No. 23-232

In the Supreme Court of the United States

BASF METALS LIMITED, ET AL.,
Petitioners,

v.

KPFF INVESTMENT, INC., ET AL.,
Respondents.

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

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 13, 2023

QUESTION PRESENTED

Where a defendant conspires to manipulate prices in a U.S. market, effectuates that conspiracy by working with U.S. co-conspirators to collusively trade in that market, and thereby harms U.S. residents who trade in that same market, does due process prohibit U.S. courts from exercising personal jurisdiction over that defendant in the resulting lawsuit?

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INTRODUCTION

BASF Metals and Standard Bank traded derivatives on a U.S. exchange, conspired with U.S. co-conspirators to manipulate the price of those derivatives, and in doing so, profited at the expense of U.S. traders. There is nothing unusual about the Second Circuit's conclusion that the U.S. traders harmed by the petitioners' U.S. market manipulation can sue them in the United States. To the contrary, American courts—including this one—have been hearing cases much like this since Congress enacted the antitrust laws over a century ago. And every circuit to have considered the issue agrees that personal jurisdiction may constitutionally be premised on a defendant's participation in such a conspiracy.

The petitioners thus ask this Court to resolve a conflict that does not exist. In arguing otherwise, they rely primarily on the mistaken assertion that the Seventh Circuit has held that personal jurisdiction may not rest on a conspiracy. In fact, it has held the opposite—just like every other circuit.

Nor do the merits offer any reason for review. The petitioners don't even try to argue that it is somehow unconstitutional for U.S. courts to exercise jurisdiction over a defendant that harms U.S. traders by manipulating a U.S. market. Instead, they contend that, as a general matter, basing jurisdiction on a defendant's participation in a conspiracy runs afoul of this Court's precedent requiring that jurisdiction rest on a defendant's own conduct. But, as the Second Circuit explained, participating in a conspiracy with sufficient forum contacts to support jurisdiction *is* a defendant's own conduct.

Contrary to the petitioners' assertion, that principle is not without limits. The lower courts' unanimous

conclusion that, in some circumstances, a defendant may purposefully avail itself of a forum by participating in a conspiracy does not mean—as the petitioners contend—that courts may *always* exercise jurisdiction based on a conspiracy. As the Second Circuit has emphasized, a defendant's "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 Short-Term Bond Mkt. Fund v. Lloyds Banking Grp.*, 22 F.4th 103, 125 (2d Cir. 2021). That's why, although the petitioners imagine a parade of horribles in which courts exercise jurisdiction based on the unforeseeable forum contacts of unknown co-conspirators, they cannot cite a single case in which that has actually happened.

There is even less reason to grant certiorari here than in most cases where the circuits agree on a correct rule of law: This Court's recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court* renders the question presented all but irrelevant. The petitioners profess the most concern about "financially important" antitrust cases like this one. But most of those cases involve defendants who routinely sold the allegedly price-fixed financial instrument into the United States. And under *Ford*, that itself is enough for personal jurisdiction, obviating any need to rely on conspiracy allegations. Before intervening on an issue that the lower courts already agree on, this Court should at least wait to see whether it matters.

STATEMENT

A. Factual Background

1. Platinum and palladium are precious metals, used in everything from jewelry to catalytic converters to computer chips. Pet. App. 6–7. They're also traded by

investors. Pet. App. 7. In addition to physical platinum and palladium, investors trade platinum and palladium derivatives—that is, financial instruments based on the metals' prices, such as futures and options. *Id.* This derivatives market, which exceeds $100 billion a year, is heavily concentrated in the United States: The New York Mercantile Exchange is the "leading centralized exchange for platinum and palladium futures and options worldwide." *Id.*[1]

This case involves four traders in both the physical and derivatives markets—BASF Metals, a "precious metals commodity" dealer; and three banks, Standard Bank, Goldman Sachs, and HSBC. Pet. App. 7–8; JA 365. Although the firms are competitors, they shared a common interest: Each company held "massive short positions" in platinum and palladium derivatives on the New York Mercantile Exchange, which meant they would profit if the price of the metals decreased. *See e.g.* JA 357. So instead of competing, the companies decided to collude to depress the price of platinum and palladium.

And they had the perfect vehicle to do so. Until 2014, these four companies were responsible for conducting a process they dubbed the "Fixing." Pet. App. 8–9. The "Fixing" was a twice-daily call, in which these companies were tasked with ascertaining the current market price of platinum and palladium—a price that would then be used as a global benchmark in both the physical and derivative markets until the next Fixing. *Id.*[2]

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[1] Citations to "Pet. App." are to the appendix submitted with the petition for certiorari; citations to "JA" are to the joint appendix filed in the Second Circuit. In addition, unless otherwise specified, all internal quotation marks, emphases, alterations, and citations are omitted from quotations throughout.

