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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a court may exercise personal jurisdiction over a non-forum defendant that purposefully and knowingly entered into a conspiracy with in-forum defendants to fix the price of a U.S. Dollar interest rate benchmark and thus the price of billions of dollars of financial instruments that they sold in the forum when the in-forum defendants committed overt acts in furtherance of the conspiracy in the forum at the request of and for the benefit of the non-forum defendant.

PARTIES TO THE PROCEEDING

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

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

CORPORATE DISCLOSURE STATEMENT

Respondent The Berkshire Bank's parent corporation is Berkshire Bancorp., and no publicly held corporation owns 10% or more of Berkshire's stock.

Respondent Government Development Bank for Puerto Rico does not have a parent corporation and no publicly held company owns 10% or more of GDB's stock.

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INTRODUCTION

The Second Circuit's decision does not warrant this Court's review. Petitioners assert that the Question Presented here is precisely the same one presented in *Lloyds Banking Group plc v. Schwab Short-Term Bond Market Fund*, No. 21-1237 (pet. for cert. filed Mar. 9, 2022). Pet. at i. However, this Court denied that petition on June 21, 2022. Petitioners do not identify any new authorities or intervening events justifying review here. Moreover, this case is a particularly poor vehicle for review because (i) the decision is a nonprecedential unpublished "summary order" that does not bind future courts within the Second Circuit, (ii) the district court has recently permitted Plaintiffs to commence discovery against Petitioners, which will likely alter the factual record relevant to the personal jurisdiction analysis, (iii) review would involve issues of state law long arm jurisdiction, and (iv) review will not change the result because Plaintiffs have adequately alleged personal jurisdiction under the "effects test."

The Court should also deny certiorari because the Second Circuit's decision faithfully applied this Court's precedents, and Petitioners' claimed circuit split is illusory.

Contrary to Petitioners' assertion, the Second Circuit does not permit the exercise of personal jurisdiction based on barebones allegations of conspiracy or based on acts of third parties entirely unknown to the defendant. The Second Circuit previously reviewed Plaintiffs' allegations of conspiracy, ruled that they easily satisfied federal pleading standards, and held, "[c]lose cases abound on this issue, but this is not one of them." *Gelboim v. Bank*

of Am. Corp. ("*Gelboim*"), 823 F.3d 759, 781 (2d Cir. 2016). This Court denied certiorari as to that decision on January 17, 2017.

Addressing personal jurisdiction based on that record, the Second Circuit held that a plaintiff must identify specific "overt acts" taken by in-forum co-conspirators, that those acts must be "foreseeable" and substantial enough not only to subject the in-forum co-conspirator to personal jurisdiction but also "must be of the sort" that the defendant "should reasonably anticipate being haled into court in the forum as a result of them." *Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC* ("*Schwab II*"), 22 F.4th 103, 125 (2d Cir. 2021). Specifically, the court found that (i) Petitioners knowingly entered into a LIBOR suppression conspiracy "with co-conspirators who were based in the United States," *id.*, (ii) they "join[ed] the conspiracy with the knowledge that overt acts in furtherance of the conspiracy had taken place in New York," App. 17, (iii) "the overt acts were foreseeable to them," *Schwab II*, 22 F.4th at 125, (iv) the co-conspirators "acted as agents" and "took steps in furtherance of the alleged conspiracy at the request of or on behalf of their co-conspirators," App. 17, and (v) as a result, Petitioners "purposely availed themselves of the privilege of conducting activities within [New York]." *Id.* (citations and quotation marks omitted). In so holding, the Second Circuit identified several detailed allegations of the in-forum overt acts, highlighting that Plaintiffs' pleadings were "replete with similar alleged communications and actions." App. At 14-15.

The Second Circuit's decision faithfully follows this Court's decisions holding that the exercise of personal

jurisdiction comports with due process where the forum contacts foreseeably "arise out of" the defendant's purposeful conduct, which "may be intertwined with his transactions or interactions with the plaintiff or other parties" *Walden v. Fiore*, 571 U.S. 277, 284 (2014), rather than from the unilateral activity of others resulting in "random," "fortuitous," or "attenuated" contacts. *Id*. Indeed, the Second Circuit's finding that Petitioners' co-conspirators were their "agents" in New York that acted at Petitioners' "request," App. at 17, places the decision squarely within this Court's precedents. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984) ("In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit."); *International Shoe Co. v. Washington*, 326 U.S. 310, 323 (1945) (personal jurisdiction can be exercised based on in-forum actions "done by agents of a corporation organized and having its headquarters elsewhere").

