NO. ____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Before a court may exercise specific personal jurisdiction over an out-of-forum defendant, due process requires that at a minimum (i) the defendant of "[its] own choice" must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State" and (ii) the plaintiff's claim "'must arise out of or relate to the defendant's contacts' with the forum." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024-25 (2021) (citations omitted). Some courts, however, subject a defendant to specific jurisdiction whenever one of that defendant's alleged co-conspirators is subject to specific jurisdiction, even if that defendant's own conduct fails to meet those two requirements. The U.S. Court of Appeals for the Second Circuit applied such "conspiracy jurisdiction" here to subject Petitioners to specific jurisdiction. Accordingly, the question presented is:

Whether due process permits a court to exercise specific personal jurisdiction over a defendant based on the forum contacts of an alleged co-conspirator, even when the defendant did not direct, control, or supervise the activities of that alleged co-conspirator.

PARTIES TO THE PROCEEDING

Petitioners BASF Metals Limited and ICBC Standard Bank Plc were defendants in the district court and defendants-appellees-cross-appellants in the Second Circuit. Goldman Sachs International, HSBC Bank USA, N.A., The London Platinum and Palladium Fixing Company Ltd., and BASF Corporation were defendants in the district court and defendants-appellees in the Second Circuit. UBS AG and UBS Securities LLC were defendants in the district court and in the Second Circuit. Respondents KPFF Investment, Inc., White Oak Fund LP, individually and on behalf of all others similarly situated, and Larry Hollin were plaintiffs in the district court and plaintiffs-appellants-cross-appellees in the Second Circuit. Modern Settings LLC, a New York Limited Liability Company, Modern Settings LLC, a Florida Limited Liability Company, on behalf of themselves and all others similarly situated, Craig R. Cooksley, individually and on behalf of all those similarly situated, Norman Bailey, Thomas Galligher, and Ken Peters were plaintiffs in the district court and in the Second Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner BASF Metals Limited's parent company is BASF Catalysts UK Holdings Ltd. BASF Metals and BASF Catalysts UK Holdings Ltd. are indirect, wholly owned subsidiaries of BASF SE, a publicly held European Corporation (*Societas Europas*). No other publicly held corporation owns ten percent or more of BASF Metals.

Petitioner ICBC Standard Bank Plc discloses that it is majority owned by Industrial and Commercial Bank of China Limited, which is publicly listed on the Hong Kong Stock Exchange and the Shanghai Stock Exchange. Standard Bank Group Ltd., a publicly held corporation incorporated under the laws of the Republic of South Africa and listed on the Johannesburg Stock Exchange, owns the remaining shares of ICBC Standard Bank Plc's stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are related:

- *In re Platinum & Palladium Antitrust Litigation*, Nos. 20-1458, 20-1575, 20-1611 (2d Cir.) (opinion remanding for further proceedings issued Feb. 27, 2023; petition for rehearing en banc denied Apr. 12, 2023).
- *Susan Levy v. BASF Metals Limited, et al.*, No. 17-3823 (2d Cir.) (petition for rehearing en banc denied Apr. 22, 2019).
- *Susan Levy v. BASF Metals Limited, et al.*, No. 19-397 (U.S. Supreme Court) (petition for a writ of certiorari denied Nov. 18, 2019).
- *In re Platinum & Palladium Antitrust Litigation*, No. 1:14-cv-9391 (S.D.N.Y.) (final judgment entered Apr. 15, 2020). The following cases are grouped under this lead case number:
  - *White Oak Fund LP, on behalf of itself and all others similarly situated v. BASF Metals Limited, et al.*, No. 1:15-cv-00436 (S.D.N.Y.) (closed Mar. 20, 2015).
  - *Larry Hollin, on behalf of himself and all others similarly situated v. BASF Metals Limited, et al.*, No. 1:15-cv-01036 (S.D.N.Y.) (closed Mar. 20, 2015).
  - *Norman Bailey, et al. v. BASF Metals Limited, et al.*, No. 1:15-cv-01712 (S.D.N.Y.) (closed Mar. 20, 2015).
  - *Craig R. Cooksley, individually and on behalf of all those similarly situated v. BASF Metals Limited, et al.*, No. 1:15-cv-01817 (S.D.N.Y.) (closed Mar. 20, 2015).

- *Susan Levy v. BASF Metals Limited, et al.*, No. 1:15-cv-07317 (S.D.N.Y.) (final judgment entered Oct. 19, 2017).

There are no additional proceedings in any court that are directly related to this case within the meaning of this Court's Rule 14(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

The Court has long held that for a defendant to be subject to specific personal jurisdiction, the plaintiff's claims "must arise out of the 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)). The Court has thus "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between ... third parties ... and the forum State." *Id.*

Some courts, however, take a different approach, including the U.S. Court of Appeals for the Second Circuit. According to the Second Circuit, a defendant can be subject to specific jurisdiction in a forum where the defendant has no contacts at all. This is so because of a jurisdictional theory that this Court has never endorsed: conspiracy jurisdiction. Here, the Second Circuit concluded that Petitioners BASF Metals Limited ("BASF Metals") and ICBC Standard Bank Plc ("ICBCS")—both foreign companies—are subject to specific jurisdiction in the Southern District of New York not based on their own contacts but rather the contacts of their alleged co-conspirators. The question here is whether conspiracy jurisdiction comports with the fundamental requirements of due process.

Merely describing conspiracy jurisdiction, however, is enough to show that it cannot possibly be constitutional. As the district court recognized here, "conspiracy jurisdiction" is "extraordinarily broad" and allows courts to "exercise personal jurisdiction over a defendant based on the actions of a co-conspirator who is entirely unknown to that

defendant." App.124. And as the Second Circuit explained, conspiracy jurisdiction is not "limited by agency principles." App.47. Instead, it has "expanded beyond its more limited roots," and now exists even where the defendant has no control over the alleged co-conspirator. App.46. By allowing a court to find jurisdiction even where a defendant has no relevant forum contacts, these courts conceded that conspiracy jurisdiction may "violate[] the Due Process Clause and Supreme Court precedent," *id.*, including "the Supreme Court's holding in *Walden v. Fiore*," App.125. These words come from the courts that *upheld* conspiracy jurisdiction in this case. The Court can well guess what the many courts that *reject* conspiracy jurisdiction say about it. As the Second Circuit admitted, courts all over the country disagree about conspiracy jurisdiction's validity. App.49 n.10.

