

No. 23-232

In The
Supreme Court of the United States

BASF METALS LIMITED &
ICBC STANDARD BANK PLC,

Petitioners,

v.

KPFF INVESTMENT, INC., ET AL.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**BRIEF OF ATLANTIC LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF
PETITIONER BASF METALS LIMITED**

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	4
The Court should grant certiorari to reinforce the due process principles underlying its jurisprudence on specific personal jurisdiction.....	4
A. “Conspiracy jurisdiction” conflicts with the due process principles that govern specific personal jurisdiction.....	4
B. “Conspiracy jurisdiction” promotes forum shopping.....	11
C. <i>Mallory v. Norfolk Southern</i> has blurred the practical distinction between general and specific personal jurisdiction over corporate defendants.....	13
CONCLUSION.....	17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bristol-Myers Squibb Co. v. Super. Ct. of Cal.</i> , 137 S. Ct. 1773 (2017)	3, 5, 6
<i>Charles Schwab Corp. v. Bank of Am. Corp.</i> (<i>Schwab I</i>), 883 F.3d 68 (2d Cir. 2018).....	8-11
<i>Daimler AG v. Bauman</i> , 571 U.S. 117 (2014)	5, 6, 9, 15
<i>Davis v. A J Elecs.</i> , 792 F.2d 74 (7th Cir. 1986)	10
<i>Erie R.R. Co. v. Tompkins</i> , 304 U.S. 64 (1938)	12
<i>Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.</i> , 141 S. Ct. 1017 (2021)	4, 6, 11
<i>Goodyear Dunlop Tires Ops., S.A. v. Brown</i> , 564 U.S. 915 (2011)	5, 6, 15
<i>Hanna v. Plumer</i> , 380 U.S. 460 (1965)	12
<i>Helicopteros Nacionales de Colombia, S.A. v. Hall</i> , 466 U.S. 408 (1984)	4, 6
<i>Int’l Shoe Co. v. Washington</i> , 326 U.S. 310 (1945)	1, 4, 14, 17

<i>Mallory v. Norfolk S. Ry. Co.</i> , 143 S. Ct. 2028 (2023)	3, 6, 13-16
<i>Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.</i> , 243 U.S. 93 (1917)	14
<i>Schwab Short-Term Bond Market Fund v. Lloyd’s Banking Group plc (“Schwab II”)</i> 22 F.4th 103 (2d Cir 2021)	8, 10
<i>Turner v. Baxley</i> , 354 F. Supp. 963 (D. Vt. 1972).....	13
<i>Unspam Techs., Inc. v. Chernuk</i> , 716 F.3d 322 (4th Cir. 2013)	8, 10
<i>Walden v. Fiore</i> , 571 U.S. 277 (2014)	6, 7
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980)	4
Other Authorities	
Ann Althouse, <i>The Use of Conspiracy Jurisdiction To Establish In Personam Jurisdiction: A Due Process Analysis</i> , 52 Fordham L. Rev. 234 (1983)	13
Christopher A. Whytock, <i>The Evolving Forum Shopping System</i> , 96 Cornell L. Rev. 481 (2011)	12
Daniel Klerman, <i>Rethinking Personal Jurisdiction</i> , 6 J. of Legal Analysis 245, 247 (2014)	12

Friedrich K. Juenger, <i>Forum Shopping, Domestic and International</i> , 63 Tulane L. Rev. 553 (1989).....	12
Jeffrey L. Rensberger, <i>Consent to Jurisdiction Based on Registering to Do Business: A Limited Role for General Jurisdiction</i> , 58 San Diego L. Rev. 309, (2021).....	12
Jess Krochtengel, <i>Corporations On Edge After High Court’s Jurisdiction Ruling</i> , Law360 (June 27, 2023).....	16
Katherine Florey, <i>The New Landscape of State Extraterritoriality</i> , __ Tex. L. Rev. __ (forthcoming), available at https://tinyurl.com/3rbpe5dc	16
Lisa Bellino Apelian, <i>Jurisdiction By Consent Under Mallory v. Norfolk Southern Railway Co.</i> , For The Defense, Sept. 2023.....	16
Philip S. Goldberg, et al., <i>The U.S. Supreme Court’s Paradigm Shift To End Litigation Tourism</i> , 14 Duke J. of Const. Law & Pub. Policy 51 (2019)	11

INTEREST OF THE *AMICUS CURIAE*¹

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. See atlanticlegal.org.