Petitioners' claim that the Second Circuit's decision conflicts with that of the Seventh Circuit and Fifth Circuit is wholly fabricated. Contrary to Petitioners' assertion, the Seventh Circuit has held – consistent with the Second Circuit – that where a state's long-arm statute permits conspiracy theory personal jurisdiction based on an overt act it comports with due process. *Textor v. Board of Regents of Northern Illinois University*, 711 F.2d 1387, 1392 (7th Cir. 1983). And as district courts have observed, the Fifth Circuit has never ruled on the viability of conspiracy theory jurisdiction. *Dietz v. Dietz*, No. 08-0521, 2008 U.S. Dist. LEXIS 108261, at *7 (W.D. La. Sep. 24, 2008). At best, Petitioners identify a couple state court decisions holding that bare allegations that

a conspiracy had an "effect" in a forum is insufficient to exercise jurisdiction over a defendant. The standard rejected by these courts was much broader than the standard adopted by the Second Circuit. At bottom, Petitioners fail to identify any court that would reach a different result in this particular case.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Plaintiffs are banks in New York and Puerto Rico that originated and owned loans with interest rates tied to LIBOR. App. 9. LIBOR is a widely used benchmark that was designed to approximate the average rate at which a group of designated banks can borrow money. *Schwab II*, 22 F.4th at 110. It serves as an index for a variety of financial instruments, including loans, bonds, interest rate swaps, commercial paper, and exchange-traded derivatives. *Id.* At all relevant times, three of the banks were headquartered in the United States, two of which – Citibank and JPMorgan – were headquartered in New York. *Id.* at 112.

The banks belonged to the British Bankers' Association ("BBA"), a trade organization for the banking and financial-services sector that sets the daily LIBOR rate for various currencies. *Id.* at 110. With respect to the daily LIBOR rate for U.S. dollars, the banks that comprised the LIBOR panel were asked to disclose the rate at which they could borrow dollars on the inter-bank market. *Id.* Under LIBOR-setting rules, (1) each bank was to independently exercise good faith judgment in submitting its estimated interest rates for borrowing funds; (2) the daily

submissions were to remain confidential until after LIBOR was computed and published; and (3) Thomson Reuters, on behalf of the BBA, would then calculate LIBOR based on the average of the middle eight submissions, and publish the final rate. *Id.* at 110.

The banks involved in setting LIBOR also bought and sold — in the United States — billions of dollars' worth of financial instruments tied to that benchmark. *Id.* Even small increases in LIBOR would have cost the banks hundreds of millions of dollars. *Gelboim*, 823 F.3d at 766. For instance, JPMorgan Chase stated that it would lose $500 million if LIBOR increased by one percentage point. *Schwab II*, 22 F.4th at 110. But if rates instantaneously decreased by one percentage point, Citibank, for example, would make $1.935 billion. *Id.*

Plaintiffs allege that, beginning in 2007, the banks – including the two headquartered in New York – engaged in a horizontal price-fixing conspiracy, with each submission reporting an artificially low cost of borrowing in order to drive LIBOR down. *Gelboim*, 823 F.3d at 766. In order to accomplish the conspiracy's purpose, the banks, including those in New York, continuously misrepresented their borrowing costs to the BBA, and their false submissions caused LIBOR to be artificially suppressed. *Charles Schwab Corp. v. Bank of Am. Corp.* ("*Schwab I*"), 883 F.3d 68, 78 (2d Cir. 2018). By understating their true borrowing costs, the banks were able to project an image of financial stability following the financial crisis that began in 2007. *Id.* Suppressing LIBOR also had the immediate effect of lowering the defendants' interest payment obligations on financial instruments tied to LIBOR, which increased the banks' profits. *Id.*

B. PROCEDURAL BACKGROUND

Following mounting evidence that LIBOR had been artificially suppressed, litigants began filing claims throughout the country with federal and state antitrust claims and various other claims based on the alleged manipulation. *Schwab II*, 22 F.4th at 111. Plaintiffs brought claims for fraud and conspiracy to commit fraud. To manage these cases, the Judicial Panel on Multidistrict Litigation established an MDL in the Southern District of New York. *Id.*

Following several decisions by the district court, including dismissal of Petitioners and other foreign defendants for lack of personal jurisdiction that resulted in appeals, on May 23, 2016, the Second Circuit held that the plaintiffs plausibly alleged a conspiracy among the defendants, and wrote, "[c]lose cases abound on this issue, but this is not one of them. *Gelboim*, 823 F.3d at 781. The court explained, "[t]hese allegations evince a common motive to conspire—increased profits and the projection of financial soundness—as well as a high number of interfirm communications." *Id.* at 765, 771, 781-82.

On remand, the district court denied plaintiffs' request for jurisdictional discovery and without holding an evidentiary hearing, *Schwab II*, 22 F.4th at 113, again held that it could not assert personal jurisdiction over the non-U.S. defendants, determining that they did not have sufficient minimum contacts with the United States or any state, and the court refused to assert personal jurisdiction under the "conspiracy jurisdiction" theory. App. 58-63. The district court rejected the plaintiffs' allegations of LIBOR-suppression in the U.S. by any alleged co-

conspirator, failing to accept the plaintiffs' well-pleaded allegations, and drawing defendant-favoring inferences from plain documentary evidence.

