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ARTICLE

Conspiracy Jurisdiction

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Abstract. Conspiracy jurisdiction is the theory that a defendant may be subject to personal jurisdiction in the forum state based on actions taken in furtherance of a conspiracy. What makes conspiracy jurisdiction unique is that as long as the acts of a co-conspirator were directed at the forum state, other members of the conspiracy may be subject to jurisdiction in the forum state, even if they otherwise lack their own direct contacts. While all personal jurisdiction issues are subject to the Due Process Clause, nowhere else is it so peculiarly implicated—and sometimes sidestepped—as when conspiracy forms the basis for personal jurisdiction. This still-developing gloss on specific jurisdiction has seen increasing but chaotic use in federal and state courts. As a result, and in contrast to the doctrine's increasing use in litigation, scholarship is extremely sparse.

This Article is the first to offer a comprehensive look at conspiracy jurisdiction's provenance and the complex current state of the law, analyzing the doctrine's varied applications in light of recent Supreme Court authority. Our Article relies chiefly on *Walden v. Fiore* and *Ford v. Montana*, which influence but do not control the doctrine, to analyze the due process contours of conspiracy jurisdiction and how the doctrine can—and will—survive once the Supreme Court inevitably grants review to resolve an active and jagged circuit split.

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Introduction

Personal jurisdiction doctrines govern the tactical dance between plaintiffs seeking to impose jurisdiction and remote defendants who seek to avoid it.[1] This push and pull between local plaintiffs and remote defendants generates mountains of metaphorical paper arising from large and small lawsuits that depend on whether an injured plaintiff can sue a particular defendant in the plaintiff's home state.[2] Yet all forms of traditional specific personal jurisdiction—that kind of jurisdiction attaching to remote rather than "at home" defendants—require a direct link between the defendant and the forum state.[3] Not so with "conspiracy jurisdiction," an increasingly popular gloss on personal jurisdiction, where defendants can be subject to personal jurisdiction because a co-conspirator's minimum contacts are imputed to the otherwise remote defendant.[4]

The last decade has seen a haphazard expansion of this "new procedure."[5] Although conspiracy jurisdiction is not brand new, neither is it an "ancient form[]" of jurisdiction.[6] It first arose in the early twentieth century, although

1. As different as the subject matter jurisdiction between state and federal courts might be, federal and state courts breathe the same air when personal jurisdiction over defendants is at issue—the air of the state in which they both physically sit. *See* FED. R. CIV. P. 4(k)(1).

2. *See* Daimler AG v. Bauman, 571 U.S. 117, 137-39 (2014). The Supreme Court held in *Daimler* that general jurisdiction was, barring exceptional circumstances, inappropriate over a corporation unless it had its principal place of business or was incorporated there, even if it otherwise did significant amounts of general business in the forum state. *Id.* The Supreme Court recently expanded corporate personal jurisdiction, however, to include instances where a state conditions doing business on the corporation's consent to general jurisdiction. Mallory v. Norfolk S. Ry., 143 S. Ct. 2028, 2032 (2023).

3. *Cf.* Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1033 (2021) (Alito, J., concurring in the judgment) ("To say that the Constitution does not require the kind of proof of causation that Ford would demand—what the majority describes as a 'strict causal relationship'—is not to say that no causal link of any kind is needed." (citation omitted)). As we discuss in Part II below, *Ford* may effect a subtle influence on the acceptance of less-than-direct causal links such as those at issue in conspiracy jurisdiction.

4. *See infra* note 8. One challenge for plaintiffs in applying the doctrine is simply knowing what happened sufficiently to plead conspiracy, where a remote defendant's actions may be more difficult to identify with adequate specificity under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

5. *Cf.* Burnham v. Superior Ct., 495 U.S. 604, 630 (1990) (Brennan, J., concurring in the judgment) (quoting Shaffer v. Heitner, 433 U.S. 186, 212 (1977)) ("'[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage.").

6. *Burnham*, 495 U.S. at 630 (Brennan, J., concurring in the judgment). Justice Brennan earlier notes that "[t]he critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process." *Id.* Whether Justice

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the term did not come into modern use until the early 1970s, and it lacked significant use until the 2010s.[7] Perhaps as a result of this history, scholarship has been sparse, disparate, and focused on narrow and distinct areas.[8] As the

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Brennan had forms other than transient jurisdiction in mind in his *Burnham* concurrence, this principle has been ingrained in notions of personal jurisdiction since *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878) ("[P]roceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

7. This Article neither conducts nor depends on an empirical study of every conspiracy jurisdiction case; we endeavor to examine trends. Nevertheless, we estimate that there were 387 federal and state cases in which the issue of conspiracy jurisdiction arose after 1972 and before 2010. Since 2010, and as of August 14, 2023, we estimate that there have been 642 such cases. We arrived at these numbers by using a Westlaw search based on the following Boolean string: *conspir! /5 jurisdiction % convict! "probable cause" prosecut!*. We then individually reviewed all retrieved cases to determine whether references were to conspiracy jurisdiction and not some other doctrine or issue, eliminating many dozens of cases this way.

   Some important limitations of this analysis: First, we acknowledge there is some subjectivity at the fringe of where a doctrine is at issue versus merely mentioned, which is why we use approximate numbers and included the latter. Second, even using this broad string, we know the search itself does not capture every single case to ever analyze the issue. For instance, somewhat incredibly, our search does not capture *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), the case that ushered in the modern era of the doctrine. *See infra* Part I.B. We attempt to account for this by adding to our figures individual cases cited in this Article not pulled in our search, which is still an imprecise accommodation but adequate for our purpose of showing the trend towards increased use.

8. There is a dearth of scholarship on conspiracy jurisdiction, almost none of which is recent. There are no more than a score of articles even mentioning the concept of conspiracy jurisdiction, with less than half undertaking any real discussion of it. Of those, no article is more recent than 2018, and thus no scholarship discusses the most recent relevant Supreme Court cases: *Walden v. Fiore*, 571 U.S. 277 (2014), and *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021). The seminal article is Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 FORDHAM L. REV. 234, 236 (1983) (examining state of the law and advocating for a due process analysis). Two interesting student notes are also worthy of serious attention: (1) Alex Carver, Note, *Rethinking Conspiracy Jurisdiction in Light of Stream of Commerce and Effects-Based Jurisdictional Principles*, 71 VAND. L. REV. 1333, 1336 (2018) (advocating for a stream of commerce/intentional tort approach for evaluating conspiracy jurisdiction); and (2) Stuart M. Riback, Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506 (1984) (arguing for rejecting the doctrine).

   Other pieces offering some substantive discussion of conspiracy jurisdiction in specific contexts include Rhett Traband, *The Case Against Applying the Co-Conspiracy Venue Theory in Private Securities Actions*, 52 RUTGERS L. REV. 227, 230 (1999) (arguing against application of conspiracy jurisdiction for venue questions in private securities actions); Julia K. Schwartz, Comment, *"Super Contacts": Invoking Aiding-and-Abetting Jurisdiction to Hold Foreign Nonparties in Contempt of Court*, 80 U. CHI. L. REV. 1961, 1987 (2013) (comparing conspiracy jurisdiction to aiding-and-abetting jurisdiction); and Thomas J. Leach, *Civil Conspiracy: What's the Use?*, 54 U. MIAMI L. REV. 1, 2-3 (1999)

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doctrine becomes more widely known, and especially in light of recent Supreme Court authority and notable petitions for writ of certiorari, the time is ripe for a comprehensive constitutional analysis of conspiracy jurisdiction.[9]

In basic terms, conspiracy is the theory that two or more persons or entities may jointly accomplish an unlawful end but be independently liable for each other's wrongful conduct.[10] State substantive law usually provides the elements and meaning of conspiracy.[11] For example, under California common law, civil conspiracy requires the "formation and operation" of a conspiracy and damages that result "from an act done in furtherance of the common design."[12] In addition, one of the acts in furtherance of the conspiracy must itself be a tort.[13] In defining damages for joint tortfeasors ("Persons Acting in Concert"), the Second Restatement of Torts suggests that one can be held liable for (1) a tortious act committed "in concert with the other or pursuant to a common design," (2) the "substantial assistance or encouragement" of such conduct, or (3) providing substantial assistance to the tortfeasor such that the conspirator's own conduct is a separate breach of duty to the injured party.[14]

(acknowledging conspiracy jurisdiction as one utility of civil conspiracy and arguing for a broader application of civil conspiracy as its own cause of action). We also acknowledge the work done on "veil piercing jurisdiction" by Lonny Hoffman. *See* Lonny Sheinkopf Hoffman, *The Case Against Vicarious Liability*, 152 U. PA. L. REV. 1023, 1027 (2004) (arguing against "imputed contacts" through veil piercing and raising the problem of looking to substantive law for jurisdictional concepts). Our goal is to update the literature to reflect the past forty years of the doctrine's development and pave a path forward—one faithful to current Supreme Court jurisprudence.

9. *See infra* Part II.B.

10. *See, e.g.*, Nat'l Fireproofing Co. v. Mason Builders' Ass'n, 169 F. 259, 264 (2d Cir. 1909) ("[A] 'civil conspiracy' . . . may be defined as a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object; or a lawful object by unlawful or oppressive means."). For one representative example, Colorado's statute imposes joint liability "on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortious act." COLO. REV. STAT. § 13-21-111.5(4).

11. When we refer to state substantive sources, we mean both statutory and common law, particularly from conspiracy and long-arm statutes.

12. Thompson v. Cal. Fair Plan Ass'n, 270 Cal. Rptr. 590, 593 (Cal. Ct. App. 1990). The reference to "common design" also appears in the Restatement. RESTATEMENT (SECOND) OF TORTS § 876 (AM. L. INST. 1979).

13. *Thompson*, 270 Cal. Rptr. at 593 (quoting Selby Realty Co. v. City of San Buenaventura, 514 P.2d 111, 122 (Cal. 1973)).

14. RESTATEMENT (SECOND) OF TORTS § 876 (AM. L. INST. 1979). There are as many slightly distinct definitions of civil conspiracy as there are jurisdictions. Civil conspiracy is usually a creature of common law except where expressly otherwise incorporated into statutes. For an interesting discussion of how various jurisdictions handle identifying the underlying tort (which may be common law or statutory), see P. Benjamin Cox, *Combination to Achieve an Immoral Purpose: The Oppressively Vague Tort of Civil Conspiracy in Arkansas*, 62 ARK. L. REV. 57, 72-73 (2009).

Although some jurisdictions seem to treat it otherwise, the traditional understanding is that civil conspiracy is not a separate or independent cause of action—it is a platform for establishing vicarious liability for some other underlying tort.[15]

Jurisdiction is a separate but fundamental construct: It is the power of a court over the subject matter of the claim (subject matter jurisdiction) and the power of a court over the defendant or property (personal jurisdiction).[16] Personal jurisdiction creates angst among scholars,[17] but at least since 1945 the concept remains moored to the Due Process Clause of the Constitution.[18] Personal jurisdiction can be general or specific.[19] General jurisdiction affords

15. *See, e.g.*, McCord v. Bailey, 636 F.2d 606, 611 n.6 (D.C. Cir. 1980) ("[C]ivil conspiracy is not in and of itself a civil wrong, giving an independent cause of action."); Prudential Def. Sols., Inc. v. Graham, 498 F. Supp. 3d 928, 943 (E.D. Mich. 2020) ("Civil conspiracy is not a claim of its own; 'it is necessary to prove a separate, actionable tort.'" (quoting Advoc. Org. for Patients & Providers v. Auto Club Ins. Ass'n, 670 N.W.2d 569, 580 (Mich. Ct. App. 2003))); *In re* Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 789 (3d Cir. 1999) ("[W]e are unaware of any jurisdiction that recognizes civil conspiracy as a cause of action requiring no separate tortious conduct. To the contrary, the law uniformly requires that conspiracy claims be predicated upon an underlying tort that would be independently actionable against a single defendant."). *But see* Cox, *supra* note 14, at 57 (noting that under Arkansas law, it was unclear "whether tortious conduct must underlie a civil-conspiracy claim" but that "[c]learly, not all conduct that is 'oppressive' or 'immoral' constitutes a tort in Arkansas."); 15A C.J.S. *Conspiracy* § 8 (West 2023) (noting that under Florida law an independent tort of conspiracy can be stated without a "predicate tort" if the conspirators display "some peculiar power of coercion" (citing *In re* Jan. 2021 Short Squeeze Trading Litig., 584 F. Supp. 3d 1161, 1203 (S.D. Fla. 2022))).

16. Jurisdiction is the authority of a court to hear and decide a case presented to it. *See, e.g.*, People *ex rel.* Clinton, 762 P.2d 1381, 1386 (Colo. 1988) ("A court's jurisdiction consists of two elements: jurisdiction over the parties (personal jurisdiction) and jurisdiction over the subject matter of the issue to be decided (subject matter jurisdiction).").

17. *See, e.g.*, Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 414 (2017) (citing, inter alia, Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1302 n.8 (2014) ("I am tired of writing articles complaining about the dismal state of the Supreme Court's personal jurisdiction jurisprudence—and complain I have.")).

18. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945).

19. Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021). Justice Kagan's description of the current state of personal jurisdiction summarizes the two kinds of personal jurisdiction as "general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction." *Id.* (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)). General jurisdiction is of little application here because conspiracy jurisdiction, as with other personal specific-jurisdiction glosses, is irrelevant for defendants who are sued in their "home state(s)." *See* 18 U.S.C. § 1332; 28 U.S.C. § 1441(b); *Goodyear*, 564 U.S. at 920.

courts power over defendants for any claim because they are "at home."[20] "Specific jurisdiction" focuses on the defendant's "minimum contacts" with the forum state.[21]

Conspiracy jurisdiction has emerged as a species of specific jurisdiction. The gist is that acts of a co-conspirator performed in a forum state in furtherance of a conspiracy create sufficient minimum contacts to establish personal jurisdiction over a remote co-conspirator, even when that co-conspirator had no other direct contacts with the forum state.[22] Put another way, a remote defendant's contacts with the forum state are linked through the instrumentality of a conspiracy rather than directly.[23] The link requires transfer of one defendant's in-state acts to the other defendant, so long as both defendants have acted in furtherance of a conspiracy, a concept colloquially known as "attribution."[24] Thus, courts have utilized civil conspiracy claims to extend jurisdiction over nonresident parties who otherwise lack direct contact with a forum state.[25]

Conspiracy in the civil sense borrows from principles of criminal conspiracy.[26] Conspiracy itself is also codified as unlawful in civil antitrust

20. *Goodyear*, 564 U.S. at 919 (explaining that general jurisdiction applies where a corporation is "essentially at home in the forum State").

21. Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984) ("It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966))).

22. Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1236-37 (6th Cir. 1981). See Part I below for a complete analysis of conspiracy jurisdiction jurisprudence, because, as we will see, different jurisdictions have nurtured or pruned the doctrine quite differently.

23. For the sake of clarity and brevity—except when necessary to quote a source—we hereafter dispense with the words "theory," "personal," or "specific" from "specific personal conspiracy theory jurisdiction" or other such phrases. Instead we simply refer to it as "conspiracy jurisdiction."

24. See Part II.B.1 below for more discussion on the use and implications of attribution.

25. *See* Cawley v. Bloch, 544 F. Supp. 133, 134 (D. Md. 1982). In short, conspiracy jurisdiction is the notion that a co-conspirator's acts may not only subject a defendant to *liability* but also to *jurisdiction*. *See infra* Part II.B.

26. There is an instructive discussion of the parallel between civil and criminal conspiracy in *Paradis v. Charleston County School District*, 861 S.E.2d 774, 778 & nn.5-6 (S.C. 2021) (citing, inter alia, 16 AM. JUR. 2D *Conspiracy* § 53 (2020)). Many cases in which plaintiffs invoke conspiracy jurisdiction involve fact patterns closely related to antitrust (covered under the Sherman and Clayton Acts) and organized unlawful conduct (notably covered by the Racketeer Influenced and Corrupt Organizations (RICO) Act). *See, e.g.*, Iron Workers Loc. Union No. 17 Ins. Fund v. Philip Morris Inc., 23 F. Supp. 2d 796, 802-03 (N.D. Ohio 1998) (involving RICO and the Clayton Act); Stauffacher v. Bennett, 969 F.2d 455, 457 (7th Cir. 1992) (involving a RICO claim), *superseded on other grounds by* Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934 (7th Cir. 2000) (acknowledging the recodification of Rule 4(f) into

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statutes[27] and in the Racketeer Influenced and Corrupt Organizations (RICO) Act—the latter of which wields the broadest of definitions.[28] Indeed, it is a violation of the RICO Act to do no more than agree with "any person to conspire" to violate another provision of the Act.[29]

This Article traces the provenance of civil conspiracy jurisdiction from its criminal and civil substantive roots to a jurisdictional gloss.[30] There is little evidence that the modern doctrine arose directly from any particular historical source, either from criminal law or civil statutes involving unlawful organized conduct. Yet revealing those sources helps us understand some of the principles that underlie both the substantive and procedural doctrine.

While defendants oppose the doctrine both theoretically and in individual disputes, it is one of the few ways plaintiffs can obtain jurisdiction over multiple defendants where liable entities can otherwise evade jurisdiction by working through intermediaries.[31] Plaintiffs are especially incentivized to pursue conspiracy jurisdiction in cases involving foreign defendants.[32] Securing personal jurisdiction over international defendants

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Rule 4(k)(1) and the enactment of 4(k)(2) as rendering moot *Stauffacher*'s limitation on worldwide service of process); Jung v. Ass'n of Am. Med. Colls., 300 F. Supp. 2d 119, 125, 140-43 (D.D.C. 2004) (involving Sherman Act); *Chrysler*, 643 F.2d at 1231, 1237 (6th Cir. 1981) (involving Clayton Act).

27. *See, e.g.*, 15 U.S.C. §§ 1, 15 (establishing civil claim of conspiracy); *The Antitrust Laws*, FTC, https://perma.cc/5MWS-BPY2 (archived Jan. 2, 2024). Both RICO and antitrust statutes have criminal and civil components. *See* G. Robert Blakey, *Of Characterization and Other Matters: Thoughts About Multiple Damages*, LAW & CONTEMP. PROBS., Summer 1997, at 97, 119-21 nn.92-94 (analyzing civil and criminal enforcement costs in antitrust and RICO matters).

28. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941 (codified as amended at 18 U.S.C. § 1961).

29. RICO Act, 18 U.S.C. § 1962(d). The Supreme Court has interpreted the phrase "to conspire" quite broadly. *See* Salinas v. United States, 522 U.S. 52, 63 (1997) ("There is no requirement of some overt act or specific act in the statute before us, unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an 'act to effect the object of the conspiracy.'" (quoting 18 U.S.C. § 371)).

30. *See infra* Part I.A. Except for historical and comparative purposes, we confine our analysis in this Article to civil conspiracy jurisdiction.

31. *See* Carver, *supra* note 8, at 1345. Alex Carver notes how the reasonableness factors of the jurisdiction analysis may lead a court to weigh in favor of a finding of jurisdiction because the harm happens in the forum state, efficiency warrants it, and the plaintiff resides there. *Id.*; *see also, e.g.*, Mackey v. Compass Mktg., Inc., 892 A.2d 479, 487 (Md. 2006) (discussing the rationale for conspiracy jurisdiction and the concept of attribution to reach remote indirect defendants).

32. Consider that most of the major personal jurisdiction Supreme Court cases over the last few decades have concerned transnational corporations. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 111 (1987) (plurality opinion); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918 (2011); J. McIntyre Mach., Ltd. v. Nicastro,

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free from general jurisdiction in any domestic forum remains an arduous task, and many international companies wield arbitration or forum selection clauses as effective shields, even where such companies are otherwise subject to personal jurisdiction.[33]

Applying and analyzing conspiracy jurisdiction is a challenge because there exists an uneven but long-entrenched circuit split about the viability of the doctrine.[34] Despite this lack of consistency, the last decade has seen a powerful uptick in the application of conspiracy jurisdiction.[35]

In *Daimler*, the Court held that corporations are subject to general jurisdiction based only on their own "continuous and systematic" contacts.[36] Thus, *Daimler* effectively foreclosed the concept of corporate general jurisdiction outside the principal place of business or state of incorporation, a concept that may have encouraged plaintiffs to turn more urgently to the doctrine of conspiracy jurisdiction.[37] However, *Daimler* had little to say about

564 U.S. 873, 886 (2011) (plurality opinion); Daimler AG v. Bauman, 571 U.S. 117, 123 (2014); *cf.* Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1022-23 (2021) (noting that the cars at issue were manufactured out-of-state in Kentucky and Canada).

33. *See, e.g.*, Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1370 (2004). We evaluate special issues for foreign defendants in Part II.B.4 below. We later offer a hypothetical situation to demonstrate a situation where a plaintiff could not have sued a foreign entity but for conspiracy jurisdiction. *See infra* note 87.

34. *See* Martin v. Eide Bailly LLP, No. 15-cv-1202, 2016 WL 4496570, at *3 (S.D. Ind. Aug. 26, 2016) ("Even before *Walden*, courts were split on the question of whether conspiracy jurisdiction comports with due process."); Jennifer E. Sturiale, *The* Other *Shadow Docket: The JPML's Power to Steer Major Litigation*, 2023 U. ILL. L. REV. 105, 121 n.124 (noting the "circuit split as to whether 'conspiracy theory jurisdiction' is a viable theory of personal jurisdiction in section 1 antitrust cases" and citing cases to that effect from the 1980s through 2018).

35. *See supra* note 7. The vast majority of conspiracy jurisdiction cases arose after January 1, 2010, and there is no clear delineation between 2010-2014 and 2014-2018, but the doctrinal changes effected by *Daimler* were still being processed into the late 2010s.

36. *Daimler*, 571 U.S. at 127 (quoting *Goodyear*, 564 U.S. at 919); *id.* at 128 ("Since *International Shoe*, 'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.'" (quoting *Goodyear*, 564 U.S. at 925)). *Daimler* contributed to the reduced role of general jurisdiction, as numerous cases have acknowledged. *See, e.g.*, Farber v. Tennant Truck Lines, Inc., 84 F. Supp. 3d 421, 430 (E.D. Pa. 2015) (citing, inter alia, Monkton Ins. Servs. v. Ritter, 768 F.3d 429, 432 (5th Cir. 2014)) (collecting cases showcasing "the overwhelming post-*Daimler* acknowledgement that *Goodyear* and *Daimler* restrict a state's ability to subject a nonresident corporate defendant to general personal jurisdiction"); *see also Monkton*, 768 F.3d at 432 (noting that, after *Goodyear* and *Daimler*, "[i]t is, therefore, incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business").

37. *See supra* note 36. We do not think *Daimler* offers as much guidance for conspiracy jurisdiction because of the parent-subsidiary or corporate-relationship issues, but to the extent a corporate entity has entered into a conspiracy with a distinct entity, there

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remote defendants and attribution, which is why two other recent Supreme Court cases offer better guideposts for conspiracy jurisdiction analysis.[38]

Walden v. Fiore came first.[39] The Court in *Walden* determined that a defendant, who had never set foot in the forum state, was subject to personal jurisdiction because the plaintiff suffered the injury in the forum state and had deep connections there.[40]

More recently, *Ford v. Montana* offers another lens through which to evaluate how conspiracy jurisdiction should be applied in the future.[41] In *Ford*, the Court held that a defendant that comprehensively serves a given market has sufficient minimum contacts even if the instrumentality of the plaintiff's injury was not specifically directed at the forum state.[42] The Court's focus in *Ford* was on "relating to" as disjunctive from "arising from" in the minimum contacts test.[43] *Ford* is germane to conspiracy jurisdiction because the instrumentalities of injury are sometimes indirect.[44] Neither *Walden* nor *Ford*, however, references conspiracy jurisdiction at all. Thus, the doctrine remains in flux, the subject of irregular petitions for writ of certiorari and a protean approach by litigants depending on the jurisdiction and circumstances.[45] This Article is our attempt to bring some order to the chaos.

The Article is divided into two Parts. Part I begins with the provenance of the doctrine and attempts to trace its roots from criminal and civil conspiracy to its present state. As will become clear, its history is a winding and sometimes vanishing road and is part of the reason the doctrine may have developed so disparately in different jurisdictions. In this Part, we also explore the intricacies of conspiracy jurisdiction by canvassing the different tests courts

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is no reason the conspiracy jurisdiction analysis would differ. *Cf.* Fogie v. THORN Ams., Inc., 190 F.3d 889, 898 (8th Cir. 1999) (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), for the proposition that "a parent and its wholly owned subsidiary lacked the capacity to conspire to violate § 1 of the Sherman Act" and therefore an "identical conclusion" results when "the same principle is applied to alleged parent-subsidiary RICO civil conspiracies"). We believe the same principle applies to conspiracy jurisdiction.

38. *See Daimler*, 571 U.S. at 122.

39. 571 U.S. 277 (2014). *Walden* was decided in the same term as *Daimler*.

40. *Id.* at 279-80.

41. *See* Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021).

42. *See id.* at 1024, 1032.

43. *Id.* at 1026.

44. *See id.* at 1023-24. In *Ford*, the instrumentalities of injury were allegedly defective cars that Ford built in Kentucky and Canada, sold in Washington and North Dakota, and only brought to Montana and Minnesota (the forum states) by customer relocation and resales. *Id.* Thus, Ford never sold the actual damaging instrumentalities in the forum states.

45. In the Conclusion, we analyze the most recent and best attempts at enticing the Supreme Court to analyze conspiracy jurisdiction.

have used in interpreting the theory. Some courts analyze conspiracy jurisdiction as an extension of state long-arm statutes or conspiracy law, and others have crafted multifactor tests, almost none of them explicitly agreeing with each other.[46] In sum, Part I surveys the way conspiracy jurisdiction arose and how it presently exists in its maddeningly inconsistent—but increasingly popular—forms.

Part II confronts the constitutional and practical challenges posed by conspiracy jurisdiction. This Part starts with the most relevant Supreme Court authority.[47] It then proceeds to analyze through these cases' normative frameworks the most likely constitutional challenges to conspiracy jurisdiction and how it can survive constitutional scrutiny.[48] A unique feature of conspiracy jurisdiction among the personal jurisdiction glosses is what we describe as the "attribution" of the acts of one defendant to another for purposes of establishing minimum contacts. As a result, attribution is one of the most prominent lenses through which we evaluate the doctrine's constitutionality.[49] After laying the groundwork for how the doctrine could survive other nonconstitutional criticisms, we suggest a normative test: Plaintiffs should have to (1) allege a conspiracy in which the defendants actively participated where (2) the object of the conspiracy's effects were knowingly directed at and felt in the forum state.[50]

Thus, as long as the conspiracy is directed at the forum state, the specific act need not be. Put differently, a conspiracy that is knowingly directed at a

46. *See infra* Part I.A and Conclusion. We focus our attention on federal courts for two reasons. First, the doctrine has developed far more extensively in federal court—even when the federal courts rely on state conspiracy law in establishing standards. Second, while state courts are equally subject to the Due Process Clause, the clearest lines of demarcation exist in the federal courts. But we acknowledge some state high courts have either adopted or rejected the doctrine. *Compare* Chenault v. Walker, 36 S.W.3d 45, 54 (Tenn. 2001) ("[W]e are aware of no good reason to bar the application of this theory [of conspiracy jurisdiction] as a matter of law where the plaintiff has made specific, credible allegations which are supported by the evidence."), *with* Nat'l Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 773 (Tex. 1995) ("[W]e decline to recognize the assertion of personal jurisdiction over a nonresident defendant based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state.").

47. *See infra* Part II.A. Throughout this Article, we employ the analytical mechanism of a simulated or hypothetical case—based on other real cases—to illustrate how the different conspiracy jurisdiction tests would operate on the same set of facts. We will offer our simulated case at the end of Part I. *See infra* note 87.

48. At their most fundamental level, all of the challenges we consider are constitutional in nature but in some instances seem more policy-based or functional than constitutional, something we discuss in Part II.B below.

49. *See infra* Part II.B.1.

50. Some of the most devilish details concern whether it is either one or both defendants that need knowing, purposeful availment of the forum state. *See infra* Part II.B.

forum state is sufficient to confer conspiracy jurisdiction under *Ford*,[51] even if *Walden* would suggest the situs of injury is insufficient alone for personal jurisdiction over remote defendants.[52]

Finally, we offer some thoughts on why the doctrine has not yet reached the Supreme Court and presage how the Supreme Court will rule when it inevitably takes up the issue to resolve the circuit split.

I. The Current Status of Conspiracy Jurisdiction

A. Conspiracy Jurisdiction's Venerable Origins

The crime of conspiracy traces its roots to thirteenth- and fourteenth-century English common law.[53] Originally related to false indictments or obstructions of justice,[54] its elements later matured into a requirement that

51. *See* Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021). As Justice Kagan puts it, "[t]he first half of ['arises out of or relates to'] asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing." *Id.*

52. *See* Walden v. Fiore, 571 U.S. 277, 289-90 (2014).