[2] Technically, the price set in the Fixing was the benchmark for

The Fixing functioned like an auction. At the start of the call, the chair of the auction would announce an opening bid supposedly "at or near the [metals'] current" market price. Pet. App. 9. Each participant would then declare whether, at that price, it would be a net buyer, net seller, or neither. *Id.* The chair would then adjust the price, repeating the process until there was no net interest in buying or selling—that is, until the expressed supply and demand were roughly in equilibrium. *Id.* At that point, the benchmark price would be set and publicly disclosed.

At least, that is how the Fixing was supposed to work. In actuality, the companies conspired to artificially depress the benchmark price. In other words, they fixed the Fixing. They did so in a number of ways: First, before the Fixing's start, the conspirators worked together to lower the apparent market price of platinum and palladium by coordinating large sell orders on the New York Metals Exchange (among other places)—including orders they never actually intended to execute. Pet. App. 5, 10, 28, 38, 39; JA 355, 485. Because the Fixing's opening bid was intended to capture the current market price, this enabled the conspirators to artificially depress that opening bid. JA 485.

Then, during the Fixing, instead of honestly assessing their trading positions, the participants colluded—communicating via chat rooms, instant messages, phone calls, and emails—to achieve a benchmark price that would benefit the group. Pet. App. 10. And throughout the Fixing, the conspirators continued to manipulate the market in an effort to "g[i]ve cover to" a benchmark price

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physical platinum and palladium. Pet. App. 8; JA 373. But the price in the derivatives market "closely tracked" the physical market, so setting the physical benchmark price also set the price in the derivatives market. Pet. App. 9; *see* JA 391.

that "would otherwise have stood out." Pet. App. 38. They did this by communicating with U.S.-based traders—employed by their affiliates—who would feed the Fixing participants non-public order information. Pet. App. 38, 45, 70. In exchange, the Fixing participants would provide the traders non-public information about the status of the in-progress Fixing. Pet. App. 38, 45, 70. The conspirators would then trade on this non-public information, both in the physical market and on the New York Mercantile Exchange, as the Fixing progressed. Pet. App. 38, 45; JA 365, 367–68.

The conspirators' efforts worked. Over and over again, for years, they succeeded at depressing the price of platinum and palladium—both in the physical and derivatives markets. Pet. App. 38–39. And over and over again, they profited. Because the conspirators knew before each Fixing what the benchmark price would be (because they set it), they could "accurately predict, and thus confidently trade as to profit off of," the Fixing price "before the Fixing even began." JA 439. And by suppressing the price, they were able to profit off their short positions in the derivatives market. Pet. App. 44; JA 357.

2. Although the petitioners are foreign companies, their conspiracy centered on the United States. The primary goal of the conspiracy was to profit on the New York Mercantile Exchange. Pet. App. 5, 10, 27–28, 38. It was effectuated by manipulating the platinum and palladium markets in the United States. Pet. App. 39. It was coordinated through "constant communication" between the petitioners and their affiliated U.S.-based traders. Pet. App. 38, 45, 70. And it harmed U.S. residents, who traded in U.S. platinum and palladium markets,

unaware that those markets had been fixed. Pet. App. 9–10.

B. Procedural Background

The respondents here are U.S. platinum and palladium traders who were harmed by the conspirators' market manipulation. Pet. App. 9–11. They sued BASF, Standard Bank, Goldman Sachs, and HSBC for violating the antitrust laws and the Commodity Exchange Act. Pet. App. 5.[3]

In response, BASF and Standard Bank—the petitioners here—moved to dismiss, arguing that the district court lacked personal jurisdiction because they are both based in London. The district court disagreed. Pet. App. 3. And the Second Circuit affirmed. *Id.*

Observing the "time-honored notion that the acts of a conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy," the Second Circuit held that BASF and Standard Bank had purposefully availed themselves of the privilege of doing business in the United States by entering into, actively participating in, and profiting from, a conspiracy in which there were "overt acts" sufficient to support personal jurisdiction in the United States. Pet. App. 42. In fact, as the Second Circuit explained, the conspiracy was *dependent* on the conspirators' contacts with the United States: BASF and Standard Bank's communications with their affiliated U.S.-based traders during the Fixing "were necessary to coordinate members of the conspiracy so that the conspiracy's attempts to move the market in

[3] This case has a long procedural history, including multiple amendments to the complaint and multiple motions to dismiss. We have limited the discussion of this history to that relevant to the question presented here.

one way or the other were not undone by individual orders." Pet. App. 45. That communication "also enabled manipulation of the benchmark prices because it provided" the Fixing participants with "access to nonpublic, real-time information about changes" in the price of physical platinum and palladium and their derivatives. *Id.* Put differently, BASF and Standard Bank knowingly colluded with U.S.-based co-conspirators, who took acts in furtherance of the conspiracy in the United States, as part of a scheme to manipulate prices in a U.S. market.