For example, the district court rejected the plaintiffs' allegation "that LIBOR submissions were transmitted to Thomson Reuters in New York, as stated by former Rabobank trader Lee Stewart in his plea allocution," in favor of defendants' contrary assertions. App. at 59-60. The district court then "easily discounted," several other allegations, and instead credited "the moving defendants' declarations stating that they did not determine or transmit their LIBOR submissions from the United States." App. at 60. The "discounted" evidence included a written exchange in which a "senior JPMorgan executive in New York directed JPMorgan's LIBOR submissions." *Id.*

The district court then rejected personal jurisdiction under the "effects test" articulated in *Calder v. Jones*, 465 U.S. 783 (1984), finding that "[n]one of plaintiffs' voluminous submissions persuade us to alter our prior holdings that there is 'no suggestion, and it does not stand to reason, that foreign defendants aimed their manipulative [persistent suppression] conduct at the United States or any particular forum state'"—instead, they targeted the *entire world*. App. at 56.

The district court subsequently applied the same analysis to Plaintiffs' claims, holding that the court could not exert personal jurisdiction over the non-U.S. defendants. App. at 28.

After the district court entered final judgment dismissing Plaintiffs' action, Plaintiffs appealed.

While Plaintiffs' appeal was pending, the Second Circuit issued its decision in *Schwab II*, which reversed the district court's personal jurisdiction ruling as to antitrust claims brought by certain plaintiffs. The panel "conclude[d] that the district court had specific personal jurisdiction under the conspiracy theory adopted in *Schwab [I]*." *Schwab II*, 22 F.4th at 121. In *Schwab I*, the Second Circuit held that a defendant could avail itself of a forum through certain actions taken by a co-conspirator in the forum. 883 F.3d at 86-87. "Much like an agent who operates on behalf of, and for the benefit of, its principal, a co-conspirator who undertakes action in furtherance of the conspiracy essentially operates on behalf of, and for the benefit of, each member of the conspiracy." *Schwab II*, 22 F.4th at 122 (citations omitted). "To assert a conspiracy theory of personal jurisdiction, a plaintiff must plausibly allege that '(1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a [forum] to subject that co-conspirator to jurisdiction in that [forum].'" *Id*. citing *Schwab I*, 883 F.3d at 87.

The Second Circuit rejected the defendants' argument that due process "requires a relationship of direction, control, and supervision before a co-conspirator's forum contacts may be imputed to absent defendants for jurisdictional purposes." *Id*. The Second Circuit further explained:

> [A]lthough we conclude that our caselaw does not require a relationship of control, direction, or supervision, we should also underscore that *Schwab*'s three-prong test *serves* the purposeful availment requirement, rather than supplants it. To that end, the conspiracy theory could not get off the ground if a defendant were altogether blindsided by its co-conspirator's contacts with the forum; the conspiratorial contacts must be of the sort that a defendant "should reasonably anticipate being haled into court" in the forum as a result of them.

Id. at 125 (emphasis in original) (citations omitted). Observing that the defendants "do not dispute that the overt acts were foreseeable to them" and that the conspiracy always involved "co-conspirators who were based in the United States," the court concluded that "the alleged overt acts taken by co-conspirators in the United States to advance the conspiracy should certainly have been anticipated by Defendants, and that is enough to make out a prima facie case that each Defendant has the requisite minimum contacts with the nation." *Id.* (citations omitted).

Two months later, the Second Circuit applied *Schwab II* to a summary order to reverse the dismissal of Plaintiffs' state law fraud and conspiracy claims in this case. App. 11. The court concluded that Plaintiffs' allegations satisfied the pleading requirements of personal jurisdiction under New York's long-arm statute, App. 15–18, and satisfied due process because Plaintiffs cited the same allegations as the *Schwab II* plaintiffs in support of their conspiracy-based theory of personal jurisdiction. App. 14. Although

the relevant forum was New York rather than the United States as a whole, the Second Circuit found that "several of the critical communications and actions" the court had "found sufficient to establish personal jurisdiction in *Schwab II* took place in New York." App. 14.

For example, Plaintiffs alleged that pursuant to the conspiracy, bank executives and managers in the New York mandated that their subordinates manipulate LIBOR. Emails between a senior JPMorgan Chase executive in New York and the banks' LIBOR submitter discussed the importance of staying in "the pack" and asking the submitter to "err on the low side" when setting LIBOR. *Id*. Plaintiffs also identified an email in which a New York-based employee of Citibank urged the bank's LIBOR submitter that "we should take a leadership [role] in bringing these LIBORS back to more sensible levels," "[e]xactly as we did 3-4 months back"; the bank's LIBOR submissions then decreased. *Schwab II*, 22 F.4th at 123. Plaintiffs also identified an admission by a Barclays' executive who was based in New York that he instructed subordinates to submit artificially low USD LIBOR rates. App. at 14. The Second Circuit observed that "Plaintiffs[]' pleadings and other supporting evidence are replete with similar alleged communications and actions that appear to involve purported conspiracy participants located in New York who took steps there to advance the conspiracy." App. At 14-15. The court found that Plaintiffs "have sufficiently alleged that certain co-conspirators acted as agents of their co-conspirators in New York and took steps in furtherance of the alleged conspiracy at the request of or on behalf of their co-conspirators. Accordingly, '[b]y joining the conspiracy with the knowledge that overt acts in furtherance of the conspiracy had taken place in New

York,' Defendants[] purposely availed themselves 'of the privilege of conducting activities within [New York].'" App. At 17. (citation omitted).

