No. 15-

IN THE

# Supreme Court of the United States

FITCH RATINGS, INC. F/K/A FITCH, INC.,

*Petitioner,*

*v.*

FIRST COMMUNITY BANK, N.A.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Due Process Clause of the Fourteenth Amendment permits just two avenues for a state court to obtain personal jurisdiction over a nonresident defendant: specific jurisdiction and general jurisdiction. The Supreme Court of Tennessee, with several other state courts of last resort, has created a third category known as "conspiracy jurisdiction." This purported third source of personal jurisdiction, never recognized by this Court, is based exclusively on the forum contacts of an alleged co-conspirator, and it can arise even when the exercise of general or specific personal jurisdiction would be impermissible. The question presented by this case is:

Whether the Due Process Clause of the Fourteenth Amendment is violated when a court, in the absence of specific or general jurisdiction, nevertheless exercises personal jurisdiction over an out-of-state defendant under a theory of "conspiracy jurisdiction."

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, The McGraw-Hill Companies, Inc. and Moody's Investors Service, Inc. were defendants-appellees before the Supreme Court of Tennessee below.

There are several additional parties to the underlying litigation that were not parties to the Supreme Court of Tennessee proceeding and decision below. They are: First Tennessee Bank, N.A.; FTN Financial Securities Corp.; Keefe, Bruyette & Woods, Inc.; Preferred Term Securities X, Ltd.; Preferred Term Securities X, Inc.; Preferred Term Securities XII, Ltd.; Preferred Term Securities XII, Inc.; Preferred Term Securities XIV, Ltd.; Preferred Term Securities XIV, Inc.; Preferred Term Securities XVI, Ltd.; Preferred Term Securities XVI, Inc.; Preferred Term Securities XXII, Ltd.; Preferred Term Securities XXII, Inc.; Preferred Term Securities XXIII, Ltd.; Preferred Term Securities XXIII, Inc. Preferred Term Securities XXVI, Ltd.; Preferred Term Securities XXVI, Inc.; J.P. Morgan Securities LLC (individually and as successor-in-interest to Bear, Stearns & Co., Inc.); Morgan Keegan & Co., Inc.; Trapeza Capital Management, LLC; Trapeza CDO XIII, Ltd.; Trapeza CDO XIII, Inc.; Suntrust Robinson Humphrey, Inc.; Soloso CDO 2007-1 Ltd.; Soloso CDO 2007-1 Corp.; and Bank of America Corporation (as successor-in-interest to Merrill Lynch, Pierce, Fenner & Smith, Inc.).

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Fitch Ratings, Inc. is a private company. Its parent companies are Hearst Ratings II, Inc. and Fimalac, S.A.

Hearst Ratings II, Inc. is a privately-held company and no publicly-held company owns 10% or more of its stock.

Fimilac, S.A. is a publicly-held company and owns more than 10% of Fitch Ratings, Inc. No other public company owns more than 10% of Fimalac, S.A.'s stock.

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**STATUTES AND OTHER AUTHORITIES**

Petitioner Fitch Ratings, Inc. f/k/a Fitch, Inc. ("Fitch") respectfully submits this petition for a writ of certiorari to review the judgment of the Supreme Court of Tennessee.

## OPINIONS BELOW

The opinion of the Supreme Court of Tennessee is not yet reported, but is currently available at 2015 WL 9025241 and reproduced as Appendix A at Pet. App. 1a-72a. The decision of the Court of Appeals of Tennessee is not reported, but is available at 2013 WL 4472514 and reproduced as Appendix B at Pet. App. 73a-116a. The order of the Circuit Court for Knox County, Tennessee is not reported, but is reproduced as Appendix C at Pet. App. 117a-122a. The reasoning of the Circuit Court for Knox County, Tennessee in support of its order was read into the record during a hearing on May 25, 2012, the transcript of which is reproduced as Appendix D at Pet. App. 123a-135a.

## JURISDICTION

The Supreme Court of Tennessee entered judgment on December 14, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

## STATEMENT OF THE CASE

The Supreme Court of Tennessee, along with the courts of last resort in six other States, allows the exercise of "conspiracy jurisdiction" over out-of-state defendants that lack any minimum contacts with the forum. But this Court has made clear that "traditional notions of fair play and substantial justice" under the Fourteenth Amendment's Due Process Clause allow only "two categories of personal jurisdiction": specific and general. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (quoting *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945)).

The outlier States that have authorized "conspiracy jurisdiction" have manufactured a third category foreign to this Court's jurisprudence. They exercise personal jurisdiction over nonresident defendants based on third-party contacts with the forum, even if the constitutionally sanctioned pathways of specific jurisdiction and general jurisdiction are unavailable. These States have exceeded the strictures of the Due Process Clause—in direct conflict with two other state courts of last resort, and in sharp tension with the remaining state courts that have not even countenanced such a theory. In effect, these States have fashioned a jurisdictional backdoor.