As the Second Circuit recognized, that's precisely "the sort of 'conduct and connection with the forum []' that should lead a defendant to 'reasonably anticipate being haled into court there.'" Pet. App. 46 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). The court therefore held that BASF and Standard Bank had sufficient contacts with the United States to support personal jurisdiction. Pet. App. 49.

The court rejected the petitioners' arguments that despite these minimum contacts, exercising personal jurisdiction would nevertheless be unreasonable. Pet. App. 49–50. New York, the court explained, has an "interest in adjudicating a claim concerning manipulation on" the New York Metals Exchange. Pet. App 51. "[T]he conveniences of modern communication and transportation ease" any burden of litigating in the United States. Pet. App. 50–51. And BASF and Standard Bank's vague invocations of international comity, the court held, were insufficient to demonstrate that U.S. courts should decline to exercise jurisdiction over corporations that harmed U.S. traders by manipulating prices in U.S. markets. *Id.* "This case," the court concluded, "is not the exceptional situation where exercise of jurisdiction is

unreasonable even though minimum contacts are present." Pet. App. 52.

REASONS FOR DENYING THE PETITION

I. There is no circuit split.

BASF and Standard Bank assert (at 3) that there is a "deep, acknowledged, and entrenched" split on the constitutionality of exercising personal jurisdiction based on a defendant's participation in a conspiracy. But, in fact, there is widespread agreement. Every circuit that has ruled on the issue has held that where a defendant chooses to participate in a conspiracy that has minimum contacts with a forum, it is constitutional for that forum to exercise jurisdiction over claims based on the defendant's participation in the conspiracy. And not a single circuit holds that it violates due process to impute to the defendant the foreseeable forum contacts that a defendant's co-conspirators make through acts taken in furtherance of the conspiracy in the forum.

A. At least seven circuits have clearly opined on whether a defendant's participation in a conspiracy with foreseeable minimum contacts with the forum can give rise to personal jurisdiction—the Second, Fourth, Sixth, Seventh, Ninth, Tenth, and District of Columbia. All seven have concluded that it can. *See Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. (Schwab II)*, 22 F.4th 103, 110 (2d Cir. 2021), *cert denied*, 142 S. Ct. 2852 (2022); *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 451 (6th Cir. 2012); *Textor v. Bd. of Regents*, 711 F.2d 1387, 1392-93 (7th Cir. 1983); *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 742 (9th Cir. 2013); *Newsome v. Gallacher*, 722 F.3d 1257, 1265 (10th Cir. 2013); *Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1069 (10th Cir. 2007); *Companhia Brasileira Carbureto de Calicio v.*

Applied Indus. Materials Corp., 640 F.3d 369, 372 (D.C. Cir. 2011) (Kavanaugh, J.); *accord J&M Assoc., Inc. v. Romero*, 488 F. App'x 373, 376 (11th Cir. 2012).

The federal circuits are not alone in reaching this conclusion. At least thirteen state supreme courts—Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kansas, Maryland, Minnesota, Nevada, South Carolina, Tennessee, and Utah—have held the same. *See Ex parte Maint. Grp., Inc.*, 261 So. 3d 337, 347 (Ala. 2017); *Gibbs v. PrimeLending*, 381 S.W.3d 829, 834 (Ark. 2011); *Matthew v. Fläkt Woods Grp. SA*, 56 A.3d 1023, 1027 (Del. 2012); *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 585 (Fla. 2000); *Stubblefield v. Stubblefield*, 769 S.E.2d 78, 82 n.4 (Ga. 2015); *Womble Bond Dickinson (US) LLP v. Kim*, 537 P.3d 1154, 1162 (Haw. 2023); *Aeroflex Wichita, Inc. v. Filardo*, 275 P.3d 869, 882 (Kan. 2012); *Mackey v. Compass Mktg., Inc.*, 892 A.2d 479, 486 (Md. 2006); *Hunt v. Nevada State Bank*, 172 N.W.2d 292, 312-13 (Minn. 1969); *Tricarichi v. Coop. Rabobank, U.A.*, 440 P.3d 645, 653 (Nev. 2019); *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796, 798-99 (S.C. 1990); *First Cmty. Bank N.A. v. First Tenn. Bank, N.A.*, 489 S.W.3d 369, 395 (Tenn. 2015); *Raser Techs., Inc. v. Morgan Stanley & Co.*, 449 P.3d 150, 169-70 (Utah 2019).