REASONS FOR DENYING THE PETITION

I. THIS COURT RECENTLY DENIED THE PETITION OF PRECISELY THE SAME QUESTION AND THIS CASE IS A POOR VEHICLE FOR DECIDING THE QUESTION PRESENTED

Petitioners state, "The question presented here is the same one presented in *Lloyds Banking Group plc v. Schwab Short-Term Bond Market Fund*, No. 21-1237 (pet. for cert. filed Mar. 9, 2022)." Pet. at i. However, this Court denied the petition in *Schwab II* on June 21, 2022. Petitioners do not present any new authorities or intervening events justifying review here. Nor do Petitioners advance any argument as to why this case is a better vehicle for review. To the contrary, the Petition reads as a petition of *Schwab I* and *Schwab II*, with the proceedings and decision in this case appended as an afterthought. Thus, there is no reason for this Court to grant this Petition after denying the petition in *Schwab II*.

This Petition takes another bite at the apple but provides this Court with an even weaker record than *Schwab II* for considering the constitutional issue. In addition to the reasons discussed below, which applied equally to the already-denied petition of *Schwab II*, this case is a poor vehicle for review because (i) it seeks review of a summary order, (ii) it involves issues of state law, and (iii) review will not change the outcome.

First, unlike *Schwab II*, the decision below is an unpublished, nonprecedential "summary order" that does not bind future Second Circuit panels or the district courts within that Circuit. *See* App. 1 (noting that the summary order does not have "precedential effect"). It thus is incapable of creating an actual circuit split because the Second Circuit is free to disregard it in the future.

Second, this Court does not generally review the lower federal courts' decisions that touch on issues of state law and will not grant certiorari to do so except in the most "extraordinary" circumstances. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (per curiam); *see also Haring v. Prosise,* 462 U.S. 306, 314 n.8 (1983) ("[S]tanding alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review."); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of a court of appeals on a matter of state law . . . .").

Plaintiffs assert claims of fraud and civil conspiracy to commit fraud under New York law. "Whether personal jurisdiction can be obtained under a state long-arm statute on a conspiracy rationale at all is a question of state law." *Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir. 1992) (citations omitted). Therefore, a New York court faced with the issue would have to determine whether, under its formulation of civil conspiracy law, exercising jurisdiction over a non-resident co-conspirator based on the acts of another co-conspirator in the forum comports with due process. Even the authorities upon which Defendants rely acknowledge that this due process analysis turns on an underlying analysis of the state's formulation of civil conspiracy. *See Davis v. A & J Electronics,* 792 F.2d 74,

75-76 (7th Cir. 1986) (distinguishing between the due process analysis of conspiracy personal jurisdiction based on state law claim that comports with the state's long-arm jurisdiction and that of a "federal civil-conspiracy theory of personal jurisdiction"). Because the petition necessarily raises state-law issues, this case is inappropriate for certiorari.

Third, even if this Court granted certiorari and accepted Petitioners' standard that personal jurisdiction can never exist based on the acts of co-conspirators unless the defendant "directs, controls or supervises" the co-conspirator's acts, it would not necessarily change the outcome. The Second Circuit found that Plaintiffs "have sufficiently alleged that certain co-conspirators acted as ***agents*** of their co-conspirators in New York and took steps in furtherance of the alleged conspiracy at the ***request of or on behalf of*** their co-conspirators." App. 17 (emphasis supplied). These findings would meet the standard proposed by Petitioners.

Further, under the facts of this case, Plaintiffs have adequately alleged personal jurisdiction based on the obvious and direct effects of the defendants' actions in New York under the "effects test." Whatever limits there might be on *Calder*'s "effects test", 465 U.S. at 787 n.6, it is broad enough to capture this case. That is particularly true because defendants surely "knew that the brunt of th[e] injury would be felt by" plaintiffs like Berkshire in New York, *id.* at 789-90, given that (1) defendants conspired to suppress U.S.-Dollar LIBOR; (2) Berkshire is a financial institution that relies on LIBOR; (3) New York is the epicenter of global finance and was a primary target of the fraud; and (4) the Petitioners themselves

sold a massive number of tainted financial instruments in New York. The effects of the defendants' conspiracy to manipulate LIBOR did not reach New York because of "a string of fortunate coincidences," *Waldman v. PLO*, 835 F.3d 317, 337 (2d Cir. 2016). Instead, New York is exactly where the defendants needed their fraud to be believed and would have expected to find the bulk of the harmed financial institutions. Put otherwise, Petitioners cannot credibly feign surprise or claim unfairness at the idea of being sued in a New York court based on the harms that their willful manipulation of "the world's most important number" caused to financial institutions like Berkshire in that state. Instead, they "must 'reasonably anticipate being haled into court there' to answer for" what they have knowingly done. *Calder*, 465 U.S. at 790 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

II. THE QUESTION PRESENTED IS NOT RIPE FOR REVIEW

This Court ordinarily does not review interlocutory decisions. *See*, *e.g.*, *Bhd. of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").