Moreover, the Second Circuit's newfound espousal of conspiracy jurisdiction is a sharp departure from its decades-long rejection of such jurisdiction. As Judge Friendly explained, "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), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). The Second Circuit has since rejected Judge Friendly's analysis as "dicta," *Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. plc* (*Schwab II*), 22 F.4th 103, 125 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2852 (2022), and replaced it with a theory "that the U.S. Supreme Court's 'decisions strongly suggest … is not enough' to 'meet due process requirements for personal

jurisdiction.'" App.49 n.10 (citation omitted). Indeed, by disregarding due process's focus on the defendant's conduct, conspiracy jurisdiction radically expands where a party can be forced to defend itself, nullifies the predictability that should characterize the law of personal jurisdiction, and threatens international comity.

Certiorari is thus warranted. The split here is deep, acknowledged, and entrenched, and the conflict between conspiracy jurisdiction and this Court's cases is apparent. The stakes are also enormous, yet this is an issue that regularly evades appellate review. Furthermore, this petition presents an ideal vehicle to resolve this important question: The issue is outcome determinative and was squarely presented to and addressed by both the district court and the Second Circuit. Moreover, when the Court considered separate petitions raising this issue last year, the Court denied both with the Chief Justice and Justices Kagan and Gorsuch taking no part in either decision. *See Lloyds Banking Grp. plc v. Berkshire Bank*, 143 S. Ct. 286 (2022); *Lloyds Banking Grp. plc v. Schwab Short-Term Bond Mkt. Fund*, 142 S. Ct. 2852 (2022). This case—which has many fewer parties—presumably would not raise the same recusal considerations. The Court therefore should grant the petition and at last address whether conspiracy jurisdiction satisfies due process.

OPINIONS BELOW

The Second Circuit's opinion, 61 F.4th 242, is reproduced at App.1-60. The district court issued two relevant decisions. The first—rejecting personal jurisdiction—is not published but is found at 2017 WL

1169626 and reproduced at App.142-289. The second, 449 F. Supp. 3d 290, found personal jurisdiction and is reproduced at App.61-141.

JURISDICTION

The Second Circuit issued its decision on February 27, 2023, App.1, and denied a timely rehearing petition on April 12, 2023, App.290-91. On July 6, 2023, Justice Sotomayor extended the filing of this petition until September 11, 2023. The Court thus has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part that "[n]o person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Fourteenth Amendment provides in relevant part that no "State [shall] deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

Petitioners BASF Metals Limited ("BASF Metals") and ICBC Standard Bank Plc ("ICBCS") are both companies organized under the laws of England and Wales. The claims at issue in this litigation do not arise out of or relate to any of their contacts with the United States. The Second Circuit nonetheless held that they are subject to specific personal jurisdiction in the United States based not on their own contacts, but on those of their alleged co-conspirators. The Second Circuit's application of conspiracy jurisdiction exacerbates an acknowledged and entrenched circuit

split and, more significantly, violates constitutional due process.

1. "Since the 1970s, London has been the center for physical platinum and palladium trading." App.149. Because many sales of platinum and palladium occur in direct "over-the-counter" transactions, the market price for these metals can be "opaque." App.148. In 1989, in order to increase market transparency, some market participants designed a recurring auction process to identify market prices in London for physical platinum and palladium at various points in time.

Between 2004 and 2014, these auctions were administered by the London Platinum and Palladium Fixing Company (LPPFC). App.63. BASF Metals and ICBCS were both members of the LPPFC during this period (as were defendants Goldman Sachs International and HSBC Bank USA, N.A.,) and had London-based employees participate in these auctions. *Id.* Neither has (nor had) a presence in the United States. App.111, 117. Auctions occurred by conference call twice each business day in London. App.63. In these auctions, the chair would announce an opening price and LPPFC members would indicate whether they were interested in buying or selling at that price. *Id.* The chair would then increase or decrease the price to home in on a price at which members bought and sold equally, and the LPPFC members were required to execute the purchases or sales they had bid during the auction. App.151.

In 2014, LPPFC transferred responsibility for the auctions to the London Metal Exchange, which

instituted "a fully automated price-discovery process." App.152.

2. Respondents are various U.S. investors in these metals and related derivatives. In 2014, several groups of plaintiffs, including Respondents, filed multiple putative class action complaints in the Southern District of New York against Petitioners and other alleged participants in an alleged conspiracy alleging violations of the Sherman Act and the Commodities Exchange Act (CEA). App.10-11. The Southern District of New York consolidated these actions in March 2015 and Respondents thereafter filed an amended complaint in April 2015. The claims alleged that BASF Metals and ICBCS were part of a conspiracy with other participants in these London-based auctions to fix the prices of physical platinum and palladium located in London or Zurich, Switzerland, in an attempt to manipulate "benchmarks" for transactions worldwide, including in the United States. App.63.

All of the defendants, including Petitioners, moved to dismiss those claims under Federal Rule of Civil Procedure 12(b)(6). Petitioners also moved to dismiss for lack of personal jurisdiction. The plaintiffs conceded that Petitioners are not subject to general jurisdiction in the United States but argued that they were subject to specific jurisdiction. App.107-08.

In March 2017, the district court (Judge Gregory Woods) concluded that the plaintiffs did not present a *prima facie* case that Petitioners are subject to personal jurisdiction in the United States. Quoting *Walden*, the court explained that specific jurisdiction requires that the claim "arise out of contacts that the

'defendant *himself*' creates with the forum," App.256 (quoting 571 U.S. at 284), yet neither Petitioner created any relevant contacts with the U.S., nor did they "aim" any conduct at the U.S., App.257. Indeed, plaintiffs did not allege that Petitioners engaged in any conduct "relevant to the alleged price manipulation" in the United States. App.276. The court also disagreed that conspiracy jurisdiction provided a basis to subject Petitioners to jurisdiction, explaining that courts are "increasingly reluctant" to recognize such a theory. App.275.