The petitioners assert (at 18) that even though these courts agree that jurisdiction may be based on a conspiracy, they "fundamentally disagree" about the requirements for doing so. But the only evidence of this supposedly fundamental disagreement is that different courts have used different words to describe different cases. The petitioners do not cite a single case that would have come out differently in a different jurisdiction. Nor can they identify even a single state or federal appellate court that would hold that due process prohibits

jurisdiction in a case like this, where the defendants entered into a conspiracy to manipulate prices in U.S. markets, furthered that conspiracy through U.S. traders, and profited by trading on a U.S. exchange.

As the Seventh Circuit has explained, "[t]here does not seem to be any question that" if a "plaintiff's complaint alleges an actionable conspiracy" that has minimum contacts with the forum, the forum has personal jurisdiction over the conspirators. *Textor*, 711 F.2d at 1392 (citing cases). After all, it's well established "that the acts of a conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy." *Id.* Personal jurisdiction—courts agree—is no different. *See, e.g.*, *Stauffacher v. Bennett*, 969 F.2d 455, 459 (7th Cir. 1992) (Posner, J.), *superseded by rule on other grounds as recognized in Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 941 (7th Cir. 2000).

In coming to this conclusion, the courts of appeal have emphasized that alleging a conspiracy does not obviate the rule that personal jurisdiction must be based on contacts "created by 'the defendant *itself*.'" *See, e.g.*, *Schwab II*, 22 F.4th at 122 (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)). But one way in which "a defendant itself" can create contacts with a forum is by choosing to participate in a conspiracy that has such contacts. *See id.* As the Second Circuit explained, "[m]uch 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." *Id.* (relying on *Daimler AG v. Bauman*, 571 U.S. 117, 135 n.13 (2014)).

In other words, the lower courts agree that personal jurisdiction based on conspiracy is permissible because it "*serves*"—rather than "supplants"—the requirement that a defendant purposefully avail itself of the forum. *Id.* at 125. A defendant who has "voluntarily participated in a conspiracy with [the] knowledge of its acts in or effects in the forum state" has "purposefully availed himself of the privilege of conducting activities in the forum state." *Instituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982).

As the Tenth Circuit put it, "[i]f three Kansans conspired to fire a cannonball into Oklahoma, we do not believe the Constitution would foreclose Oklahoma courts from exercising jurisdiction" over any of the conspirators. *Newsome*, 722 F.3d at 1266. That's because in conspiring to fire a cannonball into Oklahoma, all three conspirators purposefully directed their actions into the forum—regardless of who actually fired the shot. *See id.*

B. The petitioners attempt to manufacture a split, but the jurisdictions they cite either haven't ruled on the issue at all—or *agree* with the decision below. Take, for example, their lead case, the Seventh Circuit's decision in *Davis v. A&J Electronics*, 792 F.2d 74 (7th Cir. 1986). The question in that case was whether alleging a conspiracy allows a court to exercise personal jurisdiction even where it is not available under the forum state's long-arm statute. *Id.* at 76. In holding that it does not, *Davis* did not reject the idea that personal jurisdiction can ever rest on a conspiracy. It rejected the idea that a forum may exercise jurisdiction even when the state's long-arm statute forbids it. *See id.*[4]

[4] The petitioners' reliance (at 14) on the unpublished decision in *Smith v. Jefferson County Board of Education* is similarly flawed. 378 F. App'x 582 (7th Cir. 2010). That case, too, was about the reach of a

In fact, the Seventh Circuit has concluded that due process does *not* prohibit courts from exercising personal jurisdiction based on a defendant's participation in a conspiracy. *See Stauffacher*, 969 F.2d at 459; *Textor*, 711 F.2d at 1392–93. Analogizing to agency, the Seventh Circuit's view is that "[i]f through one of its members a conspiracy inflicts an actionable wrong in one jurisdiction, the other members should not be allowed to escape being sued there by hiding in another jurisdiction." *Stauffacher*, 969 F.2d at 459. That's no different than the Second Circuit's approach.

The petitioners fare no better with the Fifth Circuit. The petition (at 14–15) cites only one published Fifth Circuit decision, *Guidry v. United States Tobacco Co.*, 188 F.3d 619 (5th Cir. 1999). But, if anything, that case suggests that the Fifth Circuit would join every other circuit that has considered the issue and hold that personal jurisdiction may be premised on a conspiracy.

