All of these counsel in favor of granting the petition.

This case is an ideal vehicle. But for the Second Circuit's adoption of conspiracy theory of personal jurisdiction in *Charles Schwab Corp. v. Bank of America Corp.*, 883 F.3d 68 (2d Cir. 2018), the case against Petitioners would have been dismissed for lack of personal jurisdiction. The district court rejected the assertion of personal jurisdiction under both the purposeful availment and the effects tests. *See* App.110-17. Conspiracy jurisdiction is the only basis for personal jurisdiction present here.

Having failed to dispute much of what Petitioners establish in their petition, Respondents expend most of their energy urging the Court to deny the petition as a poor vehicle, because, according to them, the decision below was correct. BIO.18. It was not. As explained in the petition and in the discussion above, the Second Circuit's decision contravenes this Court's precedent. *See* Pet.21-29; *supra* 6-8.

Respondents' chief argument on this score is that *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), would have changed the outcome of this case and will eliminate the need for considering the constitutionality of conspiracy jurisdiction. As an initial matter, this claim is belied by the fact that the Second Circuit had the benefit of *Ford* when it decided the case below. Yet, the Second Circuit did not even mention *Ford*.

Undoubtedly, that is because *Ford* in no way helps Respondents. Ford Motor Company's minimum

contacts and purposeful availment were not even at issue in that case. Instead, the central issue in *Ford* was whether due process required a causal connection between the defendant's forum contacts and the plaintiff's suit. *See id.* at 1026. The Court said no. Ford "had systematically served a market in [the fora] for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States." *Id.* at 1028. Thus, the Court concluded that there was "a strong relationship among the defendant, the forum, and the litigation—the essential foundation of specific jurisdiction," and Ford was properly subject to personal jurisdiction. *Id.* 1028-29 (internal quotation marks and citation omitted). There is hardly such a relationship here.

Ford only bears on this case because *Ford* reiterated that the defendant's own contact with a forum is the gravamen of the specific personal jurisdiction analysis. *Ford* explained that the relevant contact still "must be the defendant's own choice and not 'random, isolated, or fortuitous.'" *Id.* at 1025 (quoting *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984)). Those contacts must be done "deliberately." *Id.* But as Petitioners previously explained, the Second Circuit requires no such thing. Pet.24.

Respondents resort to distorting the facts of this case. According to Respondents, this case involves a conspiracy aimed at U.S. markets, with palladium and platinum collusively traded in U.S. markets and that Petitioners "profited by trading in U.S. markets at the expense of U.S. traders." BIO.18. The district court, however, found that:

> Plaintiffs have not alleged that BASF Metals took any action that was expressly aimed at the United States. Plaintiffs argue that BASF Metals' "conduct was aimed directly *at* the U.S." because the conspiracy allegedly targeted NYMEX. But that characterization is inaccurate: BASF Metals' conduct allegedly targeted the Fix, which occurred in London.

App.116 (citation omitted). The district court reached the same conclusion with respect to ICBCS. *See* App.116-17. The panel below did not disturb those findings but found simply that because alleged communications in furtherance of the alleged conspiracy occurred in the United States, that sufficed to trigger conspiracy jurisdiction for everyone allegedly involved in the conspiracy, regardless of whether Petitioners had any control over those alleged co-conspirators. *See* App.47-49. Although Respondents try to run from it, this is a case about foreign companies, with no presence in the United States, alleged to have conspired to fix the prices of London-based auctions of palladium and platinum physically located in London or Zurich, in an attempt to manipulate price benchmarks for transactions worldwide, Pet.5-6, and whether the assertion of jurisdiction over them comports with due process.

Finally, there is no dispute that the issue is fully preserved. The limited number of parties diminishes the prospect of the need for recusals. Moreover, this case affords this Court the rare opportunity to intercede before Petitioners are subjected to the time and expense of a trial.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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