The theory of "conspiracy jurisdiction" is flatly incompatible with the Due Process Clause, which requires that personal jurisdiction be considered on a defendant-by-defendant basis and focuses only on each individual defendant's forum contacts. During the last several Terms, this Court has consistently and repeatedly rejected efforts by States to broaden the jurisdictional

inquiry beyond those bounds, most recently reaffirming that "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014); *see Daimler*, 134 S. Ct. 746; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). As at least two other state courts of last resort have recognized, the "conspiracy jurisdiction" theory embraced in the decision below breaches this Court's clear directives.

From its offices in New York, Petitioner Fitch Ratings, Inc. ("Fitch"), assigns ratings to investment products, including asset-backed securities, and other entities have sold those products in all fifty States. The Supreme Court of Tennessee—while acknowledging that Fitch lacked constitutionally sufficient contacts with the State to allow the exercise either specific or general jurisdiction—nevertheless held that the Tennessee courts might still exercise personal jurisdiction over Fitch through a "conspiracy jurisdiction" theory. Based only on the forum contacts of Fitch's alleged co-conspirators, the court below authorized Respondent to seek expensive and time-consuming discovery on this issue.

In the distinct minority of States that have authorized it, this "conspiracy" theory of jurisdiction is troublingly amenable to far-reaching and unpredictable applications, particularly in a modern, interconnected economy. It could swallow the personal jurisdiction doctrine carefully developed by this Court during the seven decades since *International Shoe*. The Court's intervention is needed here to ensure that *all* States uniformly enforce the constitutionally mandated limits on the exercise of personal jurisdiction.

1. **Statement of Facts.** Petitioner Fitch is a nationally recognized statistical credit rating organization and a Delaware corporation with its principal place of business in New York. *See* Pet. App. 82a. Fitch does business globally, and it is undisputed in the record that Fitch's transactions in Tennessee have historically amounted to approximately 1% of its United States income. *Id.* at 23a, 83a. As a rating agency, Fitch assigns ratings to investment products. Fitch performs this rating function from its offices in New York. Among the products Fitch has rated are certain asset-backed securities referred to in the decision below as PreTSL CDOs, RAST, Soloso CDO, and Trapeza CDO (the "Securities"). These Securities were rated by Fitch in its offices in New York, and were ultimately sold by other entities in all fifty states.

Respondent is a banking and financial services company that is incorporated in and has its principal place of business in Virginia. Pet. App. 1a. It filed suit against Fitch, other rating agencies, entities that issued the Securities ("Issuing Agents"), and those that sold the Securities ("Placement Agents") in the Circuit Court for Knox County, Tennessee, on September 15, 2011, for fraud and negligent misrepresentation arising out of its purchase of the Securities. *Id.* at 1a-6a. With respect to Fitch, Respondent chiefly complained that Fitch "made materially false and misleading representations and omissions" about the Securities through its ratings. *Id.* at 79a-80a; *see also id.* at 5a-6a, 75a-78a. Although Respondent did not allege that Fitch took any action whatsoever in Tennessee, it nevertheless asserted that Fitch was subject to personal jurisdiction in Tennessee.

2. **Procedural History.** Fitch moved to dismiss the action for lack of personal jurisdiction (among other arguments), asserting that Respondent did not (and could not) allege facts that would establish general or specific jurisdiction over Fitch in Tennessee consistent with due process. *See* Pet. App. 7a, 81a-83a.

Respondent then filed an amended complaint on March 20, 2012, adding new claims of civil conspiracy among all of the defendants, as well as constructive fraud and unjust enrichment. *Id.* at 7a. Respondent also added an allegation that Fitch was subject to personal jurisdiction in Tennessee because "it is alleged [Fitch] acted in a conspiracy to tortiously injure [Respondent] and that significant acts in furtherance of the conspiracy [by other defendants] took place in Tennessee." *Id.* at 7a, 52a-53a. Fitch renewed its motion to dismiss the amended complaint. *Id.* at 7a.

On June 12, 2012, the trial court granted Fitch's motion to dismiss based on lack of personal jurisdiction, rejecting Respondent's claim that Fitch was subject to "conspiracy jurisdiction" as well as Respondent's arguments in favor of an exercise of general or specific jurisdiction over Fitch. *Id.* at 120a, 126a-127a; *see also id.* at 9a.[1] The court noted that the "conspiracy" theory

1. The trial court also ruled on several motions to dismiss the case on other grounds. These holdings were challenged on appeal, *see* Pet. App. 92a, 111a-114a, and some were taken to the Supreme Court of Tennessee by the Placement Agents, *id.* at 10a. Ultimately, the Court of Appeals held that the trial court had erred in dismissing Respondent's complaint as to the Placement Agents and remanded for further proceedings against those defendants. *Id.* at 9a-11a. Those issues and holdings are irrelevant to the question presented to this Court.

of jurisdiction asserted by Respondent "would enable [Respondent] to reach out beyond the borders of this state and draw in people, because of the conduct of others, with whom they had made some kind of agreement to either engage in unlawful conduct or engage in lawful conduct by the employment of unlawful means . . . ." *Id.* at 126a.