53. Martin H. Pritikin, *Toward Coherence in Civil Conspiracy Law: A Proposal to Abolish the Agent's Immunity Rule*, 84 NEB. L. REV. 1, 6 (2005). Interestingly, one of the first indications of local jurisdictions seeking to acquire jurisdiction over remote defendants occurred in the Court of the King's Bench in England, where specific county courts would issue bills—named after themselves—subjecting remote defendants to liability by knowingly asserting a fictitious trespass in the home jurisdiction. 3 WILLIAM BLACKSTONE, COMMENTARIES *284. "Once the sheriff returns the bill noting that the defendant is not in the county where the trespass occurred, a *latitat* is issued to the sheriff of the defendant's actual residence." *Bill of Middlesex*, BLACK'S LAW DICTIONARY (11th ed. 2019). As explained by Blackstone,

> The bill of Middlesex, [then,] . . . is a kind of *capias*, directed to the sheriff of that county, and commanding him to take the defendant, and have him before our lord the king at Westminster on a day prefixed, to answer to the plaintiff of a plea of trespass. For this accusation of trespass it is, that gives the court of king's bench jurisdiction in other civil causes, as was formerly observed; since, when once the defendant is taken into custody . . . of this court, . . . [he] may here be prosecuted for any other species of injury.

3 BLACKSTONE, COMMENTARIES *285.

54. George E. Burns, Jr., *The First Conspiracy Trial*, MD. BAR J., July/Aug. 2002, at 44, 45 (early conspiracy statutes "created a crime limited to conspiracy to falsely charge another with a crime"); George E. Woodbine, Book Review, *Cambridge Studies in English Legal History*, 31 YALE L.J. 796, 796 (1922) (reviewing PERCY HENRY WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921)) (summarizing the earliest development of the doctrine as being "an illegal combination to abuse legal procedure, to promote false accusations and suits before a court"); Jerry Whitson, *Civil Conspiracy: A Substantive Tort?*, 59 B.U. L. REV. 921, 923 (1979) (noting that, although civil and criminal conspiracy developed along parallel paths in the thirteenth and fourteenth centuries, "[t]he civil side of the action fell into disuse, being replaced by the action of maintenance and an action on the case in the nature of conspiracy").

two or more persons attempt to achieve an unlawful aim and have an agreement to do so in concert.[55] One modern state law definition of criminal conspiracy defines it as "an agreement with another person to commit a crime or to assist in committing a crime [but no] person may be convicted of a conspiracy unless an overt act in furtherance of such conspiracy is alleged and proved to have been committed by such person or by a co-conspirator."[56]

The Supreme Court has never weighed in on conspiracy jurisdiction as a form of personal jurisdiction over civil defendants. But over a century ago, it set forth in relatively plain but abstract terms the proper venue for the prosecution of remote wrongdoers in the criminal context.[57] At issue in *Hyde v. United States* was whether the Supreme Court of the District of Columbia had jurisdiction over a conspiracy to defraud the United States by fraudulent acquisition of public lands.[58] *Hyde* is the earliest case for conspiracy jurisdiction in the sense that it frames the issue as whether, under the Sixth Amendment, venue in conspiracy cases "must be at the place where the conspiracy is entered into or whether it may be at the place where the overt act is performed."[59] In determining that venue was proper where the effects of the conspiracy were felt, the Supreme Court "recognized . . . that there may be a constructive presence in a State, distinct from a personal presence, by which a crime may be

55. *See, e.g.*, Singer v. Wadman, 745 F.2d 606, 609 (10th Cir. 1984) ("A civil conspiracy is the combination of two or more persons acting in concert, either to commit an unlawful act, or to commit a lawful act by unlawful means."); Banco Popular N. Am. v. Gandi, 876 A.2d 253, 263 (N.J. 2005) (under New Jersey law, "a civil conspiracy is 'a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage" (quoting Morgan v. Union Cnty. Bd. of Chosen Freeholders, 633 A.2d 985, 998 (N.J. Super. Ct. App. Div. 1993))).

56. KAN. STAT. ANN. § 21-5302(a) (2023).

57. Hyde v. United States, 225 U.S. 347, 359-62 (1912).

58. *Hyde*, 225 U.S. at 349-51. The Court in *Hyde* determined whether the District of Columbia was the proper "venue" for convicting a criminal conspirator, but such a discussion has relevance to jurisdictional questions. *Id.* at 357. And the Court in *Hyde* seems to conflate venue and jurisdiction in its decision at times, such as when it looks to the location where the "act" occurs as the place where the court then acquires "jurisdiction." *Id.* at 359.

59. *Id.* at 357. As framed by the Supreme Court, the trial court asked:

> "If these defendants got together in California and planned to defraud the United States out of its lands by the means charged in the indictment, and in pursuance of that plan sent Dimond here to get the titles from the Government, they were acting within the District of Columbia as much as if they had come and done the thing themselves." And subsequently the United States Attorney assented to the proposition that the Government could not prevail except on the theory that it was sufficient to show an overt act in the District of Columbia, and the court said "that if that theory was wrong, of course they failed."

Id. at 356-57.

consummated."[60] As the Court pointed out, "if [the crime] may be consummated it may be punished by an exercise of jurisdiction; that is, a person committing it may be brought to trial and condemnation."[61] Although *Hyde* concerned criminal conspiracy, its importance lies in the way it combines the concept of constructive presence—a concept little used up to that point—with jurisdiction.[62] Indeed, the Supreme Court has long recognized the distinction between venue and jurisdiction.[63] But in the early cases such as *Hyde*, venue appears to be the best proxy for jurisdiction because the concept of what is a *possible* forum is similar enough to what is the *preferable* forum that a focus on the location where the conspiracy occurred has something useful to tell us about what conspiracy jurisdiction would ultimately become.[64]

Hyde's careful reference to constructive presence did not take hold.[65] In fact, courts did not substantially rely on *Hyde*'s discussion of jurisdiction for

60. *Id.* at 362. The Court in *Hyde* cites several venerable cases regarding the crime of conspiracy. *Id.* at 361-62 (citing *In re* Palliser, 136 U.S. 257 (1890); Benson v. Henkel, 198 U.S. 1, 15 (1905); and Burton v. United States, 202 U.S. 344 (1906)).

61. *Id.* at 362-63.

62. The concept of constructive presence most often brings to mind *International Shoe*, but even before that decision the Supreme Court had grappled with the concept of a remote defendant having constructive presence in a state. For example, in *Chipman, Ltd. v. Thomas B. Jeffrey Co.*, a case decided eight years after *Hyde* and twenty-five years before *International Shoe,* the Court held that a corporation could be subject to jurisdiction based on service of process, registration of an agent, or business operations. 251 U.S. 373, 378 (1920). But the Court in *Chipman* focused on corporate liability and did not make the same connection to presence and jurisdiction for individuals based on their wrongful acts, as opposed to being subject to procedural bindings like designating an agent for service of process within the state. *Id.* at 378-79.

63. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68 (1939) ("The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition.").

64. Numerous sources articulate the distinction between venue and jurisdiction. *See, e.g.*, 92A C.J.S. *Venue* § 2 (West 2023) ("Jurisdiction describes the power of a court to decide the merits of a case while venue relates to where the case is to be heard. Venue refers not to the power to hear a case, but to the geographic location where a given case should be heard. The distinction lies between the power to adjudicate and the proper place for the claim to be heard. Venue does not determine the right of the court to hear and determine the case on the merits.").

65. While the Court's analysis in *Hyde* focused on constructive presence for venue purposes, the thematic parallels with personal jurisdiction are important because the analysis expressly considered the problem of the effects of a remote conspiracy in a local jurisdiction. Venue, jurisdiction, and long-arm statutes are often intertwined concepts. *See, e.g.*, JACK H. FRIEDENTHAL, MARY KAY KANE, ARTHUR R. MILLER & ADAM N. STEINMAN, CIVIL PROCEDURE § 2.1 n.9 (6th ed. 2021) ("When venue is premised on some relationship between the forum and the subject matter of the dispute, the plaintiff's ability to file suit there also depends upon whether the forum state's long-

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over three decades until a 1938 Fourth Circuit case, *Reass v. United States*.[66] There, the defendant made false statements in West Virginia, but filed applications for fraudulently obtained loans in Pennsylvania.[67] The defendant repeatedly argued that the crime, if any, occurred in Pennsylvania such that venue was improper in West Virginia.[68] Citing 12 U.S.C. § 1441(a) (the statute under which the defendant was prosecuted), the court evaluated whether the crime of conspiracy meant focusing on the location where false statements were made or where the actions based on those statements actually occurred:

> This statute is particularly applicable to the jurisdiction over crimes which consist of two or more distinct elements or acts that may be committed in different districts, such as the crime of conspiracy which, under the federal statute, consists not only of the unlawful agreement, but also of the commission of an overt act in furtherance thereof. . . . It is established that jurisdiction of the crime of conspiracy lies either where the unlawful agreement was made or where any overt act took place.[69]

The court ultimately reversed the conviction in *Reass* on the ground that the statute was designed to protect against fraudulent applications for loans.[70] As a result, "[t]he gist of the offense" was an attempt to defraud the bank, something which only occurred where the applications were made that communicated "false statements to the corporation."[71] *Reass* seems to be the

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arm statute will extend to bring the defendant within the personal jurisdiction of the court."). Likewise, *Hyde* was decided in the context of a post-*Pennoyer*-but-pre-*International Shoe* world, where it was a still-developing concept to attribute venue in a remote location when the conspiracy occurred elsewhere.

66. 99 F.2d 752, 754 (4th Cir. 1938). There is brief mention of *Hyde* in a 1927 Fourth Circuit case, *Baker v. United States*, where, in relying on *Hyde*, the court stated: "The doing of the overt act prescribed as necessary to the offense of conspiracy confers jurisdiction on the court in the district where the overt act is committed." 21 F.2d 903, 906 (4th Cir. 1927). But there is no further analysis or discussion, and we therefore consider *Baker* an outlier beyond even *Hyde* and *Reass*.

67. *Reass*, 99 F.2d at 752-53.

68. *See id.* at 753.

69. *Id.* at 754 (citing Hyde v. Shine, 199 U.S. 62 (1905); Haas v. Henkel, 216 U.S. 462, 475 (1910); Grayson v. United States, 272 F. 553, 555 (6th Cir. 1921); and Grigg v. Bolton, 53 F.2d 158, 159 (9th Cir. 1931)). The *Reass* Court also recognized a "continuity" principle of criminal law:

> Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act, commencing with the offender and hence ultimately consummated through him, as the mailing of a letter; or where there is a confederation in purpose between two or more persons, its execution being by acts elsewhere, as in conspiracy.

Id. at 754 (quoting United States v. Lombardo, 241 U.S. 73, 77 (1916)).

70. *Id.* at 755.

71. *Id.* After considering the Sixth Amendment, the Court reversed the conviction on other grounds, holding that the conviction did not meet the statute's purpose or text. *Id.* at 753-55.

only instance of an appellate court relying on *Hyde*'s discussion of conspiracy jurisdiction over crimes, but its question on appeal references venue and its grounds for reversal of the conviction were based on interpretation of a criminal statute.[72]

Neither *Hyde* nor *Reass* concerned multiple defendants and attributed conduct, something that later becomes the hallmark of civil conspiracy jurisdiction. They are nevertheless relevant to show how courts grappled with the question of jurisdiction over remote defendants where the defendant's focus and the conspiracy's effects guided the courts' analyses of jurisdiction and venue.

The next major decision analyzing jurisdiction over remote wrongdoers in the conspiracy context was a 1946 Ninth Circuit case, *Giusti v. Pyrotechnic Industries, Inc.*[73] The court held in *Giusti* that a remote corporation accused of violating California's anticompetitive laws remained subject to jurisdiction where its agents conducted business in the state of California.[74] It is difficult to trace exactly how the *Giusti* court saw conspiracy jurisdiction's provenance because the only case it relied on in support of the concept was *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, which merely held that there was a possibility of conspiracy jurisdiction under the Clayton Act.[75] *Giusti* did not cite *Hyde* or any criminal statutes, relying instead on the Clayton Act and since-repealed provisions of the California Civil Code relating to service of process.[76] In other words, *Giusti* is something of an anomaly—an early acknowledgment of the concept but without clear parents or progeny. *Giusti* further obfuscates its applicability because the co-conspirators in that case were the defendant's own agents.[77]

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72. *Id.* at 754-55 (citing Hyde v. United States, 225 U.S. 347, 362-63 (1912)). *Reass*'s focus on the location where the wrongful conduct occurred—focused as it was on the substance of the conviction—is still fascinating for how it looked to the place the wrongdoer acted rather than the place the wrongdoing was felt.

73. 156 F.2d 351 (9th Cir. 1946).

74. *Id.* at 354.

75. *Id.* (citing Eastman Kodak Co. of N.Y. v. S. Photo Materials Co., 273 U.S. 359, 372-73 (1927) (acknowledging without deciding that the Clayton Act's agency liability may give rise to expanded jurisdiction over nonpresent defendants)); *cf.* Morris & Co. v. Skandinavia Ins. Co., 279 U.S. 405, 409 (1929) (refusing to construe a statute as permitting the exercise of jurisdiction over foreign defendants).

76. *See Giusti*, 156 F.2d at 353-54 (citing CAL. CIV. CODE §§ 406a, 411 (1931) (repealed 1947); and Clayton Act, ch. 323, § 12, 38 Stat. 730, 736 (1914) (codified as amended at 15 U.S.C. § 22)).

77. *See id.* at 354. Curiously, however, the Court did not address traditional agency principles of control and authority. *See id.* The relevance of the defendant's agents being its co-conspirators seems to be limited except as to having an agent for service of process, a more specific type of agency and not relevant to what would become a more common conspiracy jurisdiction formulation. *See id.* at 353-54.

After *Giusti*, a series of antitrust cases applied the Clayton Act's early revisions to the Sherman Act to define the terms "transacts business" and "agency" for purposes of exercising jurisdiction over remote defendants.[78] This period of antitrust jurisdiction percolation in the 1950s and 1960s may have been a precursor to conspiracy jurisdiction.[79] But that theory is difficult to confirm, given that the new scope of jurisdiction flowed from far earlier statutory changes in the Clayton Act and the Sherman Act.[80] We cannot trace the modern era of conspiracy jurisdiction from these statutes.[81] Accordingly,

78. To be clear, the Clayton Act, which amended the Sherman Act, was passed during the 63rd Congress in 1914. *See* 15 U.S.C. § 22. But the venue amendments only seemed to take hold after *United States v. Scophony Corp. of America*, 333 U.S. 795, 806-07, 818 (1948) (analyzing the Clayton Act's revisions to Section 7 of the Sherman Act's venue provisions). *See, e.g.*, Donlan v. Carvel, 193 F. Supp. 246, 247-48 (D. Md. 1961) ("The purpose of [the Clayton Act amendment] was to enlarge the jurisdiction of the district courts to establish the venue of a suit under the antitrust laws not only where a corporation resides or is 'found', but also where it 'transacts business'." (quoting *Eastman Kodak*, 273 U.S. at 372-74)); Stern Fish Co. v. Century Seafoods, Inc., 254 F. Supp. 151, 153 (E.D. Pa. 1966) ("Even though the addition of the term 'transacts business' was intended to broaden venue in antitrust cases, it is not without its limitations, for the Supreme Court as well as the lower courts have interpreted the statute to require some amount of business continuity and certainly more than a few isolated and peripheral contacts with the particular judicial district.").

    One exception to this was *Bertha Building Corp. v. National Theatres Corp.*, in which the Second Circuit considered, and rejected, that service of process could be achieved over remote conspirators under Section 12 of the Clayton Act. 248 F.2d 833, 836 (2d Cir. 1957). Part of the basis for that rejection was "dictum in *Bankers Life & Casualty Co. v. Holland* . . . where Justice Frankfurter dissenting on another point observes that co-conspirators 'as such' are not 'agents' for purposes of venue." *Id.* (quoting 346 U.S. 379, 386 (1953) (Frankfurter, J., dissenting)). We discuss *Turner v. Baxley*, 354 F. Supp. 963 (D. Vt. 1972), a case that cites *Bertha Building Corp.*, in Part I.B below. The best description of the legislative history of the Clayton Act amendment is found in *United States v. National City Lines, Inc.*, 334 U.S. 573, 585-86 (1948) (reporting on the addition of "transacts business" in committee).

79. One notable case from this time period even went so far as to reference *Giusti*: *Ziegler Chemical & Mineral Corp. v. Standard Oil Co. of California*, 32 F.R.D. 241, 242-43 (N.D. Cal. 1962). In *Ziegler*, the plaintiff attempted—without success or naming as such—to wield conspiracy jurisdiction based on the expanded Clayton Act language and *Giusti*. *Id.* at 242-43. The court, however, never reached the conspiracy question:

    > [T]he allegations of the complaint are in themselves wholly inadequate for application of the *Giusti* doctrine. The *Giusti* decision was made upon the basis of a complaint which alleged continued acts by some of the conspirators in California over a period of six months. The present complaint is devoid of any allegations regarding acts done within this District in furtherance of the conspiracy by any of the conspirators.

    Id. at 243.

80. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7).

81. Without firm proof, we speculate that an increase in vicarious jurisdiction over corporations not themselves present was due to the 1950 and 1958 revisions to the Clayton Act, even though those amendments were more substantive in nature. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 315-23 (1962) (discussing the legislative

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while there is some continuity in employing conspiracy as a basis for jurisdiction in both the criminal and civil antitrust contexts, conspiracy jurisdiction itself is not a clear progeny of either.[82]

We pause here to compare briefly civil and criminal conspiracy, which have similar elements but one key distinguishing factor: "[D]amages [or injury] are the essence of a civil conspiracy, and the agreement is the essence of a criminal conspiracy."[83] Civil conspiracy "is a theory of vicarious liability that renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he or she was a direct actor and regardless of the degree of his or her activity."[84] The classic elements of civil conspiracy "are (1) an agreement between two or more individuals, (2) to do an unlawful act or to do a lawful act in an unlawful way, (3) resulting in injury to plaintiff inflicted by one or more of the conspirators, and (4) pursuant to a common scheme."[85] Considering the similarities between the history and elements of criminal and civil conspiracy,[86] it is surprising that the civil conspiracy jurisdiction cases do not acknowledge their shared

history of the Clayton Act's 1950 Amendment after opining that "[t]he dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy"); Peter D. Byrnes, *Bringing the Co-Conspirator Theory of Venue Up-to-Date and into Proper Perspective*, 11 ANTITRUST BULL. 889, 889-90 (1966) (presciently recognizing the issue of conspiracy jurisdiction but couching it in terms of venue). Indeed, Byrnes even calls the theory the "so-called co-conspirator theory of venue" as he relates it to the "agent of the non-resident defendant" as defined within the Clayton Act. *Id.* at 890.

82. There is no evidence that Congress considered *Giusti* or any other conspiracy jurisdiction theories in modifying the Clayton Act.

83. 15A C.J.S. *Conspiracy* § 7 n.2 (West 2023). The fundamental and crucial distinction between civil and criminal liability, the policy of compensation for individual injury versus punishment for societal wrongs, and their different burdens of proof does not mean their shared parentage has no bearing on the personal jurisdiction doctrine of conspiracy jurisdiction. *See also* Henry A. LaBrun, Note, *Innocence by Association: Entities and the Person-Enterprise Rule Under RICO*, 63 NOTRE DAME L. REV. 179, 183-88 (1988) (discussing the shared fundamental concepts of civil versus criminal constructs).

84. Pritikin, *supra* note 53, at 9.

85. 16 AM. JUR. 2D *Conspiracy* § 53 (West 2023).

86. *See* Woodbine, *supra* note 54, at 796. George Woodbine's review of *The History of Conspiracy and Abuse of Legal Procedure* notes that even prior to the "modern" doctrine of Elizabethan times,

> [t]here was both a civil and a criminal side to conspiracy, the civil procedure being begun by the writ of conspiracy, and the criminal procedure by presentment before a court. A particularly full treatment of the writ is given (it was statutory, no writ of conspiracy existing at common law), its scope, and the essentials of liability to it.

Id.

parentage. The uneven history of conspiracy jurisdiction may, in part, be responsible for the disparate approaches courts have taken in evaluating it.[87]

B. The Current Status of Conspiracy Jurisdiction in the Federal Courts

In 1972, the Second Circuit decided *Leasco Data Processing Equipment Corp. v. Maxwell*.[88] As Chief Judge Friendly described the issue in that case:

> The gist of the complaint is that the defendants conspired to cause Leasco to buy stock of [Pergamon], a British corporation controlled by defendant Robert Maxwell, a British citizen, at prices in excess of its true value, in violation of § 10(b) of the Securities Exchange Act and the SEC's sufficiently known Rule 10b-5.[89]

The plaintiff sought jurisdiction over the remote attorney for Maxwell, who allegedly engineered the conspiracy's aim.[90] Without articulating any rule, Chief Judge Friendly expounded on the concept that became conspiracy jurisdiction:

> To be sure, the rule in this circuit is that the mere presence of one conspirator, such as Maxwell, does not confer personal jurisdiction over another alleged

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87. Before we begin our analysis of different circuits' tests, we offer a persistent hypothetical to help illustrate how the disparate approaches should function in practice. Consider the following:

> A domestic investment company, "InvestUS," based and incorporated in New Jersey, buys securities for its customers from a foreign bank named "Eurobank." Eurobank underwrites loans secured by real estate assets located throughout Europe and then sells these loans as securities to United States investment companies, including InvestUS. Eurobank experiences financial difficulty when many of its loans go into default. InvestUS and Eurobank meet in London to discuss offering the opportunity to buy the loans as distressed assets and the possibility of buying shares of Eurobank directly to InvestUS's investors. They agree that InvestUS will solicit its customers in the United States to purchase the loans. For customers who agree to purchase loans, InvestUS will extend a "special offer" to purchase shares of Eurobank through a European investment vehicle at an artificially inflated price that does not take into account the double risk generated by buying both the loans and investing in Eurobank. InvestUS is required to vet potential American purchasers of Eurobank stock. After a series of revelations about a tenuous European real estate market, individual "Domestic Investors" around the United States sue InvestUS and Eurobank, claiming fraud and conspiracy to commit fraud. Some of these investors bought only Eurobank loan-backed securities, what we refer to as "Tranche A," while the others also bought Eurobank stock, what we refer to as "Tranche B."

We will return to this scenario multiple times to illustrate how different courts' tests would function in a broad hypothetical situation like *Domestic Investors v. Eurobank*.

88. 468 F.2d 1326 (2d Cir. 1972).

89. *Id.* at 1330.

90. *Id.* at 1343. The *Leasco* court needed to confront the remote defendant scenario in part because it overcame the presumption against extraterritoriality in concluding that Section 10(b) of the Securities Exchange Act (and by extension Rule 10b-5 thereunder) should be applied extraterritorially. *See id.* at 1336. For more discussion on the presumption against extraterritoriality, see generally Jason Jarvis, Comment, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671 (2003).

> conspirator. . . . Neither would the partnership relation between Kerman and DiBiase alone justify a conclusion that DiBiase's acts in New York were the equivalent, for purposes of personal jurisdiction, of acts by Kerman here—as would be apparent if Leasco sought to assert such jurisdiction over other members of the firm. However, the matter could be viewed differently when the relationship was the closer one between a senior partner, especially one who is a director of the client, and a younger partner to whom he has delegated the duty of carrying out an assignment over which the senior retains general supervision.[91]

The court neither adopted nor even squarely presented a case for a conspiracy jurisdiction doctrine, but *Leasco* came closer than did any case since *Giusti*.[92]

The doctrine gained momentum when the United States District Court for the District of Vermont issued its ruling in *Turner v. Baxley*.[93] *Turner* concerned an allegation that several state attorneys general conspired to hurt the plaintiff's business.[94] But in rejecting the doctrine, the court held:

> The mere presence of one conspirator in the forum state does not confer personal jurisdiction over another alleged conspirator. . . . Nor is it enough that the actions in Vermont of the Vermont Attorney General, if found to be overt acts in furtherance of the conspiracy, might confer tort liability on non-resident conspirators.[95]

The court rejected conspiracy jurisdiction, reasoning that "[t]o 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."[96]

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91. *Leasco*, 468 F.2d at 1343 (citing Bertha Bldg. Corp. v. Nat'l Theatres Corp., 248 F.2d 833, 836 (2d Cir. 1957); and H. L. Moore Drug Exch., Inc. v. Smith, Kline & French Lab'ys, 384 F.2d 97, 98 (2d Cir. 1967) (per curiam)). The court in *Leasco* previewed an issue the Second Circuit would come to discuss more carefully when it concluded that paragraph with "[t]he case for [viewing the matter differently] would be materially strengthened by proof that the junior was in frequent communication with the senior." *Id.* The Court in *Charles Schwab Corp. v. Bank of America Corp.* (*Schwab I*), 883 F.3d 68, 85 (2d Cir. 2018), later examined this principle. *See infra* note 107.

92. *See Leasco*, 468 F.2d at 1343.

93. 354 F. Supp. 963 (D. Vt. 1972). Neither *Leasco* nor *Turner*, however, actually approved of the doctrine of conspiracy jurisdiction as it would come to be used. *See Leasco*, 468 F.2d at 1343; *Turner*, 354 F. Supp. at 977.

94. *Turner*, 354 F. Supp. at 967.

95. *Id.* at 976-77 (citations omitted). In addition to *Leasco*, the Court relied on *Bertha Building Corp. v. National Theatres Corp.*, 248 F.2d 833, 836 (2d Cir. 1957), discussed in note 78 above, and *H.L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories*, 384 F.2d 97, 98 (2d Cir. 1967) (per curiam) ("[T]he presence of one co-conspirator within the jurisdiction does not give jurisdiction over all who are alleged to be co-conspirators." (citing *Bertha*, 248 F.2d at 836)).

96. *Turner*, 354 F. Supp. at 977-78.

Picking up steam, the next conspiracy jurisdiction case was *Socialist Workers Party v. Attorney General of the United States*, a holding departing in no small measure from *Turner*.[97] The Court in *Socialist Workers* held:

> [While] a person may be subjected to jurisdiction under [New York's long-arm statute] on the theory that his co-conspirator is carrying out activities in New York pursuant to the conspiracy. . . . The plaintiff must come forward with some definite evidentiary facts to connect the defendant with transactions occurring in New York.[98]

The court in *Socialist Workers* considered the other cases that alluded to conspiracy and agency, but it did not tie those theories together cleanly.[99] In other words, none of the first three "modern" cases—*Leasco*, *Turner*, and *Socialist Workers*—actually accepted the doctrine. Nevertheless, most subsequent cases cite *Leasco* as if it were the seminal case *adopting* rather than *rejecting* the doctrine.[100] But because *Leasco* is the first case to wrestle expressly with the doctrine of conspiracy jurisdiction, we too believe that the modern era of conspiracy jurisdiction commenced with *Leasco*.

From *Leasco* until present day, hundreds of reported federal and state cases mention the concept of conspiracy jurisdiction.[101] Most federal jurisdictions apply some version of the doctrine. The D.C., Second, Third, Fourth, Seventh, Tenth, and Eleventh Circuits have expressly adopted some version of the theory.[102] Although the Eighth Circuit has not spoken on the issue, its district courts have adopted and applied the theory.[103] The First, Sixth, and Ninth Circuits have not expressly adopted or rejected the theory,[104] although the

97. 375 F. Supp. 318, 321-22 (S.D.N.Y. 1974). Ann Althouse summarizes how *Socialist Workers* advanced the doctrine:

> *Socialist Workers Party* . . . spurred the growth of the conspiracy theory in two significant ways. First, it created the impression that the theory existed in state law, obscuring the fact that it is a creature of the federal courts. Second, it stated the principle that allegations of conspiracy, if they are sufficiently definite and if they "connect" the defendant to an act occurring in the forum state, can form the basis for the assertion of jurisdiction over non-resident defendants. Indeed, this case and this principle are frequently cited in later cases that neither fully articulate the theory nor justify its adoption.

Althouse, *supra* note 8, at 240-41 (citations omitted).

98. *Socialist Workers*, 375 F. Supp. at 321-22 (citations omitted).

99. *See id.* at 324-25.

100. *See, e.g.*, McLaughlin v. Copeland, 435 F. Supp. 513, 530 (D. Md. 1977) ("The leading case on the conspiracy theory of jurisdiction is *Leasco Data Processing Equipment Corp. v. Maxwell* . . . ."). Stuart Riback was the first to acknowledge the dissonance of referring to *Leasco* and *Turner* as trailblazing cases in this area without either case actually wielding the doctrine. Riback, *supra* note 8, at 531 n.149.

101. *See supra* note 7.

102. *See infra* notes 107-17 and accompanying text.