* * *

Resolution of the question presented—whether due process permits a court to exercise specific personal jurisdiction over a corporate defendant based solely on the forum contacts of an alleged co-conspirator—is critical to civil justice and the rule of law. So-called “conspiracy jurisdiction” over a corporation that lacks even minimum contacts with the forum State conflicts with what this Court in *International*

¹ Petitioners’ and Respondents’ counsel were provided timely notice in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), and many times since, has described as “traditional notions of fair play and substantial justice.”

As a steadfast advocate for free enterprise, ALF long has advocated for a level playing field in civil litigation. The controversial theory of conspiracy jurisdiction, which continues to divide the circuits and state appellate courts, *see* Pet. at 12-21, cannot be reconciled with the well-established due process principles underlying this Court’s jurisprudence on specific personal jurisdiction. ALF is filing this brief to urge the Court to grant review and reinforce those principles by squarely rejecting conspiracy jurisdiction as incompatible with due process.

SUMMARY OF ARGUMENT

The opinion below, constrained by recent Second Circuit precedents holding that an alleged co-conspirator’s forum contacts can be imputed to another alleged co-conspirator that lacks any relevant contacts with the forum State, clashes with the “fair play and substantial justice” principles embodied by this Court’s due process jurisprudence. Where, as here, there is no agency relationship (i.e., no control or supervision) between alleged co-conspirators, fictitious contacts with a forum State cannot satisfy the due process requirements that the Court’s “minimum contacts” case law demands.

Expansive jurisdictional theories such as “conspiracy jurisdiction” facilitate forum shopping, which undermines due process by tilting the playing field to a plaintiff’s advantage, especially if multiple

nonresident defendants that lack even minimum contacts with a forum State can be haled into its courts. Like the “sliding-scale approach” to minimum contacts that this Court unanimously rejected in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1781 (2017), conspiracy jurisdiction “resembles a loose and spurious form of general jurisdiction.”

The need for immediate review of the well-percolated conspiracy jurisdiction question presented by this case not only is compelled by the importance of Second Circuit precedents to the financial world, *see* Pet. at 14, but also by the Court’s decision last Term in *Mallory Norfolk Southern Railway Co.*, 143 S. Ct. 2028 (2023). By extending general jurisdiction to nonresident corporate defendants that merely do business in a State that has enacted a consent-by-registration statute, *Mallory* raises important questions about the continuing role of specific personal jurisdiction in civil litigation. The Court should grant certiorari to decide whether conspiracy jurisdiction is a constitutionally valid form of specific personal jurisdiction, and in so doing, reaffirm the bright line between specific and general jurisdiction.

ARGUMENT

The Court should grant certiorari to reinforce the due process principles underlying its jurisprudence on specific personal jurisdiction

A. “Conspiracy jurisdiction” conflicts with the due process principles that govern specific personal jurisdiction

1. Due Process Principles

The Court repeatedly has emphasized that personal jurisdiction over a nonresident corporate defendant is inextricably linked to the constitutional guarantee of due process of law.

International Shoe is “the canonical decision” on personal jurisdiction. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). “There, the Court held that a tribunal’s authority depends on the defendant’s having such ‘contacts’ with the forum State that ‘the maintenance of the suit’ is ‘reasonable, in the context of our federal system of government,’ and ‘does not offend traditional notions of fair play and substantial justice.’” *Id.* (quoting *Int’l Shoe*, 326 U.S. at 316-17). “Due process requirements are satisfied” for personal jurisdiction over a corporate defendant not “at home” in the forum State only if this “minimum contacts” test is met. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (“[T]he Due Process Clause ‘does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no

contacts, ties, or relations.”) (quoting *Int’l Shoe*, 326 U.S. at 319).