Respondent appealed the dismissal to the Court of Appeals of Tennessee, which affirmed the trial court's finding that personal jurisdiction could not be exercised over Fitch under any theory consistent with due process. *Id.* at 9a-11a, 93a-97a, 100a-111a. The Supreme Court of Tennessee eventually granted Respondent's petition to review the Court of Appeal's decision as to personal jurisdiction. *Id.* at 11a.

3. **The Decision Below.** The Supreme Court of Tennessee issued its opinion on December 14, 2015. It found that Respondent had not established a prima facie case of either general or specific jurisdiction over Fitch, and also that discovery was not warranted on those issues given Respondent's failure to establish even a "colorable claim" of jurisdiction. *Id.* at 70a. With respect to specific jurisdiction, the court observed that Fitch's "conduct as it relates to the underlying controversy was to rate investment products that were sold in all fifty states, backed by securities from all fifty states, and purchased by [Respondent], a Virginia corporation." *Id.* at 36a. In the court's view, neither Fitch's "knowledge that investors or purchasers in Tennessee might rely on their credit ratings" nor Fitch's involvement in transactions with other defendants (the Placement Agents) that themselves had contacts with Tennessee was sufficient to establish the minimum contacts necessary for exercising specific jurisdiction over Fitch. *Id.* at 30a-39a.

Fitch had argued that it would be unconstitutional for courts to exercise personal jurisdiction on a "conspiracy" theory where specific jurisdiction was lacking. The Supreme Court of Tennessee rejected that argument by holding that Respondent *had* established a "colorable claim" of "conspiracy jurisdiction" over Fitch (even though it had not established such a claim of specific jurisdiction), and remand was appropriate for consideration of jurisdictional discovery on that theory.[2] *Id.* at 70a-71a. The theory of "conspiracy jurisdiction" adopted by the Supreme Court of Tennessee allows "an out-of-state defendant involved in a conspiracy who lacks sufficient

2. Although the Tennessee high court remanded the case to the trial court for consideration of jurisdictional discovery, the judgment of the state supreme court on the federal issue—whether due process permits state courts to exercise personal jurisdiction over a defendant on a "conspiracy" theory where the exercise of specific and general jurisdiction over that defendant would be unconstitutional—is final for purposes of this Court's review. The Tennessee high court's decision threatens to erode important federal policy and constitutional concerns, *see infra* Parts I.A & II, and reversal now "would be preclusive of any further litigation on the relevant cause of action," yet if review is not granted, Fitch may ultimately prevail on remand on nonfederal grounds—either on the merits or by establishing that conspiracy jurisdiction does not exist in this case, regardless of the constitutionality of that theory. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). And depending on how the trial court rules on remand, the further proceedings may render the constitutional issue here mooted and unreviewable. *Id.* at 481-82. For these reasons, this Court routinely takes review of interlocutory decisions from state courts involving questions of the constitutionality of the exercise of personal jurisdiction. *See Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984) (citing *Shaffer v. Heitner*, 433 U.S. 186, 195-96 & n.12 (1977); *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978)).

'minimum contacts' with the forum state [to] be subject to jurisdiction because of a co-conspirator's contacts with the forum." *Id.* at 39a (citation omitted). As adopted by the Supreme Court of Tennessee, this theory allows imputation of forum contacts among co-conspirators when

> (1) two or more individuals conspire to do something,
> (2) that they could reasonably expect to lead to consequences in a particular forum, if,
> (3) one co-conspirator commits overt acts in furtherance of the conspiracy, and
> (4) those acts are of a type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statute of the forum state[.]

*Id.* at 40a (citation omitted). In holding that Respondent had put forth a "colorable claim" under this test, the Supreme Court of Tennessee only expressly addressed the first prong, pointing to allegations suggesting that Fitch "agreed to act in concert to fraudulently market" the securities at issue. *Id.* at 70a-71a; *see also id.* at 52a-56a.

This petition followed.