The Question Presented arises in an interlocutory posture. Review by this Court at this time would involve an incomplete record that is a moving target. In fact, since the Petition was filed, the district court has ordered for fact discovery to commence. Consequently, as the litigation proceeds, the contours of the case may

change dramatically—through voluntary dismissal, class certification, summary judgment, or settlement before the Court can render a decision on the merits.

Specifically, the district court denied Plaintiffs' request for jurisdictional discovery (and did not hold an evidentiary hearing) before it dismissed Petitioners for lack of personal jurisdiction. Therefore, discovery will certainly uncover additional facts relevant to not only jurisdiction based on Petitioners' co-conspirators' acts in the forum but also facts relevant to other bases for personal jurisdiction that Plaintiffs asserted against Petitioners, including the "effects test." Discovery and further proceedings should be permitted to play out so that this Court may consider a fully developed record. Moreover, thirteen defendants have settled with Plaintiffs, two of the settlements were granted final approval only after the appeal of the district court was taken, and one after the Petition was filed.

This ever-changing landscape may render the Court's work superfluous. Either the Question Presented will be mooted by the outcome of discovery, summary judgment and/or trial or Petitioners will have the opportunity to seek review again on the basis of a fully developed factual record. Under such circumstances, the Court is better served, at a minimum, waiting until a final judgment has been entered before considering the Question Presented. *See Abney v. United States,* 431 U.S. 651, 656 (1977) (recognizing "a firm congressional policy against interlocutory or 'piecemeal' appeals" and observing that "courts have consistently given effect to that policy").

III. THERE IS NO CIRCUIT SPLIT AND, IF IT EXISTS, IS PREMATURE

None of the cases cited in the Petition are remotely similar to the situation here, and accordingly none can establish a circuit split. The Petition collects isolated snippets of opinions whose *dicta* supposedly differ to create the illusion of a split. Pet. at 11-13. But Petitioners do not show a conflict among the resulting *judgments*, that the outcome of this case would be different in any other circuit on the existing record, or the result in this action is inconsistent with any precedent from this Court. Until such occasion, there is no true circuit-split and no reason for this Court to take up an issue in which the circuits concur in judgments.

As the district courts of the Fifth Circuit have observed, the Fifth Circuit has never ruled on the viability of conspiracy theory jurisdiction. *Dietz v. Dietz*, No. 08-0521, 2008 U.S. Dist. LEXIS 108261, at *7 (W.D. La. Sep. 24, 2008) ("The Court has conducted its own independent research, and has been unable to find any decisions from the Fifth Circuit specifically dealing with this issue"). The cases upon which Petitioners rely to manufacture a circuit split confirm this. In *Guidry v. United States Tobacco Co.*, 188 F.3d 619, 631 (5th Cir. 1999), the Fifth Circuit did not reject the conspiracy theory of personal jurisdiction adopted by the Second Circuit and other courts. Rather, the court held that because the plaintiffs had demonstrated sufficient minimum contacts as to each member of the conspiracy directly it "need not consider or decide" whether each defendant "also had sufficient minimum contacts with Louisiana because it conspired with one or more [defendants] to commit an intentional

or willful act in, or that such act had sufficient effects in, Louisiana, and that the commission of that act caused damage to the plaintiffs in Louisiana." *Id.* at 631.

The situation was the same in the unpublished, non-precedential decision in In *Delta Brands v. Danieli Corp.*, 99 F. App'x 1, 5-6, 8 (5th Cir. 2004). There, the Fifth Circuit held that there was no personal jurisdiction as to any defendant because none of the defendants (which were all out-of-state entities) had any minimum contacts with Texas, much less committed an overt act in furtherance of the conspiracy in Texas. *Id.* at 5-8. On the general issue of conspiracy theory jurisdiction, the court did not address the "overt act" standard. Rather, it found the pleadings deficient because in the section of the complaint alleging the conspiracy, "[plaintiff] makes no reference to the state of Texas." *Id.* at 6. Thus, the court did not reject any specific standard for establishing personal jurisdiction through a theory of conspiracy but rather found that the pleadings were insufficient because the plaintiff "has failed to show how the alleged conspiracy between the defendants had any connection to the state of Texas." *Id.* at 8.

Contrary to Petitioners' assertion, the Seventh Circuit has held – consistent with the Second Circuit – that where a state's long-arm statute permits conspiracy theory personal jurisdiction based on an overt act it comports with due process. *Textor*, 711 F.2d at 1392.

The case upon which Defendants rely – *Davis v. A&J Electronics*, 792 F.2d 74, 75 (7th Cir. 1986) – is inapposite because involved jurisdiction under Fed. R. Civ. P. 4(e). The *Davis* court affirmed its holding in *Textor*

but merely held that there was no "independent federal 'civil co-conspirator' theory of personal jurisdiction." *Id.* at 74. Here, the reach and contours of jurisdiction under Rule 4(e) is not at issue. Even if it were, courts in the Seventh Circuit have questioned the continued viability of *Davis*, recognizing that "[*Davis*] was decided before the 1993 amendments to Rule 4, and did not involve the application or Rule 4(k)(2)…and… was decided before the Illinois long-arm statute was amended to extend to the constitutional limits of due process." *Flag Co. v. Maynard*, 376 F. Supp. 2d 849, 854-55 (N.D. Ill. 2005) (citations omitted). "After this extension, multiple decisions in this district have found the conspiracy theory of jurisdiction to comport with due process." *Id.* (collecting cases).