As part of that order, the district court further concluded that the Sherman Act claims must be dismissed for lack of antitrust standing but that some CEA claims could go forward. App.147. The plaintiffs were given leave to amend their complaint.

3. After the plaintiffs amended their complaint, the defendants again moved to dismiss under Rule 12(b)(6). Petitioners also again moved to dismiss for lack of personal jurisdiction. While those motions were pending, however, the Second Circuit adopted conspiracy jurisdiction in *Charles Schwab Corp. v. Bank of America Corp.* (*Schwab I*), 883 F.3d 68, 86-88 (2d Cir. 2018). Specifically, the Second Circuit concluded that specific jurisdiction exists so long as a plaintiff *alleges* 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.* at 86-87 (citing *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013)).

Schwab I changed the course of this litigation. Although again concluding that neither Petitioner is subject to specific jurisdiction under this Court's tests, *see* App.110-17 (rejecting jurisdiction under both "purposeful availment" and "the effects test"), the district court concluded that Petitioners *are* subject to suit in the U.S. under the Second Circuit's test for conspiracy jurisdiction. App.118. The court reasoned that plaintiff plausibly alleged that Petitioners participated in a London-based conspiracy and that alleged U.S. co-conspirators—specifically, employees of allegedly affiliated U.S. companies—satisfied conspiracy jurisdiction's "overt acts" requirement. App.118-24. The court further concluded that because minimum contacts exist via conspiracy jurisdiction, Petitioners would have to make "a compelling case" that comity concerns counseled against jurisdiction. App.127 (applying the "compelling case" requirement from *Burger King*, 471 U.S. at 477).

Despite denying Petitioners' motions to dismiss based on lack of personal jurisdiction, the district court expressed concerns with conspiracy jurisdiction, which it characterized as "extraordinarily broad." App.124. The court pointed out the "tension" between conspiracy jurisdiction and "the Supreme Court's holding in *Walden*" that specific jurisdiction must "arise out of the contacts that the 'defendant *himself*' creates with the forum." App.125. The court also worried that conspiracy jurisdiction could subject foreign defendants to jurisdiction "based on the actions of a co-conspirator who is entirely unknown to that defendant." App.124. Yet the court ultimately concluded that "any doubts about the continued

viability of conspiracy jurisdiction in the Second Circuit were resolved by *Schwab*." App.126.

In the same decision, the district court dismissed all of the plaintiffs' claims on the merits under Rule 12(b)(6). The court explained that the plaintiffs continue to lack antitrust standing and that, given intervening Second Circuit precedent, their CEA claims were improperly extraterritorial. App.62. Rather than file another amended complaint, the plaintiffs asked for entry of final judgment, which the district court did on April 15, 2020. App.16.

4. Most plaintiffs did not appeal. Respondents, however, did, and Petitioners cross-appealed the denial of their motions to dismiss for lack of personal jurisdiction. Petitioners argued that conspiracy jurisdiction "violates the Due Process Clause and Supreme Court precedent." App.46. They also emphasized that at a bare minimum, conspiracy jurisdiction would require an agency relationship, yet Respondents had not alleged such a relationship.

During the pendency of the appeal and cross-appeal, the Second Circuit decided *Schwab II*. The Second Circuit there held that no agency relationship is required because conspiracy jurisdiction "does not require a relationship of control, direction, or supervision." *Schwab II*, 22 F.4th at 125.

5. Relying on conspiracy jurisdiction, the Second Circuit affirmed the denial of Petitioners' motion to dismiss for lack of personal jurisdiction in an opinion written by Judge Steven Menashi. App.5-6. In light of *Schwab II*, the panel concluded that alleged communications during the auctions by alleged U.S. co-conspirators were sufficient to trigger conspiracy

jurisdiction for everyone allegedly involved in the conspiracy, including Petitioners, whether or not those alleged co-conspirators were under Petitioners' control. App.47-49.

The Second Circuit acknowledged that conspiracy jurisdiction is controversial and may suffer from multiple flaws. The panel explained, for example, that in the wake of *Schwab II*, "[c]onspiracy jurisdiction seems to have expanded beyond its more limited roots." App.46. The panel also agreed that "[t]here may be grounds for" Petitioners' objections that conspiracy jurisdiction violates this Court's precedent, *id.*, and "acknowledge[d] the debate" among courts with respect to conspiracy jurisdiction. App.49. The panel also observed that conspiracy jurisdiction does not appear to "give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." App.48 (quoting *World-Wide Volkswagen Corp. v. Woodso*n, 444 U.S. 286, 297 (1980)). Despite these misgivings, however, the panel concluded that its hands were tied by *Schwab II*. App.49. After finding conspiracy jurisdiction, the panel further concluded that although subjecting foreign defendants to suit in the U.S. may have comity implications, such "international rapport concerns … do not apply equally in a case, such as this one, that involves specific jurisdiction." App.52.

Separately, the Second Circuit reversed the district court's dismissal of the antitrust claims for lack of antitrust standing and vacated its dismissal of the CEA claims because Respondents sufficiently

pleaded domestic conduct such that the claims were not extraterritorial. App.39. Those claims thus are now again in the district court for discovery and motions practice following the Second Circuit's denial of a petition for rehearing en banc. App.290-91.

REASONS FOR GRANTING THE PETITION

Conspiracy jurisdiction cannot be squared with this Court's repeated and emphatic holdings that specific jurisdiction's required "relationship" between the defendant and the plaintiff's claims "must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden*, 571 U.S. at 284 (quoting *Burger King*, 471 U.S. at 475). As the Court explained just two years ago in *Ford*, before an out-of-forum defendant may be subjected to specific jurisdiction, at a minimum the defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State" and the plaintiff's claim "'must arise out of or relate to the defendant's contacts' with the forum." 141 S. Ct. at 1024-25 (citations omitted). Yet here, the Second Circuit found personal jurisdiction over foreign defendants with no relevant contact with the forum based on the forum contacts of others over whom defendants exercised no control.