## REASONS FOR GRANTING THE PETITION

Certiorari review is warranted here. The Supreme Court of Tennessee's decision, in line with its own precedent and the decisions of six other States' courts of last resort, endorses a theory of "conspiracy jurisdiction" that can be used to exercise personal jurisdiction over a defendant based on the forum contacts of its alleged

co-conspirators, even where the exercise of general or specific jurisdiction would be unconstitutional because the defendant itself lacks sufficient contacts with the forum State. This decision not only conflicts with decisions from two other States' high courts holding that so-called "conspiracy jurisdiction" violates due process, it also ignores this Court's precedent establishing that there are only two categories of personal jurisdiction and this Court's recent cases reaffirming the strict limits due process imposes on personal jurisdiction. And it directly contradicts this Court's instruction in *Walden v. Fiore* that "the relationship [giving rise to jurisdiction] must arise out of contacts that the defendant *himself* creates with the forum State." *Walden v. Fiore*, 134 S. Ct. at 1122 (citation omitted); *see also Daimler*, 134 S. Ct. 746; *Goodyear*, 131 S. Ct. 2846.

Moreover, the Supreme Court of Tennessee's theory allows for personal jurisdiction in virtually any forum in any multi-defendant case, leads to vastly expanded jurisdictional discovery that does away with the principle of proportionality, and unfairly forces a defendant to litigate the merits of a case in a potentially improper forum before the jurisdictional issue is decided. Petitioner urges this Court to take review in order to ensure that the fairness and predictability fostered by its recent jurisprudence requiring that personal jurisdiction be based only on a defendant's own purposeful acts not be undone by several States' adoption of a heretofore unrecognized third basis for jurisdiction that sidesteps this Court's due process requirements and allows jurisdiction to be based entirely on a third party's contacts with the forum.

## I. The Decision Below Furthers A Split Among State Courts Of Last Resort On A Fundamental Due Process Issue By Wrongly Allowing For Personal Jurisdiction In The Absence Of Minimum Contacts.

### A. The Decision Below Ignores This Court's Precedent And Violates Due Process.

If there is anything that should be clear from this Court's personal jurisdiction jurisprudence, it is that due process requires that personal jurisdiction be exercised *only* on the basis of a defendant's own purposeful contacts with a forum. Over three decades ago, this Court explained that "[e]ach defendant's contacts with the forum State must be assessed *individually*" when considering whether personal jurisdiction comports with due process. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) (citing *Rush*, 444 U.S. at 332) (emphasis added); *see also Calder v. Jones*, 465 U.S. 783, 790 (1984) (holding that forum contacts of out-of-state employees of a national company "are not to be judged according to their employer's [in-state] activities"). More recently, this Court unanimously rejected an attempt to root jurisdiction over a foreign corporation based on contacts of its separately incorporated domestic subsidiary. *Daimler*, 134 S. Ct. at 759-60. And if there remained any doubt as to the propriety of exercising jurisdiction over a defendant based on a third party's forum contacts, this Court removed it recently in *Walden* by confirming that "a defendant's relationship with a plaintiff or *third party*, standing alone, is an insufficient basis for jurisdiction," as "it is the defendant, not the plaintiff or *third parties*, who must create contacts with the forum State." 134 S. Ct. at 1123, 1126 (emphases added). The Court instructed

that "[d]ue process requires that a defendant be haled into court in a forum State based on *his own affiliation* with the State," and not based on "contacts he makes by interacting with other persons affiliated with the State." *Id.* at 1123 (emphasis added).

The decision below ignores this clear body of law by explicitly authorizing Tennessee courts to exercise jurisdiction over a defendant under "conspiracy jurisdiction" purely based on the forum contacts of alleged third-party co-conspirators. The Supreme Court of Tennessee explicitly found that facts to support general or specific jurisdiction over Fitch were so lacking that Respondent had not even presented a "colorable claim" of jurisdiction under those theories, but nevertheless found that such a claim of "conspiracy jurisdiction" *had* been presented. Pet. App. 70a-71a; *see also id.* at 17a-39a. This holding leaves no room for doubt that the Tennessee high court was endorsing the exercise of personal jurisdiction over out-of-state defendants that completely lack their own minimum contacts with the State required for specific or general jurisdiction—the only species of jurisdiction this Court has recognized.

Moreover, the test for "conspiracy jurisdiction" applied by the Supreme Court of Tennessee on its face allows courts to exercise personal jurisdiction over a defendant that lacks its own constitutionally-sufficient forum contacts. The only prong of that test that is related to a defendant's *own* connection to the forum is the requirement that the defendant "could reasonably expect [the conspiracy] to lead to consequences in a particular forum . . . ." Pet. App. 40a. This requirement does not ensure that state courts are only exercising personal jurisdiction consistent with