“*International Shoe’s* conception of ‘fair play and substantial justice’ presaged the development of two categories of personal jurisdiction.” *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014). The Court describes these as “general or all-purpose jurisdiction, and specific or case-linked jurisdiction.” *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 919 (2011). “The primary focus” of both categories “is the defendant’s relationship to the forum State.” *Bristol-Myers*, 137 S. Ct. at 1779.

“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.” *Goodyear*, 564 U.S. at 919 (quoting *Int’l Shoe*, 326 U.S. at 317).

But “[s]pecific jurisdiction is very different.” *Bristol-Myers*, 137 Sup. Ct. at 1780.

It covers defendants less intimately connected with a State, but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name “purposeful availment.” The defendant . . . must take some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State. The contacts must be the defendant’s own choice and not random,

isolated, or fortuitous. They must show that the defendant deliberately reached out beyond its home. . . . Yet even then—because the defendant is not “at home”—the forum State may exercise jurisdiction in only certain cases. The plaintiff’s claims . . . must arise out of or relate to the defendant’s contacts with the forum.

Ford, 141 S. Ct. at 1024-25 (internal quotation marks and citations omitted); see *Bristol-Myers*, 137 S. Ct. at 1779-80 (discussing the differences between general and specific jurisdiction); *Daimler*, 571 U.S. at 126-133 (same); *Helicopteros*, 466 U.S. at 414 (same); *Goodyear*, 564 U.S. at 919 (same).

“[S]pecific jurisdiction has become the centerpiece of modern jurisdiction theory.” *Daimler*, 571 U.S. at 128 (quoting *Goodyear*, 564 U.S. at 925). The Court “has increasingly trained on the relationship among the defendant, the forum, and the litigation, *i.e.*, specific jurisdiction.” *Id.* at 132-22 (internal quotations marks and citation omitted). At least until the Court’s recent decision in *Mallory* (see discussion below), “general jurisdiction [has played] a reduced role.” *Id.* at 128 (quoting *Goodyear*, 564 U.S. at 925).

In *Walden v. Fiore*, 571 U.S. 277, 283 (2014), the Court “addresse[d] the ‘minimum contacts’ necessary to create specific jurisdiction.” The Court explained that “the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant’s conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him.” *Id.* at 285.

[T]he relationship must arise out of contacts that the ‘defendant *himself*’ creates with the forum State. Due process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant — not the convenience of plaintiffs or third parties. . . . Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the ‘random, fortuitous, or attenuated’ contacts he makes by interacting with other persons affiliated with the State.

Id. at 285-86 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

2. Conspiracy Jurisdiction

The Second Circuit panel’s tepid application of “a conspiracy theory of specific jurisdiction” to the Petitioners—foreign corporations that lack even minimum contacts in the forum State of New York—underscores what the panel “acknowledge[s] [is] the debate over [the] question” of whether “the rules of conspiratorial liability should . . . govern a court’s personal jurisdiction over a conspirator.” App. 42, 48, 49; *see also id.* at 49 n.10 (collecting cases that criticize the theory of conspiracy jurisdiction); Pet. at 12-18 (discussing same).

According to the panel, it was “bound to follow” the Second Circuit’s formulation of conspiracy jurisdiction

set forth in *Charles Schwab Corp. v. Bank of America Corp.* (“*Schwab I*”), 883 F.3d 68, 86-88 (2d Cir. 2018). App. 49. The panel explained that even though “[t]he allegations in the complaint might not establish that [Petitioners] themselves had minimum contacts with the forum State . . . we have already held in *Schwab I* that ‘a *co-conspirator*’s minimum contacts . . . in furtherance of the conspiracy’ fulfills the requirement that the ‘defendant must have purposefully availed itself of the privilege of doing business in the forum’” *Id.* at 45-46 (citing *Schwab I*, 883 F.3d at 85-87).