In *Guidry*, the district court granted a motion to dismiss for lack of personal jurisdiction because the plaintiff failed to adequately allege a conspiracy. *Id.* at 623. The Fifth Circuit reversed, holding that even if the conspiracy allegations failed, the court still should have considered whether there was some other basis for exercising jurisdiction. *Id.* at 625. In doing so, the court did not suggest that personal jurisdiction based on a conspiracy would be improper had it been adequately alleged. *See id.* To the contrary, the court explained the principles that would govern such a claim "[i]n case the district court is confronted with these issues again." *Id.* at

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state's long-arm statute. The court held that the plaintiff hadn't adequately alleged a conspiracy with connections to the forum state at all and that, even if he had, the allegations still would not fall within the forum state's long-arm statute. *Id.* at 586.

631. There would be no need to provide guidance on how to determine whether the conspiracy allegations in a complaint support personal jurisdiction if the Fifth Circuit believed such jurisdiction was unconstitutional.

As the petition points out (at 14), one unpublished Fifth Circuit decision from twenty years ago does seem to have misinterpreted a line from *Guidry* as limiting personal jurisdiction in conspiracy cases. *See Delta Brands Inc. v. Danieli Corp.*, 99 F. App'x 1, 6 (5th Cir. 2004). But that is not the law of the Fifth Circuit, and there is no reason to think that other panels will do the same. If anything, that the Fifth Circuit has not needed to clarify its law over the past two decades demonstrates how rarely this issue even arises.

Falling back, the petitioners argue that the decision below conflicts with decisions of the Nebraska and Texas Supreme Courts. But that, too, is incorrect. While admittedly unclear, the Nebraska Supreme Court's decision in *Ashby v. State* noted only that the court had not yet ruled on the doctrine either way and was not "inclined to do so" at that time. 779 N.W.2d 343, 360 (Neb. 2010).

And the Texas Supreme Court has merely recognized that conspiring with a Texas-based resident, "*by itself*" does not subject the non-resident to jurisdiction in Texas courts. *M&F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co.*, 512 S.W.3d 878, 887 (Tex. 2017) (emphasis added). The Second Circuit agrees. *See* Pet. App. 42–43. Like the Texas Supreme Court, the Second Circuit has held that "the mere existence of a conspiracy" with a forum resident "is not enough." *Charles Schwab Corp. v. Bank of Am. Corp. (Schwab I)*, 883 F.3d 68, 86 (2d Cir. 2018). To demonstrate that a defendant purposefully availed itself of a forum through a conspiracy—in the

Second Circuit or anywhere else—the conspiracy must be "directed towards the forum," or a co-conspirator must have taken "overt acts in furtherance of the conspiracy" in the forum. *Id.* at 86–87.

For the same reason, the decision below is not a "sharp departure"—or, indeed, any departure at all—from prior Second Circuit precedent. Pet. 2. The petitioners invoke (at 2, 25) Judge Friendly's observation that "the mere presence of one conspirator" in a forum does not "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). But, again, the Second Circuit continues to hold that view. *See Schwab II*, 22 F.4th at 124-25 (citing *Leasco*). The Second Circuit requires more than just mere presence; it requires that a co-conspirator commit overt acts in furtherance of the conspiracy that have "sufficient contacts with" the forum "to subject that co-conspirator to jurisdiction" in the forum. Pet. App. 42–43.

So what's left of the petitioners' "cavernous" split? Pet. 19. A handful of district courts and some "criticism" from "courts and commentators." Pet. 15–17. That's hardly enough to warrant this Court's intervention.

II. The question presented will have little practical impact following this Court's decision in *Ford*, and this case is a poor vehicle to consider it.

Despite the unanimity of the lower courts, BASF and Standard Bank contend that this Court's intervention is necessary because the cases in which personal jurisdiction is premised on a conspiracy are often important cases alleging collusion in large financial markets. *See* Pet. 30. But this Court's recent decision in *Ford Motor Co. v.*

Montana Eighth Judicial District Court, 141 S. Ct. 1017 (2021), obviates any need to rely on a conspiracy to exercise personal jurisdiction in most of these cases.

Ford holds that "[w]hen a company . . . serves a market for a product in a [forum] and that product causes injury in the [forum] to one of its residents, the [forum's] courts may entertain the resulting suit." *Id.* at 1022. That rule captures most of the cases in which plaintiffs allege a conspiracy to manipulate a financial market. The defendants in these cases are ordinarily large institutions that routinely sell the instruments they're alleged to have price-fixed into the United States. *See, e.g.*, *Schwab II*, 22 F.4th at 110; *Allianz Glob. Invs. GmbH v. Bank of Am. Corp.*, 2021 WL 3192814, at *1 (S.D.N.Y. July 28, 2021); *Contact v. Bank of Am. Corp.*, 385 F. Supp. 3d 284, 290 (S.D.N.Y. 2019).