this Court's jurisprudence over defendants that are fairly "at home" in the forum, *Daimler*, 134 S. Ct. at 760-62, or that have "purposefully avail[ed themselves] of the privilege of conducting activities" such that they "should reasonably anticipate being haled into court there," *World-Wide Volkswagen*, 444 U.S. at 297. Indeed, the test reverts to allowing jurisdiction based solely on a defendant's mere "reasonabl[e] expectation" of "consequences" flowing from its out-of-state actions, which this Court has repeatedly and conclusively rejected. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) ("[F]oreseeability of causing *injury* in another State . . . is not a 'sufficient benchmark' for exercising personal jurisdiction."); *see also Asashi Metal Indus. Co., v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987) (Opinion of O'Connor, J.) ("[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state."); *World-Wide Volkswagen*, 444 U.S. at 295-97. It can and will be used in future cases to justify the exercise of personal jurisdiction over defendants that lack their own constitutionally sufficient forum contacts—unless this Court corrects the Supreme Court of Tennessee's error.

In short, the holding below and the test it applied directly contradict this Court's clear and recent instruction that "[d]ue process requires that a defendant be haled into court in a forum State based on *his own affiliation* with the State," and not based on "contacts he makes by interacting with other persons affiliated with the State." *Walden*, 134 S. Ct. at 1123 (emphasis added). More generally, the decision represents a fundamental departure from this Court's long-standing recognition that

personal jurisdiction only comes in two flavors—general and specific. *Daimler*, 134 S. Ct. at 761 (citing *Int'l Shoe Co.*, 326 U.S. at 316). The practical effect of this departure will be to create a back door to nationwide jurisdiction over entities with national reach and to allow time-consuming and expensive discovery on the merits of conspiracy allegations even where jurisdiction may be lacking. *See infra* Part II. This latter consequence not only threatens to undo this Court's historic and recently reaffirmed limitations on personal jurisdiction, but also undermines the protections established by this Court's pleading cases, particularly *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)—as shown by the decision in this case, which authorizes Respondent to seek jurisdictional discovery based on implausible conspiracy allegations.

### B. The State Courts Of Last Resort Are Split On Whether Conspiracy Jurisdiction Violates Due Process.

The Supreme Court of Tennessee is not alone in recognizing an unconstitutional theory of "conspiracy jurisdiction" based on the forum contacts of co-conspirators where an individual defendant lacks its own minimum contacts with the forum State. Including Tennessee, seven States' high courts have approved of this theory and have rationalized it as consistent with due process. These decisions are in direct conflict with the holdings of two other State courts of last resort, which have rejected the notion of "conspiracy jurisdiction" based on the forum contacts of co-conspirators as inconsistent with due process, and have held that each defendant's forum contacts must be assessed individually, consistent with this Court's jurisprudence.

**1.** ***Seven States Allow "Conspiracy Jurisdiction" In The Absence Of Individual Minimum Contacts.*** Like Tennessee, the courts of last resort in Arkansas, Florida, Delaware, Kansas, Maryland, and Minnesota have adopted an expansive theory of "conspiracy jurisdiction" that allows courts to exercise personal jurisdiction over a defendant based on the forum contacts of alleged co-conspirators, when that defendant lacks its own minimum contacts with the forum and would otherwise be outside the courts' specific jurisdiction—and have held that this theory comports with due process.

For instance, Maryland recognizes a "conspiracy theory" of jurisdiction under which "an out-of-state party involved in a conspiracy who would lack sufficient, personal, 'minimum contacts' with the forum state if only the party's individual conduct were considered nevertheless may be subject to suit in the forum jurisdiction based upon a co-conspirator's contacts with the forum state." *Mackey v. Compass Mktg., Inc.*, 892 A.2d 479, 484 (Md. 2006). The court explained that this theory "permits certain actions done in furtherance of a conspiracy by one co-conspirator to be attributed to other co-conspirators for jurisdictional purposes." *Id.* The Maryland court rationalized that due process was ultimately satisfied because its exercise of "conspiracy jurisdiction" was constrained by a requirement that a defendant could reasonably expect consequences in the forum, *id.* at 490-91—a requirement that directly conflicts with this Court's personal jurisdiction jurisprudence, *see supra* Part I.A.

The courts of last resort in Arkansas, Delaware, Florida, Kansas, Minnesota, and South Carolina have

also endorsed a theory of "conspiracy jurisdiction" that is materially the same as that adopted by Tennessee and Maryland. *See Gibbs v. PrimeLending*, 381 S.W.3d 829 (Ark. 2011); *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 585-86 (Fla. 2000); *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796, 798-99 (S.C. 1990); *Instituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982); *Hunt v. Nevada State Bank*, 172 N.W.2d 292, 310-13 (Minn. 1969).[3]

Although many of these courts have rationalized "conspiracy jurisdiction" as consistent with due process, the decision below makes clear that this theory actually *expands* personal jurisdiction beyond the limits this Court has previously set by allowing courts to exercise personal jurisdiction over defendants that lack their *own* constitutionally-sufficient contacts. *See supra* Part I.A.