Defendants' reliance on state court decisions is likewise unavailing. In *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995), the Texas Supreme Court did not reject the "overt act" conspiracy theory of personal jurisdiction. Rather, it rejected a much broader theory that would "assert[] 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 (emphasis supplied), rather than any "overt act" by a co-conspirator in the jurisdiction that itself created minimum contacts sufficient for personal jurisdiction. Indeed, the court in *Gibson* specifically stated that personal jurisdiction could be based on a defendant's "relationship with another" co-conspirator:

> To comport with due process, the exercise of long-arm jurisdiction over a defendant must rest not on a conceptual device but on ***a finding that the non-resident, through his relationship***

> ***with another, has 'purposefully avail[ed him] self of the privilege of conducting activities within the forum State…The relationship may be described in terms of conspiracy***, but such a characterization should not mask the real facts of the relationship or avoid analysis of the attribution process. The term "conspiracy" is meaningful only to the extent that it helps to elucidate these facts.

Id. at 773 (citations and quotation marks omitted) (emphasis supplied). In *dicta*, the court stated only "due process will not permit the plaintiff to use ***insignificant acts*** in the forum to assert jurisdiction over all co-conspirators." *Id.* (citations omitted) (emphasis supplied). There can be no dispute that Petitioners' New York co-conspirators' manipulation of LIBOR, which was the entire purpose of the conspiracy, was not an "insignificant act."

Similarly, in *Ashby v. State*, 779 N.W.2d 343 (2010), the conspiracy theory of personal jurisdiction the Nebraska Supreme Court rejected was not the "overt act" standard but a broader conspiratorial "effect" standard. It considered whether there was personal jurisdiction over a non-resident co-conspirator "if through one of its members a conspiracy ***inflicts an actionable wrong*** in one jurisdiction. *Id. at* 360 (emphasis supplied). Moreover, the court did not rule out that a form of conspiracy personal jurisdiction could exist if the nature of the conspiracy and the non-resident's knowledge about the in-forum actions were more significant. Instead, the court held only that the allegations concerning the non-resident's "connection to Nebraska" failed to "rise[] to the level that he should have anticipated being haled into court here." *Id.* at 361.

In *Schwab II* and this case, the Second Circuit held that the numerous in-forum acts taken by Petitioners' co-conspirators to manipulate LIBOR were known to Petitioners prior to entering into the conspiracy, App. at 17, foreseeable and of the sort that a defendant "should reasonably anticipate being haled into court" in the forum as a result of them." *Schwab II*, 22 F.4th at 125. At most, the distinction between the judgment in this case and in *Ashby* turns on the facts alleged rather than the law.

At bottom, there is nothing in the cases relied on by Petitioners that suggests that personal jurisdiction would be rejected under the facts here. The Second Circuit found that (i) Petitioners purposefully entered into a conspiracy that "involved the manipulation of U.S.-Dollar LIBOR with co-conspirators who were based in the United States," *id.*, (ii) they "join[ed] the conspiracy with the knowledge that overt acts in furtherance of the conspiracy ***had taken place*** in New York," App. 17 (emphasis supplied), (iii) "the overt acts were foreseeable to them," *Schwab II*, 22 F.4th at 125, (iv) "certain co-conspirators acted as agents of their co-conspirators in New York and took steps in furtherance of the alleged conspiracy at the request of or on behalf of their co-conspirators," App. 17, and (v) as a result, Petitioners "purposely availed themselves of the privilege of conducting activities within [New York]." *Id.* (citations and quotation marks omitted). Petitioners identify no circuit that would reach a different result.

Even if a circuit split does exist (it does not), review would be premature in light of this Court's recent discussion of specific jurisdiction in *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court* ("*Ford*"), 141 S. Ct. 1017 (2021). In *Ford*, this Court held that a strict causal

relationship between a defendant's in-state activity and the litigation is not necessary to establish specific jurisdiction. *Id*. at 1026. "None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do…. [O]ur most common formulation of the rule demands that the suit 'arise out of *or relate to* the defendant's contacts with the forum.'" *Id*. (emphasis in original). The Court stated that the standard "contemplates that some relationships will support jurisdiction without a causal showing." *Id*.