In so holding, the Second Circuit exacerbated an acknowledged and deep split among federal courts of appeals and state supreme courts. In addition, the Second Circuit's decision cannot be reconciled with this Court's precedent in at least three respects: Conspiracy jurisdiction (i) permits specific jurisdiction based on an alleged co-conspirator's forum conduct, rather than a defendant's own forum conduct; (ii)

makes it impossible for any defendant to predict where it will be subjected to suit; and (iii) disrespects international comity. Even the courts that *upheld* conspiracy jurisdiction in this very case characterize it as "extraordinarily broad," "in tension with the Supreme Court's holding in *Walden*," and perhaps even a "violat[ion]" of "the Due Process Clause and Supreme Court precedent interpreting it." The Court's review is necessary to ensure that the nation's courts apply due process consistently and to correct the Second Circuit's constitutional errors.

The Court should also grant review because whether conspiracy jurisdiction satisfies due process is an important and recurring question, especially given that a large volume of the nation's most significant commercial litigation is filed in the Second Circuit.

This petition, moreover, is an ideal vehicle to address conspiracy jurisdiction. Both the district court and the Second Circuit addressed the question at length following full briefing from the parties. The issue is outcome determinative because conspiracy jurisdiction is the only basis for jurisdiction here. And given the limited number of parties, the petition should not present significant recusal risk. The Court thus should grant the petition and resolve whether conspiracy jurisdiction satisfies due process.

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

Conspiracy jurisdiction is the subject of a deep and acknowledged split involving many federal courts of appeals and state supreme courts. *See, e.g.*, Naomi Price & Jason Jarvis, *Conspiracy Jurisdiction*, 76 Stan.

L. Rev. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4509627 (explaining that conspiracy jurisdiction is the subject of a "long-entrenched circuit split"); Peter Spero, *Conspiracy as a Basis of Obtaining Personal Jurisdiction, Fraudulent Transfers, Prebankruptcy Planning and Exemptions* §18:19.50 (2020) (documenting "division of authority relative to whether a conspiracy can subject a nonresident to personal jurisdiction"). Notably, here, the Second Circuit itself "acknowledge[d] the debate" over whether conspiracy jurisdiction is constitutional. App.46. Only this Court can ensure that due process is uniformly applied.

A. Numerous Courts Reject Conspiracy Jurisdiction.

The Second Circuit recognized that conspiracy jurisdiction is controversial because it disregards the central focus of specific jurisdiction: The defendant's *own* contacts with the forum. App.42. Despite its misgivings, however, the panel felt bound by circuit precedent to uphold conspiracy jurisdiction here. In proceeding down this flawed path, the Second Circuit has again placed itself on the opposite side of those courts that correctly reject conspiracy jurisdiction. That split is both deep and substantial.

1. In *Davis v. A & J Electronics*, the Seventh Circuit rejected that there exists an "independent federal 'civil co-conspirator' theory of personal jurisdiction." 792 F.2d 74, 75-76 (7th Cir. 1986). There the defendant, A & J Electronics, was a California corporation with its principal place of business in California. *Id.* at 75. Plaintiffs "did not allege or offer any evidence" that the defendant "conducted any

business in" the forum state of Wisconsin. *Id.* The only connection plaintiffs claimed A & J Electronics had with Wisconsin was its leasing of space in California to one of the other defendants, which purportedly allowed that defendant to "bolster[]" its "apparent commercial soundness … in a false and misleading fashion" in Wisconsin. *Id.* Since then, the Seventh Circuit has dismissed the theory of conspiracy jurisdiction as "marginal at best." *Smith v. Jefferson Cnty. Bd. of Educ.*, 378 F. App'x 582, 586 (7th Cir. 2010).

This particular split is especially important because the Seventh Circuit is home to the Chicago Mercantile Exchange, the largest futures exchange in the world. The Second Circuit, of course, is home to many important financial and commodities markets. Especially given conspiracy jurisdiction's disproportionate application to foreign defendants, *see, e.g.*, Price & Jarvis, *supra* ("Plaintiffs are especially incentivized to pursue conspiracy jurisdiction in cases involving foreign defendants."), it is untenable for the two largest U.S. exchanges to be governed by different jurisdictional rules.

Not only has the Second Circuit set itself against the Seventh Circuit, but it has also put itself in direct conflict with the Fifth Circuit, the Texas Supreme Court, and the Supreme Court of Nebraska. The Fifth Circuit has held that "[t]o establish its prima facie case of specific personal jurisdiction," a plaintiff must "demonstrate that [the defendant] individually, and not as part of the conspiracy, had minimum contacts with Texas." *Delta Brands Inc. v. Danieli Corp.*, 99 F. App'x 1, 6 (5th Cir. 2004). And in *Guidry v. United*

States Tobacco Co., 188 F.3d 619 (5th Cir. 1999), the Fifth Circuit faulted 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.

The Texas Supreme Court agrees. In *National Industry Sand Association v. Gibson*, 897 S.W.2d 769 (Tex. 1995), that court declined "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." *Id.* at 773. Consistent with this Court's focus on the defendant's own contacts, the court reasoned that "[c]onspiracy as an independent basis for jurisdiction" distracts "from the ultimate due process inquiry: whether the out-of-state defendant's contact with the forum was such that it should reasonably anticipate being haled into a court in the forum state." *Id.* It therefore concluded that personal jurisdiction did not exist even though the defendant had allegedly conspired with a Texas corporation and allegedly harmed Texas residents. *Id.* at 776. The rule in Texas is thus straightforward: "[A] nonresident's alleged conspiracy with a Texas resident does not confer personal jurisdiction over the nonresident in Texas." *M & F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co.*, 512 S.W.3d 878, 887 (Tex. 2017).