**2. *Two States Have Refused To Recognize "Conspiracy Jurisdiction" As Inconsistent With Due Process.*** In direct conflict with the seven State high courts that have endorsed "conspiracy jurisdiction" based on third-party forum contacts as consistent with due process, the courts of last resort in Texas and Nebraska have held that this theory violates due process, and instead require each defendant's forum contacts to be assessed individually.

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3. The Supreme Court of Alabama has likewise recognized the theory, but has made clear that it has not yet "define[d] the contours of conspiracy jurisdiction" in that State. *Ex parte Reindel*, 963 So. 2d 614, 621-22 (Ala. 2007).

In *National Industry Sand Association v. Gibson*, the Supreme Court of Texas rejected a plaintiff's attempt to rely on conspiracy allegations as the sole basis of personal jurisdiction over a defendant. 897 S.W.2d 769, 772 (Tex. 1995). The court acknowledged that several other jurisdictions had recognized civil conspiracy as "a separate basis to support the exercise of jurisdiction" over those "whom jurisdiction would otherwise be lacking." *Id.* at 773. But the court declined to extend the theory into Texas based on due process concerns, explaining that, "[t]o 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 . . . has purposefully availed himself of the privilege of conducting activities within the forum State," and "it is the contacts of the defendant himself that are determinative." *Id.* (citations omitted). Accordingly, the court "restrict[ed] [its] inquiry to whether [the defendant] *itself* purposefully established minimum contacts such as would satisfy due process . . . ." *Id.* (emphasis added). In *Ashby v. Nebraska*, the Supreme Court of Nebraska similarly declined to recognize personal jurisdiction on the basis of conspiracy allegations in the absence of a defendant's *own* minimum contacts with the forum, because to do so would "violat[e] his right to due process." 779 N.W.2d 343, 361 (Neb. 2010).[4]

* * * * *

4. Other States' high courts have acknowledged the conflicting precedent over the constitutionality of "conspiracy jurisdiction" but refused to rule on the issue. *See, e.g.*, *Schwartz v. Frankenhoff*, 733 A.2d 74, 79-81 (Vt. 1999); *St. Croix, Ltd. v. Shell Oil Co.*, No. 2011-0057, 2011 WL 235994, at *4 (V.I. Jan. 22, 2014).

The decision below deepens the existing split among the States' courts of last resort by joining those courts that recognize "conspiracy jurisdiction" based on third-party forum contacts even *after* this Court reaffirmed the defendant-centric nature of the personal jurisdiction inquiry in *Daimler* and *Walden.* Indeed, the Supreme Court of Tennessee went so far as to cite *Walden* and still authorize jurisdiction based on third-party contacts contrary to its command. Pet. App. 36a-38a, 70a-71a. In addition to the due process harms caused by the decision below (and those in the other States that apply "conspiracy jurisdiction"), *see supra* Part I.A, the split among the States over the constitutionality of "conspiracy jurisdiction" undermines the "predictability" that due process limitations on personal jurisdiction are intended to protect. *Burger King*, 471 U.S. at 472. Because the law varies dramatically between States, a New York-based company like Fitch cannot realistically predict where its New York actions will subject it to personal jurisdiction.[5]

5. To the extent the federal Courts of Appeals have considered "conspiracy jurisdiction," they have largely declined to rule on its constitutionality and have deferred to state law, sometimes allowing for jurisdictional discovery on the theory. *See, e.g.*, *Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1070 (10th Cir. 2007); *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 102 n.8 (3d Cir. 2004); *Stauffacher v. Bennett*, 969 F.2d 455, 459-60 (7th Cir. 1992), *superseded by rule on other grounds as stated in Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 940-41 (7th Cir. 2000); *Edmond v. U.S. Postal Serv. General Counsel*, 949 F.2d 415, 425-27 (D.C. Cir. 1991); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1236-37 (6th Cir. 1981); *Glaros v. Perse*, 628 F.2d 679, 682 & n.4 (1st Cir. 1980). Some Circuits appear to assume the existence of a "conspiracy theory of personal jurisdiction" without exercising it or analyzing its constitutionality. *See, e.g.*, *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322, 329-30 (4th Cir. 2013) (citing *McLaughlin v. McPhail*, 707 F.2d 800, 807 (4th Cir. 1983)); *FC Inv.*

## II. The Question Presented Is Exceptionally Important.

The Supreme Court of Tennessee's holding that there can be personal jurisdiction on a conspiracy theory in the absence of defendants' individual minimum contacts—and the States' deepening disagreement over the constitutionality of this theory—has additional, important implications for litigants that makes the need for this Court's review particularly urgent.