In *Schwab Short-Term Bond Market Fund v. Lloyd’s Banking Group plc* (“*Schwab II*”), 22 F.4th 103 (2d Cir 2021), the Second Circuit indicated that it held in *Schwab I* “that a defendant can . . . avail itself of a forum through certain actions taken by a co-conspirator in the forum.” *Id.* at 122 (citing *Schwab I*, 883 F.3d at 86-87). According to *Schwab II*, “[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.*

“Under [this] theory, ‘one conspirator’s minimum contacts allow for personal jurisdiction over a co-conspirator,’ even when the co-conspirator lacks such contacts itself.” App. 42 (quoting *Schwab I*, 883 F.3d at 86); see *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 329 (4th Cir. 2013) (listing three “conspiracy jurisdiction” pleading requirements, which the Second Circuit adopted in *Schwab I* and repeated in *Schwab II*). One of the “three requirements for

imputing the minimum contacts of one co-conspirator to another” is that “the plaintiff must allege that . . . a co-conspirator’s overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state.” App. 42-43 (quoting *Schwab I*, 883 F.3d at 87). The panel acknowledged here that this “is not a difficult requirement to meet.” *Id.* at 44.

The Court should flatly reject the fiction that one alleged co-conspirator’s contacts with a forum State are another alleged co-conspirator’s contacts with the forum State where, as here, there is no agency relationship between the two. “Agency relationships . . . may be relevant to the existence of specific jurisdiction.” *Daimler*, 571 U.S. at 135 n.13 (italics omitted). But that is neither the case, nor the question presented, here. *See* Pet. at 24-25. At the very least, the question of whether specific jurisdiction can be exercised over an alleged co-conspirator based entirely on *vicarious* minimum contacts with the forum State warrants this Court’s review.

The Second Circuit itself explained in this case that “[i]n the context of personal jurisdiction, due process demands that *each* defendant over whom a court exercises jurisdiction have some minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” App. 40 (internal quotation marks omitted) (emphasis added). Acknowledging that “[t]here may be grounds” for due process objections to conspiracy jurisdiction, the panel observed that “[c]onspiracy jurisdiction seems to have

expanded beyond its more limited roots,” since “[e]arly cases upheld jurisdiction over nonresident conspirators based . . . on the theory that the in-state coconspirators acted as agents of the nonresident defendants.” *Id.* at 46-47 (internal quotation marks omitted).

Schwab II, however, “squarely rejected that limitation on conspiracy jurisdiction.” *Id.* at 47. The court of appeals concluded there “that ‘our caselaw does not require a relationship of control, direction, or supervision’ to establish conspiracy jurisdiction.” *Id.* (quoting *Schwab II*, 22 F.4th at 125); *see also Unspam*, 716 F.3d at 329 (three-part test for conspiracy jurisdiction makes no mention of an agency relationship). Yet, as noted above, the court of appeals in *Schwab II* attempted to justify its conspiracy jurisdiction theory by analogizing an alleged co-conspirator that has forum contacts to a corporation’s in-state agent. *See* 22 F.4th at 122. In other words, the court of appeals essentially transformed the narrow agency exception into a broad conspiracy jurisdiction rule.

The court’s attempt to equate a bona fide corporate agent and an alleged co-conspirator that has forum contacts is flawed on its face, especially where, as here, the Petitioners did not direct, control, or supervise the activities of their alleged New York-based co-conspirators.