In *Ashby v. State*, 779 N.W.2d 343 (Neb. 2010), the Supreme Court of Nebraska also rejected conspiracy jurisdiction. The court explained that it would "offend notions of fair play and substantial justice, and would violate due process" to subject an out-of-forum

defendant to jurisdiction when the defendant did not itself engage in any in-forum conduct. *Id.* at 361. Furthermore, the court recognized another significant flaw: Permitting personal jurisdiction on this theory would improperly "merge[] the jurisdiction issue with the merits of the case." *Id.*

2. Many courts that have not had occasion to outright reject conspiracy jurisdiction have nonetheless criticized it. *See, e.g.*, *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 because "the Court [has] directed that '[e]ach defendant's contacts with the forum State must be assessed individually'" (quoting *Calder v. Jones*, 465 U.S. 783, 790 (1984)); *Green v. Advance Ross Elecs. Corp.*, 427 N.E.2d 1203, 1208 (Ill. 1981) (declining to accept conspiracy jurisdiction without an agency relationship); *see also Knaus v. Guidry*, 906 N.E.2d 644, 660 (Ill. App. Ct. 2009) ("Many courts and commentators have criticized the doctrine as an imprecise and sometimes inaccurate test for determining jurisdiction.").

Such criticism has become even more pointed after *Walden*'s holding that "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction" because "[d]ue process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous,

or attenuated' contacts he makes by interacting with other persons affiliated with the state." 571 U.S. at 286 (quoting *Burger King*, 471 U.S. at 475). For example, the Southern District of Indiana has concluded that after *Walden*, "courts are moving away from the theory" and "Indiana courts have never found that the conspiracy theory of jurisdiction exists in Indiana, nor would they likely find that such basis for jurisdiction exists in Indiana." *Martin v. Eide Bailly LLP*, 2016 WL 4496570, at *4 (S.D. Ind. Aug. 26, 2016); *see also id.* at *3 ("Many courts that have considered the viability of vicarious conspiracy jurisdiction post-*Walden* have rejected it …."). In fact, the lower courts in this case openly wondered whether conspiracy jurisdiction could be reconciled with *Walden*.

Furthermore, many trial courts have cast doubt on conspiracy jurisdiction. *See, e.g.*, *Rickman v. BMW of N. Am. LLC*, 538 F. Supp. 3d 429, 440 (D.N.J. 2021) ("[F]ederal due process does not square with the conspiracy-jurisdiction theory."); *In re Auto. Parts Antitrust Litig.*, 2015 WL 4508938, at *4 (E.D. Mich. July 24, 2015) ("The Court has no basis for imputing the actions of one defendant to another in analyzing jurisdiction in the absence of an explicit directive by the Sixth Circuit to do so."); *Prakash v. Altadis U.S.A. Inc.*, 2012 WL 1109918, at *18 (N.D. Ohio Mar. 30, 2012) ("Since personal jurisdiction must be based on the actions and contacts of the specific defendant at issue, the Court declines to apply the so called 'conspiracy theory of jurisdiction' …." (citation omitted)); *In re Lernout & Hauspie Sec. Litig.*, 2004 WL 1490435, at *8 (D. Mass. June 28, 2004) ("Even assuming that the conspiracy theory of jurisdiction is

cognizable in this Circuit, which as this Court stated … is highly questionable, the plaintiffs here have a very high hurdle to clear ….” (footnote omitted)); *Steinke v. Safeco Ins. Co. of Am.*, 270 F. Supp. 2d 1196, 1200 (D. Mont. 2003) (“This Court has never recognized the conspiracy theory of jurisdiction, nor has the Ninth Circuit, nor has the Montana Supreme Court.”); *Insolia v. Philip Morris Inc.,* 31 F. Supp. 2d 660, 672 (W.D. Wis. 1998) (“Wisconsin courts have not recognized a theory of specific jurisdiction based on allegations that a nonresident is part of a conspiracy.”); *see also Mansour v. Superior Ct.*, 46 Cal. Rptr. 2d 191, 197 (Ct. App. 1995) (“California does not recognize conspiracy as a basis for acquiring personal jurisdiction over a party.”).

B. Other Courts Accept Conspiracy Jurisdiction But Disagree About What It Requires.

Although some courts have rejected conspiracy jurisdiction, other courts have adopted it. Even courts that recognize conspiracy jurisdiction, however, fundamentally disagree about what it requires.

1. In adopting conspiracy jurisdiction, the Second Circuit followed the Fourth Circuit. *See Schwab I*, 883 F.3d at 87 (concluding that the Fourth Circuit “sets forth the appropriate test for alleging a conspiracy theory of jurisdiction” (citing *Unspam Techs.*, 716 F.3d at 329). In both courts, defendants can be subjected to personal jurisdiction “through the actions of their alleged coconspirators.” *Unspam Techs.*, 716 F.3d at 329.

Numerous state supreme courts agree. *See Tricarichi v. Coop. Rabobank, U.A.*, 440 P.3d 645, 653-

54 (Nev. 2019); *Raser Techs., Inc. ex rel. Hous. Phoenix Grp., LLC v. Morgan Stanley & Co.*, 449 P.3d. 150, 169-70 (Utah 2019); *Ex parte Maint. Grp., Inc.*, 261 So. 3d 337, 347 (Ala. 2017); *First Cmty. Bank, N.A. v. First Tenn. Bank, N.A.*, 489 S.W.3d 369, 394-95 (Tenn. 2015); *Stubblefield v. Stubblefield*, 769 S.E.2d 78, 82 n.4 (Ga. 2015); *Gibbs v. PrimeLending*, 381 S.W.3d 829, 834 (Ark. 2011); *Mackey v. Compass Mktg., Inc.*, 892 A.2d 479 (Md. 2006); *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 585 (Fla. 2000); *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796, 798-99 (S.C. 1990); *Istituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982); *Hunt v. Nevada State Bank*, 172 N.W.2d 292, 312-13 (Minn. 1969).

The split of authorities regarding conspiracy jurisdiction is thus apparent and, indeed, cavernous.

2. Even courts that adopt conspiracy jurisdiction disagree about what it requires. In Minnesota, for example, the inquiry is whether there is a conspiracy with *effects* in the forum. *See Hunt*, 172 N.W.2d at 311 ("Once participation in a tortious conspiracy—the effect of which is felt in this state—is sufficiently established, actual physical presence of each of the alleged conspirators is not essential to a valid assertion of jurisdiction."). By contrast, other jurisdictions examine the *knowledge* of the defendant. *See Gibbs*, 381 S.W.3d at 834 (participating in conspiracy "with knowledge of its acts or effects in the forum state" permits personal jurisdiction (citation omitted)). And other courts still seemingly combine these tests while adding a reasonableness overlay, asking whether "the co-conspirators reasonably

expected at the time of entering into the conspiracy that their actions would have consequences in" the forum. *Tricarichi*, 440 P.3d at 653 (emphasis omitted); *see Mackey*, 892 A.2d at 489 (same).