103. *See infra* note 110 and accompanying text.

104. *See In re* Lernout & Hauspie Sec. Litig., No. 00-CV-11589, 2004 WL 1490435, at *7 (D. Mass. June 28, 2004) (expressing "doubt" as to "whether [the conspiracy jurisdiction]

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Ninth Circuit has come close to rejecting it.[105] Only the Fifth Circuit has rejected it outright in an unpublished decision.[106]

Although the doctrine holds sway in most jurisdictions, the tests vary. In the Second Circuit, the birthplace of modern conspiracy jurisdiction, plaintiffs must allege participation by the defendant and co-conspirator where at least one of them makes an overt act in furtherance of the conspiracy in the forum state.[107] The Fourth Circuit is relatively active in applying the doctrine,[108] and its test requires that plaintiffs allege a conspiracy existed, the defendant participated in the conspiracy, and a co-conspirator undertook an overt act in furtherance of the conspiracy with sufficient contact to the forum state.[109]

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theory is even viable in the First Circuit"); Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1236-37 (6th Cir. 1981) (refusing to adopt or reject this theory); Gen. Steel Domestic Sales, LLC v. Suthers, No. 06-cv-411, 2007 WL 704477, at *5 (E.D. Cal. Mar. 2, 2007) (declining to adopt the theory when "the validity of [the] conspiracy theory of jurisdiction . . . is in doubt" within the Ninth Circuit and where plaintiff failed to allege a conspiracy).

105. *See* PETER SPERO, FRAUDULENT TRANSFERS, PREBANKRUPTCY PLANNING AND EXEMPTIONS § 18:19.50 (West 2022) (listing state and federal courts that have adopted or rejected conspiracy jurisdiction and noting that the Ninth Circuit has "most likely" rejected the doctrine). We are not sure we agree, however, that the First Circuit has expressly rejected the theory. *See infra* notes 119-20.

106. WorldVentures Holdings, LLC v. Mavie, No. 18-cv-393, 2018 WL 6523306, at *10 (E.D. Tex. Dec. 12, 2018) ("Because the Fifth Circuit and Texas Supreme Court have both found that personal jurisdiction must be based on a defendant's 'individual contacts' with the forum 'and not as part of [a] conspiracy,' minimum contacts is established only if 'the alleged conspiracy w[as] related to or arose out of [defendants'] contacts with Texas." (first two alterations in original) (quoting Delta Brands Inc. v. Danieli Corp., 99 F. App'x 1, 6 (5th Cir. 2004) (per curiam))); *see, e.g.*, Guidry v. U.S. Tobacco Co., 188 F.3d 619, 625 (5th Cir. 1999) (criticizing the district court for jumping to conspiracy jurisdiction rather than analyzing each individual defendant's contacts).

107. *Schwab I*, 883 F.3d 68, 87 (2d Cir. 2018). Before *Schwab I* and after, the state long-arm statute is relevant and permits the application of conspiracy jurisdiction. *See, e.g.*, *In re* Platinum & Palladium Antitrust Litig., 449 F. Supp. 3d 290, 323 n.24 (S.D.N.Y. 2020) (finding that the New York long-arm statute is even more demanding than the Second Circuit's conspiracy jurisdiction test). Eurobank, *see supra* note 87, would likely succumb to conspiracy jurisdiction in the Second Circuit because it took an overt act (the agreement in London) with an aim of selling its allegedly fraudulent securities in the forum state(s). If Eurobank had merely passively accepted offers at an arm's length transaction from InvestUS, however, the courts in the Second Circuit could not exercise personal jurisdiction over it. Assuming a case is brought against Eurobank in New York, it will likely be subject to conspiracy jurisdiction given the evidence that it had knowledge of, and consent and benefit from, the conspiracy. We examine the Second Circuit's test in greater detail in note 286 below.

108. Twenty-one district court cases in the Fourth Circuit alone cite the conspiracy jurisdiction test set forth in *Unspam Techs., Inc. v. Chernuk*, 716 F.3d 322 (4th Cir. 2013).

109. *Id.* at 329. In *Unspam*, the Fourth Circuit stated its test for conspiracy:

> To succeed on [a conspiracy jurisdiction] theory, the plaintiffs would have to make a plausible claim (1) that a conspiracy existed; (2) that the four bank defendants participated in the

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While district courts in the Eighth Circuit apply underlying state law,[110] they articulate a three-part test for exercising conspiracy jurisdiction: "that (1) a conspiracy existed, (2) the non-resident defendant participated in or joined the conspiracy, and (3) an overt act was taken in furtherance of the conspiracy within the forum's borders."[111] The Tenth Circuit applies the doctrine, but plaintiffs "must offer more than 'bare allegations' that a conspiracy existed, and must allege facts that would support a prima facie showing of a conspiracy."[112]

> conspiracy; and (3) that a coconspirator's activities in furtherance of the conspiracy had sufficient contacts with Virginia to subject that conspirator to jurisdiction in Virginia.

Id. Under this test—which bears striking similarity to that articulated in *Schwab I*—Eurobank, *see supra* note 87, would be subject to personal jurisdiction within the Fourth Circuit.

110. The Eighth Circuit is an exception in that it has not expressly adopted the doctrine, but its districts courts have uniformly applied it. *See, e.g.*, DURAG Inc. v. Kurzawski, No. 17-cv-5325, 2020 WL 2112296, at *1 (D. Minn. May 4, 2020); Stangel v. Rucker, 398 N.W.2d 602, 606 (Minn. Ct. App. 1986) (discussing state law requirements for application of conspiracy jurisdiction). District courts in Minnesota and Iowa, for example, recognize the validity of the doctrine based on the state long-arm statute but adopt a three-part test common to district courts sitting in the Eighth Circuit. *See, e.g.*, Personalized Brokerage Servs., LLC v. Lucius, No. 05-cv-1663, 2006 WL 208781, at *5 (D. Minn. Jan. 26, 2006) ("[Plaintiff] must show '(1) the existence of a conspiracy; (2) the nonresident's participation in or agreement to join the conspiracy; and (3) an overt act taken in furtherance of the conspiracy within the forum's boundaries.'" (quoting Remmes v. Int'l Flavors & Fragrances, Inc., 389 F. Supp. 2d 1080, 1095-96 (N.D. Iowa 2005))). It appears this test may have been borrowed from the D.C. Circuit. *See Remmes*, 435 F. Supp. 2d at 942 (citing Jung v. Ass'n of Am. Med. Colls., 300 F. Supp. 2d 119, 141 (D.D.C. 2004)). In *Kurzawski*, the Court acknowledged Minnesota state law and its Supreme Court's long-arm statute's application over conspirators. *See* 2020 WL 2112296, at *5 (citing Hunt v. Nev. State Bank, 172 N.W.2d 292, 311 (Minn. 1969)). But even then, well before conspiracy jurisdiction was in wide use, the Court found:

> "Once participation in a tortious conspiracy—the effect of which is felt in this state—is sufficiently established, actual physical presence of each of the alleged conspirators is not essential to a valid assertion of jurisdiction." . . . [But] Minnesota's "long-arm statute . . . does not confer jurisdiction whenever a tort is committed by a nonresident[]" with consequences in Minnesota and that "due process . . . requires that 'minimum contacts' exist between the defendant and the forum state."

Id. (first quoting *Hunt*, 172 N.W.2d at 311; and then quoting Kopperud v. Agers, 312 N.W.2d 443, 445 (Minn. 1981)). Physical presence has not been required since *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); thus, the presence of the conspirator is not necessary, but the effects of its conspiracy are. We think Eurobank, *see supra* note 87, would be subject to personal jurisdiction in the Eighth Circuit as long as a plaintiff could allege its agreement with InvestUS targeted investors within the forum state.

111. *See, e.g.*, Yellow Brick Rd., LLC v. Childs, 36 F. Supp. 3d 855, 864 (D. Minn. 2014). The Eighth Circuit as a whole has not articulated a more recent or better test for conspiracy jurisdiction than the district court did in *Yellow Brick Road*.

112. Melea, Ltd. v. Jawer SA, 511 F.3d 1060, 1069 (10th Cir. 2007) (quoting Lolavar v. de Santibañes, 430 F.3d 221, 229 (4th Cir. 2005)); *see also* Newsome v. Gallacher, 722 F.3d 1257, 1265 (10th Cir. 2013) (approving of conspiracy jurisdiction even where the conspiracy itself takes place outside of the forum). This statement is problematic

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Finally, the D.C. Circuit has adopted the following test[113]: Plaintiffs must make a "prima facie showing of (1) a conspiracy (2) in which the defendant participated and (3) a co-conspirator's overt act within the forum, subject to the long-arm statute and in furtherance of the conspiracy."[114]

Some circuits do not have their own test and instead have relied on state law as the basis for conspiracy jurisdiction. The Third Circuit applies the

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because it conflates a heightened pleading standard for proof of a conspiracy with the procedural bar to conspiracy jurisdiction. The Court helpfully clarifies that "a co-conspirator's presence within the forum might reasonably create the 'minimum contacts' with the forum necessary to exercise jurisdiction over another co-conspirator if the conspiracy is directed towards the forum, or substantial steps in furtherance of the conspiracy are taken in the forum." *Melea*, 511 F.3d at 1070; *see also* Merriman v. Crompton Corp., 146 P.3d 162, 187 (Kan. 2006) (finding that, under Kansas state law, "[e]ach defendant, as an alleged co-conspirator to which the acts of another co-conspirator are attributed, agreed to participate in a conspiracy that, at the time of the agreement, could reasonably have been expected to reach Kansas consumers"). We focus on conspiracy *liability* as opposed to jurisdiction in Part II.B.1-.2 below. The Tenth Circuit's focus on one conspirator's presence as a means to exercise jurisdiction over its remote co-conspirator is not unique, but it is interesting because it makes one conspirator's presence a minimum contact for the other. Under this rule, Eurobank, *see supra* note 87, would not be any more at risk in the Tenth Circuit unless InvestUS was actually in one of those states. Unexplained by the Tenth Circuit, however, is whether the first conspirator needs to be "at home" (i.e., subject to general jurisdiction), *see supra* note 20 and accompanying text, or merely have some other more attenuated presence. We think the former based on the Court's focus on presence.

113. We think the genesis of this test is dicta from a 1991 D.C. Circuit case discussing jurisdictional discovery: *Edmond v. United States Postal Service General Counsel*, 949 F.2d 415, 425 (D.C. Cir. 1991). In *Edmond*, the Court acknowledged the existence of the theory of conspiracy jurisdiction but noted that it had not expressly set forth its limits before. *Id.* Nevertheless, the Court held "it is an abuse of discretion to deny jurisdictional discovery where the plaintiff has specifically alleged: (1) the existence of a conspiracy, (2) the nonresident's participation, and (3) an injury-causing act of the conspiracy within the forum's boundaries." *Id.* This test seems to be employed by the D.C. District Court but not necessarily embraced by the Circuit itself. *See, e.g.*, Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997) (requiring for conspiracy jurisdiction that a plaintiff "plead with particularity 'the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy'" (quoting Dooley v. United Techs. Corp., 786 F. Supp. 65, 78 (D.D.C. 1992))).

114. *See, e.g.*, Youming Jin v. Ministry of State Sec., 335 F. Supp. 2d 72, 78 (D.D.C. 2004) (citing *Jung*, 300 F. Supp. 2d at 141) (listing the requirements to satisfy Washington D.C.'s long-arm statute, D.C. CODE § 13-423). Again, the better-articulated conspiracy jurisdiction test in the D.C. Circuit comes from district court cases rather than the circuit. *Compare Jungquist*, 115 F.3d at 1031 (citing *Dooley*, 786 F. Supp. at 78), *with Edmond*, 949 F.2d at 425. In D.C., Eurobank, *see supra* note 87, would be subject to conspiracy jurisdiction because there was a conspiracy, Eurobank participated, and InvestUS presumably made an overt act in the forum state (as long as it reached out to customers in the District of Columbia). The test for InvestUS would be no different than for any other minimum contacts situation involving a remote seller reaching out to buyers in the forum state.

doctrine as long as state law provides, which it does not always do.[115] The Seventh Circuit also relies on state law, applying the doctrine under Illinois law and requiring plaintiffs to allege both an actionable conspiracy and a substantial act in furtherance of the conspiracy which was performed in the forum state.[116] The Eleventh Circuit, relying repeatedly on Alabama and Florida law, also applies the doctrine in accordance with state law.[117]

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115. *See, e.g.*, Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 102 n.8 (3d Cir. 2004) (explaining that whether jurisdictional contacts may be imputed to foreign defendants based on "the conspiracy theory of jurisdiction" must be determined with reference to a state's long-arm statute and substantive conspiracy law); Rickman v. BMW of N. Am. LLC, 538 F. Supp. 3d 429, 439-40 (D.N.J. 2021). The district court in *Rickman* undertook a fine analysis of underlying state law (in that case, New Jersey law) and concluded New Jersey had "not clearly recognized that theory." 538 F. Supp. 3d at 439 (citing LaSala v. Marfin Popular Bank Pub. Co., 410 F. App'x 474, 478 (3d Cir. 2011)). In Delaware too, the federal courts look to state law. *See, e.g.*, Chase Bank USA N.A. v. Hess Kennedy Chartered LLC, 589 F. Supp. 2d 490, 499-500 (D. Del. 2008) (applying conspiracy jurisdiction because it was permissible under Delaware state law); Istituto Bancario Italiano SpA v. Hunter Eng'g, Co., 449 A.2d 210, 225 (Del. 1982) (Delaware state supreme court recognizing conspiracy jurisdiction). Another New Jersey district court case lamented the lack of Third Circuit precedent but concluded somewhat less emphatically than the court in *Rickman* that "[w]hether personal jurisdiction can be obtained under a state long-arm statute on a conspiracy rationale at all is a question of state law." Roy v. Brahmbhatt, No. 07-cv-5082, 2008 WL 5054096, at *8 n.4 (D.N.J. Nov. 26, 2008) (alteration in original) (quoting Stauffacher v. Bennett, 969 F.2d 455, 460 (7th Cir. 1992)). The *Rickman* court opined that the theory does not comport with federal due process, but we do not think that rule controls the more specific acknowledgment by the Third Circuit that state law applies. *See Rickman*, 538 F. Supp. 3d at 439-40. As to our hypothetical, *see supra* note 87, in the Third Circuit—or at least in New Jersey—it is unlikely the theory would bring Eurobank within its ambit unless Eurobank had its own direct outreach to New Jersey residents or a formal agency relationship with InvestUS.

116. Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d 1387, 1392-93 (7th Cir. 1983) ("To plead successfully facts supporting application of the conspiracy theory of jurisdiction a plaintiff must allege both an actionable conspiracy and a substantial act in furtherance of the conspiracy performed in the forum state."); *Stauffacher*, 969 F.2d at 460 (citing Davis v. A & J Elecs., 792 F.2d 74, 76 (7th Cir. 1986)); *see also* Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc., No. 12-cv-296, 2012 WL 12929662, at *1 (N.D. Ind. Oct. 10, 2012) ("[I]t is unclear whether the conspiracy theory of jurisdiction is available under Indiana law."). Eurobank, *see supra* note 87, would not be subject to personal jurisdiction in Illinois because it took no act in furtherance of the conspiracy in the forum state, but if it had, conspiracy jurisdiction would be irrelevant because there would be direct minimum contacts. We think a better, more nuanced reading of *Textor* and its progeny is that a substantial act must be taken in furtherance of the conspiracy, regardless of the conspirator's actual location. A similar problem arises in the Eighth Circuit. *See supra* notes 110-11 and accompanying text.

117. United Techs. Corp. v. Mazer, 556 F.3d 1260, 1281-82 (11th Cir. 2009) ("Florida courts have held that the state's long-arm statute can support personal jurisdiction over any alleged conspirator where any other co-conspirator commits an act in Florida in furtherance of the conspiracy, even if the defendant over whom personal jurisdiction is sought individually committed no act in, or had no relevant contact with, Florida."

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As noted above, conspiracy jurisdiction is on uneven ground in several circuits.[118] While the First Circuit has refused to adopt or reject conspiracy jurisdiction expressly, it has applied principles similar to those of other circuits in conspiracy contexts.[119] However, it also has criticized the D.C. District Court's somewhat "liberal" application of the doctrine, leaving one to question whether the First Circuit actually rejects the theory or just a so-called "liberal approach."[120] Similarly, the Sixth Circuit has not accepted or rejected the theory.[121] The Ninth Circuit has expressed deep skepticism about the doctrine,[122] and its district courts usually dismiss any conspiracy jurisdiction

(citing Machtinger v. Inertial Airline Servs., Inc., 937 So. 2d 730, 734-36 (Fla. Dist. Ct. App. 2006) (finding conspiracy jurisdiction in Florida where the defendants' fraudulent misrepresentations in furtherance of the conspiracy occurred in Florida, but the parties entered into the conspiracy agreement in Ohio))); *see* J & M Assocs. v. Romero, 488 F. App'x 373, 375 (11th Cir. 2012) (per curiam) ("Alabama courts have adopted the conspiracy theory of personal jurisdiction." (citing *Ex parte* Reindel, 963 So. 2d 614, 622-24 (Ala. 2007))). If true, this kind of conspiracy jurisdiction is what the Fifth Circuit resists; it also clearly subjects Eurobank, *see supra* note 87, to jurisdiction in the Eleventh Circuit.

118. *See supra* note 34 and accompanying text.

119. *See, e.g.*, *In re* Lernout & Hauspie Sec. Litig., No. 00-CV-11589, 2004 WL 1490435, at *7 (D. Mass. June 28, 2004) ("The conspiracy theory 'require[s] something more than the presence of a co-conspirator within the forum state, such as substantial acts performed there in furtherance of the conspiracy and of which the out-of-state co-conspirator was or should have been aware.'" (alteration in original) (quoting Glaros v. Perse, 628 F.2d 679, 682 (1st Cir. 1980))). But the district court in *Lernout* expressly acknowledged "doubt" about whether the "theory is even viable in the First Circuit." *Id.* at *7.

120. *Glaros*, 628 F.2d at 682 n.4 (distinguishing *Mandelkorn v. Patrick*, 359 F. Supp. 692 (D.D.C. 1973), and declining to adopt the D.C. District Court's "rather liberal approach to conspiracy pleading, or to . . . recognize a conspiracy theory of personal jurisdiction at all"). The First Circuit would likely reject a finding of personal jurisdiction over Eurobank, *see supra* note 87, because Eurobank had no presence in the First Circuit nor did it perform substantial acts there. *See, e.g.*, *In re Lernout*, 2004 WL 1490435, at *7. It also lacked sufficient control over InvestUS to satisfy an agency test, at least for plaintiffs suing based on Tranche A.

121. *See* Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1237 (6th Cir. 1981) (declining to adopt or reject conspiracy jurisdiction and finding insufficient factual allegations). We do not know what would happen to Eurobank, *see supra* note 87, in the Sixth Circuit. It might depend on which district court heard the case. *See infra* notes 127-30 and accompanying text.

122. Gen. Steel Domestic Sales, LLC v. Suthers, No. 06-cv-411, 2007 WL 704477, at *5 & n.5 (E.D. Cal. Mar. 2, 2007) (collecting cases and concluding that "the validity of conspiracy theory of jurisdiction in this circuit is in doubt"); *see* Kipperman v. McCone, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976) ("Contrary to plaintiff's assertion that personal jurisdiction over alleged co-conspirators may be acquired vicariously through the forum-related conduct of any single conspirator, the Court believes that personal jurisdiction over any non-resident individual must be premised upon forum-related acts personally committed by the individual. Imputed conduct is a connection too tenuous to warrant the exercise of personal jurisdiction."). However, an early mention

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analysis based on deficient conspiracy allegations,[123] or they note that the doctrine has been rejected in that circuit.[124]

Only the Fifth Circuit has expressly rejected the doctrine,[125] concluding that personal jurisdiction does not lie solely based on a defendant's participation in a conspiracy with a co-conspirator who had contacts with a state.[126]

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of conspiracy liability, there based on agency, occurred in the Ninth Circuit in *Hoffman v. Halden*, where the court stated:

> If sufficient allegations appear of the acts of one defendant among the conspirators, causing damage to plaintiff, and the act of the particular defendant was done pursuant to the conspiracy, during its course, in furtherance of the objects of the conspiracy, with the requisite purpose and intent . . . then all defendants are liable for the acts of the particular defendant under the general principle of agency on which conspiracy is based.

268 F.2d 280, 295-96 (9th Cir. 1959). The theory may have fallen into disrepair in part because the Ninth Circuit shortly thereafter rebranded it to what we would call "agency jurisdiction." *See* Sher v. Johnson, 911 F.2d 1357, 1362 (9th Cir. 1990) ("For purposes of personal jurisdiction, the actions of an agent are attributable to the principal." (citing Wells Fargo & Co v. Wells Fargo Express Co., 556 F.2d 406, 419 (9th Cir. 1977) (acknowledging breadth of cases applying agency jurisdiction))). Eurobank, *see supra* note 87, would only be subject to personal jurisdiction in the Ninth Circuit if the plaintiffs in Tranche B allege Eurobank made InvestUS their agent.

123. For example, one of the most recent opportunities for the Ninth Circuit to consider the merits of the doctrine was in *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995). However, the court in that case did not address the validity of the doctrine because the plaintiff failed to properly allege the existence of a conspiracy. *Id.* at 364.

124. *See, e.g.*, *Suthers*, 2007 WL 704477, at *5 (declining to adopt the theory when "the validity [of conspiracy jurisdiction] is in doubt" within the Ninth Circuit and where plaintiff failed to allege a conspiracy); UMG Recordings, Inc. v. Glob. Eagle Ent., Inc., No. 14-cv-03466, 2015 WL 12752879, at *8 (C.D. Cal. July 2, 2015) ("While 'some [other] jurisdictions recognize a theory of personal jurisdiction based on conspiracy, . . . California courts [and federal courts applying California's long-arm statute] have rejected such theory.'" (alterations in original) (quoting McKay v. Hageseth, No. C-06-1377, 2007 WL 1056784, at *2 n.3 (N.D. Cal. Apr. 6, 2007))); Mansour v. Superior Ct., 46 Cal. Rptr. 2d 191, 197 (Cal. Ct. App. 1995) ("California does not recognize conspiracy as a basis for acquiring personal jurisdiction over a party."); *see also* Steinke v. Safeco Ins. Co. of Am., 270 F. Supp. 2d 1196, 1200 (D. Mont. 2003) ("This Court has never recognized the conspiracy theory of jurisdiction, nor has the Ninth Circuit, nor has the Montana Supreme Court.").

125. The contrast between the First and the Fifth Circuits exemplifies the difficulties in evaluating this doctrine. Consider that the First Circuit criticized without fully rejecting the test in the D.C. Circuit, *see supra* note 120 and accompanying text, and the Fifth Circuit criticizes the very idea that defendants could be subject to personal jurisdiction where they have not undertaken a direct act, *see infra* note 126 and accompanying text, which is somewhat "strawman-ing" the test other jurisdictions use. This is why the circuit split is best described as jagged.

126. *See* Guidry v. U.S. Tobacco Co., 188 F.3d 619, 625 (5th Cir. 1999) (criticizing the district court for jumping to conspiracy jurisdiction rather than analyzing each individual defendant's contacts); *see also* WorldVentures Holdings, LLC v. Mavie, No. 18-cv-393, 2018 WL 6523306, at *10 (E.D. Tex. Dec. 12, 2018) ("Because the Fifth Circuit and Texas Supreme Court have both found that personal jurisdiction must be based on a defendant's 'individual contacts' with the forum 'and not as part of [a] conspiracy,'

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Sometimes, there is little consistency even within the same circuit.[127] For example, because the Sixth Circuit has not expressly adopted or rejected conspiracy jurisdiction,[128] district courts within that circuit—even those sitting in the same state—have approached the theory in different ways. The Southern District of Ohio has acknowledged the theory without affirmatively adopting it,[129] while courts in the Northern District of Ohio have highlighted the lack of precedent and have refused to adopt the doctrine.[130]

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minimum contacts is established only if 'the alleged conspiracy w[as] related to or arose out of [defendants'] contacts with Texas." (first and second alterations in original) (quoting Delta Brands Inc. v. Danieli Corp., 99 F. App'x 1, 6 (5th Cir. 2004) (per curiam))); Logan Int'l Inc. v. 1556311 Alberta Ltd., 929 F. Supp. 2d 625, 631 (S.D. Tex. 2012) (same); Dontos v. Vendomation NZ Ltd., No. 11-CV-0553, 2012 WL 3702044, at *4 (N.D. Tex. Aug. 27, 2012) (rejecting the plaintiff's argument that conspiracy jurisdiction permitted an exercise of specific jurisdiction because "the Fifth Circuit does not recognize any such conspiracy jurisdiction"); Alexander v. Glob. Tel Link Corp., No. 17-cv-560, 2018 WL 8997440, at *6 (S.D. Miss. May 14, 2018) (applying reasoning based on the defendant's contacts with Mississippi). The line of Fifth Circuit cases acknowledges that Texas's long-arm statute is coextensive with the Due Process Clause, and, as a result, a rejection of conspiracy jurisdiction was based solely on the Due Process Clause, not state law. *Delta Brands*, 99 F. App'x at 3, 6. That "a defendant cannot be subject to personal jurisdiction *solely* because he participated in an alleged conspiracy with a co-conspirator who had contacts with Texas" suggests again that the circuit split is not a clearly binary choice because few other courts would disagree with the Fifth Circuit that conspiracy jurisdiction is ever based "solely" on the conspiracy. *Logan Int'l*, 929 F. Supp. 2d at 631 (emphasis added). In any event, Eurobank, *see supra* note 87, is not likely to be subject to jurisdiction in the Fifth Circuit unless it has other more direct contact.

127. We take this opportunity to restate that our jurisdiction-based review of conspiracy jurisdiction is not exhaustive.

128. Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1237 (6th Cir. 1981) ("In light of our holding [finding insufficient support for the existence of a conspiracy], we need neither adopt nor reject the 'conspiracy theory' of *in personam* jurisdiction as a general principle of law in this circuit.").

129. *See, e.g.*, Stolle Mach. Co. v. RAM Precision Indus., No. 10-cv-155, 2011 WL 6293323, at *7 (S.D. Ohio Dec. 15, 2011) (concluding the plaintiff did not meet the third prong of the conspiracy theory jurisdiction test enunciated in *Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, Inc.*, 410 F. Supp. 2d 592, 599 (E.D. Ky. 2006)).

130. *See, e.g.*, Int'l Watchman Inc. v. Strap.ly, No. 18-cv-1690, 2019 WL 1903557, at *4 (N.D. Ohio Apr. 29, 2019) ("[C]ourts in this district have declined to exercise personal jurisdiction over a non-resident defendant based solely upon participation in a conspiracy when the defendant has no other contacts with Ohio."); Iron Workers Loc. Union No. 17 Ins. Fund v. Philip Morris Inc., 23 F. Supp. 2d 796, 808 (N.D. Ohio 1998) (noting that "federal courts in Ohio have not adopted the conspiracy theory" and refusing to apply it as a result); Spivak v. Law Firm of Tripp Scott, P.A., No. 13-CV-1342, 2015 WL 1084856, at *5 (N.D. Ohio Mar. 10, 2015) ("[The conspiracy] theory has been directly considered and rejected twice in this District in cases applying Ohio law."); Prakash v. Altadis U.S.A. Inc., No. 10-CV-33, 2012 WL 1109918, at *18 (N.D. Ohio Mar. 30, 2012) ("[T]he 'absent co-conspirator' doctrine . . . is not recognized as a means for establishing personal jurisdiction in this district." (citing Hollar v. Philip Morris Inc., 43 F. Supp. 2d 794, 802 n.7 (N.D. Ohio 1998))).

C. New York and the Second Circuit: The *Berceau* of Conspiracy Jurisdiction

Perhaps due to the nature of the New York federal courts' dockets[131] or perhaps because of conspiracy jurisdiction's provenance (nearly all the early "modern" conspiracy jurisdiction cases arose in the Second Circuit),[132] the Second Circuit is the *berceau*[133] of conspiracy jurisdiction. A close look at the Second Circuit's decision in *Charles Schwab Corp. v. Bank of America Corp.* (*Schwab I*),[134] the first part of the most recent and important application of conspiracy jurisdiction, helps frame conspiracy jurisdiction's future.