Take this case: BASF and Standard Bank both hold "substantial market share" in the market for physical platinum and palladium and on the New York Mercantile Exchange. JA 353, 365, 367–68. And so they trade both physical platinum and palladium and their derivatives in the U.S. market. *See id.*; Pet. App. 38 (explaining that each of the conspirators "conducts precious metals trading in the United States"); *id.* ("much" of their alleged market manipulation in physical and derivative markets "was domestic"). The plaintiffs are U.S. residents, harmed in the United States by price-fixed platinum and palladium and their derivatives—exactly the products that the petitioners routinely market in the United States.[5]

[5] Before *Ford*, the district court incorrectly concluded that, absent the conspiracy allegations, it could not exercise personal jurisdiction over the petitioners. Pet. App. 115. But that conclusion was based on the premise that the petitioners did not trade platinum and palladium or their derivatives in the United States. *See* Pet. App.

Before *Ford*, many courts, including the Second Circuit, would have held that these allegations, standing alone, aren't enough for personal jurisdiction. These courts mistakenly believed that a defendant's forum contacts must *cause* a plaintiff's injury. *See, e.g. Schwab I*, 883 F.3d at 84; *Kuenze v. HTM Sport-Und Freizeitgeräte AG*, 102 F.3d 453, 456 (10th Cir. 1996). And so, in their view, it was not enough for a plaintiff to allege that a defendant routinely sold a product into the forum, and that product injured the plaintiff—a plaintiff had to allege that they bought the product from the defendant itself. *See Kuenze*, 102 F.3d at 457; *see also In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d at 742 (looking to the defendants' conspiracy's contacts with the forum so that it "need not decide" whether personal jurisdiction could be based on the defendants' sales of the relevant product in the forum states to third parties).

Ford rectified this mistake by clarifying that causation is not required. A forum may exercise jurisdiction over a claim that arises out of or *relates to* a defendant's forum contacts. *Ford*, 141 S. Ct. at 1026. A claim brought by a forum resident who is injured in the forum by a product the defendant routinely sells into the forum is, *Ford* holds, at least related to the defendant's forum contacts. *Id.* at 1027. So in cases like this one—the very cases that the petitioners claim justify this Court's review—there is no longer any need to determine whether a defendant has sufficient minimum contacts through its participation in a conspiracy. There's personal jurisdiction under *Ford*.

111, 117. As the Second Circuit recognized, that premise is incorrect—the plaintiffs allege that both BASF and Standard Bank traded in the physical and derivatives markets in the United States. Pet. App. 5, 10, 28, 38, 39; JA 355, 485.

The appeal in this case was already pending by the time *Ford* was decided. But given *Ford*, there aren't likely to be many more decisions like the one below. Before intervening on an issue that the lower courts already agree on, this Court should at least wait to see whether it still matters.

And even if this Court did want to intervene, this case is a particularly poor vehicle to do so. As explained above, there would be jurisdiction here, regardless of whether the plaintiffs had alleged a conspiracy or not. If this Court is going to examine the circumstances under which a conspiracy can give rise to personal jurisdiction, it should at least do so in a case in which it would make a difference. Following *Ford*, it's not yet clear how many cases remain in which participation in a conspiracy is likely to be the only basis for jurisdiction—or under what circumstances those cases will arise. If this Court is going to provide guidance on personal jurisdiction in conspiracy cases, it should wait to do so until it can ascertain the impact (if any) of its decision.[6]

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[6] The petitioners assert (at 32–33) that this issue "regularly evades appellate review" because the final judgment rule precludes the immediate appeal of personal jurisdiction decisions. But the final judgment rule precludes immediate review of almost all interlocutory decisions—that's the point of the rule. This argument, therefore, could apply to almost any petition for certiorari. The petitioners don't identify any reason personal jurisdiction is less likely than any other issue to reach this Court. Nor could they. This Court frequently decides questions of personal jurisdiction. *See, e.g.*, *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023); *Ford*, 141 S. Ct. 1017 (2021). And as the petitioners themselves point out (at 3), this Court recently denied petitions for certiorari on the same issue they present here.