The nature of the required contact with the forum also varies. The Utah Supreme Court, for example, asks whether the defendant could have "reasonably anticipated that her co-conspirator's actions would connect the conspiracy to the forum state in a *meaningful* way." *Raser*, 449 P.3d at 170 (emphasis added). Alabama, by contrast, requires the overt act or acts to "amount to a constitutionally sufficient contact with Alabama," *Ex parte Maint. Grp.*, 261 So. 3d at 348—a circular standard if there ever was one. The Tennessee Supreme Court, for its part, requires that the "acts are of a type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statue of the forum state." *First Cmty. Bank, N.A.*, 489 S.W.3d at 394; *Mackey*, 892 A.2d at 489 (requiring same).

3. The Court's clear admonition in *Walden* that courts must assess the "contacts that the 'defendant *himself*' creates with the forum," 571 U.S. at 284, has not rectified this chaos. To the contrary, both the Utah Supreme Court and the Nevada Supreme Court shunted aside this instruction in adopting their tests for conspiracy jurisdiction. *See Raser*, 449 P.3d at 166-67; *Tricarichi*, 440 P.3d at 653. Furthermore, the Second Circuit also adopted conspiracy jurisdiction after *Walden*, and refuses to reverse course notwithstanding the Court's emphasis that a defendant must have deliberately created forum contacts. And given the Second Circuit's well-known

reluctance to reconsider circuit precedent en banc, there is no reason to think that it will ever budge. In short, a defendant's due process rights now depend on the forum in which the plaintiff elects to file suit.

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

Not only does the Second Circuit's decision implicate an acknowledged circuit split, but it also conflicts with this Court's cases in numerous respects. Indeed, the decision (i) disregards this Court's oft-repeated rule that personal jurisdiction must be based on the defendant's own forum contacts; (ii) destroys the predictability for defendants that this Court has held should be the hallmark of personal jurisdiction; and (iii) threatens international comity. On their own, each of these conflicts warrant this Court's review; combined, there can be no doubt.

A. The Second Circuit's Test Is Not Based On The Defendant's Forum Contacts.

As the Second Circuit acknowledged below, "[t]here may be grounds" to conclude that conspiracy jurisdiction "violates the Due Process Clause and Supreme Court precedent interpreting it." App.46. Conspiracy jurisdiction 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." *Id.* The Court's cases do not allow a court to assert personal jurisdiction over a defendant based on someone else's contacts.

1. Ever since *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Court has recognized that forums may subject an out-of-forum defendant to personal jurisdiction. Yet for just as long,

the Court has stressed that such authority must be cabined to protect the due process rights of defendants. The Court therefore has held that absent consent, a forum may only assert jurisdiction over an out-of-forum defendant where "the defendant has 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Goodyear Dunlop Tires Operations, SA v. Brown*, 564 U.S. 915, 923 (2011) (quoting *Int'l Shoe*, 326 U.S. at 316). General jurisdiction requires a defendant to have contacts with the forum that "are so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State." *Id.* at 919. Specific jurisdiction is narrower; it only exists where the plaintiff's claims "'arise out of or relate to the defendant's contacts' with the forum." *Ford*, 141 S. Ct. at 1025 (citation omitted). Both, however, share at least one thing in common: They are based on the defendant's voluntary decision to create contacts with the forum.

The Court thus has outright said that the "unilateral activity of … a third person is not an appropriate consideration" for jurisdictional purposes. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Instead, "[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) (citing *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)). This is so, the Court has emphasized, because "[t]he primary focus of [the] personal jurisdiction inquiry is the defendant's relationship to the forum State." *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. 255, 262 (2017). Thus, for there to

be specific jurisdiction, the plaintiff's claims "must arise out of the contacts that the 'defendant *himself*' creates with the forum State." *Walden*, 571 U.S. at 284 (quoting *Burger King*, 471 U.S. at 475). As this Court explained in *Ford*, its most recent specific-jurisdiction case, the defendant "must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.'" *Ford*, 141 S. Ct. at 1024-25 (alteration in original) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

Given the requirement that personal jurisdiction depends on a defendant's voluntary contacts with a forum, the 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 (citing *Helicopteros*, 466 U.S. at 417). In *Walden*, for example, the Court reversed a lower court for disregarding the "[d]ue process" requirement that a defendant can only "be haled into court in a forum State based on his own affiliation with the State," and not "contacts he makes by interacting with other persons affiliated with the State." *Id.* at 286. The Court reiterated that holding in *Bristol-Myers Squibb*, where it again reversed a court that disregarded the rule that "for a state court to exercise specific jurisdiction, 'the *suit*' must 'aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'" 582 U.S. at 262 (alterations in original) (citation omitted). And most recently, *Ford* explains that although specific jurisdiction can exist even where a suit "relates to" a defendant's contact with a forum rather than arising directly out of that contact, the relevant contact still "must be the defendant's own choice and not 'random,

isolated, or fortuitous.'" 141 S. Ct. at 1025 (quoting *Keeton*, 465 U.S. at 774).

2. Here, the district court recognized that the Second Circuit's test for conspiracy jurisdiction "may be in tension with the Supreme Court's holding in *Walden v. Fiore*." App.125. And on appeal, the Second Circuit acknowledged that "[t]here may be grounds" for that conclusion. App.46.

The Second Circuit's acknowledgement was an understatement: The Second Circuit's test does not remotely satisfy this Court's requirement that the defendant itself must have "deliberately," *Ford*, 141 S. Ct. at 1025, engaged in contacts in the forum. Instead, under conspiracy jurisdiction, it is enough for a plaintiff merely to allege that the defendant participated in a conspiracy and that a co-conspirator would be subject to specific jurisdiction in the forum. *See Schwab II*, 22 F.4th at 122-25. The plaintiff does not even need to allege that the defendant "directed, controlled, and/or supervised the co-conspirator who carried out the overt acts in the forum." *Id.* at 124.