The Seventh Circuit in *Davis v. A J Electronics*, 792 F.2d 74 (7th Cir. 1986), rejected the same analogy upon which the Second Circuit’s *Schwab* conspiracy jurisdiction theory is based. Explaining that the

Illinois long-arm statute “permits the exercise of personal jurisdiction over a party to a civil conspiracy if a co-conspirator acts within Illinois as the party’s agent,” the court emphasized (prior to *Schwab I* and *II*) that there is “not . . . an independent federal ‘civil co-conspirator’ theory of personal jurisdiction.” *Id.* at 76.

With the supposed ability to hale nonresident corporations into a forum State’s courts based on illusory forum contacts, the freewheeling form of conspiracy jurisdiction approved by the Second Circuit is, as the district court observed, “extraordinarily broad.” App. 124.

B. “Conspiracy jurisdiction” promotes forum shopping

There can be no “fair play and substantial justice” if expansive jurisdictional theories such as conspiracy jurisdiction enable antitrust or civil RICO plaintiffs to forum shop by haling alleged, far-flung co-conspirators into a presumably plaintiff-friendly forum solely on the basis of one of the alleged co-conspirator’s contacts with the forum State.

Sometimes described as “litigation tourism,” forum shopping “is the practice of filing a lawsuit in a location believed to provide a litigation advantage to the plaintiff regardless of the forum’s affiliation with the parties or claims.” Philip S. Goldberg, et al., *The U.S. Supreme Court’s Paradigm Shift To End Litigation Tourism*, 14 Duke J. of Const. Law & Pub. Policy 51, 52 (2019); see, e.g., *Ford*, 141 S. Ct. at 1031 (“[T]he plaintiffs were engaged in forum-shopping—

suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State.”).

“As a rule, counsel, judges, and academicians employ the term ‘forum shopping’ to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit.” Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 *Tulane L. Rev.* 553 (1989); see also Jeffrey L. Rensberger, *Consent to Jurisdiction Based on Registering to Do Business: A Limited Role for General Jurisdiction*, 58 *San Diego L. Rev.* 309, 333-35 (2021) (discussing “illegitimate” or “invidious” forum shopping). “Other things being equal, the higher a plaintiff’s expectation that a particular court will make a favorable court-access decision, the more likely she is to file a lawsuit in that court.” Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 *Cornell L. Rev.* 481, 484 (2011). To make matters worse, “[l]oose jurisdictional rules that allow plaintiffs to choose among many potential courts give judges an incentive to be pro-plaintiff in order to attract litigation.” Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 *J. of Legal Analysis* 245, 247 (2014).

This Court has endeavored to deter forum shopping since at least *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (“discouragement of forum-shopping” is one of the “aims of the *Erie* rule”). Perhaps for practical reasons, the Court has not yet directly held that the Due Process Clause protects corporate

defendants from forum shopping. *See Mallory*, 143 S. Ct. at 2049 (Alito, J., concurring in part and concurring in the judgment). Nonetheless, conspiracy jurisdiction facilitates forum shopping, which by any measure, is the antithesis of fair play.

To allow the maintenance of a civil conspiracy action in every forum where an overt act was allegedly carried out in furtherance of the conspiracy would be an open invitation to forum shopping and harassment of defendants by unscrupulous litigants. Such a result would hardly be in keeping with “traditional notions of fair play and substantial justice.”

Turner v. Baxley, 354 F. Supp. 963, 977-78 (D. Vt. 1972); *see also* Ann Althouse, *The Use of Conspiracy Jurisdiction To Establish In Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234, 250 n.92 (1983) (“[T]he hardship of forcing the plaintiff to pursue its action in many forums . . . is offset by the consideration that permitting the plaintiff to consolidate litigation may enable him to forum shop and to harass defendants, in contravention of principles of due process.”).

C. *Mallory v. Norfolk Southern* has blurred the practical distinction between general and specific jurisdiction over corporate defendants

The Court’s June 2023 decision in *Mallory v. Norfolk Southern Railway Co.*, 143 S. Ct. 2028, not

only has engendered confusion about where general jurisdiction over corporate defendants can be exercised, but also, from a practical viewpoint, whether the well-understood bright-line distinction between general and specific personal jurisdiction still exists. The present appeal affords the Court an important and timely opportunity to clarify the impact of *Mallory* on specific personal jurisdiction.