The cases cited by Petitioners to argue for the existence of a circuit split (Pet. at 13-18) predate *Ford*. This Court should give the circuit courts (and state Supreme Courts) time to rule on *Ford*'s impact on their conspiracy jurisdiction precedent. Any split of authority (there is none) may well resolve itself without need for this Court's intervention. This is especially true given that Petitioners propose a bright line rule on specific jurisdiction similar to the strict "causation" requirement that was rejected in *Ford*, asserting that personal jurisdiction based on acts of co-conspirators can ***never*** conform with due process unless the out-of-forum defendant "directed, controlled, and/or supervised the alleged co-conspirator who carried out the overt acts in the forum." Pet. at 15. Moreover, Petitioner's activity in New York was similar to that in *Ford*. Just as Ford "d[id] not contest that it does substantial business in Montana and Minnesota… [and] agrees that it has 'purposefully avail[ed] itself of the privilege of conducting activities' in both places" (*id*. at 1026), Defendants "involved in setting LIBOR also bought and sold — in the United States — billions of dollars' worth of financial instruments tied to that benchmark." *Schwab II*, 22 F.4th at 110. Petitioners also purposefully

entered into a conspiracy with New York-based banks that they knew were manipulating LIBOR from New York and they "do not dispute that the overt acts were foreseeable to them." *Id.* This Court should allow circuit courts to rule whether the "arise out of or relate to" standard forecloses jurisdiction unless such control is alleged before this Court takes up the question, if needed. *E.g., McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) (citing need for "the issue [to] receive[] further study [in the lower courts] before it is addressed by this Court."); *Heartland Plymouth Court MI, LLC v. Nat'l Labor Relations Bd.*, 838 F.3d 16, 21 (D.C. Cir. 2016) (noting "an issue's 'percolation' among the circuits" is a factor "that can improve the likelihood of certiorari being granted").

IV. THE COURT OF APPEALS' DECISION IS CORRECT

The Second Circuit's decision is consistent with this Court's prior decisions holding that the exercise of personal jurisdiction comports with due process where the forum contacts foreseeably flow from the defendant's purposeful conduct rather than from the unilateral conduct of others resulting in "random," "fortuitous," or "attenuated" contacts.

"The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation." *Walden*, 571 U.S. at 283-84. "[T]he relationship must ***arise out of*** contacts that the 'defendant *himself*' ***creates*** with the forum State" *Id.* at 284 (second emphasis in original) quoting *Burger King Corp.* v. *Rudzewicz*, 471

U. S. 462, 475 (1985), which "may be intertwined with his transactions or interactions with the plaintiff or other parties" *Walden*, 571 U.S. at 286. "A forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional ***conduct by the defendant*** that ***creates*** the necessary contacts with the forum," *id.* (emphasis supplied), rather than from the "***unilateral*** activity of another party or a third person," *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) (emphasis supplied), or the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Walden*, 571 U.S. at 286, quoting *Burger King*, 471 U. S., at 475.

This Court in *Walden* explicitly recognized that a defendant could create minimum contacts with the forum not only through its own acts, but "***through an agent***, goods, mail, or some other means." *Id.* at 285. This Court likewise held in *International Shoe* that personal jurisdiction can be exercised based on in-forum actions "done by agents of a corporation organized and having its headquarters elsewhere." 326 U.S. at 323; *see also Daimler AG v. Bauman*, 571 U.S. 117, 135 n.13 (2014) ("a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there").

The Second Circuit's decision is consistent with these decisions. The court correctly applied longstanding, black-letter law that co-conspirators act as each other's agents: "Much like an agent who operates on behalf of, and for the benefit of, its principal, a co-conspirator who undertakes action in furtherance of the conspiracy essentially operates on behalf of, and for the benefit of, each member of the conspiracy." *Schwab II*, 22 F.4th at 122. Relying on

numerous internal communications from the defendants, Plaintiffs allege that Petitioners purposefully entered into a conspiracy with New York-based banks to manipulate LIBOR, which Petitioners knew the New York-based banks had done and would continue to do from New York. Indeed, such manipulation from New York was necessary for the fraudulent conspiracy to operate. The Second Circuit found that Petitioners' co-conspirators were their agents in New York that acted at Petitioners' "request". App. at 17. Thus, Petitioners entered into a conspiracy with knowledge and expectation that their agents would follow their requests and further the conspiracy from New York.

Even if the Second Circuit had not expressly found that in this case the co-conspirators were acting as each other's agents that would not change the analysis. The legal connection between co-conspirators is strong enough to render one conspirator criminally liable for the acts of another, regardless of the former's knowledge of or specific intent to commit any particular wrongful act. *Pinkerton v. United States*, 328 U.S. 640 (1946). It would hardly make sense to accord conspiracy less force in civil cases than it has in the criminal context. As Judge Posner has explained, when "for most purposes the acts of one conspirator within the scope of the conspiracy are attributed to the others, … we have difficulty understanding why personal jurisdiction should be an exception." *Stauffacher*, 969 F.2d at 459. That is particularly true where, as here, the soliciting and selling of LIBOR-based instruments in New York—the financial hub of the world—would plainly have been foreseeable to all of the defendant conspirators.

Nor does subjecting defendants to jurisdiction based on their co-conspirators' contacts with the forum

state deprive defendants of the requisite "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign." *Burger King*, 471 U.S. at 472. Participation in a conspiracy easily meets this requirement. Plaintiffs plausibly allege that Petitioners entered an agreement with New York-based defendants to artificially suppress LIBOR from New York, and then the co-conspirators sold financial instruments that were affected by the manipulated LIBOR rates. Petitioners "most certainly knew that [they were] affiliating [themselves] with an enterprise" with contacts in New York. *Id.* at 480. Personal jurisdiction over Petitioners does not exist through the happenstance of a third party's unilateral actions, but rather is predicated on the agreements and intentional acts of Petitioners to perpetrate a scheme that was executed from and directly impacted New York, as they well knew it would when they entered into a conspiracy with New York-headquartered banks. *See World-Wide Volkswagen*, 444 U.S. at 297 (the purpose of the Due Process Clause is 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").