The Second Circuit's "extraordinarily broad" theory, App.46, thus cannot be reconciled with this Court's cases. In this Court, the only way to impute someone else's contacts to a defendant would be through an agency relationship. *See, e.g.*, *Int'l Shoe*, 326 U.S. at 323. That limited exception makes sense because where an agency relationship exists, the agent's forum contacts *are* the defendant's. An agency relationship only exists where the principal "control[s] (or [has] the right to direct or control)" the agent. *Meyer v. Holley*, 537 U.S. 280, 286 (2003); *see also* Restatement (Third) of Agency §1.01 (2006) (agency

requires "that the agent shall act on the principal's behalf and subject to the principal's control"). Where no agency relationship exists, however, Judge Friendly rightly recognized that "the mere presence of one conspirator" in the forum does not "confer personal jurisdiction over another alleged conspirator." *Leasco*, 468 F.2d at 1343.

The Second Circuit now rejects Judge Friendly's views as "dicta" and holds that conspiracy jurisdiction does not require an agency relationship. *Schwab II*, 22 F.4th at 125. The conflict between the Second Circuit and this Court is thus plain. Indeed, "[a]utomatic attribution of contacts" whenever a plaintiff alleges a conspiracy "avoids consideration of the individual defendant's contact with the forum state—the very essence of jurisdiction." Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234, 253 (1983).

B. The Second Circuit's Test Is Unpredictable.

The Second Circuit's test also conflicts with the principle that personal jurisdiction rules should "give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297; *cf. Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (explaining "virtue" of "easily ascertainable" jurisdictional rules). Unpredictable jurisdictional rules also harm the public by discouraging investment, complicating a plaintiff's choice about

where to sue, and bogging courts down with collateral disputes rather than merits questions. *Cf. Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

The Second Circuit's test is anything but predictable. Not only does a defendant not need to have "any connection with co-conspirator acts in the forum state" to be subjected to personal jurisdiction there, *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), but conspiracy jurisdiction allows suit "based on the actions of a co-conspirator who is entirely unknown to that defendant," App.46. No business can structure its affairs with any degree of confidence if jurisdiction can be based on the conduct of an *unknown* alleged co-conspirator who has forum contacts the defendant knows *nothing* about.

Judge Woods expressed concern with the "extraordinarily broad" implications of this unpredictable and unknown dynamic and included the following hypothetical in his opinion:

> Imagine that, hoping to earn profits by trading abroad, Bank A conspired to manipulate the Fix price in London with Bank B. Imagine also that, entirely unbeknownst to Bank A, Bank B received information about platinum trading from a United States branch of Bank C. Under the *Schwab* standard, a United States court may have personal jurisdiction over Bank A based on the transmission of information from Bank C to Bank B—even though Bank A is not alleged to have had any control over, or

> even to have known about, Bank C's communication.

App.124.

Recognizing the perversity of "blindsid[ing] a defendant with an alleged "co-conspirator's contacts with the forum," the Second Circuit has suggested that perhaps such contacts sometimes can be disregarded as not "foreseeable" to the defendant. *Schwab II*, 22 F.4th at 125. Even setting aside that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause," *World-Wide Volkswagen*, 444 U.S. at 295, that nod to foreseeability encourages even more uncertainty because the standard for foreseeability is itself unclear. Regardless, it is hard to see how a meaningful foreseeability test can co-exist when a defendant may be subjected to jurisdiction based on the alleged acts of an unknown alleged co-conspirator.

Once more, the Second Circuit acknowledged this danger. *See* App.48 (observing that conspiracy jurisdiction may conflict with *World-Wide Volkswagen*'s "predictability" rule). It nonetheless concluded that circuit precedent compelled affirmance. *Id.* But it turns due process on its head to force defendants to submit to jurisdiction based on such an unpredictable, clear-as-mud standard.

C. The Second Circuit's Test Threatens International Comity.

Finally, the Second Circuit's test also conflicts with this Court's rule that personal jurisdiction should respect "international comity." *Daimler*, 571 U.S. at 141. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the

international field." *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 115 (1987) (citation omitted). Indeed, "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 114. Although respect for international comity may be vindicated through *International Shoe*'s fairness factors, *see id.* at 113, "[c]onsiderations of international rapport" should also play a role in evaluating the threshold minimum contacts inquiry, *Daimler*, 571 U.S. at 142.

Once more, the Second Circuit's test conflicts with this Court's cases. In an age where multinational companies compete against each other across the globe, plaintiffs can allege conspiracy-related activity in almost any forum on earth. Yet "[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case." *Id* at 141. Allowing a plaintiff to hale a foreign defendant into a U.S. court based on a theory as limitless as the Second Circuit's threatens comity by allowing U.S. courts to assert authority over essentially any company anywhere so long as a plaintiff can plausibly allege some conspiracy with some connection to U.S. markets. Foreign companies therefore may reasonably do all they can to avoid being caught in this trap, including refusing to do business with American companies.

This case illustrates the danger. Petitioners are not U.S. entities. And as the district court recognized, neither has engaged in any relevant in-forum conduct.

See App.110-17. Nonetheless, the Second Circuit held that Petitioners must make a "*compelling* case" that comity concerns "would render jurisdiction unreasonable" because such concerns apply with less force in cases of specific jurisdiction. App.50 (emphasis added) (citation omitted); *see also id.* at 52 (because of conspiracy jurisdiction, "[t]his case is not 'the "exceptional situation" where exercise of jurisdiction is unreasonable even though minimum contacts are present'" (citation omitted)). Yet conspiracy jurisdiction's capacious and unpredictable scope—a far cry from the exercises of specific jurisdiction that this Court recognizes—threatens international rapport even more than general jurisdiction does. General jurisdiction, after all, at least requires deliberate contacts with a forum.

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

Finally, the Court should grant review because conspiracy jurisdiction poses significant and recurring constitutional questions.