Under the initial *Schwab I* test, to successfully assert conspiracy jurisdiction, a plaintiff must allege that "(1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state."[135] The Second Circuit noted that in making this decision, it adopted the Fourth Circuit's test for alleging a conspiracy theory of jurisdiction.[136]

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131. We surmise New York courts are hotbeds of conspiracy jurisdiction issues because their dockets are replete with lawsuits involving transnational defendants or antitrust claims, which are common breeding grounds for conspiracy jurisdiction questions. *See Antirust Case Filings*, U.S. DEP'T OF JUST., https://perma.cc/ZE58-F336 (archived Jan. 2, 2024) (to view the number of cases arising out of each jurisdiction, select the "Filter by Federal Court" tab and then expand by selecting "show more"); *see also* Alaina Lancaster, *California's Northern District Has the Most Antitrust Cases of Any Federal Court in Last 5 Years*, LAW.COM (Apr. 20, 2023, 11:00 AM), https://perma.cc/ DE76-PPEJ (reporting that the U.S. District Court for the Southern District of New York had the third most antitrust case filings in the last five years).

132. *See supra* notes 88-99.

133. Literally "cradle."

134. 883 F.3d 68 (2d Cir. 2018). In that case, *id.* at 86, the court relied on a prior related decision, *Gelboim v. Bank of America Corp.*, which held that the same plaintiffs had already adequately pleaded an antitrust conspiracy, 823 F.3d 759, 782 (2d Cir. 2016). The 2018 *Schwab I* decision was the first of two directly related cases concerning a conspiracy to fix London interbank-loan prices—the second came in 2021 and is discussed in note 139 below and accompanying text.

135. *Schwab I*, 883 F.3d at 87.

136. *Id.* ("We agree that *Unspam* sets forth the appropriate test for alleging a conspiracy theory of jurisdiction . . . ." (citing Unspam Techs., Inc. v. Chernuk, 716 F.3d 322, 329 (4th Cir. 2013))). Although the Second Circuit adopted the Fourth Circuit's conspiracy jurisdiction test, the Second Circuit had recognized the doctrine under traditional principles of general or long-arm jurisdiction before *Schwab I*. *See In re* Aluminum Warehousing Antitrust Litig., 90 F. Supp. 3d 219, 227 (S.D.N.Y 2015) ("The concept of 'conspiracy jurisdiction' is better cast as an argument supporting general or long-arm jurisdiction. In short, if an entity has in fact engaged in some affirmative act directed at the forum, it may be subject to jurisdiction for that reason. The rules and doctrines applicable to personal jurisdiction are sufficient without the extension of the law to a

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The *Schwab I* test's three components merit discussion. First, a mere allegation or existence of a conspiracy will not pass muster; instead, the acts of said conspiracy "must have been 'in furtherance of the conspiracy.'"[137] However, a showing of an agency relationship is not necessary under the *Schwab I* test.[138] A few years later, the Second Circuit took up the same case and further clarified that conspiracy-based jurisdiction does not require a relationship of direction, control, or supervision.[139] Second, "an out-of-state defendant can be subject to personal jurisdiction in New York [through conspiracy jurisdiction] . . . when that defendant 'has knowledge of the New York acts of his co-conspirators.'"[140] Third, the plaintiff must still demonstrate that the defendant's conduct and connection with the forum is such that the defendant "should reasonably anticipate being haled into court" there.[141]

An illustrative recent application of *Schwab I* arose in *In re Platinum*.[142] In that case, London-based precious metals firms were accused of conspiring with affiliate traders located in New York to manipulate the London Fix benchmark prices of precious metals.[143] The Southern District of New York, quoting the *Schwab I* test, found that the communications between the foreign defendants and the in-state traders satisfied the last prong of the *Schwab I* test because the relevant acts of communication included the publication of non-public information and overall being in "constant communication."[144] The Second

separate and certainly nebulous 'conspiracy jurisdiction' doctrine."). For a discussion on how the Second Circuit heralded conspiracy jurisdiction, see Part I.B above.

137. *Schwab I*, 883 F.3d at 86 (quoting *Unspam*, 716 F.3d at 329).

138. Contant v. Bank of Am. Corp., 385 F. Supp. 3d 284, 292 & n.2 (S.D.N.Y. 2019).

139. Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. (*Schwab II*), 22 F.4th 103, 122 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2852 (2022). This decision clarifies the difference between conspiracy jurisdiction and agency-based jurisdiction. Had the Court decided that relation, relationship, or control was a requirement, a plaintiff would have to make allegations much more akin to an agency relationship. "Under [New York's long-arm] statute, there is jurisdiction over a principal based on the acts of an agent where 'the alleged agent acted in New York for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal.'" *Schwab I*, 883 F.3d at 85 (quoting Grove Press, Inc. v. Angleton, 649 F.2d 121, 122 (2d Cir. 1981)); *see also* N.Y. C.P.L.R. § 302(a)(2) (McKinney 2023) ("[A] court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or *through an agent* . . . commits a tortious act within the state . . . ." (emphasis added)).

140. *Contant*, 385 F. Supp. 3d at 292 n.2 (quoting N.Y. C.P.L.R. § 302 Practice Commentary C302:4 (McKinney 2013)).

141. *Schwab II*, 22 F.4th at 125 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

142. *In re* Platinum & Palladium Antitrust Litig., 449 F. Supp. 3d 290, 323-27 (S.D.N.Y. 2020).

143. *Id.* at 298-301.

144. *Id.* at 325-26. As *In re Platinum* demonstrates, one factual allegation likely to establish conspiracy jurisdiction is communication between the co-conspirators. *Id.* In *Berkshire Bank v. Lloyds Banking Group*, No. 20-1987-cv, 2022 WL 569819, at *2-3 (2d Cir. Feb. 25,

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Circuit, on appeal, affirmed the district court's application of conspiracy jurisdiction, stating that "allegations that 'evince a common motive to conspire' combined with 'a high number of interfirm communications' are adequate to plead a conspiracy."[145]

Conversely, in *City of Almaty v. Ablyazov*, the Southern District of New York concluded that the allegations regarding communications between the defendant and the co-conspirators showed only evidence of a general conspiracy, not a conspiracy in the forum.[146] *City of Almaty* concerned an action to recover $300 million by a city and state-owned bank against a former mayor and his co-conspirators.[147] The court held that, although the city had connected the mayoral defendant to the conspiracy in which the in-state defendant participated, the city did not allege the requisite control, knowledge, or benefit on behalf of the mayor.[148]

2022), the Second Circuit acknowledged that allegations of communication between co-conspirators were part and parcel of the holding in *Schwab II*, stating:

> [The *Schwab II*] Court looked to whether certain communications among the alleged LIBOR co-conspirators constituted overt acts sufficient to confer personal jurisdiction in the United States as a whole. . . . After considering several communications proffered by the plaintiffs, we held in *Schwab II* that '[i]f true, these communications would establish overt acts taken by co-conspirator Banks in the United States in furtherance of the suppression conspiracy, vesting the district court with personal jurisdiction over each Defendant.' . . . *Schwab II* informs our analysis here because several of the critical communications and actions we found sufficient to establish personal jurisdiction in *Schwab II* took place in New York."

(quoting *Schwab II*, 22 F.4th at 123). *See also Contant*, 385 F. Supp. 3d at 294 (concluding the third prong of the *Schwab I* test was satisfied by, among other things, the plaintiff alleging that one of the co-conspirators engaged in communications within the Southern District of New York in furtherance of the conspiracy). This could have been foreshadowed by *Leasco*. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1343 (2d Cir. 1972) ("The case for [viewing the conspiracy jurisdiction determination more favorably] would be materially strengthened by proof that the junior was in *frequent communication* with the senior." (emphasis added)).

145. *In re* Platinum & Palladium Antitrust Litig., 61 F.4th 242, 270, 278 (2d Cir. 2023) (quoting Gelboim v. Bank of Am. Corp., 823 F.3d 759, 781-82 (2d Cir. 2016)).

146. 278 F. Supp. 3d 776, 807-08 (S.D.N.Y. 2017).

147. *Id.* at 782-83. While the holding of this case has not been incorporated into Second Circuit jurisprudence, it demonstrates the gatekeeping role of the state long-arm statute, which itself requires control, knowledge, or benefit. *See supra* note 139.

148. *City of Almaty*, 278 F. Supp. 3d at 808. The court specified:

> Plaintiffs simply do not sufficiently allege Viktor Khrapunov's "awareness of the effects of the activity in New York," nor that the coconspirators in New York "acted at the behest of or on behalf of, or under the control of" Viktor Khrapunov. . . . The mere fact that Ilyas is Viktor's son, and that Ilyas *is* alleged to have personally directed the New York activities, is insufficient to give rise to an inference that Viktor was involved in any New York activity, nor that Viktor directed, knew about, or had control over the activities in New York.

Id. (citing Emerald Asset Advisors, LLC v. Schaffer, 895 F. Supp. 2d 418, 431 (S.D.N.Y. 2012); and First Cap. Asset Mgmt., Inc. v. Brickellbush, Inc., 218 F. Supp. 2d 369, 394-95, 399 (S.D.N.Y. 2002)). But, as we address in more detail in Part II.B below, there is significant daylight between a requirement of control ("personally directed" is the

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The Second Circuit's test also demonstrates the fragile equilibrium between resisting the temptation to broaden the application of conspiracy jurisdiction and protecting its policy objectives. The Southern District of New York described the "*Schwab* [*I*] standard for conspiracy jurisdiction [as] extraordinarily broad. Indeed, under the *Schwab* standard, a court can exercise personal jurisdiction over a defendant based on the actions of a co-conspirator who is entirely unknown to that defendant."[149] Although a plaintiff need not allege that a defendant controls, directs, or supervises an out-of-state co-defendant,[150] the New York long-arm statute requires that there be benefit, knowledge, or some control for a co-defendant to be subject to the reach of New York courts.[151] These requirements are "consonant with the due process principle that a defendant must have purposefully availed itself of the privilege of doing business in the forum."[152]

In contrast to the Second Circuit, other courts that recognize conspiracy jurisdiction do not use an elaborate multifactor test per se but rather inquire into the actus reus (effects of the acts) and the mens rea (knowledge and intentional targeting) of an out-of-state co-conspirator. This view is espoused by the Tenth Circuit and is reminiscent of the effects test enunciated in *Calder v. Jones*, which permits the exercise of jurisdiction over a defendant if (1) the defendant commits an intentional act (2) that is expressly aimed at the forum state and (3) causes actual harm that the defendant knows is likely to be suffered in the forum state.[153] For example, in their assessment of the applicability of conspiracy jurisdiction, Tenth Circuit courts require that, in addition to pleading prima facie conspiracy with more than "bare allegations," the plaintiff must show minimum contacts, a task that can be completed by

language employed by the court) and a requirement of "knowledge." *See infra* notes 294-301 and accompanying text.

149. *In re Platinum*, 449 F. Supp. 3d at 326.

150. This lack of requirement, as stated in *Schwab I*, can be squared with the requirements of the New York long-arm statute. The court in *Schwab II* clarified that "*Schwab* [*I*]'s three-prong test *serves* the purposeful availment requirement, rather than supplants it." *Schwab II*, 22 F.4th 103, 125 (2d Cir. 2021). Therefore, recalling the two-part inquiry in the Supreme Court's personal jurisdiction evaluation, a court will first look to its long-arm statute, and *then* look to the due process requirement of the Constitution. *See infra* notes 199-201 and accompanying text.

151. *In re Platinum*, 449 F. Supp. 3d at 320-21.

152. *Id.* at 320 (quoting *Schwab I*, 883 F.3d 68, 85 (2d Cir. 2018)).

153. *See* Newsome v. Gallacher, 722 F.3d 1257, 1265-66 (10th Cir. 2013) (recognizing the similarity with the *Calder* effects test but declining to "decide the precise standard to apply in this circumstance" because the defendants were "materially identical for personal jurisdiction purposes"); Calder v. Jones, 465 U.S. 783, 787 n.6, 789-90 (1984). For background on *Calder v. Jones* and the effects test, see notes 214-18 and accompanying text below. As explained below, we think an effects-test approach is neither sufficient nor applicable to conspiracy jurisdiction. *See infra* note 218.

showing the presence of one co-conspirator in the forum state and that "the conspiracy is directed towards the forum, or substantial steps in furtherance of the conspiracy [by the in-state co-conspirator] are taken in the forum."[154]

The test elaborated in *Hoffman v. Halden*[155] is another example of one aimed at capturing intentional conduct by indirect actors, even if it does not concern personal jurisdiction. In that case, the Ninth Circuit ruled "all defendants" could be liable under the general principle of agency on which conspiracy is based "[i]f sufficient allegations appear of the acts of one defendant among the conspirators . . . done pursuant to the conspiracy, during its course, in furtherance of the objects of the conspiracy, with the requisite purpose and intent and under color of state law."[156] What is not clear, however, is the awareness necessary to find personal jurisdiction over remote conspirators.[157]

D. State Law Influence on Conspiracy Jurisdiction: Long-Arm Statutes and Agency Law

More broadly, two significant but unrelated principles influence the present state of conspiracy jurisdiction. The first principle is that a state's long-

154. Hart v. Salois, 605 F. App'x 694, 699-700 (10th Cir. 2015) (per curiam) (quoting Melea, Ltd. v. Jawer SA, 511 F.3d 1060, 1069-70 (10th Cir. 2007)).

155. 268 F.2d 280 (9th Cir. 1959), *overruled in part on other grounds by* Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

156. *Id.* at 295-96. *Hoffman*, decided before *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), illustrates how some jurisdictions use the language of conspiracy jurisdiction but characterize it as agency, a problem we confront in detail in Part II.B below.

157. The court in *Cockrum v. Donald J. Trump for President, Inc.* alluded to this principle as well in noting that "intentional conduct" helps bridge the gap between remote acts and local injury. 319 F. Supp. 3d 158, 183 n.21 (D.D.C. 2018) (quoting Walden v. Fiore, 571 U.S. 277, 286 (2014)). The court in *Youming Jin v. Ministry of State Security* discusses the dichotomy between substantive conspiracy and conspiracy jurisdiction: "In fact, it is not entirely clear whether the doctrine of conspiracy jurisdiction seeks to sidestep an explicit due process analysis altogether or whether due process is the second step in an analysis that begins with the three elements [(1) a conspiracy (2) in which the defendant participated and (3) a co-conspirator's overt act within the forum]." 335 F. Supp. 2d 72, 78-79 (D.D.C. 2004). The court observed:

> As one response to the problematic relationship between due process and conspiracy jurisdiction, courts often require another element for conspiracy jurisdiction: the defendant's awareness or knowledge of the co-conspirator's acts in the forum. . . . Courts are mixed on what constitutes an adequate showing of this awareness or knowledge. As the Second Circuit stated, however, it means more than "the rather low floor of foreseeability necessary to support a finding of tort liability."

Id. at 79-80 (citation omitted) (quoting *Leasco*, 468 F.2d at 1341). It is unclear what level of knowledge the Second Circuit requires for conspirator defendants—it is somewhat more than mere awareness but perhaps less than a conspiracy jointly and knowingly directed at the forum state. We address our normative view of a knowledge requirement in Part II.B below.

arm statute constrains not only the state courts themselves but also the reach of the federal courts.[158] Long-arm statutes can therefore play an important role in determining the reach of conspiracy jurisdiction.[159] The second principle is that state substantive law concerning principles of agency, or conspiracy itself, often plays a prominent role, even when the personal jurisdiction question is being evaluated in a federal court.[160]

Long-arm statutes arose primarily in response to *International Shoe*'s approval of states extending their jurisdiction over defendants located outside the forum state.[161] Although many states extend jurisdiction to the limits of the Due Process Clause, most states articulate in greater detail what acts or contacts give rise to personal jurisdiction over defendants.[162] In those states,

158. FED. R. CIV. P. 4(k)(1)(A) ("[Service of process] establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."); Daimler AG v. Bauman, 571 U.S. 117, 125 (2014) ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." (citing FED. R. CIV. P. 4(k)(1)(A))).

159. For example, the Minnesota Supreme Court has interpreted the state's long-arm statute to authorize the application of conspiracy jurisdiction. *See* Hunt v. Nev. State Bank, 172 N.W.2d 292, 311 (Minn. 1969). The Court reasoned that "[t]his construction of our statute follows from the premise that the legislature intended the statute to reach as far as constitutional limitations would permit." *Id.* Conspiracy jurisdiction in the D.C. Circuit is also derived from the District of Columbia's long-arm statute. *Youming Jin*, 335 F. Supp. 2d at 78 ("Because the District of Columbia long-arm statute provides for jurisdiction over persons acting directly *and* their agents, D.C. CODE § 13-423(a), courts deem the defendant's co-conspirator the defendant's 'agent.'" (quoting Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997))).

160. City of Almaty v. Ablyazov, 278 F. Supp. 3d 776, 807 (S.D.N.Y. 2017) (noting that "New York courts have recognized that agency jurisdiction under [New York's long-arm statute] includes the so-called 'conspiracy theory' of personal jurisdiction" (quoting *In re* Satyam Comput. Servs. Ltd. Sec. Litig., 915 F. Supp. 2d 450, 484 (S.D.N.Y. 2013))).

161. *See* FRIEDENTHAL ET AL., *supra* note 65, § 3.12 & n.373.

162. *See id.* Comparing and contrasting the detailed New York long-arm statute with the more sweeping California long-arm statute highlights this point. *Compare* N.Y. C.P.L.R. § 302 (McKinney 2023) (listing grounds upon which a court sitting in New York has personal jurisdiction over out-of-state defendants), *and* Nat'l Union Fire Ins. Co. v. UPS Supply Chain Sols., Inc., 74 F.4th 66, 72 (2d Cir. 2023) ("Though many state statutes extend personal jurisdiction to the full extent permitted by the Constitution—thereby merging the statutory and constitutional inquiries—New York's long-arm statute does not reach so far."), *with* CAL. CIV. PROC. CODE § 410.10 (West 2023) (permitting courts in California to "exercise jurisdiction on any basis not inconsistent with the [California or U.S.] Constitution[s]"). The Illinois long-arm statute includes both approaches. *See* 735 ILL. COMP. STAT. 5/2-209(a) (2023) (listing business transactions, commission of a tortious acts, ownership, use, or possession of real property, and contracting to insure a person, property, or risk within the state as grounds for an exercise of jurisdiction); 735 ILL. COMP. STAT. 5/2-209(c) (2023) (permitting Illinois courts to "exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States"); *see also* KM Enters., Inc. v. Glob. Traffic Techs., Inc., 725 F.3d 718, 732 (7th Cir. 2013) ("Illinois's long-arm statute permits its courts to

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long-arm statutes typically employ language that captures the unlawful activities of co-conspirators.[163] When courts analyze conspiracy jurisdiction under state long-arm statutes, plaintiffs must allege facts sufficient to plead the underlying civil conspiracy successfully.[164] Jurisdictions such as the Third Circuit and the District of Minnesota have adopted this view.[165] However,

exercise personal jurisdiction to the fullest extent allowed by the Illinois and U.S. Constitutions.").

163. *See, e.g.*, Wings to Go, Inc. v. Reynolds, No. 15-cv-2556, 2016 WL 97833, at *3 (D. Md. Jan. 8, 2016) (finding that Maryland's long-arm statute authorized jurisdiction over a defendant whose "overt acts" were part of a "persistent course of conduct" (citing MD. CODE ANN., CTS. & JUD. PROC. § 6-103(b)(4) (West 2023))); EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A., 246 F. Supp. 3d 52, 89 (D.D.C. 2017) (evaluating conspiracy jurisdiction under the "transacting business" prong of the state long-arm statute (quoting D.C. CODE § 13-423(a)(1) (2023))). Likewise, in *Mackey v. Compass Marketing, Inc.*, the Maryland Supreme Court found the conspiracy theory of jurisdiction to be consistent with Maryland's long-arm statute, which Maryland considers coextensive with due process. 892 A.2d 479, 486, 492, 493 n.6 (Md. 2006). The *Mackey* court succinctly stated:

> Because the conspiracy theory gives one subject to personal jurisdiction in a forum the ability to avoid in advance being subject to suit in the forum, it satisfies the fundamental due process requirement that a defendant can be involuntarily subjected to the personal jurisdiction of a forum only if the defendant "purposefully avails itself of the privilege of conducting activities in the forum state."

Id. at 489 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). We do not assume that conspiracy jurisdiction is necessarily recognized just because a state's long-arm statute could support the imposition of conspiracy jurisdiction based on its text.

164. Hart v. Salois, 605 F. App'x 694, 699-700 (10th Cir. 2015) (per curiam) (distinguishing between pleading the underlying conspiracy and minimum contacts sufficient to confer jurisdiction). As always, federal courts must ensure that jurisdiction complies with any applicable long-arm statute and constitutional due process requirements. *See, e.g.*, Lockard v. Equifax, Inc., 163 F.3d 1259, 1265 (11th Cir. 1998) ("The first step involves determining whether the forum state's long-arm statute provides a basis for jurisdiction. If it does, then we determine whether there are sufficient minimum contacts between the forum state and the defendants such that satisfy [sic] the Fourteenth Amendment Due Process Clause's notions of fair play and substantial justice."); Snow v. DirecTV, Inc., 450 F.3d 1314, 1317 (11th Cir. 2006) (stating that jurisdiction over a nonresident defendant must satisfy the state's long-arm statute and the Due Process Clause).

165. *See, e.g.*, Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 102 n.8 (3d Cir. 2004) (Scirica, C.J., concurring in part, dissenting in part) (noting that whether jurisdictional contacts may be imputed to foreign defendants based on "the conspiracy theory of jurisdiction" must be determined with reference to a state's long-arm statute); Hunt v. Nev. State Bank, 172 N.W.2d 292, 311 (Minn. 1969) (holding that Minnesota law "does not require a finding that each defendant be physically present in this state at the time the conspiracy has its fruition"); DURAG Inc. v. Kurzawaski, No. 17-cv-5325, 2020 WL 2112296, at *5 (D. Minn. May 4, 2020) (stating that conspiracy jurisdiction "requires (1) the existence of a conspiracy; (2) the nonresident's participation in or agreement to join the conspiracy; and (3) an overt act taken in furtherance of the conspiracy within the forum's boundaries" (quoting Eagle Creek Software Servs., Inc. v. Jones, No. 14-cv-4925, 2015 WL 1038534 (D. Minn. Mar. 10, 2015))). *But see* Arrington v. Colortyme, Inc., 972 F. Supp. 2d 733, 745 (W.D. Pa. 2013) (curiously opining that, "[a]lthough the Court

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both jurisdictions exemplify how approaches to conspiracy jurisdiction can overlap. As noted above, the Third Circuit applies the theory based on a state's long-arm statute but only when permitted by state law.[166] Similarly, the District of Minnesota applies the theory because "[t]he Minnesota Supreme Court has interpreted Minnesota's long-arm statute to authorize conspiracy-based personal jurisdiction."[167]

Courts have also analyzed the application of conspiracy jurisdiction as an extension of the principles of agency law. In so doing, they "have recognized that agency jurisdiction . . . *includes* the so-called 'conspiracy theory' of personal jurisdiction."[168] Though distinct from a state long-arm statute, an agency law analysis can itself be the source of jurisdiction under a state long-arm statute because many states recognize that the acts of an agent can serve as a basis for applying jurisdiction to a principal.[169] This view is espoused by courts—such as

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of Appeals for the Third Circuit has not explicitly adopted this theory of jurisdiction, it has not disavowed it, and other courts of appeals have applied the theory when authorized to do so by the state's long-arm statute").

166. LaSala v. Marfin Popular Bank Pub. Co., 410 F. App'x 474, 478 (3d Cir. 2011) (declining to apply the conspiracy theory of personal jurisdiction, but only because it was unavailable under New Jersey law).

167. *DURAG*, 2020 WL 2112296, at *5. Even in jurisdictions where a state's long-arm statute supports the imposition of conspiracy jurisdiction, it is an interesting question whether federal courts must separately approve of the doctrine. From an *Erie* perspective, personal jurisdiction is not clearly a procedural or substantive issue. *See, e.g.*, Alexander Proudfoot Co. World Headquarters v. Thayer, 877 F.2d 912, 917-18 (11th Cir. 1989) (carefully and thoroughly considering whether personal jurisdiction is subject to state law under *Erie*, as "[f]ederal courts have consistently held that no federal statute or Rule of Civil Procedure controls issues of personal jurisdiction"); *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). And yet, federal courts have noted:

> A court may exercise personal jurisdiction over a defendant in a civil case only if it has the authority to do so from a source of positive law (such as a statute or a rule of civil procedure) and if exercising jurisdiction would not violate "the outer limits" set by the Due Process Clauses of the Fifth and Fourteenth Amendments.

Aldossari *ex rel.* Aldossari v. Ripp, 49 F.4th 236, 257 (3d Cir. 2022) (quoting Fischer v. Fed. Express Corp., 42 F.4th 366, 380-83 (3d Cir. 2022)). "Federal courts thus 'ordinarily follow state law in determining the bounds of their jurisdiction over persons.'" *Aldossari*, 49 F.4th at 257 (quoting Daimler AG v. Bauman, 571 U.S. 117, 125 (2014)).

168. City of Almaty v. Ablyazov, 278 F. Supp. 3d 776, 807 (S.D.N.Y. 2017) (emphasis added) (quoting *In re* Satyam Comput. Servs. Ltd. Sec. Litig., 915 F. Supp. 2d 450, 484 (S.D.N.Y. 2013)).

169. *See, e.g.*, N.Y. C.P.L.R. § 302(a) (McKinney 2023). Section 302(a) specifically acknowledges that personal jurisdiction may lie against a person or entity that acts "in person or through an agent." *Id.* Moreover, as is the case in Minnesota and New York, there may be overlap where state long-arm statutes explicitly extend to conduct falling within the purview of the agency theory. Minnesota has adopted overlapping but distinct versions of conspiracy jurisdiction. *See Hunt*, 172 N.W.2d at 311 ("Our statute, however, does not require a finding that each defendant be physically present in this state at the time the conspiracy has its fruition. Once participation in a tortious conspiracy—the effect of which is felt in this state—is sufficiently established, actual

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courts in New York and Minnesota—that typically analyze conspiracy jurisdiction as an extension of the agency-centered approach where jurisdiction is proper if a co-conspirator committed tortious acts in the forum state as the *agent* of a nonresident defendant.[170] In New York, courts have recognized that "[b]y its terms, New York's long-arm statute gives courts personal jurisdiction over 'any non-domiciliary' who 'through an agent . . . commits a tortious act within the state'" and they "have defined 'agent' under the statute to include 'co-conspirators.'"[171] Likewise, in the District of Columbia, "[b]ecause the District of Columbia long-arm statute provides for jurisdiction over persons acting directly *and* their agents . . . courts deem the defendant's co-conspirator the defendant's 'agent.'"[172]

New York and the District of Columbia demonstrate how approaches to conspiracy jurisdiction need not be mutually exclusive. Although those jurisdictions recognize that "agents" includes "co-conspirators" under their long-arm statutes, federal courts have created full-fledged analytical frameworks for conspiracy jurisdiction, separate from agency jurisdiction.[173] That is because, "[a]lthough conspiracy and agency both involve attribution of liability, the doctrines are not identical, the latter being far closer to purposeful availment."[174] Specifically, agency is defined as a "fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act," a

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physical presence of each of the alleged conspirators is not essential to a valid assertion of jurisdiction."); *DURAG*, 2020 WL 2112296, at *5 (noting that "[t]he Minnesota Supreme Court has interpreted Minnesota's long-arm statute to authorize conspiracy-based personal jurisdiction," and setting forth the three-part test which "[f]ederal courts in [the District of Minnesota] and elsewhere seem to apply consistent[ly]").

170. Edwardo v. Roman Cath. Bishop of Providence, 579 F. Supp. 3d 456, 468 (S.D.N.Y. 2022) (recognizing that "a court may exercise personal jurisdiction over a non-domiciliary who 'through an agent . . . commits a tortious act within the state'" (quoting N.Y. C.P.L.R. § 302(a)(2) (McKinney 2022)), *aff'd*, 66 F.4th 69 (2d Cir. 2023); *see supra* note 169.

171. Rudersdal v. Harris, No. 18-cv-11072, 2021 WL 2209042, at *15 (S.D.N.Y. Feb. 27, 2021) (first quoting N.Y. C.P.L.R. § 302(a)(2) (McKinney 2021); and then quoting *In re* Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 805 (S.D.N.Y. 2005)), *modified*, 2022 WL 263568 (S.D.N.Y. Jan. 28, 2022). While the Second Circuit has crafted its own multipart test, "the New York jurisdictional rule addresses the reach of conspiracy jurisdiction under New York law, not whether the exercise of jurisdiction comports with constitutional due process." Contant v. Bank of Am. Corp., 385 F. Supp. 3d 284, 292 (S.D.N.Y. 2019). In other words, New York's long-arm statute *permits* the exercise of conspiracy jurisdiction and the Second Circuit's test *limits* it. *See id.*

172. Youming Jin v. Ministry of State Sec., 335 F. Supp. 2d 72, 78 (D.D.C. 2004) (quoting Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1031 (D.C. Cir. 1997)) (citing D.C. CODE § 13-423(a) (2023)).

173. *See supra* Part I.C.