Petitioners assert that the Second Circuit's decision conflicts with this Court's prior decisions because this Court has stated that "purposeful availment" requires that "the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Walden*, 571 U.S. at 283-84 quoting *Burger King*, 471 U. S. at 475. That is incorrect. As discussed above, this Court expressly recognized in *Walden* that a defendant can create contacts with the forum "through an agent," and a co-conspirator

easily fits that bill. The principle Petitioners cite was espoused to distinguish contacts linked to defendants' purposeful conduct from "random," "fortuitous," or "attenuated" contacts, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *World-Wide Volkswagen*, 444 U.S. at 299, or from the "unilateral activity of another party or a third person," *Helicopteros Nacionales de Colombia,* 466 U.S. at 417, which were wholly detached from the defendants' conduct. As discussed above, Petitioners cannot claim to be shocked that they were haled into court in New York based on their conduct.

Petitioners cite no authority for their proposed bright line rule that jurisdiction based on the in-forum acts of a co-conspirator should be prohibited in all cases as a matter of law unless a plaintiff can demonstrate the defendant "directed, controlled and/or supervised the co-conspirator." Petitioners' formulation would preclude all personal jurisdiction over any out-of-forum co-conspirators. Conspiracies, particularly conspiracies to violate federal and state laws, are almost always agreements among legally separate entities that lack formal (or enforceable) corporate structures of control, direction and supervision, particularly where the object of the conspiracy is a criminal as well as civil violation.

Here, the Second Circuit found that the New York co-conspirators took their acts in furtherance of the fraud at Petitioners' "request[]," App. 17, rather than at their "direction." There is nothing in this Court's prior decisions that suggests that the Due Process analysis turns on such a trivial distinction.

Petitioners also assert that the Second Circuit's decision 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." Pet. at 16 (citations omitted). They are wrong. The Second Circuit stated "the conspiracy theory could not get off the ground if a defendant were altogether blindsided by its co-conspirator's contacts with the forum; the conspiratorial contacts must be of the sort that a defendant 'should reasonably anticipate being haled into court' in the forum as a result of them." *Schwab II*, 22 F.4th at 125. This standard, by its express terms, is consistent with this Court's prior decisions.

Petitioners misleadingly say that this Court has stated that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." Pet. at 17 citing *World-Wide Volkswagen*, 444 U.S. at 295. But this was in reference to "foreseeability of causing injury in another State." *Id*. This case is about contacts, not injury. And in *World-Wide Volkswagen*, this Court went on to state, "the foreseeability that is critical to due process analysis is…that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S. at 297 (citations omitted). Here, Petitioners purposefully entered into a conspiracy to suppress LIBOR with New York-headquartered banks to manipulate a U.S. Dollar denominated interest-rate benchmark used in billions of dollars of financial instruments that the defendants themselves sold in New York during the conspiracy and that the defendants knew was used by countless others for their own financial instruments in New York. It was certainly foreseeable that Petitioners

should anticipate being haled into court in New York when their fraud was uncovered.

V. THE COURT OF APPEALS' DECISION HAS NOT "UPENDED THE LAW OF PERSONAL JURISDICTION"

Petitioners contend that the Second Circuit's decision will result in non-forum defendants being dragged into court based on bald allegations of conspiracy and as a result of unforeseeable acts by co-conspirators in the forum. Pet. at 18-21. This is wrong.

First, defendants are well protected from that risk by the well-developed case law around federal pleading standards articulated by this Court's seminal decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The concern over barebones allegations of conspiracy expressed in the older opinions cited by Petitioners has rightly faded based on this Court's tightening of the standards required to allege a conspiracy in federal court.

Even so, "[t]he cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough." *Stauffacher*, 969 F.2d at 460. The decisions of the Second Circuit are no exception. Requiring in-forum "overt acts" in furtherance of the conspiracy forecloses the ability of bald allegations of conspiracy to be sufficient. Indeed, the Second Circuit highlighted several detailed allegations of the in-forum overt acts and noting that Plaintiffs' pleadings were "replete with similar alleged communications and actions." App. At 14-15. Moreover, the court crafted its decision within the

established due process standard and made clear that happenstance cannot be the basis for personal jurisdiction, explaining, "the conspiracy theory could not get off the ground if a defendant were altogether blindsided by its co-conspirator's contacts with the forum; the conspiratorial contacts must be of the sort that a defendant 'should reasonably anticipate being haled into court' in the forum as a result of them." *Schwab II*, 22 F.4th at 125. On the face of the Second Circuit's decisions bare allegations of conspiracy would not meet this standard.

Notably, all of the cases cited by Petitioners pre-date *Schwab II* and this case. Thus, to the extent there was previously any ambiguity, the Second Circuit has clarified the issue obviating any need for this Court's review.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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