Although this Court has repeatedly held that there can be no personal jurisdiction where, as here, a defendant has not created any contacts with the forum, the Second Circuit is correct that the Court has never explicitly addressed when, if ever, "one conspirator's minimum contacts allow for personal jurisdiction over a co-conspirator." *Schwab I*, 883 F.3d at 86. This case is an ideal vehicle for the Court to at last resolve this important question of federal law.

1. To begin, the question presented here merits review because the Second Circuit's analysis is utterly

divorced from bedrock due process principles. If that divorce is permitted to persist, plaintiffs can rope in defendants without any relevant connection to a forum—as, indeed, happened here. Moreover, to combat such broad assertions of personal jurisdiction, defendants will be forced to litigate the merits of a suit—namely, whether a conspiracy exists—at the outset of the case, improperly merging substantive and procedural law. This Court, not the Second Circuit, should decide whether to expand personal jurisdiction well beyond recognizable limits.

This question is especially important because it also has significant real-world effects. The types of cases where conspiracy jurisdiction is invoked tend to be among the most financially important in the entire judicial system. Respondents here, for example, seek significant antitrust damages for many years of auctions—and that's *before* trebling. For their part, the *Schwab* and *Berkshire Bank* cases concerned the LIBOR multidistrict litigation, with class actions addressing transactions worth "trillions" of dollars. *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 767, 779 (2d Cir. 2016). Cases where plaintiffs allege conspiracies disproportionately involve more parties than run-of-the-mill cases and greater amounts in controversy. Conspiracy-jurisdiction cases also are regularly international in scope, raising comity concerns.

Furthermore, whether personal jurisdiction exists often will be the most important question that a court will decide. Massive discovery costs combined with the threat of treble damages—unique features of U.S. antitrust law—may push defendants "to settle even

anemic cases." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (discovery may give "a plaintiff with a largely groundless claim" an "in terrorem" tool to drive up "settlement value"). And even if a defendant stands its ground and refuses to settle, litigating a case to final judgment in the wrong court *by itself* offends due process, which "protects the defendant against the *burdens of litigating* in a distant or inconvenient forum." *World-Wide Volkswagen*, 444 U.S. at 291-92 (emphasis added).

The number of cases to which conspiracy jurisdiction is applied is growing. Since the Second Circuit—home to the lion's share of the nation's high-stakes commercial litigation—decided *Schwab I*, courts in that circuit have applied the Second Circuit's theory of conspiracy jurisdiction numerous times. *See, e.g.*, *SL-x IP S.á.r.l. v. Bank of Am. Corp.,* 2021 WL 4523711, at *6 (S.D.N.Y. Sept. 30, 2021), *aff'd sub nom. SL-x IP S.à.r.l. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2023 WL 2620041 (2d Cir. Mar. 24, 2023); *Allianz Glob. Invs. GmbH v. Bank of Am. Corp.*, 2021 WL 3192814, at *3-4 (S.D.N.Y. July 28, 2021); *In re Tether & Bitfinex Crypto Asset Litig.*, 576 F. Supp. 3d 55, 89-90 (S.D.N.Y. 2021); *Rich v. Fox News Network LLC*, 2020 WL 6276026, at *6 (S.D.N.Y. Sept. 15, 2020); *Contant v. Bank of Am. Corp.*, 385 F. Supp. 3d 284, 292 (S.D.N.Y. 2019); *see generally* Price & Jarvis, *supra* ("[T]he last decade has seen a powerful uptick in the application of conspiracy jurisdiction."). This avalanche is hardly surprising given just how "extraordinarily broad" the Second Circuit's theory is. App.46. And that is just the Second Circuit.

2. This case is also an ideal vehicle to address whether conspiracy jurisdiction comports with due process and, if so, under what circumstances. The issue has been preserved, with extensive briefing by the parties. It was also addressed by the district court, which considered conspiracy jurisdiction both before *Schwab I* and then again in light of it. *See* App.118, 273. The district court also thoroughly documented why Petitioners could not be subject to personal jurisdiction under any other theory. *See* App.110-17. In its published opinion, the Second Circuit acknowledged that courts disagree about conspiracy jurisdiction, forthrightly cataloged arguments against conspiracy jurisdiction, and even conceded that it may conflict with this Court's precedent. Yet the Second Circuit felt "bound" by circuit precedent to affirm. App.49. In doing so, the Second Circuit reiterated that an agency relationship is not required for conspiracy jurisdiction and did not suggest that such a relationship exists here. App.47. Thus, whether Petitioners are subject to personal jurisdiction depends *entirely* on the Second Circuit's theory that jurisdiction exists even where a defendant has no control over the alleged co-conspirator. The question presented was indisputably preserved and is outcome determinative.

Unlike the *Schwab* and *Berkshire Bank* petitions, moreover, this case is also an excellent vehicle because it concerns only a limited number of parties. With the exception of Petitioners, only two of the other defendants (Goldman Sachs and HSBC) and very few of the plaintiffs remain in the case. And only Petitioners challenge conspiracy jurisdiction and would be affected by the Court's consideration of this

issue. Accordingly, although the validity of conspiracy jurisdiction is a question of broad and recurring applicability, there are only a handful of parties to this particular litigation, and even fewer who would be affected by the Court's determination. The risk that recusal will be required increases where many parties are present—as, unsurprisingly, often is the case where conspiracy jurisdiction is alleged. The fact that this petition appears unlikely to present recusal risk thus also strongly supports certiorari. Should the Court pass on this petition, it is hardly certain the full Court would be able to hear the next one.

Finally, certiorari is especially warranted because conspiracy jurisdiction regularly evades appellate review. A defendant cannot immediately appeal an order denying a motion to dismiss for lack of personal jurisdiction, so a district court's conclusion that conspiracy jurisdiction exists will be moot if the defendant prevails on the merits or (as often happens) the parties settle. This case is unusual because the district court denied Petitioners' motions to dismiss for lack of personal jurisdiction but granted their motions to dismiss for failure to state a claim. App.140. Because the Second Circuit affirmed the denial of Petitioners' personal jurisdiction motions but reversed as to Rule 12(b)(6), the Court can address conspiracy jurisdiction here *before* Petitioners are subjected to trial in an unconstitutional forum and the due process violation is complete.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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