174. *Youming Jin*, 335 F. Supp. 2d at 79 n.3.

relationship which does not necessarily exist in conspiracies.[175] New York and the District of Columbia only view agency as a statutory source of validity for conspiracy jurisdiction, whereas the Ninth Circuit equates conspiracy jurisdiction with agency jurisdiction as a matter of theory.[176] Although conspiracy jurisdiction can be statutorily derived from agency-law provisions in long-arm statutes, conspiracy jurisdiction will differ from agency in that the relationship of co-conspirators will not always be one of fiduciaries.[177] In turn, where a fiduciary relationship does exist, agency law will provide another analytical framework for the application of jurisdiction.[178]

Relatedly, conspiracy jurisdiction is often ensconced in substantive state conspiracy laws.[179] For example, the Eleventh Circuit evaluates what allegations a plaintiff must make to meet the elements of conspiracy claims

175. Transamerica Leasing, Inc. v. La Republica de Venezuela, 200 F.3d 843, 849-50 (D.C. Cir. 2000) (quoting RESTATEMENT (SECOND) OF AGENCY § 1(1) (AM. L. INST. 1958)); *see also Contant*, 385 F. Supp. 3d at 292-93 (clarifying the distinction between purely agency-based personal jurisdiction and conspiracy jurisdiction).

176. *See supra* notes 122-24 and accompanying text (discussing the Ninth Circuit test).

177. It is precisely because conspiracies may lack direction or control that agency law is not an adequate tool to address jurisdiction over remote co-conspirators. As such, "automatically equating conspiracy jurisdiction with agency-law analysis would not appear to satisfy due process in every, or even most, situations." *Youming Jin*, 335 F. Supp. 2d at 80 n.3.

178. *See Contant*, 385 F. Supp. 3d at 293 ("[D]elegation and supervision might be relevant to establishing an agency relationship sufficient to confer personal jurisdiction, but they are not required."); *In re* Platinum & Palladium Antitrust Litig., 61 F.4th 242, 272 (2d Cir. 2023) ("[T]he argument that our exercise of conspiracy jurisdiction should be limited by agency principles is no longer available. We have observed that 'some control is necessary to establish agency for jurisdictional purposes,' . . . but we have squarely rejected that limitation on conspiracy jurisdiction." (citation omitted) (quoting CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 366 (2d Cir. 1986))); Veleron Holding, B.V. v. Morgan Stanley, 117 F. Supp. 3d 404, 454 (S.D.N.Y. 2015) ("Under New York law, 'the agency relationship is fiduciary in nature and imposes on an agent, among others, a duty of "utmost good faith."'" (quoting UBS AG, Stamford Branch v. HealthSouth Corp., 645 F. Supp. 2d 135, 144 (S.D.N.Y. 2008)); *In re* Nine W. LBO Sec. Litig., 482 F. Supp. 3d 187, 200 (S.D.N.Y. 2020) ("A relationship of agency gives rise to a fiduciary relationship, . . . but a fiduciary relationship is not itself a necessary prerequisite to establishing agency." (citing *In re* Trib. Co. Fraudulent Conv. Litig., 946 F.3d 66, 79 (2d Cir. 2019))).

179. There is an underanalyzed, underlying tension between federal courts developing legal tests to assess conspiracy jurisdiction and recognizing state law as a controlling source of conspiracy jurisdiction's validity. A growing number of courts, notably in the Second Circuit, have built what looks increasingly like federal common law on conspiracy jurisdiction (look no further than *Schwab I*). 883 F.3d 68, 86 (2d Cir. 2018) (citing a prior related decision which itself cited only federal authority in construing substantive conspiracy law). *Schwab I* cites *Gelboim v. Bank of America Corp.*, 823 F.3d 759, 778 (2d Cir. 2016), in which the Court summarized what factors sufficiently demonstrate conspiracy to fix pricing under the Sherman Act.

under state law while also requiring that the "overt acts" pled be taken "within the forum . . . in furtherance of the conspiracy."[180]

The intersection between the long-arm statute approach, the agency approach, and the common law approach is complex. The three approaches all have the same basic assumption: that a particular state recognizes conspiracy jurisdiction as a jurisdictional avenue for exercising jurisdiction over a remote defendant. However, the vehicles used to reach this destination differ. In jurisdictions like the Third Circuit, the state's long-arm statute—a jurisdictional vehicle—drives the analysis.[181] In jurisdictions like the Tenth Circuit, common law conspiracy—a substantive vehicle—contains a jurisdictional component permitting conspiracy jurisdiction.[182] And in jurisdictions like the Ninth Circuit, courts reject conspiracy jurisdiction but wield a similar tool in jurisdiction based on agency—itself a hybrid between the substantive law of agency and the procedural long-arm statute.[183] This hybrid vehicle results in the simultaneous application of different approaches—a phenomenon that can be seen in the Second Circuit, where conspiracy jurisdiction is premised both on the state's long-arm statute and as part of the long-arm statute's agency provision.[184]

It is no coincidence that state law permeates courts' analysis of conspiracy jurisdiction. Under Rule 4(k)(1)(A), the Federal Rules of Civil Procedure constrain the territorial reach of federal district courts to the same geographic reach as the states in which they sit, which for conspiracy jurisdiction implicates not only state long-arm statutes but also, where applicable, state

180. J & M Assocs. v. Romero, 488 F. App'x 373, 375 (11th Cir. 2012) (per curiam) (quoting *Ex parte* McInnis, 820 So. 2d 795, 806-07 (Ala. 2001)); *see also* Luck v. Primus Auto. Fin. Servs., Inc., 763 So. 2d 243, 247 (Ala. 2000) (stating that the elements of civil conspiracy in Alabama are: (1) "concerted action by two or more people" to (2) "achieve[] an unlawful purpose or a lawful end by unlawful means").

181. *See, e.g.*, *supra* note 115; Roy v. Brahmbhatt, No. 07-cv-5082, 2008 WL 5054096, at *6 (D.N.J. Nov. 26, 2008) (opining that the Third Circuit had not generally approved the theory of conspiracy jurisdiction but individual courts had).

182. *See supra* note 153 and accompanying text; *infra* notes 353-57 and accompanying text. *But see* Hart v. Salois, 605 F. App'x 694, 700 (10th Cir. 2015) ("[W]e have cautioned that 'to hold that one co-conspirator's presence in the forum creates jurisdiction over other co-conspirators threatens to confuse the standards applicable to personal jurisdiction and those applicable to liability." (quoting Melea, Ltd. v. Jawer SA, 511 F.3d 1060, 1070 (10th Cir. 2007))). The court in *Hart*, therefore, required both prima facie conspiracy allegations and minimum contacts to establish conspiracy jurisdiction. *Id.*

183. *See* Hoffman v. Halden, 268 F.2d 280, 296 (9th Cir. 1959) (holding defendants liable "under the general principle of agency on which conspiracy is based"), *overruled on other grounds by* Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962); Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001) (imputing minimum contacts sufficient to find personal jurisdiction where there exists an "alter ego or agency relationship" (citing Kramer Motors, Inc. v. Brit. Leyland, Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980) (per curiam))).

184. *See supra* notes 171, 178.

conspiracy law.[185] In each individual jurisdiction, the *Erie* doctrine demands consideration of substantive state law on conspiracy where a court considers the procedural guardrails of its jurisdiction.[186] In other words, when federal jurisdictions look to state substantive law for their conspiracy jurisdiction tests, state law governs the limits of personal jurisdiction, whether the courts expressly acknowledge this or not.[187] *Erie* is relevant because where a federal court relies on state conspiracy law as guidance for conspiracy jurisdiction, such law is substantive even though jurisdiction is usually considered procedural.[188]

The analytical problem associated with a state-by-state approach is, of course, that federal courts—even those in the same circuit—may not only have different standards for *jurisdiction* but also differing underlying substantive conspiracy law.[189] The differing analyses between the state and federal courts makes analysis tricky where conspiracy jurisdiction can be either a species of existing substantive law or a jurisdictional gateway doctrine.[190] The exercise of jurisdiction, which can be both "outcome determinative" and result in "forum shopping,"[191] is probably better characterized as a procedural question.[192] The

185. FED. R. CIV. P. 4(k)(1)(A). *But see* Jason Jarvis, *Geometric Federalism*, 76 ALA. L. REV. (forthcoming 2025) (arguing that Rule 4(k)(1)(B) violates principles of federalism). Service is also effective within the 100-mile "bulge" for joinder cases, FED. R. CIV. P. 4(k)(1)(B), or when authorized by a federal statute, FED. R. CIV. P. 4(k)(1)(C).

186. In short, if the state law is substantive, then *Erie* mandates deference. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). More specifically, "federal courts sitting in diversity apply state substantive law and federal procedural law." Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 427 (1996). But "[c]lassification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor." *Id.* It is unclear whether looking to *state substantive conspiracy law* as guidance for the exercise of *federal conspiracy jurisdictional limits* is necessarily an *Erie* question or not where personal jurisdiction of federal courts is subject to the same due process limits as state courts and no federal rule governs.

187. The court in *Roy*, for example, acknowledges that New Jersey state law controlled in part based on principles of comity. *See* Roy v. Brahmbhatt, No. 07-cv-5082, 2008 WL 5054096, at *9 (D.N.J. Nov. 26, 2008).

188. *See supra* note 186 and accompanying text.

189. *E.g.*, Stauffacher v. Bennett, 969 F.2d 455, 460 (7th Cir. 1992) (collecting cases and discussing the "diversity of approaches" to the requisite allegations of conspiracy). For example, according to Sixth Circuit courts, Ohio's long-arm statute does not "reach[] to the limits of the Due Process Clause, and the analysis of [the] statute is a particularized inquiry wholly separate from the analysis of Federal Due Process law." Conn v. Zakharov, 667 F.3d 705, 712 (6th Cir. 2012); *see also* Int'l Watchman Inc. v Strap.ly, No. 18-cv-1690, 2019 WL 1903557, at *3 (N.D. Ohio Apr. 29, 2019) (explaining that only once the Ohio long-arm statute permits the exercise of jurisdiction will a court analyze whether due process is satisfied).

190. As we discuss in Part II.B.2 below, the conflation of substantive and procedural law is an unfortunately too common faux pas in the realm of conspiracy jurisdiction.

191. Hanna v. Plumer, 380 U.S. 460, 466-67 (1965) ("'Outcome-determination' analysis was never intended to serve as a talisman." (citing Byrd v. Blue Ridge Rural Elec. Coop., 356

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fact that service of process is governed by the Federal Rules of Civil Procedure supports this understanding.[193] Whether a given jurisdiction looks to state conspiracy law or employs its own federal jurisdiction tests is not necessarily mutually exclusive; in fact, as noted above, states like Minnesota and New York have adopted overlapping explanations.[194]

In sum, most jurisdictions agree that a plaintiff "must allege both an actionable conspiracy and a substantial act in furtherance of the conspiracy performed in the forum state."[195] Beyond that, the theory of conspiracy jurisdiction has nearly as many interpretations as jurisdictions, and it remains a complex and inconsistent doctrine—with the Fifth Circuit serving as the vanguard for resisting the doctrine (with the Ninth and possibly First Circuits in league), and the Second Circuit leading the charge for the other circuits, which have firmly adopted some version of conspiracy jurisdiction. With this complex background in mind, we turn next to the constitutional validity and future trajectory of the doctrine.

U.S. 525, 537 (1958))). *Hanna* also noted that the "*Erie* rule" was designed in part to avoid "forum shopping." *Id.* at 467.

192. The debate over whether a certain issue is procedural versus substantive has existed for many decades, including specifically with regard to jurisdiction. *See, e.g.*, Note, *Federal and State Precedents on Doing Business: Jurisdiction over Foreign Corporations Under* Erie, 67 YALE L.J. 1094, 1099 (1958) ("[J]urisdiction has traditionally been . . . classified [as procedural]. . . . [But d]oing business has been analogized to venue which is procedural both historically and under *Erie*.").

193. *See, e.g.*, *Hanna*, 380 U.S. at 463-64 (holding that Federal Rule of Civil Procedure 4(d)(1) controls service of process in diversity actions). "The *Erie* rule has never been invoked to void a Federal Rule." *Id.* at 470.

194. *See supra* notes 110, 159, 167 and accompanying text. Where conspiracy jurisdiction is solely based on the allegations of conspiracy as a cause of action, query whether conspiracy jurisdiction is no longer operating as personal jurisdiction but rather as subject matter jurisdiction or as a pleading standard. For example, in *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, the court "consider[ed] [the issues of personal jurisdiction and whether plaintiffs pled a plausible claim] in tandem" because "conspiracy jurisdiction . . . cannot exist unless the . . . [c]omplaint actually states a plausible claim of civil conspiracy." 246 F. Supp. 3d 52, 90 (D.D.C. 2017). *See also Ex parte* Reindel, 963 So. 2d 614, 623 (Ala. 2007) ("To be sure, the conspiracy averments in the complaint must exceed 'bald speculation' and mere conclusory assertions. However, this burden is not heavy, especially '[w]hen determination of the jurisdictional facts is intertwined with and may be dispositive of questions of ultimate liability.'" (alteration in original) (citations omitted) (first quoting *Ex parte* McInnis, 820 So. 2d 795, 806-07 (Ala. 2001); and then quoting McLaughlin v. Copeland, 435 F. Supp. 513, 530 (D. Md. 1977))); J & M Assocs. v. Romero, 488 F. App'x 373, 375 (11th Cir. 2012) (per curiam) (applying Alabama conspiracy law in the determination of personal jurisdiction).

195. Textor v. Bd. of Regents of N. Ill. Univ., 711 F.2d 1387, 1393 (7th Cir. 1983).

II. Constitutionality and Effectiveness

This Part seeks to accomplish two purposes. First, it sets forth the controlling principles of personal jurisdiction through the lens of current Supreme Court precedent, focusing on *Walden*.[196] This case helps us discern some of the most important principles that guide our analysis of whether the doctrine satisfies due process. Second, it explores constitutional and practical challenges to the doctrine, concluding with our proposed holistic approach to conspiracy jurisdiction.[197] Because conspiracy jurisdiction is a species of specific personal jurisdiction, analysis of conspiracy jurisdiction benefits from a brief review of personal jurisdiction.[198]

In determining whether it can exercise personal jurisdiction over a defendant, a court first evaluates whether the state's long-arm statute authorizes personal jurisdiction.[199] Then, the court evaluates whether jurisdiction comports with the constitutional requirement of due process, a requirement first elaborated in *Pennoyer v. Neff*[200] and modernized in *International Shoe*.[201]

International Shoe's focus on "minimum contacts" and "fair play and substantial justice" has become the touchstone of the modern specific personal jurisdiction due process analysis.[202] In subsequent cases, the Court has developed "independent, if conceptually overlapping, methods of demonstrating minimum contacts,"[203] but it has uniformly emphasized that the defendant must "purposefully avail[]" itself of the forum state[204] and that the lawsuit must "arise out of or relate to" such purposefully established contacts.[205] Later, in

196. 571 U.S. 277 (2014).

197. *See infra* note 409 and accompanying text.

198. *See also* FRIEDENTHAL ET AL., *supra* note 65, §§ 3.4-3.7.

199. Daimler AG v. Bauman, 571 U.S. 117, 125 (2014).

200. *See* 95 U.S. 714 (1878), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

201. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *see also* Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021) (referring to *International Shoe* as the "canonical decision" in the area of personal jurisdiction).

202. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

203. Best Van Lines, Inc. v. Walker, 490 F.3d 239, 243 (2d Cir. 2007); *see also* Contant v. Bank of Am. Corp., 385 F. Supp. 3d 284, 291 (S.D.N.Y. 2019) (quoting *Best Van Lines*, 490 F.3d at 243).

204. *E.g.*, Hanson v. Denckla, 357 U.S. 235, 253 (1958).

205. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-73 (1985) ("Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, [a] 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." (citations omitted) (first quoting Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984); and then quoting Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984))). As we discuss in note 273 and the accompanying text below, *Ford* clarified the meaning of the phrase "arise out of

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World-Wide Volkswagen Corp. v. Woodson (*WWVW*),[206] the Court identified several factors relevant to determining whether the assertion of personal jurisdiction is reasonable: "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies."[207] In other words, the defendant must purposefully avail itself of the forum state such that it has sufficient minimum contacts, the plaintiff's claims must arise out of or relate to the defendant's contacts, and the exercise of jurisdiction must be reasonable.[208] Even more simply stated, "minimum contacts" plus "nexus" plus "reasonableness" yields purposeful availment.[209]

A. The Relevant Supreme Court Precedent

Some academics consider the personal jurisdiction doctrine to be complex at best and "an irrational and unpredictable due process morass" at worst.[210] Theoretical questions relevant to conspiracy jurisdiction abound. For example, is there purposeful availment by a bank if the defendant acts through an independent instrumentality when the unknowing bank transfers funds that were deposited by a resident of the forum state and later alleged to be

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or relate to." 141 S. Ct. at 1026 (noting that the "first half" of this phrase refers to causation but the second half need not).

206. 444 U.S. 286 (1980).

207. *Id.* at 292 (citations omitted). The Court reemphasized those factors in *Burger King*, 471 U.S. at 476-77.

208. *Ford*, 141 S. Ct. at 1024-25. Purposeful availment is particularly important to the conspiracy jurisdiction analysis insofar as it suggests the knowledge component we find so crucial to a constitutional approval of the instant doctrine. *See infra* notes 321-22 and accompanying text.

209. *WWVW*, 444 U.S. at 291-92; *see Ford*, 141 S. Ct. at 1025. We employ the term "nexus" as shorthand for the "aris[ing] out of or relat[ing] to" language employed repeatedly by the Supreme Court and most recently emphasized in *Ford*, 141 S. Ct. at 1026 (emphasis omitted) (quoting Daimler AG v. Bauman, 571 U.S. 117, 127 (2014)). For a recent discussion of *Ford* offering the term "nexus" as a way to encapsulate "arising out of or relating to," see Brittany Day, Ford Motor Company v. Montana Eighth Judicial District Court*: Redefining the Nexus Requirement for Specific Jurisdiction*, 16 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1 (2021).

210. Sachs, *supra* note 17, at 1302; *see also, e.g.*, Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 3 (2006) ("Academics often lament the current law of personal jurisdiction as incoherent and convoluted."); Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633, 682 (2019) (noting "widespread agreement that the Court's Fourteenth Amendment personal jurisdiction analysis is an incoherent mess").

wrongfully obtained?[211] Does the Court's broadened test for "arising out of and relating to" after the *Ford* decision subject a co-conspirator to jurisdiction in a forum state due to the relationship with a co-conspirator, the object of the conspiracy, or the conspiracy itself?[212] Is a conspiracy more akin to a distribution agreement through which products or instrumentalities are conveyed into the stream of commerce, or is it more like the corporate relationships between parents and subsidiaries?[213] Answering these questions must start with a review of recent Supreme Court precedent, which colors the rest of our analysis.

We begin with *Calder v. Jones*, the seminal case on the intentional tort gloss on personal jurisdiction.[214] *Calder* concerned a lawsuit brought by a plaintiff in California state court over the publication of an allegedly libelous article in Florida.[215] The plaintiff—Shirley Jones of *Oklahoma!* fame—was a professional entertainer whose career was based in California; the defendants, who had no contacts with California, had published and edited the article in Florida in a magazine with a large circulation in California.[216] In fashioning the proverbial "effects test," the Supreme Court held that jurisdiction was "proper in California based on the 'effects' of [the defendants'] Florida conduct in

211. *See* United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 615 (1st Cir. 2001). The court ruled that purposeful availment "is only satisfied when the defendant purposefully and voluntarily directs his activities toward the forum so that he should expect, by virtue of the benefit he receives, to be subject to the court's jurisdiction based on these contacts." *Id.* at 624 (rejecting the government's argument for specific jurisdiction based, among other things, on a business relationship rather than the defendant's own contacts).

212. *See Ford*, 141 S. Ct at 1026.

213. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 106 (1987); Williams v. Yamaha Motor Co., 851 F.3d 1015, 1021 (9th Cir. 2017) (describing an alter ego personal jurisdiction test for parents and subsidiaries). One way of looking at the fractured opinion in *Asahi* is that the plurality found there to be no minimum contacts, 480 U.S. at 112-13, Justice Brennan's concurrence found there were minimum contacts but the exercise of jurisdiction would be unreasonable, and Justice Stevens's concurring opinion thought it could be decided on only reasonableness. *Id.* at 116 (Brennan, J., concurring in part and concurring in the judgment); *id.* at 121 (Stevens, J., concurring in part and concurring in the judgment). To us, *Asahi* stands for the proposition that reasonableness alone is insufficient to establish personal jurisdiction. If we are right, *relationship* alone will likewise be insufficient for personal jurisdiction. *See Daimler*, 571 U.S. at 136 (rejecting the Ninth Circuit's formulation that "[a]nything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist" (quoting Bauman v. DaimlerChrysler Corp., 676 F.3d 774, 777 (9th Cir. 2011) (O'Scannlain, J., dissenting from denial of rehearing en banc))). Of course, the Court in *Daimler* was examining general, not specific, jurisdiction but we think it still has bearing on the debate. *Id.*

214. 465 U.S. 783, 788-89 (1984).

215. *Id.* at 784.

216. *Id.* at 785-86, 788-89.

California," which is where the defendants "expressly aimed" their "intentional, and allegedly tortious" conduct.[217] Thus, the Court found that jurisdiction was proper in California because the defendant "intended to, and did, cause tortious injury to [the plaintiff] in California."[218]

In the same term, the Supreme Court decided *Keeton v. Hustler Magazine, Inc.*, a case that also involved a libel action.[219] In *Keeton*, the plaintiff, a New York resident, sued the defendant, a resident of Ohio and California and publisher of an alleged libelous article, in a New Hampshire court.[220] The Court reinforced its holding in *Calder v. Jones*, and concluded that New Hampshire had personal jurisdiction over the magazine because the defendant had sold so many copies of its magazine in New Hampshire.[221] The difference between *Calder*[222] and *Keeton*[223] is that Keeton did not reside in New Hampshire, the forum state. This, however, did not defeat the plaintiff's claim, because Keeton experienced the injury in New Hampshire.[224]

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217. *Id.* at 789.

218. *Id.* at 787. For a discussion of the effects of *Calder v. Jones* on the application of conspiracy jurisdiction, see Carver, note 8 above, at 1359-63 (arguing that *Walden* "foreclose[s] an expansive reading of *Calder*" on the theory that jurisdiction is only appropriate if a defendant targets the forum state and not merely the plaintiff or through conduct producing foreseeable effects in the forum state). While Carver's approach has superficial appeal, we disagree that traditional glosses on jurisdiction—such as the effects test or the stream of commerce theory—offer the most appropriate analytical framework for conspiracy jurisdiction. *See id.* at 1362 (advocating for the application of the effects-based jurisdictional principles or the stream of commerce principles and for abandoning the principle of attribution). We further think foreseeability, while not dispositive, is not irrelevant. Carver's approach also does not adequately capture the issue of "attribution," which we think should be a fixture of conspiracy jurisdiction. *See infra* notes 312-16 and accompanying text. Lonny Hoffman offers another explanation of attribution in *The Case Against Vicarious Liability*, arguing that "[t]he attribution of contacts of one person or entity to another for jurisdictional purposes is a frequently seen and often invoked form of traditional jurisdictional argument. Indeed, this rationale is necessary for engaging in jurisdictional analysis for any case involving nonnatural entities, such as corporations, which cannot act except through others." Hoffman, *supra* note 8, at 1026. We think the same conclusion applies for any case involving a conspiracy.

219. 465 U.S. 770, 781 (1984).

220. *Id.* at 772.

221. *Id.* at 772-74.

222. 465 U.S. at 785.

223. 465 U.S. at 772.

224. *Id.* at 777 ("The reputation of the libel victim may suffer harm even in a State in which he has hitherto been anonymous."). The *WWVW* reasonableness factors also played a key role in favor of the plaintiff. *Id.* at 775-79. The Supreme Court's rationale for extending jurisdiction over the defendant focused on the state of New Hampshire but was not necessarily limited to only one state. *Id.* at 775-76 (holding that whether it is fair to hale defendant into New Hampshire "depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a

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As seen through the prism of *Calder* and *Keeton*, some intentionality of the in-state injury—and in turn, an actual injury felt in the state—can be sufficient to establish personal jurisdiction in that state, regardless of the plaintiff's or the defendant's remoteness from the forum state. Translating this principle to the context of conspiracy jurisdiction, the surrogate for this "intentionality" is knowledge. Without the *knowledge* of the in-state effects of one's out-of-state acts combined with the in-state acts of a co-conspirator, there is no intentionality.[225]

Conspiracy usually implies intent—or at least relies on an underlying intentional tort.[226] It would seem, therefore, that *Calder* and *Keeton* would be the most useful and controlling Supreme Court cases.[227] But we think there are three reasons—with which we agree—that the majority of conspiracy jurisdiction cases virtually ignore these authorities.[228] The first and most important reason is that there was no indirect defendant in *Calder* or *Keeton*.[229]

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legitimate interest in holding respondent answerable on a claim related to those activities" and that "it is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State").

225. In fact, regardless of the application of *Calder*, the purposeful availment prong implies some sort of intentionality as a defendant must expect to be haled into court in a particular forum as a result of his action. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985) ("[A] forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents."); *WWVW*, 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

226. *See, e.g.*, Selby v. O'Dea, 156 N.E.3d 1212, 1234 (Ill. App. Ct. 2020) (emphasizing that "civil conspiracy is an intentional tort" under Illinois law); *cf.* Kasparian v. County of Los Angeles, 45 Cal. Rptr. 2d 90, 99 (Cal. Ct. App. 1995) (requiring intent to enter into a conspiracy and for the tort of intentional interference). New York law, by contrast, characterizes conspiracy as requiring an underlying intentional tort but does not consider conspiracy its own tort. Agron v. Douglas W. Dunham, Esq. & Assocs., No. 02-cv-10071, 2004 WL 691682, at *1 (S.D.N.Y. Mar. 31, 2004) (citing Alexander & Alexander of N.Y., Inc. v. Fritzen, 503 N.E.2d 102, 103 (N.Y. 1986)).

227. *See, e.g.*, Contant v. Bank of Am. Corp., 385 F. Supp. 3d 284, 291 (S.D.N.Y. 2019) (quoting the "expressly aimed" language from *Calder v. Jones*, 465 U.S. 783, 789-90 (1984)).

228. Even cases that refer to conspiracy jurisdiction and cite *Calder* rarely, if ever, rely on the *Calder* effects test for their conspiracy jurisdiction inquiries. For a representative example, see ASI, Inc. v. Aquawood, LLC, No. 19-cv-763, 2022 WL 980398, at *15 n.13 (D. Minn. Mar. 31, 2022) (separating the effects test from a conspiracy jurisdiction review).

229. *Calder* involved a writer (South) and publisher and editor (Calder) both from the same remote location with the same level of intent and culpability. 465 U.S. at 785-86. Keeton was a New York resident suing an Ohio and California defendant in New Hampshire—also an unusual situation inapplicable to the essential conspiracy jurisdiction issue. *Keeton*, 465 U.S. at 772.

The crucial issue in conspiracy jurisdiction is when a remote defendant can be subject to jurisdiction due to their relationship to a co-conspirator.[230] That scenario was not implicated in *Calder* or *Keeton*.[231] If a remote defendant is directly liable, whether for an intentional tort or an unintentional tort, there is no need for conspiracy, jurisdiction or otherwise.

The second reason is that *Calder* focused on the state where the effects of an intentional tort are *felt*, but conspiracy jurisdiction is more concerned with the *actions* of the remote co-conspirator.[232] The torts at issue in *Calder* are intentional.[233] Thus, the *Calder* "effects test" requires a definitive intentional tort for which the relevant defendant is alleged to be liable. In that regard it differs from conspiracy, where the relevant remote defendant is liable only through the conspiracy.[234]

The third reason is that the tort of conspiracy is less of an intentional tort—at least not in the sense of *Calder* and *Keeton*, where the defendant intentionally targets the plaintiff—and more of an intention to obtain a gain, which incidentally injures the plaintiff.[235] Stated differently, the intent at issue in conspiracy jurisdiction is to commit the conspiracy rather than to hurt the

230. *See infra* Part II.B.1.

231. *See supra* notes 214-24 and accompanying text.

232. We think this distinction between where the effects are felt and how the conspirators act is one unique aspect about conspiracy jurisdiction. Another reason we think *Calder* and *Keeton* have had little influence on conspiracy jurisdiction is that they have had less influence on personal jurisdiction in general than the broader line of contract and negligence cases. We acknowledge that it is an imprecise test, but *Calder* has been around thirty years longer than *Walden* and yet has only 6,370 case citations to *Walden*'s 5,169.