First, the "conspiracy jurisdiction" theory applied by the Supreme Court of Tennessee threatens to do away with all limits on personal jurisdiction in the modern

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*Grp. LC v. IFX Mkts., Ltd.*, 529 F.3d 1087, 1096 (D.C. Cir. 2008); *First Chi. Int'l v. United Exch. Co.*, 836 F.2d 1375, 1378 (D.C. Cir. 1988). One Circuit—the Seventh—has applied conspiracy jurisdiction without considering its constitutionality. *See Textor v. Bd. of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1392-93 (7th Cir. 1983). The federal district courts are sharply divided on the issue—many reject the concept of "conspiracy jurisdiction" as unconstitutional, while others have endorsed and applied variants of the theory as consistent with due process. *Compare, e.g.*, *Brown v. Kerkhoff*, 504 F. Supp. 2d 464, 513-18 (S.D. Iowa 2007); *Silver Valley Partners, LLC v. DeMotte*, 400 F. Supp. 2d 1262, 1268 (W.D. Wash. 2005); *Insolia v. Philip Morris Inc.*, 31 F. Supp. 2d 660, 672-73 (W.D. Wis. 1998); *Karsten Mfg. Corp. v. U.S. Golf Ass'n*, 728 F. Supp. 1429, 1433-34 (D. Ariz. 1990); *with Remmes v. Int'l Flavors & Fragrances, Inc.*, 389 F. Supp. 2d 1080, 1095-96 (N.D. Iowa 2005); *Se. Constr., Inc. v. Tanknology-NDE Int'l, Inc.*, No. Civ. A. 3:05-210, 2005 WL 3536239, at *7-10 (S.D. W. Va. Dec. 22, 2005); *Vt. Castings, Inc. v. Evans Prods. Co., Grossman's Div.*, 510 F. Supp. 940, 944 (D. Vt. 1981). In addition, many district courts have applied forms of "conspiracy jurisdiction" without considering its constitutionality. *See, e.g.*, *In re Vitamins Antitrust Litig.*, 270 F. Supp. 2d 15, 27-28 (D.D.C. 2003); *Nat'l Union Fire Ins. Co. v. Kozeny*, 115 F. Supp. 2d 1231, 1237 (D. Colo. 2000); *Simon v. Philip Morris, Inc.*, 86 F. Supp. 2d 95, 119-20 (E.D.N.Y. 2000).

world. Technological advancements have resulted in an ever-increasingly interconnected economy and new types of relationships between persons individual and corporate. In the litigation context, these advances mean that plaintiffs can cobble together enough connections between defendants to allege that the defendants are co-conspirators in almost any case. This case, for example, involves mere allegations of conspiracy between multiple defendants who have many different types of normal-course connections and business relationships. The notion of "conspiracy jurisdiction" thus allows a plaintiff that cannot assert specific or general jurisdiction over a particular defendant to nonetheless establish personal jurisdiction over that defendant simply by pointing to its normal-course economic relationships with other defendants and calling that a "conspiracy."

The unbridled nature of "conspiracy jurisdiction" in the modern economy interferes with federalism and the orderly administration of the laws among States. This Court has previously made clear that limits on the exercise of personal jurisdiction are necessary to preserve the sovereignty of all the States and the system of interstate federalism even in a world of increasing economic interdependence. *See World-Wide Volkswagen*, 444 U.S. at 293-94. Restrictions on personal jurisdiction "are a consequence of territorial limitations on the power of the respective States," and require that personal jurisdiction not be exercised "against an individual or corporate defendant with which the state has no contacts, ties, or relations"—***even if***, as a result of modern technology and economic relationships, the "defendant would suffer minimal or no inconvenience . . . the forum State has a strong interest in applying its law . . . [and] the forum

State is the most convenient location for litigation . . . ." *Id.* at 294 (citations omitted). In today's reality, the concept of "conspiracy jurisdiction" would make these territorial limits that are necessary to our federalism a nullity. Indeed, the holding below is a sharp break from this Court's recent line of cases including *Goodyear*, *Daimler*, and *Walden*, ensuring that territorial limits are respected by requiring that personal jurisdiction be based on a defendant's purposeful conduct towards a State, and the issue presented here is a natural successor to the issues resolved in those cases.