III. The decision below is correct.

This Court has long held that where a defendant "has purposefully directed [its] activities" at a forum, and "litigation results from alleged injuries that arise out of or relate to those activities," the forum "does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction" over the defendant. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–73 (1985). That's precisely what happened here: BASF and Standard Bank (1) conspired to manipulate prices in U.S. markets, (2) furthered that conspiracy by collusively trading in those U.S. markets while leveraging information gathered from U.S. co-conspirators, and then (3) profited by trading in U.S. markets at the expense of U.S. traders. If that's not "purposeful availment" of the "privilege of conducting activities within" the United States, it's hard to know what is. *World-Wide Volkswagen Corp.*, 444 U.S. at 297; *see also Ford*, 141 S. Ct. at 1028 (jurisdiction exists where defendant "systematically served a market" in the forum for the "very [product]" that injured the plaintiffs in that forum).

Nevertheless, the petitioners argue that U.S. courts lack jurisdiction to hear the U.S. traders' claims. That contention has no support in this Court's case law or the principles underlying the due process clause. The Second Circuit was right to reject it.

A. The petitioners don't even try to explain how exercising jurisdiction in this case would violate due process—they can't. Instead, they contend that, as a general matter, exercising personal jurisdiction based on a defendant's participation in a conspiracy conflicts with this Court's precedent. In particular, BASF and Standard Bank repeatedly assert that the Second Circuit's case law—and the many decisions around the country that

agree with it—conflict with this Court's decision in *Walden v. Fiore*, 571 U.S. 277 (2014). *Walden*, the petition recites, held that personal jurisdiction must be based on "contacts that the defendant *himself* creates with the forum." *Id.* at 284. But, as the courts of appeal have consistently recognized, a defendant itself creates contacts with a forum when it enters a conspiracy directed at that forum or takes overt acts through a co-conspirator in the forum. *See, e.g.*, *Schwab II*, 22 F.4th at 122; *Newsome*, 722 F.3d at 1265.

The petitioners take issue with imputing the forum contacts of a defendant's co-conspirators to the defendant. But they concede (at 24) that personal jurisdiction may rest on the acts of a defendant's agents. *See, e.g. Daimler AG*, 571 U.S. at 135 n.13 (explaining that the forum contacts of a defendant's agent may give rise to personal jurisdiction). According to the petitioners, that "makes sense" because an "agent's forum contacts *are* the defendant's." Pet. 24.[7]

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[7] The petitioners assert that "[i]n this Court, the *only* way to impute someone else's contacts to a defendant would be through an agency relationship." Pet. 24 (emphasis added). That's incorrect. This Court has repeatedly recognized that personal jurisdiction can be based on imputed contacts, without requiring an agency relationship. *See, e.g.*, *Daimler*, 571 U.S. at 135 n.13 (purposeful availment through "agents *or* distributors" (emphasis added)); *World-Wide Volkswagen Corp.*, 444 U.S. at 297 (serving the market in the forum "directly *or indirectly*" supports personal jurisdiction (emphasis added)). In claiming otherwise, the only authority the petitioners cite is Justice Black's concurrence in *International Shoe Co. v. Washington*, 326 U.S. 310, 323 (1945) (Black, J., concurring in judgment). Pet. 21–22. But that concurrence says only that it is "unthinkable" that the due process clause could prohibit basing personal jurisdiction on the contacts of a defendant's agent; it does not say that agency is the *only* circumstance in which contacts may be imputed. *International Shoe Co.*, 326 U.S. at 323.

But the same is true of a co-conspirator's contacts. They *are* the defendant's. Just as the acts of an agent within the scope of the agency are attributable to the principal, it's black-letter law that the acts of a conspirator within the scope of the conspiracy are attributable to the co-conspirators. *See, e.g.*, *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 496 (2023); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 249–50 (1917) (explaining that "each member" of a conspiracy is "the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all"); *Pinkerton v. United States*, 328 U.S. 640, 646–47 (1946) (similar); Restatement (Third) of Torts: Liability for Economic Harm § 27 (2020). And with good reason: A conspirator acts through its co-conspirators just as a principal acts through its agents.

Indeed, co-conspirators acting in furtherance of the conspiracy *are* "agents of one another." *Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974); *see Ocasio v. United States*, 578 U.S. 282, 288 (2016) ("[W]hen people enter into a conspiracy to accomplish an unlawful end, each and every member becomes an agent for the other conspirators in carrying out the conspiracy."); *Hitchman*, 245 U.S. at 249–50; 3A Fed. Jury Prac. & Instr. § 150:65 (6th ed.).

In accordance with this longstanding rule, this Court has repeatedly held that a criminal defendant charged with conspiracy may be tried anywhere any co-conspirator took an overt act in furtherance of the conspiracy. *See, e.g.*, *Smith v. United States*, 599 U.S. 236, 244 (2023); *Ford v. United States*, 273 U.S. 593, 622 (1927); *Hyde v. United States*, 225 U.S. 347, 349 (1912), *superseded on other grounds as recognized in Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017); *see also id.* at 365 (explaining that this was the rule at common law). The petitioners do not mention

these cases—let alone explain how it could possibly be so unfair as to violate due process for a forum to exercise personal jurisdiction over a civil defendant, when it could indisputably try a criminal one under the same circumstances.[8]

The reason that every court of appeal to have actually ruled on the issue has held that personal jurisdiction may be based on a defendant's participation in a conspiracy is because that is correct.