Mallory upholds state corporate registration statutes that require a nonresident corporation to consent to a State's general jurisdiction as a condition for doing business in the State. Based on *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), *Mallory's* plurality opinion indicates that "all *International Shoe* did was stake out an *additional* road to jurisdiction over out-of-state corporations. . . . *International Shoe* held that an out-of-state corporation that *has not* consented to in-state suits may also be susceptible to claims in the forum State based on the 'quality and nature of [its] activity' in the forum." 143 S. Ct. at 2039 (quoting *Int'l Shoe*, 326 U.S. at 319). According to *Mallory*, "[t]he two precedents sit comfortably side-by-side." *Id.* at 2038.

The practical effect of *Mallory's* holding is to subject a corporation to general, *i.e.*, all-purpose, jurisdiction in potentially every State where it does business even though it is *not* "at home." Justice Barrett's dissenting opinion, joined by Chief Justice Roberts and Justices Kagan and Kavanaugh, explains that

All a State must do is compel a corporation to register to conduct business there (as every State does) and enact a law making registration sufficient for suit on any cause (as every State could do). Then, every company doing business in the State is subject to general jurisdiction based on implied “consent”—not contacts.

Such an approach does not formally overrule our traditional contacts-based approach to jurisdiction, but it might as well. By relabeling their long-arm statutes, States may now manufacture “consent” to personal jurisdiction.

143 S. Ct. at 2055 (Barrett, J., dissenting).

In light of *Mallory*, defense counsel are asking: What is the continuing role of the Court’s finely tuned principles on the minimum contacts required for specific personal jurisdiction? If a corporation can be sued for any reason in any State where it does business and a consent-by-registration statute has been enacted, what is the purpose of determining whether there also is specific jurisdiction over the corporate defendant in a particular suit? Justice Barrett expressed concern in *Mallory* that “[i]f States take up the Court’s invitation to manipulate registration, *Daimler* and *Goodyear* will be obsolete, and, at least for corporations, *specific jurisdiction will be ‘superfluous.’*” *Id.* at 2065 (emphasis added).

As Justice Alito stated in his separate opinion, a state consent-by-registration scheme such as

Pennsylvania’s also “injects intolerable unpredictability into doing business across state borders.” *Id.* at 2054 (Alito, J., concurring in part and concurring in the judgment). From the viewpoint of the civil litigation defense bar, “[t]he implications of [*Mallory*] are overwhelming.” Lisa Bellino Apelian, *Jurisdiction By Consent Under Mallory v. Norfolk Southern Railway Co.*, For The Defense, Sept. 2023, at 19; *see also* Katherine Florey, *The New Landscape of State Extraterritoriality*, __ Tex. L. Rev. __, 36 (forthcoming) (“[G]iven that all states have corporate registration statutes . . . cases founded on general jurisdiction . . . are likely to proliferate.”);² Jess Krochtengel, *Corporations On Edge After High Court’s Jurisdiction Ruling*, Law360 (June 27, 2023) (“The [*Mallory*] decision is putting corporations on edge that they could be sued virtually anywhere.”).

The “conspiracy jurisdiction” theory at issue here exacerbates the uncertainty triggered by *Mallory*, and is inconsistent with due process. As the Second Circuit panel recognized here, “[t]he due process limitations on in personam jurisdiction . . . are meant to ‘give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’” App. 48 (quoting *World-Wide Volkswagen*, 444 U.S. at 297); *see also* Pet. at 25.

The Court should grant review and not only reject conspiracy jurisdiction, but also reaffirm the due

² Available at <https://tinyurl.com/3rbpe5dc>.

process limitations on specific personal jurisdiction recognized by *International Shoe* and its progeny.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

October 2023