233. Interestingly, the Supreme Court in *Calder* never identifies the elements of defamation under California law but does acknowledge they are intentional. 465 U.S. at 789 (noting that the defendants' "intentional, and allegedly tortious, actions were expressly aimed at California"); *see also* Stellar v. State Farm Gen. Ins., 69 Cal. Rptr. 3d 350, 354 (Cal. Ct. App. 2007) ("Defamation, which includes libel and slander, is an intentional tort which requires proof that the defendant intended to publish the defamatory statement." (quoting Allstate Ins. Co. v. LaPore, 762 F. Supp. 268, 271 (N.D. Cal. 1991))).

234. *See infra* note 315.

235. Conspiracy is an agreement, either explicit or tacit, to do something illegal and not, in the civil sense, to commit a crime. It is therefore concerned with, for example, getting an unfair advantage, acquiring money by some fraudulent means, or making deals prohibited by law. *See, e.g.*, *In re* Performance Nutrition, Inc., 239 B.R. 93, 115 (Bankr. N.D. Tex. 1999) ("[A] civil conspiracy is not a cause of action within itself, but a basis for imposing exemplary damages predicated upon the existence of actual damages." (citation omitted)).

plaintiff, as in pure intentional tort scenarios.[236] This distinction makes *Calder* less helpful in tea-leaf reading than *Walden* and *Ford*.[237]

Walden concerned allegations of intentional conduct outside the forum state with effects felt therein.[238] The peculiar facts bear repeating.[239] The case was a *Bivens* action against a deputized Drug Enforcement Agency (DEA) officer for having falsified an affidavit to justify a search and seizure.[240] Anthony Walden was a local police officer whom the DEA had deputized to assist with drug enforcement at Atlanta's airport.[241] He seized $97,000 in cash from plaintiffs' baggage, later drafting and sending to a Georgia U.S. Attorney's office an allegedly false affidavit supporting the seizure.[242] The issue was whether a defendant who harms a plaintiff is subject to personal jurisdiction in the plaintiff's residence merely because of the plaintiff's connection rather than the defendant's directed acts.[243] Writing for a unanimous Court, Justice Thomas concluded the answer is "no."[244]

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236. The quintessential conspiracy case—say, an antitrust price-fixing claim—is often defined by the defendants' desire to acquire a benefit rather than injure a specific victim. Consider the fact that plaintiffs often plead price-fixing cases as unjust enrichment, a claim which by definition focuses on the defendant's unlawful gain or benefit. *See, e.g.*, *In re* Auto. Parts Antitrust Litig., 29 F. Supp. 3d 982, 1014 (E.D. Mich. 2014) ("[W]hen stripped to its essence, a claim of unjust enrichment requires [plaintiff]s to allege sufficient facts to show that Defendants received a benefit and under the circumstances of the case, retention of the benefit would be unjust."). Plaintiffs also often frame their price-fixing claim as a benefit received by the defendant. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 595 (1986) ("[*S*]*uccessful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation."); City of Rockford v. Mallinckrodt ARD, Inc., 360 F. Supp. 3d 730, 747 (N.D. Ill. 2019) ("The gravamen of plaintiffs' antitrust claims is that defendants acted and conspired to raise . . . prices exorbitantly high as part of a vertical price-fixing scheme . . . in order to unlawfully preserve [the defendant]'s monopoly for its . . . pecuniary benefit.").

237. *See infra* notes 260-62, 285-86.

238. 571 U.S. 277, 279-81 (2014).

239. *Walden* is a fun case to teach. Students love that this case sounds like a plotline from *Better Call Saul*—starting like a DEA drug bust but ending up with successful international gamblers suing a "temp" DEA agent.

240. *Id.* at 281.

241. *Id.* at 279-80.

242. *Id.* at 280-81.

243. *See id.* at 285 ("[O]ur 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there."). Or, as the Court subsequently summarized, "the plaintiff cannot be the only link between the defendant and the forum." *Id.*

244. *See id.* at 282. The interesting part of *Walden* is the distinction between injury to the plaintiff and the purposeful availment of a forum state, something highlighted much

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After setting forth a simple restatement of the minimum contacts test, the Court addressed what it considered two aspects relevant to the particular case.[245] First, the Court emphasized that the contact must be created by the "defendant *himself*."[246] It is not the plaintiff's contacts with the forum state that matter, as the Court reminded us, nor is it those "of another party or a third person."[247] Even a plaintiff's substantial contacts with the forum state do not create jurisdiction over defendants.[248]

The Court secondarily highlighted that it is the defendant's contacts with the state, not with "persons who reside there," that matter.[249] While "a defendant's relationship with a plaintiff or third party, standing alone," is not enough, something more than "random, fortuitous, or attenuated' contacts" may be.[250] The Court took pains to focus on two aspects of a sufficient relationship between the defendant and the forum state. First, an adequate relationship "arise[s] out of [defendant's own] contacts."[251] Second, an adequate relationship requires defendant's contacts with the state rather than "persons who reside there."[252] In other words, a *relationship* with another entity by itself is insufficient to create minimum contacts, but a relationship plus *conduct* could be.[253] The Court reasoned that the defendant's conduct was not directed at the forum state and his relationship to the plaintiffs alone was insufficient for the exercise of personal jurisdiction.[254] Another way of describing the central holding of *Walden* is that plaintiffs themselves cannot serve as the sole connector between a

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more recently in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1026 (2021), discussed in notes 267-74 and the accompanying text below.

245. *Walden*, 571 U.S. at 284.

246. *Id.* at 284 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)). The Court emphasized in *Burger King*, however, that while the defendant itself needs to create a connection, it need not personally be present in the state. 471 U.S. at 475-76.

247. *Walden*, 571 U.S. at 284 (quoting Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 417 (1984)) ("[The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.").

248. *See id.* at 285.

249. *Id.* This is a debatable distinction. Contacts are contacts, whether they concern entities, products, actions, contracts, or torts. This is no idle concern as it relates to conspiracy jurisdiction. *See infra* notes 256-59 and accompanying text.

250. *Walden*, 571 U.S. at 286 (quoting *Burger King*, 471 U.S. at 475).

251. *Id.* at 284.

252. *Id.* at 285.

253. *See id.* Again, this distinction is difficult to parse in application, as it is hard to conceive of maintaining a relationship without some conduct. As we will later explain, the relationship at issue in *Walden* was plaintiff-to-forum and not defendant-to-defendant. *See infra* note 259 and accompanying text.

254. *Walden*, 571 U.S. at 289.

defendant and a forum state, and wrongful conduct directed at a plaintiff does not mean wrongful conduct directed at the forum state.[255]

Walden suggests that conspiracy jurisdiction may be constitutional, but it also highlights troublesome distinctions where there are few bright lines.[256] Conspiracy jurisdiction based solely on the relationship between co-conspirators, even where one conspirator has direct and specific contacts with the forum state rather than just a plaintiff, are likely insufficient. A relationship between conspirators by itself is not enough—the contacts must belong to the defendant, not to its co-conspirator.[257] Assuming that relationship is not the co-conspirator's sole contact with a forum state, however, as long as a contact becomes something more than "random, isolated, or fortuitous," a court is likely able to establish personal jurisdiction over a co-conspirator.[258] Based on *Walden*, the Supreme Court might not sustain the doctrine if the only connection of a co-conspirator were to their co-conspirator rather than to the forum state.[259] On the other hand, the dichotomy with which the Court was concerned in *Walden* was between a plaintiff's connection (where they were injured) to a forum state versus the defendant's connection or lack thereof, so the Court may find an important distinction between a plaintiff's connection to a forum state and the defendant's connection to the forum state.

What we can draw from *Walden* is the conclusion that knowledge of acts taken in furtherance of the conspiracy, which are directed at the forum state, bridges the gap between a relationship and acts that are more than random,

255. *Id.* at 290 ("*Calder* made clear that mere injury to a forum resident is not a sufficient connection to the forum. . . . The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way.").

256. The Court in *Walden* rejected minimum contacts, reasoning that the plaintiff's connection with the forum state alone is not enough because that connection is not "decisive in determining whether the defendant's due process rights are violated" in the jurisdictional analysis. *Id.* at 279 (quoting Rush v. Savchuk, 444 U.S. 320, 332 (1980)). But it did not suggest that plaintiff's connections are irrelevant. "[A] defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties." *Id.* at 286.

257. *Id.* ("[A] defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.").

258. Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021) (quoting Keeton v. Hustler Mag., Inc., 465 U.S. 770, 774 (1984)).

259. The Court in *Walden* seemed simultaneously skeptical of relying on the relationships themselves as contacts while at the same time acknowledging "transactions or interactions" as being "intertwined" with minimum contacts. *Walden*, 571 U.S. at 286. We think the Court was trying too hard to be narrowly focused. Nearly all contacts are relational.

fortuitous, or attenuated.[260] Further, *Walden* permits the use of knowledge as evidence of a remote conspirator's in-forum contacts as long as the knowledge relates to the effects of the conspiracy *in* the forum state, even if those acts may partly occur outside.[261] However, while knowledge of the targeting of a conspiracy in a particular forum is a permissible proxy for a defendant's contacts with a state, we do not think it alone is enough.[262]

Ford Motor Co. v. Montana Eighth Judicial District Court[263] is the most recent major personal jurisdiction case, as well as the first serious examination of the minimum contacts doctrine since *Bristol Myers Squib Co. v. Superior Court* in 2017.[264] We therefore analyze it for what it portends for conspiracy jurisdiction's future, even though we think it is less on point than *Walden*.

Ford concerned two lawsuits brought against Ford arising out of car accidents involving a Ford Crown Victoria (Minnesota) and a Ford Explorer (Montana).[265] As the Court noted, Ford is a "global auto company" with business "everywhere."[266] Ford conceded purposeful availment within the respective forum states but not that the specific conduct—the sale of the specific vehicles that crashed with their injured owners inside—had occurred in the forum state.[267]

260. Consider again our hypothetical Eurobank case. *See supra* note 87. If Eurobank has a strong relationship and clear illegal agreement with InvestUS but no knowledge of the forum state where InvestUS sells the fraudulent investment opportunities, it does not matter under *Walden* where the plaintiffs reside or even where the injury occurred—Eurobank will not be subject to personal jurisdiction. This is why the knowledge of the remote co-conspirator of the aim of the conspiracy is vital.

261. *Walden*, 571 U.S. at 285 ("[P]hysical presence in the forum is not a prerequisite to jurisdiction [but] physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact." (internal citations omitted)).

262. Thus, the *Schwab I* test—which calls for, among other things, a co-conspirator's own acts to be directed at the forum state—might satisfy the Court. 883 F.3d 68, 87 (2d Cir. 2018). But the Tenth Circuit's test is perhaps more suspect, seeking broader allegations of a conspiracy "directed towards the forum [state]" or "substantial steps in furtherance of the conspiracy . . . taken in the forum" state. Newsome v. Gallacher, 722 F.3d 1257, 1265 (10th Cir. 2013) (quoting Melea, Ltd. v. Jawer SA, 511 F.3d 1060, 1070 (10th Cir. 2007)). This language might generally be less specific than the Supreme Court might prefer. *See supra* note 153 and accompanying text.

263. 141 S. Ct. 1017 (2021).

264. 137 S. Ct. 1773 (2017).

265. *Ford*, 141 S. Ct. at 1022-23.

266. *Id.* at 1022.

267. *Id.* at 1026.

The Court rejected Ford's argument.[268] It considered "two sets of values—treating defendants fairly and protecting 'interstate federalism.'"[269] It was fair to hale Ford into that jurisdiction, according to the Court, because it does substantial business in the forum states and actively serves and relies on those markets.[270] Ford's "causation-only approach" was rejected because its activities and the injury need not have a causal relationship as long as the activities and injury relate to each other.[271] If a defendant deliberately extends business into a forum state, any instrumentality relating to that business can give rise to personal jurisdiction, even if its origin was not the particular forum state.[272]

Justice Kagan, writing for the Court, helpfully emphasized the important distinction *Ford* stands for in the panoply of personal jurisdiction cases: that the defendant's contacts must "arise out of *or relate to* the defendant's contacts with the forum."[273] This emphasis suggests that the territorial focus of the

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268. *Id.* at 1032.

269. *Id.* at 1025 (quoting *WWVW*, 444 U.S. at 293).

270. *Id.* at 1026-27. It is beyond the scope of this Article, but we find curious the Supreme Court's use of "substantial business" because that is a concept underlying *general* personal jurisdiction, not *specific*. *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117, 149 (2014) (Sotomayor, J., concurring in the judgment) (pointing out that the Court's general jurisdiction jurisprudence had normally tested the defendant's volume of business in the forum state rather than how substantial that volume was in relation to other jurisdictions).

271. *See Ford*, 141 S. Ct. at 1026. The Supreme Court cited *WWVW* for support on this point, noting the contrast between "the [New York car] dealer's position to that of two other defendants—Audi, the car's manufacturer, and Volkswagen, the car's nationwide importer (neither of which contested jurisdiction)." *Id.* at 1027. Because they had substantial activities in Oklahoma, it did not matter that the exact car that caused the injury was sold in New York. *See id.*

272. *Id.* at 1026-27. The Court elaborated:

> [T]he [*WWVW*] Court explained [that] a company thus "purposefully availing itself" of the Oklahoma auto market "has clear notice" of its exposure in that State to suits arising from local accidents involving its cars. And the company could do something about that exposure: It could "act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are still too great, severing its connection with the State."

Id. at 1027 (alterations omitted) (citations omitted) (quoting *WWVW*, 444 U.S. at 297). Again, the Court in *Ford* evokes general jurisdiction concepts in finding specific personal jurisdiction.

273. *Id.* at 1026 (quoting Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780 (2017)). *Ford* can be read more or less expansively depending on how much importance one places on the Court's observations about the significance of Ford's contacts with Montana and Minnesota. For example, the Court acknowledges that Ford "serves [the] market" of the forum states with its "product" and "the product malfunctions there." *Id.* at 1027. But the Court also never says that the volume of Ford's business was dispositive, and one could also view its key contribution to personal jurisdiction as the "or relating to" disjunctive. For purposes of conspiracy jurisdiction, we think both principles are relevant.

instrumentality is less important than the connection between the defendant and the forum state, as long as the connection relates to the injury.[274]

The influence of *Ford*, a relatively recent case, is still growing, but it has generated at least two citations in the conspiracy jurisdiction context so far. The first case is *In re European Government Bonds Antitrust Litigation*, in which the court applied *Ford* and analyzed a conspiracy jurisdiction claim but not in concert.[275] The second case is *In re Mexican Government Bonds Antitrust Litigation*,[276] which grapples with reconciling *Ford* and the Second Circuit's leading conspiracy jurisdiction case, *Schwab II*:

> Plaintiffs argue that *Ford* . . . displaced *Schwab*. But *Ford* and *Schwab* are not irreconcilable. *Ford* is not about the sale of financial instruments; not about rate-setting; and not about fraud or conspiracy. And *Ford*, by its terms, does not compel the conclusion that there *is* specific jurisdiction over foreign misconduct based on sales in the United States like those in *Schwab*. At most, *Ford* undermines the rationale leading to *Schwab*'s bottom line. *Schwab* held that specific jurisdiction over the fraud claim did not exist in part because the "transactions did not cause Defendants' . . . submissions . . . , nor did the transactions in some other way give rise to claims seeking to hold Defendants liable for those submissions." *Ford* holds that "some relationships will support jurisdiction without a causal showing."[277]

According to the district court, *Ford* and *Schwab I* can be reconciled because they do not confront the same issue, a statement with which we generally agree. But we disagree with the court's characterization of *Ford*.[278] We do not

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274. *See id.* It is hard to read this portion of *Ford*, which lacks an express reference to a test of reasonableness, without an implicit reasonableness reference. In other words, it is fair and reasonable that a defendant that sells millions of dollars of goods in a forum state ought to be held accountable there even if the specific instrumentality of plaintiff's injury came to the forum state indirectly. *See id.*

275. No. 19-cv-2601, 2022 WL 768680, at *9-10 (S.D.N.Y. Mar. 14, 2022). The court agreed with the defendants' arguments that *Ford* requires a "strong relationship" between the defendants and the forum state. *Id.* (quoting *Ford*, 141 S. Ct. at 1028). But it concluded that the standard for personal jurisdiction was met with regard to the defendants because, among other things, they worked through "affiliates with whom they had an agent-principal relationship." *Id.* "By working with their New York-based agents to sell [European Government Bonds] to consumers in the United States, the [defendants] purposefully availed themselves of jurisdiction in New York." *Id.* (citing *Schwab I*, 883 F.3d 68, 85 (2d Cir. 2018)). Relying on *Ford*, the district court in *European Government Bonds* concluded that defendants "had strong intentional contacts with [the forum state]" by "transact[ing] business, including selling and marketing [European Government Bonds]." *Id.* at *10.

276. No. 18-CV-2830, 2022 WL 950955 (S.D.N.Y. Mar. 30, 2022).

277. *Id.* at *3 (citations omitted) (first quoting *Schwab I*, 883 F.3d at 84; and then quoting *Ford*, 141 S. Ct. at 1026).

278. One approach to understanding how *Ford* affects conspiracy jurisdiction is that an indirect co-conspirator may have such significant contacts through its direct conspirator contacts to the forum state such that exercise of personal jurisdiction is reasonable. *See Ford*, 141 S. Ct. at 1026-27 (rejecting a hypertechnical focus on the

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think the "causal" relationship is the meaningful issue between *Schwab I* and *Ford*. Nor do we agree that the "bottom line" from *Schwab I* is undermined by *Ford*.[279] The bottom line of *Schwab I* is that overt acts in furtherance of a conspiracy can subject a remote conspirator to jurisdiction even in the absence of a relationship of control or supervision.[280] Nothing in *Ford* undermines this conclusion because *Ford*'s bottom line is an instruction to avoid focusing on the specific instrumentality of injury.[281] *Ford* therefore supports an appropriate exercise of conspiracy jurisdiction by acknowledging a holistic view of contacts, whether those come through a different state and instrumentality or, we posit, through a conspiracy.[282]

Ford further informs our analysis of conspiracy jurisdiction when we consider how the Court addresses "[t]he only complication here, [which] is that the company sold the specific cars involved in these crashes outside the forum States, with consumers later selling them to the States' residents."[283] That attenuation complication bears on conspiracy jurisdiction in the sense that a conspiracy scenario might involve a co-conspirator who does not directly

specific product that caused injury in favor of a holistic approach). Whether the forum state has personal jurisdiction by a conspiracy-connection or an indirect but solo-connection probably does not matter under *Ford*. *See id.* at 1026 ("None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do.").

279. It is a difficult to say with certainty what the district court meant by its statement that, at most, *Ford* does little more than undermine *Schwab I*'s "bottom line." *Mex. Gov't Bonds*, 2022 WL 950955, at *3. *Ford* says less, we think, than the court and the defendant in *Mexican Government Bonds* assert. *See Ford*, 141 S. Ct. at 1026. *Ford* held that a remote defendant with massive contacts in a forum state will be liable there if the contacts "relate to" the plaintiff's injury, even if the specific instrumentality was not directed at the forum state. *Id.* at 1026 (emphasis omitted). We think the bottom line of *Schwab I* is a broader understanding of relationship than agency or parent-subsidiary, and *Ford* is silent on that issue. *See generally id.*

280. *Schwab II*, 22 F.4th 103, 122 (2d Cir. 2021) (rejecting defendant's argument that the remote co-conspirator needed to evidence "a relationship of direction, control, [or] supervision").

281. *See supra* note 279 (discussing whether *Ford*'s updated reading of "arising out of or related to" is limited to jurisdictions where the defendant also has substantial contacts that are "related to" the instrumentality of injury).

282. *Ford*, 141 S. Ct. at 1026. Ford's primary argument against jurisdiction was for "causation-only" contacts—that although Ford had significant contacts with the forum state, those were not the specific contacts that caused the injury. *See id.* But the Supreme Court rejected that argument:

> *Ford*'s causation-only approach finds no support in this Court's requirement of a "connection" between a plaintiff's suit and a defendant's activities. That rule indeed serves to narrow the class of claims over which a state court may exercise specific jurisdiction. But not quite so far as Ford wants. None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do.

Id. (citation omitted) (quoting Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1781 (2017)).

283. *Id.* at 1029.

intervene in the forum state but whose actions collectively affect the forum state in connection with its conspirator.[284] *Ford* will likely control the scenario where a remote defendant has significant but varied connections to a forum state in general, but the object of the specific conspiracy was unrelated to the forum state except by the actions of a co-conspirator.[285] But what *Ford* says indirectly and more broadly—that the totality of the defendant's relationship to the forum state is more important than a bright line question of whether *the specific product caused the plaintiff's injury*—is also vital to a rational, consistent application of the conspiracy jurisdiction doctrine because it frees the Court to uphold conspiracy jurisdiction's indirect assertion of jurisdiction.[286]

Ford bolsters the constitutionality of attribution because it allows the attribution of car sales in general to one defective car not actually sold in the forum states.[287] A plaintiff who proves that a remote defendant knew of the in-

284. Under our hypothetical scenario, *see supra* note 87, *Ford* may increase Eurobank's chances of being subject to conspiracy jurisdiction if Eurobank and InvestUS offer broad securities sales in a forum state. In other words, if we change the scenario to include the fact that Eurobank, through InvestUS, sells numerous securities directly to customers in Minnesota, but not the securities described in the original hypothetical, then *Ford* suggests Eurobank could be subject to personal jurisdiction in Minnesota because of its general but powerful connection to the state. *See Ford*, 141 S. Ct. at 1029. Query whether this is really conspiracy jurisdiction though; a plaintiff could reasonably argue it did not need to rely on the conspiracy—it might argue there are direct minimum contacts.

285. Consider the hypothetical where a foreign manufacturer sells copious product to buyers in New York and is accused of being a co-conspirator with a local defendant in a scheme to defraud buyers of a product the foreign manufacturer only indirectly distributes and does not even know ends up in New York. *Ford* would apply in the sense that the manufacturer has deep connections with the forum state—as Ford did in Minnesota and Montana—but not the specific connection of that particular Ford automobile. *See id.* at 1032.

286. We suspect that the principle of attribution was underlying the Second Circuit's reasoning in refusing to limit the co-conspirator relationship to one in which there is control, direction, or supervision. *See Schwab I*, 883 F.3d 68, 86-87 (2d Cir. 2018). Courts have interpreted New York's long-arm statute, N.Y. C.P.L.R. § 302(a) (McKinney 2023), to instead require relationships of control, benefit, or knowledge. *See, e.g.*, *In re* Sumitomo Copper Litig., 120 F. Supp. 2d 328, 340 (S.D.N.Y. 2000) (quoting Grove Press, Inc. v. Angleton, 649 F.2d 121, 122 (2d Cir. 1981) (analyzing conspiracy jurisdiction pursuant to N.Y. C.P.L.R. § 302(a))). In turn, that same relationship—through the control, benefit, or knowledge of the conspiracy—establishes that a defendant has purposefully availed himself of a forum state. And if directed to the state, the co-conspirator's overt acts constitute sufficient minimum contacts. In this regard, comparing the allegations in *Schwab I* and *Schwab II* is helpful because in *Schwab I*, false public statements or sales to California were insufficient to support conspiracy jurisdiction, while in *Schwab II*, the email communications constituted "overt acts." *See Schwab I*, 883 F.3d at 87; *Schwab II*, 22 F.4th 103, 123 (2d Cir. 2021).

287. *Ford*, 141 S. Ct. at 1024. Again, the Court so emphatically focuses on marketing and selling automobiles in the forum states—but not the specific automobiles at issue—can give the misleading impression that the *volume* of contacts is why the Court found

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state acts of his co-conspirator may try to rely on *Calder*. But a stronger connection to the forum state would be needed under *Walden* as those co-conspirator's acts would not necessarily be considered the remote defendant's contacts with the state.[288] Under *Ford*, if a remote defendant's acts in furtherance of the conspiracy occurred outside of the state, they relate to the injury caused in the state because the remote defendant knows that the effects of both conspirators' acts will injure someone in that state.[289] It is precisely because of this knowledge, ancillary to the conspiracy relationship, that the attribution of the in-state defendant's acts to the remote defendant can occur, thus fulfilling *Walden*'s requirement that a defendant himself has minimum contacts with the forum.[290]

In sum, *Calder* and *Keeton* found personal jurisdiction where a defendant intentionally causes injury in a remote forum, while *Walden* rejected the rationale that a plaintiff's contacts with the state are sufficient to apply personal jurisdiction even if the plaintiff felt injury in the forum state.[291] *Ford* opens a new opportunity for personal jurisdiction by allowing its application when the injury relates to the defendant's contacts.[292] *Walden* and *Ford* suggest that where purposeful acts—demonstrated by knowledge—that directly relate to a conspiracy can subject a remote co-conspirator defendant to jurisdiction in a forum state even if those acts were not directed at the forum state as long as the conspiracy is.[293]

B. A Due Process Critique of Conspiracy Jurisdiction

Although courts apply many distinct tests for conspiracy jurisdiction, certain elements raise constitutional and practical concerns. This Part explores those concerns while offering a fresh look at the theory's constitutionality.[294]

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personal jurisdiction. But *Ford* should not be read that way in light of *Daimler*. It was not the great number of contacts that mattered to the Court; it was the fact that they were so directly related to the same type of instrumentality that caused the plaintiffs' injuries. *See id.* at 1031-32; Daimler AG v. Bauman, 571 U.S. 117, 138-39 (2014).

288. Calder v. Jones, 465 U.S. 783, 789 (1984) (reasoning that intent implies knowledge); Walden v. Fiore, 571 U.S. 277, 279 (2014) (determining that the minimum contacts analysis depends on the defendant's contacts with the state, not contacts with plaintiffs who live there).

289. *See Ford*, 141 S. Ct. at 1030.

290. *See Walden*, 571 U.S. at 285.

291. *See supra* Part II.A.

292. *See Ford*, 141 S. Ct. at 1032.

293. See *supra* note 274 and accompanying text; *Walden*, 571 U.S. at 283-84.

294. We focus primarily on constitutionality but also address policy concerns when appropriate. *See infra* Part II.B.2-.4.

1. To satisfy due process, attribution through conspiracy jurisdiction requires "relationship," "knowledge," and "action"

Attribution means applying the liability of one to another.[295] This principle is therefore chiefly about relationships.[296] Attribution matters because it bridges the gap between the remote defendant's out-of-state contacts and a co-conspirator's in-state acts, thus actuating the minimum contacts necessary for personal jurisdiction under *Walden*.[297] Given the nature of a conspiracy, courts evaluating conspiracy jurisdiction first consider the nature of the defendants' relationship. Assuming the co-conspirators' relationship is based only on the conspiracy, courts should then ask whether they are more akin to a "third party" or "another party," as contemplated in *Walden*,[298] or whether they are conjoined as a joint enterprise and, therefore, closely related.[299] In all situations where conspiracy jurisdiction can be applied, it must be the latter.[300]

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295. Attribution generally has a plain meaning of transferring fault, and this is the concept in the law we also use when discussing conspiracy jurisdiction. *See, e.g.*, First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 620 (1983) (rejecting the claim that the Foreign Sovereign Immunities Act intended to allow "the attribution of liability among instrumentalities of a foreign state"). Agency law employs the concept of attribution, but in conspiracy jurisdiction, attribution is not about principals and agents but about co-conspirators. *See, e.g.*, Brown v. DirecTV, LLC, 562 F. Supp. 3d 590, 607 n.22 (C.D. Cal. 2021) (noting attribution may not require "the existence of an agency relationship to establish liability" (citing RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. a (AM. L. INST. 2006))).

296. Usually thought of as arising in the agency context, attribution of a defendant's contacts with a forum state has been deemed improper for purposes of general jurisdiction but not necessarily for specific personal jurisdiction. Bilek v. Fed. Ins. Co., 8 F.4th 581, 591 (7th Cir. 2021); Daimler AG v. Bauman, 571 U.S. 117, 135 n.13 (2014) ("Agency relationships . . . may be relevant to the existence of *specific* jurisdiction.").

297. To clarify, although we think it achieves the minimum contacts requirements under *Walden*, attribution is permissible under *Ford*, so long as the remote defendant's out-of-state acts relate to the injury felt in the state. *See Walden*, 571 U.S. at 283-84; *Ford*, 141 S. Ct. at 1028.

298. *See Walden*, 571 U.S. at 284 (reinforcing the court's repeated rejection of "attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State" (quoting Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 417 (1984))).

299. *Id.* at 284-85. The Court's summary of instances where it has rejected personal jurisdiction repeatedly focuses on individual defendants and not relationships to "plaintiffs or third parties." *Id.* (quoting Rush v. Savchuk, 444 U.S. 320, 332 (1979)) (citing *WWVW*, 444 U.S. 286, 291-92 (1980); *Helicopteros*, 466 U.S. at 417; and Hanson v. Denckla, 357 U.S. 235, 253-54 (1958)). Although the Court does not use the term "joint enterprise" in *Walden*, we think it is fair to conjecture that the case would have come out differently (or at least not unanimously) if there had been a federal agent working with the Georgia-based officer from Nevada.