B. Unable to demonstrate otherwise, the petitioners resort to extreme hypotheticals. If personal jurisdiction is ever allowed to rest on a conspiracy, they claim (at 26), there will be no bar to hauling a defendant into court "based on the conduct of an *unknown* alleged co-conspirator who has forum contacts the defendant knows *nothing* about." But as the Second Circuit has explained, a "conspiracy theory" of personal jurisdiction cannot "get off the ground" if a defendant is "blindsided by its co-conspirator's contacts with the forum." *Schwab II*, 22 F.4th at 125. That's because the whole point of the inquiry is to determine whether the defendant has, through the conspiracy, purposefully availed itself of the forum. *See id.* So "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." *See id.*; *see also*

[8] Indeed, the Constitution explicitly limits where criminal defendants may be tried. U.S. Const. amend. VI; *id.* art. III, § 2, cl. 3; *see United States v. Cabrales*, 524 U.S. 1, 6 & n.1 (1998) (explaining that these provisions are rooted in the founders' frustration with the King's practice of transporting colonists "beyond Seas to be tried"). It would make no sense if hidden within the due process clause was an unwritten limitation on jurisdiction over civil defendants that is greater than the Constitution's explicit protections for criminal defendants.

Twitter, 598 U.S. at 496 (even for purposes of liability, only "reasonably foreseeable" acts in furtherance of the conspiracy may be attributed to co-conspirators); *Pinkerton*, 328 U.S. at 647–48 (similar).[9]

Presumably that's why the petitioners cannot identify a single case in which a court has actually exercised personal jurisdiction based on the unforeseeable forum contacts of an unknown co-conspirator. And here, it's undisputed that the petitioners knew about their U.S. co-conspirators—traders employed by the petitioners' corporate affiliates—and those co-conspirators' U.S. contacts. The petitioners were in "constant communication" with them. Pet. App. 70. Indeed, none of the high-stakes antitrust cases the petitioners are worried about could ever be brought against a defendant who could not foresee a domestic impact. Congress has explicitly limited the Sherman Act's extraterritorial reach to conspiracies that have a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. 15 U.S.C. § 6a(1); *see F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004).

The petitioners repeatedly emphasize that the decision below raised concerns about a doctrine that would allow any forum contact of any co-conspirator to be attributed to the defendant, regardless of whether that contact was reasonably foreseeable or in furtherance of the conspiracy. But, again, that is not what the Second

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[9] Contrary to the petitioners' suggestion (at 27), this does not mean that imputing a co-conspirator's overt acts to a defendant allows personal jurisdiction to rest on mere "foreseeability alone." *World-Wide Volkswagen Corp.*, 444 U.S. at 295. Rather, the doctrine recognizes that a defendant purposefully avails itself of the forum when it enters a conspiracy that is effectuated through overt acts in the forum.

Circuit—or any other court—has held. In the unlikely event that some court does so, this Court can grant review then.

C. In a last-ditch effort to generate concern, the petitioners claim (at 27) that it will threaten international comity to ever allow courts to exercise jurisdiction based on a defendant's participation in a conspiracy. But they never explain how. Many conspiracies are entirely domestic. And, consistent with this Court's instructions, courts—including the Second Circuit here—already consider international comity as part of the ordinary personal jurisdiction inquiry. *See* Pet. App. 51–52 (citing *Asahi Metal Industry Co. v. Super. Ct. of Cal.,* 480 U.S. 102, 115 (1987)).

The petitioners don't explain why this Court should jettison longstanding principles of conspiracy law to accommodate a concern that the personal jurisdiction inquiry already accommodates.

* * *

Ultimately, the petitioners can point to nothing wrong with the lower courts' consensus that if a "conspiracy inflicts an actionable wrong in" a forum, its members "should not be allowed to escape being sued there by hiding in another jurisdiction." *Stauffacher*, 969 F.2d at 459.

American courts have been hearing cases in which foreign defendants conspire to affect a U.S. market since the antitrust laws were enacted more than a century ago. *See, e.g.*, *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) (Hand, J.); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577-78 (1986); *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct.

1865, 1870 (2018). This case is no different. There is no reason to grant review.

CONCLUSION

This Court should deny the petition for certiorari.

December 13, 2023

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