Second, the concept of "conspiracy jurisdiction" allows cases that would otherwise be dismissed for lack of personal jurisdiction to proceed through full-blown, expensive, and oftentimes case-dispositive discovery at the outset of the case before jurisdiction has been determined—even where, as in this case, a threshold request for jurisdictional discovery to show specific jurisdiction has been rejected as meritless. For the reasons already discussed in this Part, Tennessee's "conspiracy jurisdiction" theory makes it all too easy for a plaintiff to set forth a supposedly "colorable claim" of personal jurisdiction—or "sufficient facts that, if taken as true, in the light most favorable to the plaintiff, would demonstrate a showing of jurisdiction," Pet. App. 65a—by alleging a few facts suggesting a conspiracy with potential nationwide effects and the actions of one co-conspirator in the forum state. This showing of a "colorable claim" is generally sufficient to entitle the plaintiff to jurisdictional discovery.[6] But because "conspiracy jurisdiction" is based

6. *See, e.g.*, *Chapman v. Krutonog*, 256 F.R.D. 645, 649 (D. Haw. 2009); *Savage v. Bioport, Inc.*, 460 F. Supp. 2d 55, 62 (D.D.C.

on the same operative facts as the merits of the plaintiff's conspiracy claim, jurisdictional discovery in these cases overlaps heavily with merits discovery, and covers issues central to the merits of the plaintiff's case. For instance, a plaintiff allowed jurisdictional discovery on a "conspiracy jurisdiction" theory will be able to develop, and likely prove, facts that show the existence of a conspiracy and its purpose, as well as defendants' participation in the conspiracy. In many cases, this will be enough to establish some defendants' liability.

This dramatic increase in threshold discovery runs contrary to this Court's recent revision to Federal Rule of Civil Procedure 26(b)(1), which now cautions that discovery should be "proportional to the needs of the case, considering . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). It also works a deep unfairness

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2006); *Ex parte Troncalli Chrysler Dodge, Inc.*, 876 So. 2d 459, 468 (Ala. 2003); *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 625 (1st Cir. 2001); *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000); *cf. Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402-03 (4th Cir. 2003) (in order to justify jurisdictional discovery, a plaintiff must offer more than "speculation or conclusory assertions about contacts with a forum state"); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (holding that jurisdictional discovery requires a "threshold showing" of "factual allegations that suggest 'with reasonable particularity'" the existence of personal jurisdiction); *Bowers v. Wurzburg*, 501 S.E.2d 479, 485 (W. Va. 1998) (holding that "discovery will be denied when the assertion of personal jurisdiction is frivolous, the complaint failed to plead the requisite jurisdictional contact, or the plaintiff has asserted only bare allegations of jurisdictional facts . . . .").

to the non-resident defendant by subjecting it to the burden and expense of full merits discovery in a foreign forum regardless of whether that forum actually has jurisdiction over the defendant under any theory. This, of course, undermines the very purpose of due process limitations on personal jurisdiction: to "protect[] the defendant against *the burdens of litigating* in a distant or inconvenient forum." *World-Wide Volkswagen*, 444 U.S. at 292 (emphasis added).

Third, precisely because a plaintiff's invocation of "conspiracy jurisdiction" often results in jurisdictional discovery that overlaps with the merits, the question of the constitutionality of "conspiracy jurisdiction" tends to defy appellate review. By the time a defendant is in a position to appeal the exercise of conspiracy jurisdiction, the merits of the plaintiff's conspiracy claim will already be developed and likely decided. If the plaintiff's allegations of conspiracy are substantiated through discovery, it is too late for a jurisdictional appeal: even if the defendant succeeded in having the suit dismissed for lack of jurisdiction, the already-discovered facts would just be used against him in a second suit in an appropriate forum. And if the discovery fails to substantiate the plaintiff's claims, the defendant will have no motive to appeal the jurisdictional theory. This case thus presents a rare opportunity for this Court to take up the issue of whether and when the theory of "conspiracy jurisdiction" comports with due process—and to do so before it is too late for the result to make a difference to the parties.

Finally, it is important for all litigants to operate within a framework of clear, uniformly applied jurisdictional rules that permit "defendants to structure their primary

conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472 (citation omitted). The conflict among the States regarding the due process limitations on the exercise of personal jurisdiction based on third-party forum contacts makes such "assurance" impossible for litigants seeking to determine whether their relationship with others will expose them to suit in a State with which they otherwise have no jurisdictional contacts. This uncertainty will inevitably deter valuable economic activity by corporations unwilling to enter into transactions without the ability to make a meaningful assessment of where that new relationship could render it amenable to suit (or at least extensive jurisdictional discovery).

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The Tennessee Supreme Court's decision "offend[s] notions of fair play and substantial justice, and . . . violate[s] due process." *Ashby*, 779 N.W.2d at 361. It disregards this Court's clear instructions that personal jurisdiction must be based on a defendant's individual forum contacts. It furthers a longstanding division among the States over the constitutional limits on the imputation of jurisdictional contacts between co-conspirators. And it ultimately does away with all limits on personal jurisdiction in most multi-defendant cases, and leads to increased discovery and unpredictability for litigants in all forums. This Court's review is warranted to restore the uniformly applicable limitations that due process imposes on the exercise of personal jurisdiction.

## CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

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Respectfully submitted,

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