300. Iron Workers Loc. Union No. 17 Ins. Fund v. Philip Morris Inc., 23 F. Supp. 2d 796, 806-07 (N.D. Ohio 1998) (rejecting conspiracy jurisdiction and liability for remote defendants without their own direct contacts).

This principle is illustrated in *Contant*, an important decision from the Southern District of New York.[301] There, defendants argued that their contacts with a co-conspirator were so attenuated that even a conspiracy did not join them in any cohesive relationship.[302] Because the defendant had not taken any acts in the forum state, a nonagency relationship alone was insufficient, according to the defendant. [303] The court disagreed, reasoning that the focus on only one defendant's unilateral acts "misapprehends both the nature of a conspiracy and the nature of conspiracy jurisdiction."[304] According to the court, a co-conspirator is not legally a third party because the co-conspirators who "previously pursued their own interests separately are combining to act as one for their common benefit."[305] Jurisdiction can therefore be premised on the acts of a co-conspirator because of their *relationship*.[306]

Co-conspirators do not lack a relationship because co-defendants are not just "another party" under the law.[307] Legally, co-conspirators are joined in a common enterprise, and it is that common enterprise that effects harm on a plaintiff in the forum state.[308] As recognized in *Walden*, "a defendant's contacts with the forum State may be intertwined with his transactions or interactions with . . . other parties."[309] Indeed, some courts tout the merits of attributing a

301. Contant v. Bank of Am. Corp., 385 F. Supp. 3d 284, 291-96 (S.D.N.Y. 2019). *Contant* has some excellent analysis, but its conclusion that unilateral acts are imparted to co-conspirators would only satisfy due process, in our view, if the defendant at least took some action in furtherance *of the conspiracy*. It is a fair question to ask when there might be a situation where a co-conspirator did *not* take any action. One possible scenario is where parties reached an agreement to illegally fix prices but one of the conspirators failed to actually do so.

302. *Id.* at 292-93 (arguing that only an agency relationship is an adequate basis on which to base conspiracy jurisdiction).

303. *Id.* at 292.

304. *Id.* at 293.

305. *Id.* (quoting Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984)).

306. *See id.*

307. This assumes that the plaintiff can adequately plead the relationship. For a discussion of the pleading difficulties plaintiffs alleging conspiracy jurisdiction might face, see Part II.B.3 below.

308. *Cf. Copperweld*, 467 U.S. at 770-73. *Copperweld* is a fascinating case for our exploration of conspiracy and common enterprise because it so carefully considered a far narrower doctrine—the intra-enterprise conspiracy doctrine. *Id.* at 766-67. But in doing so, its analysis of what constitutes a conspiracy under the Sherman Act reasons that form should not overcome substance and that divisions and subsidiaries are not distinct entities for purposes of conspiracy; in effect, they cannot form an independent joint enterprise because they are already joined at the hip. *See id.* at 772-73. We agree. *See also, e.g.*, Charles v. Tex. Co., 18 S.E.2d 719, 726 (S.C. 1942) ("Each conspirator is liable for all damages naturally resulting from any wrongful act of a co-conspirator in exercising the joint enterprise." (quoting 11 AM. JUR. *Conspiracy* § 57 (1937))).

309. Walden v. Fiore, 571 U.S. 277, 286 (2014).

resident's acts to an out-of-state co-conspirator because conspiracy is not its own substantive cause of action but is a mechanism for transferring and sharing liability for another underlying tort.[310]

As a policy matter, co-conspirators should also not be considered third parties.[311] Courts have the ability to impose civil liability on co-conspirators, an issue related to but separate from the concept of jurisdiction.[312] Imputed conduct is a long-standing policy principle recognized in the personal jurisdiction context as constitutionally proper.[313] Attribution of an in-state co-conspirator's acts to a nonresident defendant further empowers states to gain more control over their judiciary and to adjudicate claims based on the defendant's acts, which result in harm within the forum state.[314] This, in turn, promotes the interests of the inter-state judiciary: "If 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

310. *See, e.g.*, McCord v. Bailey, 636 F.2d 606, 611 n.6 (D.C. Cir. 1980); Mackey v. Compass Mktg., Inc., 892 A.2d 479, 87 (Md. 2006); Wings to Go, Inc. v. Reynolds, No. 15-cv-2556, 2016 WL 97833, at *4 (D. Md. Jan. 8, 2016); Gold v. Gold, No. 17-CV-00482, 2017 WL 2061480, at *2 (D. Md. May 15, 2017); *see also* Purple Onion Foods, Inc. v. Blue Moose of Boulder, Inc., 45 F. Supp. 2d 1255, 1258 (D.N.M. 1999) (refusing to "ascribe co-conspirator status" to co-defendant because attribution is not viable without a "legally recognized conspiracy").

311. Functionally, "third party" implies a lack of a relationship. Legally, the term implies an arm's length transaction, which conspiracies are not. And from a policy standpoint, the whole point of conspiracy and conspiracy jurisdiction is a linkage between defendants that goes beyond the remoteness of a third-party defendant relationship, of which there are legion in civil lawsuits.

312. *See* Chenault v. Walker, 36 S.W.3d 45, 53-54 (Tenn. 2001) (reasoning that the concept of conspiracy jurisdiction "follows plainly from the very definition of conspiracy and the meaning of co-conspirator liability: the acts of a conspirator in furtherance of an illegal agreement with his co-conspirator are attributed to that co-conspirator"). In *Wings to Go, Inc. v. Reynolds*, the district court alluded to the "very nature of a conspiracy theory" as a justification to find that "a co-conspirator can only be held liable in a particular forum if he *reasonably expected* at the time of entering the conspiracy that the other co-conspirator would act in a manner sufficient to subject herself to personal jurisdiction in that forum." No. 15-cv-2556, 2016 WL 97833, at *4 (D. Md. Jan. 8, 2016) (first quoting Compass Mktg., Inc. v. Schering-Plough Corp., 438 F. Supp. 2d 592, 596 (D. Md. 2006); and then quoting *Mackey*, 892 A.2d at 490). We explore the substantive liability and procedural jurisdiction dichotomy in Part II.B.2 below.

313. *See, e.g.*, Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 45 (1st Cir. 2002) (confronting joint venture imputation of contacts for standard personal jurisdiction purposes without reference to conspiracy jurisdiction).

314. Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1030 (2021) (noting that "principles of 'interstate federalism' support jurisdiction . . . . [where, as in *Ford*] States have significant interests at stake—'providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors,' as well as enforcing their own safety regulations" (third alteration in original) (first quoting *WWVW*, 444 U.S. 286, 293 (1980); and then quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985))).

another jurisdiction."[315] Attribution allows courts to exercise their jurisdiction over someone instead of resorting to severing the claims and forcing the plaintiff to litigate in different fora simultaneously. Attribution also furthers a plaintiff's interest in convenient and effective relief.[316] Though conspiracy involves organized conduct, its secretive nature can present challenges for plaintiffs seeking to make sufficient allegations.[317] Conspiracy jurisdiction empowers courts to exercise jurisdiction over remote conspirators who may benefit from a safe harbor created by the very nature of conspiracy, thereby pursuing the forum state's, plaintiff's', and judiciary's interests.[318] In one sense, this policy-based justification is constitutionally supported by the foundational reasonableness principles articulated in *WWVW*.[319]

Another feature of conspiracy jurisdiction is its ability to shift the minimum contacts requirement from an analysis of a defendant's own contacts with the forum state to a defendant's relationship with a co-conspirator.[320] But a defendant's conspiracy-based relationship alone is not enough to confer jurisdiction without some form of conduct.[321]

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315. Stauffacher v. Bennett, 969 F.2d 455, 459 (7th Cir. 1992).

316. Each of these interests serves the fundamental concept of fairness, inherent to all personal jurisdiction analyses. *See Ford*, 141 S. Ct. at 1025-26 n.2 (referencing the importance of ensuring fairness).

317. Consider *Bell Atlantic Corp. v. Twombly*, in which the Supreme Court agreed with the district court's grant of a motion to dismiss for failure to state a claim on the basis that a price-fixing conspiracy was inadequately pleaded. 550 U.S. 544, 553 (2007). One way of looking at *Twombly* and its younger sibling, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), is as a recognition that allegations of conspiratorial conduct by powerful defendants operating in secret is subject to the heightened plausibility pleading standard.

318. The very nature of conspiracy acts as an intrinsic limit to frivolous claims:

> [Conspiracy is an] elastic, sprawling and pervasive offense, . . . so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent.

Conspiracy, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting Krulewitch v. United States, 336 U.S. 440, 445-48 (1949) (Jackson, J., concurring in the judgment and opinion of the Court)). *See infra* Part II.B.3 for a discussion of the evidentiary challenges faced by plaintiffs.

319. *See WWVW*, 444 U.S. at 292.

320. *See* HOGAN LOVELLS, THE LAW OF PERSONAL JURISDICTION: A GAME CHANGER FOR FOREIGN BANKS INVOLVED IN LITIGATION IN THE U.S. 3 (2017), https://perma.cc/TSJ2-8TPH (reporting an increase in conspiracy jurisdiction claims as a result of the Supreme Court ruling in *Daimler*).

321. Walden v. Fiore, 571 U.S. 277, 286 (2014). The Court has also emphasized that "unilateral activity of another party or a third person" cannot subject a defendant to personal jurisdiction. Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 417 (1984); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985). *Daimler* is a general jurisdiction case, but it helps us understand the basic principle that even outside the general jurisdiction context, close-knit parent-subsidiary relationships do

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As a result, the question after whether there exists an adequate relationship between the defendants is whether the remote defendant had knowledge of the conspiracy's aim.[322] Knowledge—often a requirement in state long-arm statutes—is perhaps the only way a mere relationship between individuals as co-defendants can be transformed into a relationship of co-conspirators.[323] Plaintiffs who plead that the conspirators had knowledge that the conspiracy's aim was the forum state inoculate themselves against a defendant's argument that to subject such a defendant to personal jurisdiction violates due process because even if the defendant did not direct its act at the forum state, the conspiracy—as though it were an entity itself—did so.

Before *Walden*, plaintiffs only had to allege that "the defendant had any knowledge, control, approval or discretion" over the co-conspirator's acts within the state.[324] No longer. One post-*Walden* court observed that "following *Walden*, a plaintiff . . . must plead, at a minimum, that the defendant *knew* his co-conspirator was carrying out acts in furtherance of the conspiracy in the forum."[325] Knowledge is a vehicle through which a mere relationship between individuals as co-defendants transforms into a relationship of co-conspirators.[326]

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not alone create minimum contacts. *See* Daimler AG v. Bauman, 571 U.S. 117, 134-36 (2014) (rejecting the Ninth Circuit's agency-imputation theory for subsidiaries as overly broad).

322. *See* EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A., 246 F. Supp. 3d 52, 90-92 (D.D.C. 2017) (rejecting conspiracy jurisdiction in part because of a lack of knowledge—where plaintiff failed to plead that defendant "knew" that there were equity investors to be defrauded, "knew" investors would be defrauded, "was aware" of improper investments, or "intended" to use money to fund a wrongful scheme). When we say knowledge of the conspiracy's aim, we mean knowledge that the conspiracy's effects may be felt in the forum state. We do not mean knowledge of every reasonably anticipated result of the conspiracy, and we do not mean knowledge in a general sense that the conspiracy could affect the world at large. Without such a knowledge component, there is a reasonable argument, for example, that the remote co-conspirator should be no more liable than the defendant who places products in the stream of commerce. *E.g.*, Asahi Metal Indus. v. Superior Ct., 480 U.S. 102, 111 (1987) (plurality opinion).

323. *See, e.g.*, Dixon v. Mack, 507 F. Supp. 345, 349-51 (S.D.N.Y. 1980) (analogizing knowledge to "ratification" of a co-conspirator's acts).

324. *See* Youming Jin v. Ministry of State Sec., 335 F. Supp. 2d 72, 83 (D.D.C. 2004) (emphasis omitted).

325. *EIG Energy Fund*, 246 F. Supp. 3d at 91-92 (emphasis omitted) (citing *Youming Jin*, 335 F. Supp. 2d at 83).

326. *See Dixon*, 507 F. Supp. at 349-51. We also call the reader's attention back to our initial reference point for conspiracy in general. *See* Pritikin, *supra* note 53, at 6-8. If conspiracy liability may attach for a conspirator who is not a "direct actor" and "regardless of the degree" of activity, does this mean conspiracy jurisdiction should as well? *Id.* at 9. We caution against such a broad reading, primarily because the concept of criminal or civil liability for conspiracy is different than the due process-ensconced theory of conspiracy jurisdiction.

Walden rejects the notion that a plaintiff's injury is sufficient for minimum contacts,[327] but a focus on knowledge supports the constitutionality of conspiracy jurisdiction. And *Ford* helps us understand an appropriate relational attribution from defendant-to-defendant may satisfy due process, even if a sole remote defendant to the forum state does not, as long as the co-conspirator's out-of-state conduct relates to the injury suffered in the forum state. What *Ford* and *Walden* tell us together is that: (1) the Supreme Court is prepared to countenance jurisdiction over remote defendants who have no more than indirect minimum contacts as long as there is an appropriate relationship with the forum state;[328] and (2) knowledge can be a vehicle through which a court can find that an out-of-state defendant's acts are directed at a state because knowledge can rehabilitate a lack of direct action through a defendant's complicity with acts in furtherance of the conspiracy.[329]

Finally, in addition to relationship and knowledge,[330] a defendant must have taken some action in furtherance of the conspiracy.[331] As an initial matter, in the absence of an act there is no conspiracy at all.[332] But more than just satisfying the most basic requirement of conspiracy liability, requiring action by the remote defendant in furtherance of the conspiracy helps ensure that application of the doctrine satisfies due process.[333]

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327. *See* Walden v. Fiore, 571 U.S. 277, 284 (2014) (finding that the connection to the plaintiff is not the touchstone of minimum contacts).

328. We are fully aware that neither *Walden* nor *Ford* concerned multiple defendants and their imputed contacts. They are not on all fours with conspiracy jurisdiction. They are, however, the most recent and important personal jurisdiction cases in the Supreme Court's canon, and they tell us more about how the Supreme Court will rule on conspiracy jurisdiction than any other of the Court's cases.

329. This idea echoes the *Hyde* Court in referencing a defendant's constructive presence when that defendant participates in a conspiracy. Hyde v. United States, 225 U.S. 347, 362-63 (1912); *see also supra* notes 62, 65.

330. We admit there is some overlap between all of these elements.

331. Due process requires more than knowledge or awareness, but clinging to an overly technical reliance on specific acts done in the forum state by each individual defendant unnecessarily muddles the elegance of conspiracy jurisdiction and overlooks all of the legal and policy reasons for treating conspiracies as joint enterprises. To be subject to personal jurisdiction, a defendant needs to direct acts somewhere. If those acts are directed at the forum state, there is no need for conspiracy jurisdiction. If not, however, the acts must be directed in furtherance of the conspiracy. And if the conspiracy is directed at the forum state, we think there are minimum contacts.

332. 16 AM. JUR. 2D *Conspiracy* § 54 (West 2023); *see, e.g.*, *Hyde*, 225 U.S. at 375-77 (holding that overt act done in furtherance of a conspiracy may be attributed to all co-conspirators).

333. This principle is supported by tests such as the D.C. Circuit's, which requires "an overt act" in furtherance of the conspiracy. *See, e.g.*, FC Inv. Grp. LC v. IFX Mkts., Ltd., 529 F.3d 1087, 1096 (D.C. Cir. 2008) (quoting Kopff v. Battaglia, 425 F. Supp. 2d 76, 81 n.4 (D.D.C. 2006)).

Comparing the D.C. and Second Circuit tests illustrates the importance of requiring acts in conjunction with relationships. The D.C. Circuit's conspiracy jurisdiction test requires that plaintiffs (1) make a prima facie showing of a conspiracy (2) in which the defendant participated and (3) a co-conspirator's overt act within the forum, "subject to the long-arm statute and in furtherance of the conspiracy."[334] This test is broad in the sense that it focuses on whether an act is overt and whether it is in furtherance of a conspiracy, but it sidesteps the question of the relationship.[335] In fact, courts in the District of Columbia have rejected the idea that relationship is an essential element of establishing conspiracy jurisdiction, comparing it to the "personal jurisdiction version of 'guilt by association,'" insufficient to demonstrate personal jurisdiction, a principle with which we disagree.[336]

By contrast, the Second Circuit's test requires that the out-of-state co-conspirator has committed acts that have *sufficient contacts* with the forum state.[337] By mirroring the language of the "minimum contacts" prong, the Second Circuit's test is a better model for addressing the needs expressed in *Walden*.[338] That is so in part because the Second Circuit's test implies that a

334. *Id.* The genesis of this test is dicta from a 1991 D.C. Circuit case discussing jurisdictional discovery: *Edmond v. United States Postal Service General Counsel*, 949 F.2d 415, 425 (D.C. Cir. 1991). In *Edmond*, the court acknowledged the existence of the theory of conspiracy jurisdiction but noted that it had not expressly set forth its limits before. *Id.* Nevertheless, the court held "it is an abuse of discretion to deny jurisdictional discovery where the plaintiff has specifically alleged: (1) the existence of a conspiracy, (2) the nonresident's participation, and (3) an injury-causing act of the conspiracy within the forum's boundaries." *Id.*; *see supra* note 113.

335. D.C. Circuit apologists might rightly argue the conspiracy element is alone sufficient to satisfy the relationship qualification, but we think being more explicit about the relationship component will help avoid claims of attributive overreaching. Additionally, the D.C. Circuit explained that this test was elaborated in cases where the defendants did not challenge the allegations of an overt act in furtherance of a conspiracy, instead focusing on whether a long-arm statute could reach out-of-state co-conspirators who lack direct contacts with the district. *See* First Chi. Int'l v. United Exch. Co., 836 F.2d 1375, 1379 n.4 (D.C. Cir. 1988). Thus, the D.C. Circuit leaves out the question of whether this test applies when allegations of a conspiracy are uncertain.

336. Miller v. Holzmann, No. 95-cv-1231, 2007 WL 778568, at *6 (D.D.C. Mar. 6, 2007) ("It is the personal jurisdiction version of 'guilt by association.' As this Court has previously stated, however, 'plaintiff cannot aggregate allegations concerning multiple defendants in order to demonstrate personal jurisdiction over any individual defendant.'" (quoting Robinson v. Ashcroft, 357 F. Supp. 2d 142, 144 (D.D.C. 2004))).

337. *Schwab I*, 883 F.3d 68, 87 (2d Cir. 2018).

338. *See* Walden v. Fiore, 571 U.S. 277, 289 (2014). That said, at least one district court in the District of Columbia entertained exactly the right issue even without this explicit component of the framework. *See, e.g.*, Youming Jin v. Ministry of State Sec., 335 F. Supp. 2d 72, 80 (D.D.C. 2004). There, the Court compared and contrasted "conspiracy and agency" and noted that while "both involve attribution of liability, the doctrines are not identical, the latter being far closer to purposeful availment. . . . Thus, automatically

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relationship must exist—the element that permits the attribution of one co-conspirator's acts to another—thus allowing the creation of a nexus between the removed co-conspirator's contacts to the forum state.[339] It is also a better model because the characterization of an act as "overt" does not mean it is a "sufficient" minimum contact—especially if such an act is unrelated to the conspiracy or without knowledge of its in-state implications.[340] A focus on the co-conspirator's overt acts in the forum is insufficient to ensure that there remains a connection between the out-of-state conspirator and the forum state, independent of the acts of the third party, the co-conspirator.[341]

Semantics aside, specific jurisdiction is not only about relationships—it is also about acts—and a valid conspiracy jurisdiction doctrine should not run afoul of that principle. Two cases from the Northern District of Ohio demonstrate how courts have focused on action in the conspiracy jurisdiction context. In *Hollar v. Philip Morris Inc.*, a pre-*Walden* case, the court refused to apply conspiracy jurisdiction because "personal jurisdiction must be based on the actions and contacts of the specific defendant at issue."[342] In *Iron Workers Local Union No. 17 Insurance Fund v. Philip Morris Inc.*, the court also declined to find that the defendant, a holding company incorporated in the United Kingdom, purposefully availed itself of the laws of Ohio by way of the few contacts it had with the state because "the unilateral activity of another party or a third person is not an appropriate consideration when determining [jurisdiction]."[343]

To satisfy due process, a court must confirm that there is a sufficient nexus in the relationship between the conspirators, which by definition must involve

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equating conspiracy jurisdiction with agency-law analysis would not appear to satisfy due process in every, or even most, situations." *Id.* at 79 n.3 (citation omitted).

339. *See, e.g.*, Socialist Workers Party v. Att'y Gen. of U.S., 375 F. Supp. 318, 321-22 (S.D.N.Y. 1974). Communication and common motive to conspire, in turn, can demonstrate the existence of the conspiratorial relationship. *See supra* note 144.

340. If the D.C. Circuit's test stated that "any" act instead of an "overt" act would suffice, covert or subtle acts would subject a defendant to personal jurisdiction. The test does not, of course, which suggests that the D.C. Circuit is concerned with knowledge rather than who completed the overt action in the forum state. *See supra* note 113. Awareness is not enough, however. *See supra* note 157.

341. *See Walden*, 571 U.S. at 284. The requirement that a plaintiff plead that a conspirator took an overt act in the forum state is simply that the allegations show "the purpose of the act was to advance the overall object of the conspiracy," a seemingly low threshold. Halberstam v. Welch, 705 F.2d 472, 487 (D.C. Cir. 1983). This definition lacks any requirement that the act performed be connected to the forum, unlike the Second Circuit test and its "sufficiency" requirement, which implicates that the overt act be related to the forum, usually via the knowledge imparted between co-conspirators by virtue of their relationship. *See Schwab I*, 883 F.3d at 86-87.

342. 43 F. Supp. 2d 794, 802 n.7 (N.D. Ohio 1998).

343. 23 F. Supp. 2d 796, 800, 808 (N.D. Ohio 1998) (citing Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 417 (1984)).

knowledge of the in-state aim of the conspiracy and that there were sufficient acts (overt or not) taken in furtherance of the conspiracy.[344] To attribute to a defendant the same personal jurisdiction over a co-conspirator requires relationship and action.[345] But a defendant's action only counts if it stems from the knowledge that the acts are directed in the forum state. In the absence of the three principles of relationship, knowledge, and action, attribution of personal jurisdiction by conspiracy jurisdiction does not meet constitutional muster.

2. Conflating liability with jurisdiction creates unconstitutional pressures

Attribution without relationship, knowledge, and action is how conspiracy jurisdiction can violate the Due Process Clause. Conspiracy jurisdiction can also be suspect when courts conflate the concept of liability with the concept of jurisdiction.[346] The ramifications of doing so can be unfair to both defendants and plaintiffs.

The Seventh Circuit's decision in *Stauffacher* helps illustrate this point.[347] In that case, the court recognized that defendants will face a conundrum in disputing conspiracy claims because a plaintiff automatically wins the jurisdictional issue if the plaintiff wins on the merits.[348] Simply put, the court's power over a defendant is confirmed if the defendant is liable. But if the plaintiff does not prevail, the defendant would waive a 12(b)(2) defense and "take the judgment for its preclusive value in subsequent suits."[349] The court noted that if a defendant wanted to resolve the jurisdictional issue in advance, a district court would have to conduct an evidentiary hearing "as extensive as, and in fact duplicative of, the trial on the merits."[350] The court concluded that such a hearing was the only alternative for a defendant rather than "to be dragged into

344. *See supra* notes 306-09, 319-20, 333-42.

345. Again, we view the "action" required quite broadly after *Ford*. Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1032 (2021). Anything done in furtherance of a conspiracy, which effects are felt in the forum state, would qualify, "overt" or otherwise, as long as the conspiracy was directed at the forum state and the defendants knew it as such.

346. We recognize that there is an intrinsic connection between a defendant's liability and a court's ability to exercise jurisdiction over a defendant. It is precisely because courts have an interest in adjudicating claims over defendants who, but for the conspiracy, would lack minimum contacts with the states that conspiracy jurisdiction emerged. However, in this Subpart, we focus on the evidentiary- or allegation-based conflation of liability and jurisdiction.

347. Stauffacher v. Bennett, 969 F.2d 455, 459 (7th Cir. 1992).

348. *Id.*

349. *Id.*

350. *Id.*

court on mere allegations."[351] In part to preserve the defendant's due process rights, Judge Posner describes the divide between jurisdiction and liability.[352] On the other hand, plaintiffs who are trying to win on the merits at the pleading stage often lose because they lack the specificity needed to articulate adequate facts about the conspiracy.[353] In conclusion, a plaintiff should plead that a conspiracy exists and establish its prima facie case for liability. But that prima facie case should not be a merits decision on the issue of whether a court has jurisdiction, nor should it preclude jurisdictional discovery.

Conspiracy jurisdiction is particularly susceptible to confusing the standards applicable to personal jurisdiction with those applicable to liability.[354] Consider the Tenth Circuit's test, which requires that plaintiffs "offer more than bare allegations that a conspiracy existed, and . . . allege facts that would support a prima facie showing of a conspiracy."[355] As seen in the Tenth Circuit's test, the substantive conspiracy law itself is also the basis for overcoming a traditional "vanilla" flavor of specific personal jurisdiction.[356] Assuming a plaintiff brings a conspiracy claim in Oklahoma (which sits in the territorial jurisdiction of the Tenth Circuit), she would simply have to establish the following elements with more than bare allegations: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result."[357] This test, which is by nature substantive, results in what may be termed a dress rehearsal for trial on the merits, leaving little room for the protection of the defendant's due process rights.[358]

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351. *Id.*

352. *Id.* (stating that merging the jurisdictional issue with the merits is a problem endemic to conspiracy jurisdiction approaches requiring plaintiffs to plea a prima facie case of conspiracy); Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 944 (7th Cir. 2000) ("[J]urisdiction and liability are two separate inquiries."). "The laws on which the suit are based would be irrelevant because a state or federal statute cannot transmogrify insufficient minimum contacts into a basis for personal jurisdiction by making these contacts elements of a cause of action, since this would violate due process." *Cent. States*, 230 F.3d at 944.

353. *See supra* note 317.

354. *See* Hart v. Salois, 605 F. App'x 694, 700 (10th Cir. 2015) (per curiam) (quoting Melea, Ltd. v. Jawar SA, 511 F.3d 1060, 1070 (10th Cir. 2007)).

355. *Id.* at 699 (quoting *Melea*, 511 F.3d at 1069).

356. *Id.* at 700 (criticizing the plaintiff for alleging a conspiracy and "that a substantial part of the events giving rise to his claims occurred in [the forum state of] Utah," but failing to show steps were taken in Utah in furtherance of the conspiracy).

357. Hitch Enters. v. Cimarex Energy Co., 859 F. Supp. 2d 1249, 1268 (W.D. Okla. 2012) (quoting Schovanec v. Archdiocese of Okla. City, 188 P.3d 158, 175 (Okla. 2008)).

358. In *Newsome v. Gallacher*, the north star in the Tenth Circuit's conspiracy jurisdiction jurisprudence, the court posited a hypothetical in which three Kansas residents conspired to fire a cannonball into Oklahoma. 722 F.3d 1257, 1266 (10th Cir. 2013). The

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The Tenth Circuit's test is also problematic because a plaintiff must still demonstrate that the defendant's conduct and connection with the forum are "such that [the defendant] should reasonably anticipate being haled into court there"[359] in the absence of a formal agency relationship between the defendant and the in-state co-conspirator,[360] a requirement the Tenth Circuit's test fails to ensure. That is why courts that have focused on interpreting conspiracy jurisdiction under minimum contacts, as opposed to substantive state law, have incorporated in their standards mens rea-like requirements, such as the burden to prove knowledge or that a defendant has intentionally targeted a state.[361] By emphasizing the due process requirements of personal jurisdiction as a pleading requirement separate from proving liability for the object of the conspiracy, courts can avoid confusing substantive conspiracy with procedural conspiracy jurisdiction.

3. Unreasonable evidentiary burdens unfairly impair the "plaintiff's interest"

To safeguard the interests of the defendant and the state, courts sometimes impose threshold evidentiary barriers that plaintiffs must overcome.[362] In fact, this barrier often defeats claims of conspiracy

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Tenth Circuit concluded that under this hypothetical, an Oklahoma court would not be prevented from exercising jurisdiction over the Kansas residents. *Id.* As the District of Minnesota aptly stated, "The Tenth Circuit's cannonball hypothetical isn't a perfect fit with most conspiracy-based personal jurisdiction cases." DURAG Inc. v. Kurzawski, No. 17-cv-5325, 2020 WL 2112296, at *6 n.6. (D. Minn. May 4, 2020). As in most cases, "the issue is whether due process permits attributing the in-state defendant's conduct to the out-of-state defendants." *Id.* Noting that the hypothetical would not raise an attribution issue, the District of Minnesota further stated that it "probably better resembles the jurisdictional theory embodied in *Calder*." *Id.*; *see supra* notes 214-18 (discussing *Calder v. Jones*). We suspect the reason for the Tenth Circuit's flawed test stems from this simplified view of conspiracy jurisdiction cases.

359. *WWVW*, 444 U.S. 286, 297 (1980).

360. The plaintiff would not need to allege conspiracy jurisdiction if one co-conspirator was an agent of another (in the legal sense) because traditional principles of agency law would permit personal jurisdiction. *See supra* notes 138, 159 and accompanying text.

361. *See supra* Part I.C.

362. *See, e.g.*, Mandelkorn v. Patrick, 359 F. Supp. 692, 696 (D.D.C. 1973). *Mandelkorn*, which relies on *Hoffman v. Halden*, notes the difficulty in pleading a "conspiracy by anything other than conclusory terms" because such "would necessarily involve questions of the state of mind of the alleged conspirators and agreements among them which by their nature would be inaccessible to Plaintiff." 359 F. Supp. at 696 (citing *Hoffman v. Halden*, 268 F.2d 280, 295-96 (9th Cir. 1959)). This concern, merited though it may be, is strikingly similar to the arguments made by the plaintiff and rejected by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but

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jurisdiction where a plaintiff could make more than frivolous claims against defendants.[363] But overly stringent evidentiary burdens can constitutionally infringe the reasonableness factors elucidated in *WWVW*—including the "plaintiff's interest."[364] While Judge Posner may be right that "[t]he cases are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough," those same evidentiary standards can impose procedural hardships,[365] frustrating the degree of predictability which jurisdiction must afford to the legal system to satisfy due process.[366]

A plaintiff's assertion of conspiracy jurisdiction often faces inherent evidentiary challenges[367] in addition to the pleading standards imposed by courts.[368] Pleading requirements that prevent plaintiffs from conducting proper jurisdictional discovery (and not "fishing expeditions") can undermine

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it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

363. The *Stauffacher* Court did not apply conspiracy jurisdiction because the allegations were not sufficient to show that the defendant was an agent of the conspiracy. *See* Stauffacher v. Bennett, 969 F.2d 455, 460 (7th Cir. 1992). It is hard to say, however, whether the plaintiff's claims in *Stauffacher* were frivolous.

364. *WWVW*, 444 U.S. at 292.

365. *Stauffacher*, 969 F.2d at 460. This case stemmed from an appeal of a 12(b)(2) dismissal of the claims made by Wisconsin residents alleging violations of state, RICO, and federal securities laws. *Id.* at 457. The plaintiffs alleged that the defendants, a Canadian bank, its employees, and others, "aided and abetted, conspired, and perpetrated the [conspired act] as being 'legitimate.'" *Id.* at 460. Judge Posner concluded that defendants were not subject to Wisconsin's long-arm statute because the plaintiffs did not sufficiently argue that the defendants were agents of a conspiracy. *Id.* The court found that the defendants could have been subject to personal jurisdiction if the plaintiffs took "the final step . . . to claim that [out-of-state Defendants were] . . . agent[s] of the conspiracy itself." *Id.* Rather, the plaintiff only alleged that the defendant was an agent of the in-state co-conspirator. *Id.*; *see also* Jung v. Ass'n of Am. Med. Colls., 300 F. Supp. 2d 119, 141 (D.D.C. 2004) (holding that the facts must be proved by a preponderance of the evidence, a requirement that is "strictly enforced" and "warily" applied (quoting Dooley v. United Techs. Corp., 786 F. Supp. 65, 77 (D.D.C. 1992))).

366. *WWVW*, 444 U.S. at 297.

367. *See supra* note 317 and accompanying text; *Mandelkorn*, 359 F. Supp. at 697 (requiring only that a plaintiff plead overt acts taken in furtherance of the conspiracy because "[t]here are inherent difficulties in the pleading of a conspiracy, for by its very nature it involves agreements and questions of intent not accessible to the Plaintiff").

368. *See* Int'l Watchman Inc. v. Strap.ly, No. 18-cv-1690, 2019 WL 1903557, at *4 (N.D. Ohio Apr. 29, 2019) (concluding that conspiracy jurisdiction did not lie because the plaintiff failed to adequately plead a claim for civil conspiracy); First Cmty. Bank, N.A. v. First Tenn. Bank, N.A., 489 S.W.3d 369, 400 (Tenn. 2015) (concluding that the plaintiff failed to establish a prima facie case of an agreement between the alleged co-conspirators—and thus a conspiracy claim—by only alleging that the co-conspirators had "agreed to act in concert to fraudulently market" securities).

conspiracy jurisdiction.[369] The purpose of conspiracy jurisdiction, which conceivably allows plaintiffs to assert jurisdiction over harmful conspiratorial conduct, is hamstrung when courts, such as in the Tenth Circuit, require elevated pleading standards to establish jurisdiction that compound on the existing inherent pleading challenges.[370] Such a challenge might arise in the Tenth Circuit, for example, which requires a plaintiff to plead a prima facie case of substantive conspiracy for purposes of establishing jurisdiction.[371]

In response to the inherent difficulty of proving conspiracy claims, some courts have adopted less stringent standards. To require a more substantial showing than minimal factual allegations in a case alleging a civil conspiracy would be "harsh, if not impossible" given the "difficulties of pleading and proving conspiracy."[372] The Southern District of New York, for example, has noted that "great leeway should be allowed the pleader" in pleading a prima facie case of conspiracy, "since by nature of the conspiracy, the details may not be readily known at the time of the pleading."[373] This is especially true in the context of pleading conspiracy jurisdiction.

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369. Richards v. Duke Univ., 480 F. Supp. 2d 222, 231 (D.D.C. 2007) (refusing plaintiff's requested "fishing expedition" jurisdictional discovery in a conspiracy jurisdiction case).

370. Both federal and state courts routinely recognize the difficulty in proving civil conspiracy. *See, e.g.*, InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003) ("Because direct evidence, the proverbial 'smoking gun,' is difficult to come by, 'plaintiffs have been permitted to rely solely on circumstantial evidence (and the reasonable inferences that may be drawn therefrom) to prove a conspiracy.'" (quoting Rossi v. Standard Roofing, Inc., 156 F.3d 452, 465 (3d Cir. 1998))); Shure v. Ford, No. 2011-CA-000144-MR, 2012 WL 1657133, at *11 (Ky. Ct. App. May 11, 2012) ("A conspiracy is inherently difficult to prove, and notwithstanding that difficulty, the burden is on the party alleging that a conspiracy exists to establish each and every element of the claim in order to prevail." (citing Krauss Willis Co. v. Publishers Printing Co., 390 S.W.2d 132, 134 (Ky. 1965))).

371. *See* Melea, Ltd. v. Jawer SA, 511 F.3d 1060, 1069 (10th Cir. 2007) ("In order for personal jurisdiction based on a conspiracy theory to exist, the plaintiff must offer more than 'bare allegations' that a conspiracy existed, and must allege facts that would support a prima facie showing of a conspiracy." (quoting Lolavar v. de Santibanes, 430 F.3d 221, 229 (4th Cir. 2005))).

372. *Mandelkorn*, 359 F. Supp. at 696. *But see* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) (criticizing the sufficiency of allegations of "parallel conduct" as "much like a naked assertion of conspiracy").

373. City of Almaty v. Ablyazov, 278 F. Supp. 3d 776, 807-08 (S.D.N.Y. 2017) (quoting Maersk, Inc. v. Neewra, Inc., 554 F. Supp. 2d 424, 458 (S.D.N.Y. 2008)); *see also Mandelkorn*, 359 F. Supp. at 696-97 (asserting conspiracy jurisdiction although the defendants had no direct contacts with the District of Columbia); *Int'l Watchman*, 2019 WL 1903557, at *2 (holding that when a district court does not hold "an evidentiary hearing, the 'burden on the plaintiff to establish personal jurisdiction is relatively slight'" (quoting Air Prods. & Controls, Inc. v. Safetech Int'l, Inc., 503 F.3d 544, 549 (6th Cir. 2007))); *First Tenn. Bank, N.A.*, 489 S.W.3d at 395 (relying on Tennessee's definition of the tort of conspiracy in determining the burden plaintiffs bear to establish

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As scholars before us have concluded, jurisdictional discovery may offer a way forward in the plaintiffs' pleading efforts.[374] Courts themselves have remarked that jurisdictional discovery is warranted where, even if a plaintiff has "not made a *prima facie* showing, [a plaintiff] ma[kes] a sufficient start toward establishing personal jurisdiction."[375] Plaintiffs are offered "ample opportunity to secure and present evidence relevant to the existence of jurisdiction."[376] However, until the principle of jurisdictional discovery takes better hold in the conspiracy jurisdiction sphere,[377] plaintiffs face an upward battle in asserting jurisdiction if they cannot meet the evidentiary burdens.[378]

4. Special considerations for foreign defendants

Personal jurisdiction has been described as "particularly daunting in the international setting," especially in suits involving foreign corporate defendants.[379] Conspiracy jurisdiction adds to the ever-present complications caused by foreign defendants litigating in domestic courts.[380] Thus, although

jurisdiction at the motion to dismiss stage). Indeed, pleading conspiracy jurisdiction is no less difficult than pleading conspiracy itself.

374. Althouse, *supra* note 8, at 258-59.

375. Stratagem Dev. Corp. v. Heron Int'l N.V., 153 F.R.D. 535, 547-48 (S.D.N.Y. 1994).

376. APWU v. Potter, 343 F.3d 619, 627 (2d Cir. 2003) (quoting Phx. Consulting, Inc. v. Republic of Angola, 216 F.3d 36, 40 (D.C. Cir. 2000)).

377. *See generally* Althouse, *supra* note 8. Althouse recommended jurisdictional discovery forty years ago, but the idea has not yet been widely adopted.

378. While to our knowledge no court has articulated an appropriate framework to account for this lacuna, a "knowledge" requirement can serve as a factor in the court's analysis. The advantage the Second Circuit has is a long-arm statute, which, while not coextensive with the Constitution, provides specific modalities for the application of jurisdiction when a case arises out of a conspiracy. N.Y. C.P.L.R. § 302(a) (McKinney 2023). Many states do not have such a detailed long-arm statute, so a court will likely focus on the minimum contacts analysis. In turn, a court could overlook the role knowledge plays in demonstrating the acts forming the co-conspirator relationship. Additionally, as the evidentiary requirements are in many ways tied to the fact that courts often mistake substance for procedure, by solving the latter issue courts will avoid making mistakes and running into the former issue.

379. *See* Gerlinde Berger-Walliser, *Reconciling Transnational Jurisdiction: A Comparative Approach to Personal Jurisdiction over Foreign Corporate Defendants in US Courts*, 51 VAND. J. TRANSNAT'L L. 1243, 1245-46 (2018) ("Foreign corporations have faced lawsuits before US courts in cases with—in their eyes—little connection to the forum state in situations where their own domestic courts would typically deny jurisdiction.").

380. For a nuanced view on the push-and-pull between litigation and arbitration, especially for international defendants, see Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1143-44 (2019) ("U.S. courts have raised barriers to transnational litigation, for example, by narrowing the bases for personal jurisdiction, especially over foreign defendants, and expanding forum non conveniens far beyond a 'limited exception.' These developments can make the barriers for plaintiffs in transnational cases even higher than the obstacles that other plaintiffs generally face."). For more analysis on

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conspiracy jurisdiction represents one of the few means available in a plaintiff's arsenal to secure jurisdiction over remote foreign defendants, there are constitutional implications for the foreign defendants subject to the reach of such jurisdiction.

First, subjecting transnational defendants to conspiracy jurisdiction may not comport with the reasonableness factors of *WWVW* if comity is ignored.[381] Comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of . . . persons who are under the protection of its laws."[382] In theory, "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system" are a consideration of "significant weight" under the "reasonableness" inquiry.[383] *Asahi* reiterated that courts should "consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction."[384] However, in practice, courts focus less on the theoretical reasons for comity and more on the logistical ease of bringing a foreign party into a U.S. court. Consider the Second's Circuit statement in *In re Platinum*.[385] The court found "only weak support" for the defendant's argument that the burden of litigating in the U.S. is severe "because the 'conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago.'"[386]

Moreover, courts often discount comity in their personal jurisdiction analyses.[387] Some courts "repeatedly confess that they do not really understand

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transnational litigation in domestic courts generally, see Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995, 998 (2015) (canvassing the benefits and limitations on domestic litigation of international issues in the context of an open market).

381. The Supreme Court recognized comity in 1895 in *Hilton v. Guyot*, 159 U.S. 113, 164-65, 228 (1895).

382. *Id.* at 164.

383. Asahi Metal Indus. v. Superior Ct., 480 U.S. 102, 114 (1987); *see* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 476 (1985).

384. *Asahi*, 480 U.S. at 115 (emphasis omitted).

385. *In re* Platinum and Palladium Antitrust Litigation, 61 F.4th 242 (2d Cir. 2023).

386. *Id.* at 273-74 (citing Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 129-30 (2d Cir. 2002)) (noting the forum state's interest in adjudicating a claim concerning a manipulation of the forum's stock exchange and the plaintiff's interest in litigating in the forum as a U.S. resident).

387. *E.g.*, Contant v. Bank of Am. Corp., 385 F. Supp. 3d 284, 296 (S.D.N.Y. 2019) (explaining that "[t]he Foreign Defendants have not 'present[ed] a compelling case' why interstate comity concerns would render the exercise of jurisdiction unreasonable" (quoting Eades v. Kennedy, PC, 799 F.3d 161, 169 (2d Cir. 2015))); *see also* City of Almaty v. Ablyazov, 278 F. Supp. 3d 776, 810 (S.D.N.Y. 2017) ("New York has a strong interest in

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what international comity means."[388] And even if courts pay heed to the doctrine first elaborated in *Hilton v. Guyot*,[389] the function of conspiracy jurisdiction—namely, to expand jurisdiction over those who commit harms in a forum through a conspiracy rather than directly—will often outweigh comity.[390] Unlike for domestic defendants, a court will not necessarily consider a foreign defendant's interests in adjudicating a conspiracy claim in its home country.[391] A failure to consider comity, therefore, affects the due process rights of defendants in the sense that it undermines fairness and reasonableness.

The second transnational challenge arises from defendants' motions to dismiss or transfer based on *forum non conveniens*.[392] *Forum non conveniens* allows a federal court otherwise empowered to hear a matter to dismiss it despite having both subject matter and personal jurisdiction.[393] That procedural defense does not depend on the pleading elements of conspiracy.[394] However, *forum non conveniens* is particularly effective in cases where the defendant has no contacts with the entire United States aside from its

ensuring that its real estate market is not utilized for the purpose of laundering money or as a safe harbor for stolen funds from foreign authorities.").

388. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2073 (2015). In *In re Platinum*, the Second Circuit rejected the parties' argument that "international rapport" would be as harmed by the exercise of specific personal jurisdiction as by the exercise of general personal jurisdiction. 61 F.4th at 274. The parties cited to *Daimler AG v. Bauman*, 571 U.S. 117, 142 (2014), which, as discussed, had to do with general jurisdiction. *In re Platinum*, 61 F.4th at 274; *see supra* note 36 and accompanying text. However, we disagree with the Second Circuit that international rapport does not "apply equally" in cases involving specific jurisdiction, much less conspiracy jurisdiction. *Id.*

389. 159 U.S. 113, 164, 228 (1895); *see, e.g.*, Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 456 (2d Cir. 1985) (describing *Hilton* as "the leading case on the concept of comity"); Asvesta v. Petroutsas, 580 F.3d 1000, 1011 (9th Cir. 2009) ("*Hilton v. Guyot* provides the guiding principles of comity." (alterations omitted) (quoting Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997)).

390. *Cf.* Jung v. Ass'n of Am. Med. Colls., 300 F. Supp. 2d 119, 155 (D.D.C. 2004) (declining to compel arbitration where countervailing policy interests favored hearing conspiracy claims as a whole).

391. To be clear, because reasonableness is part of the Supreme Court's due process jurisprudence, a refusal to even consider reasonableness—and comity when that principle ought to apply—violates due process.

392. *See* Am. Dredging Co. v. Miller, 510 U.S. 443, 453 (1994).

393. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS L. § 424 cmt. a (AM. L. INST. 2018).

394. A dismissal pursuant to the doctrine of *forum non conveniens* may occur "when an alternative forum has jurisdiction to hear [a] case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'" *Am. Dredging Co.*, 510 U.S. at 447-48 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981)).

relationship with a co-conspirator.[395] Remote defendants argue, of course, that the public and private "*Gilbert* factors" favor transfer or dismissal in particular when not only their contacts, but evidence, are outside the forum state.[396] *Forum non conveniens* is an especially powerful doctrine in transnational cases because, "[a]lthough the Supreme Court has recognized abstention doctrines allowing dismissal in favor of other federal courts or in favor of State courts, *forum non conveniens* is the only doctrine under which the Supreme Court has approved dismissal in favor of foreign courts."[397]

Assuming a court exercises conspiracy jurisdiction over a foreign defendant, the onus is on the defendant to persuade the court that the forum is so inconvenient and unfair that the case should be dismissed.[398] However, the residency of the parties also proves important in the analysis:

> Federal courts apply a presumption in favor of the plaintiff's choice of forum. The presumption is strongest when the real party in interest is a U.S. resident bringing suit in a U.S. court. The choice of a U.S. court by a foreign real party in interest, including a nonresident U.S. citizen, is entitled to less deference.[399]

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395. Alternatively, if a defendant successfully asserts *forum non conveniens*, the doctrine of conspiracy jurisdiction would have done little to help plaintiffs. In that sense, conspiracy jurisdiction is a catch-22. For a discussion involving conspiracy and *forum non conveniens*, see *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 72, 79-83, 90 (D.D.C. 2017). *Forum non conveniens* is incorporated in statutes such as RICO. *See* 18 U.S.C. § 1965; FRANK J. MARINE & PATRICE M. MULKERN, U.S. DEP'T OF JUST., ORGANIZED CRIME & RACKETEERING SECTION, CIVIL RICO: 18 U.S.C. §§ 1961-1968; A MANUAL FOR FEDERAL ATTORNEYS 95 (2007). RICO allows a district court to transfer the case to another district or to a foreign country if the defendant establishes that "the litigation may be conducted elsewhere against all defendants." MARINE & MULKERN, *supra*, at 95 (citing PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998)). Additionally, *forum non conveniens* can pose challenges in conspiracy jurisdiction cases where the essence of the injury does not lie in contract, thus removing the possibility for a forum selection clause to act as a shield against litigating in a particular venue. The doctrine can create an even higher burden when the defendant's only contacts to a state are through the acts of a conspirator. *See* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 21 (2010) (arguing compellingly that the inconvenience of a forum should not form part of the "reasonableness" prong of specific personal jurisdiction because it "muddle[s]" the doctrine and convenience should only be considered "if at all, when it infringes potential constitutional limits on venue").

396. *See* Piper Aircraft, 454 U.S. at 241-42 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947), *superseded by statute*, 28 U.S.C. § 1404(a)).

397. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS L. § 424 cmt. i (AM. L. INST. 2018); *Am. Dredging*, 510 U.S. at 449 n.2 ("[*F*]*orum non conveniens* has continuing application only in cases where the alternative forum is abroad.").

398. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS L.§ 424 cmt. d (AM. L. INST. 2018).

399. *Id.* This presumption may run counter to the very principle of comity. *See also* City of Almaty v. Ablyazov, 278 F. Supp. 3d 776, 792, 810 (S.D.N.Y. 2017) (finding "[i]ndividual [d]efendants' arguments in favor of *forum non conveniens* unpersuasive" and noting that "'unless the balance [of interests] is strongly in favor of the defendant, the plaintiff's

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As a result, conspiracy jurisdiction defendants may need to overcome a significant hurdle to assert *forum non conveniens* as a defense when a court thinks that conspiracy jurisdiction otherwise confers personal jurisdiction. That is especially true if the court perceives this particular attack on the forum as a riposte to conspiracy jurisdiction itself.[400]

The courts' failure to consider comity and the presumption favoring a plaintiff's chosen forum not only goes against the spirit of the Supreme Court's ruling in *Hilton* but also the Court's interpretation of the *WWVW* reasonableness factors, leaving foreign defendants grappling with unpredictable and burdensome fora.[401] Conspiracy jurisdiction complicates these issues further because of the likelihood that defendants subject to it lack direct contact with a forum state.

Conclusion: The Future of Conspiracy Jurisdiction

Although conspiracy jurisdiction has been percolating in the courts for decades, almost no scholarship exists on the topic. As a result, there is little

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choice of forum'—if legitimate—'should rarely be disturbed.'" (quoting *Gilbert*, 330 U.S. at 508)).

400. *Compare* Rudersdal v. Harris, No. 18-cv-11072, 2021 WL 2209042, at *1, *9, *17-18 (S.D.N.Y. Feb. 27, 2021) (refusing to extend conspiracy jurisdiction under Rule 4(k)(2), "which permits jurisdiction only where the defendant 'is not subject to jurisdiction in any state's courts of general jurisdiction,'" but finding *forum non conveniens* to apply to a subset of defendants (quoting FED. R. CIV. P. 4(k)(2)), *with* EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A., 246 F. Supp. 3d 52, 77, 82 n.7, 83, 91 (D.D.C. 2017) (rejecting conspiracy jurisdiction and declining to apply *forum non conveniens* in a case where jurisdiction was governed by a forum selection clause), *aff'd*, 894 F.3d 339 (D.C. Cir. 2018), *and City of Almaty*, 278 F. Supp. 3d at 794 ("Even assuming *arguendo* that the Individual Defendants' offered concessions have rendered Switzerland an adequate alternative forum, the Court also grounded its original decision . . . on a determination that [plaintiffs'] selection of this forum for their claims is entitled to substantial deference and that the balance of the competing interests is not 'strongly in favor of the defendant,' as generally required to disturb a plaintiff's legitimate choice of forum." (quoting *Gilbert*, 330 U.S. at 508)).

For other unsuccessful *forum non conveniens* arguments, see *Allstate Life Insurance Co. v. Linter Group Ltd.*, 782 F. Supp. 215, 221-23, 226 (S.D.N.Y. 1992) (applying conspiracy jurisdiction); *Chase Bank USA N.A. v. Hess Kennedy Chartered LLC*, 589 F. Supp. 2d 490, 500-02 (D. Del. 2008) (applying conspiracy jurisdiction); and *Kyko Global, Inc. v. Prithvi Information Solutions Ltd.*, No. 18-cv-01290, 2020 WL 1159439, at *31-33, *36 (W.D. Pa. Mar. 10, 2020) (applying conspiracy jurisdiction). *But see* LG Display Co. v. Obayashi Seikou Co., 919 F. Supp. 2d 17, 27, 33-34 (D.D.C. 2013) (declining to apply conspiracy jurisdiction).

401. *See supra* note 381. As a foreign entity, Eurobank, *see supra* note 87, could make this fairness argument effectively, particularly if it understood InvestUS's representations as not targeting investors in specific states. In that event, its ability to argue forcefully that it should not be held accountable in, say, New Jersey, if it knew InvestUS was offering securities to investors in New Jersey, would be weakened.

familiarity with its terminology, except perhaps for litigants involved in transnational or antitrust cases where it may be a familiar friend (or foe). Outside the Second Circuit,[402] where it has been widely applied, conspiracy jurisdiction has not seen the same doctrinal development or consistency in application as other glosses on personal specific jurisdiction.[403] Recall the circuit split that creates jarring discrepancies in the application of conspiracy jurisdiction, from the Fifth Circuit which disallows the doctrine entirely, to the D.C. Circuit, where courts have developed an arguably liberal approach to conspiracy jurisdiction, or the Seventh Circuit, which applies the doctrine in Illinois but not in Indiana.[404] Yet, as the doctrine becomes more firmly ensconced in the various federal and state courts that confront jurisdiction over remote defendants involved in a conspiracy, this lack of familiarity is changing. Conspiracy jurisdiction is finding its place in the pantheon of specific jurisdiction glosses—internet contacts, intentional torts, contract situations, stream of commerce, and the like.[405]

When the proper vehicle is presented, the Supreme Court is likely to take up the issue and clarify its contours. When it does, we think *Walden* and *Ford* will be guiding precedents, as they are the most recent statements by the Court on the contours of personal jurisdiction where the defendant lacks an obvious direct contact with the forum state. Those cases suggest that the Supreme Court is likely to uphold conspiracy jurisdiction as long as it comports with due process guardrails.[406] To understand what those guardrails will be, consider again the broadest principles for which the two cases stand.

Walden represents a narrowing walkway to location and injury, confining jurisdiction to where a defendant directs its contacts, not merely where the injury occurs as *Calder* may have suggested.[407] *Ford* represents a widening step towards a holistic view of specific personal jurisdiction, abjuring a formalistic focus on a specific contact-to-injury paradigm—all while taking into

402. Even in the Second Circuit, the key conspiracy jurisdiction test has only arguably been settled in the last few years through *Schwab I* and *Schwab II*. *See Schwab I*, 883 F.3d 68 (2d Cir. 2018); *Schwab II*, 22 F.4th 103 (2d Cir. 2021).

403. Although the term does not yet have popular use, we refer to specific personal jurisdiction situations such as contracts, intentional torts, or conspiracy jurisdiction as "glosses" on more general rules of personal jurisdiction. *See, e.g.*, Walden v. Fiore, 571 U.S. 277, 285 (2014) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479-80 (1985); and Keeton v. Hustler Mag., Inc., 465 U. S. 770, 781 (1984)).

404. *See supra* Part I.B.

405. *See, e.g.*, Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction over Virtually Present Defendants*, 64 U. MIA. L. REV. 133, 141, 166-68 (2009) (noting how the minimum contacts test has been applied in this series of specific contexts—a flexibility that is both a blessing and a curse).

406. *See supra* Part II.A.

407. *See supra* notes 256-57, 297-99 and accompanying text.

consideration reasonableness and fairness to both parties.[408] Evaluated together, these principles confine a legitimate forum state to a location where the conspiracy's effects are directed, not just where the plaintiff resides. Still, the conspirator's acts in furtherance of the conspiracy can subject the remote defendant to jurisdiction even if those acts themselves did not occur in the forum state. This means that as long as the parties' joint conspiracy is knowingly directed at the forum state (satisfying *Walden*), acts taken in furtherance of the conspiracy "relate to" the plaintiff's injury in the forum state by attribution (satisfying *Ford*). A proper but simple conspiracy jurisdiction test, therefore, would require plaintiffs to (1) allege a conspiracy in which the defendants actively participated where defendant knew (2) the object of the conspiracy's effects were directed at and felt in the forum state.[409] In turn, a remote co-conspirator's active participation should require the remote defendant to perform acts contributing to the overall conspiracy, with the knowledge that the effects of such acts which are directed in the forum, together with the in-state co-conspirator's acts, would also be felt there. That kind of test would address what we think is the greatest criticism of the doctrine: that it unfairly attributes the minimum contacts of one defendant to its co-conspirator.

The opportunity to adopt this—or a similar test—will certainly arise in the Supreme Court. As noted above, a recent, meaningful opportunity for the Supreme Court to weigh in on conspiracy jurisdiction arose in the *Schwab v. Lloyd's Banking Group* cases—specifically in *Schwab II*.[410] The petition for writ of certiorari presented the question of "[w]hether a court may exercise personal jurisdiction over a defendant merely because the defendant's alleged co-conspirator took foreseeable actions in the forum in furtherance of an alleged conspiracy, even though the defendant did not direct, control, or supervise the

408. *See supra* note 292 and accompanying text. We acknowledge again the limitations of *Ford*, which arose in the specific context of a massive global company with extensive contacts in the forum state, and how that scenario is unlikely to be repeated in most conspiracy jurisdiction scenarios. But it remains the best and most recent explanation of what matters to the Supreme Court in its personal jurisdiction jurisprudence.

409. We emphasize that while this test is short and designed to be simple, each word is important. "Defendants" (plural) must "actively" (not passively) participate in a conspiracy "the object of which" is "directed at" and "felt in" the forum state.

410. *Schwab II*, 22 F.4th 103, 124 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2852 (2022) (mem.). Prior certiorari petitions related to conspiracy jurisdiction were filed in *MCC (Xiangtan) Heavy Indus. Equip. Co. v. Liebherr Mining & Constr. Equip., Inc.*, No. 171003 (Va. Mar. 22, 2018), https://perma.cc/UP2S-HBTL (an unreported denial of an untimely motion to set aside default), *cert. denied*, 139 S. Ct. 378 (2018) (mem.), and *First Community Bank, N.A. v. First Tennessee Bank, N.A.*, 489 S.W.3d 369 (Tenn. 2015).

alleged co-conspirator."[411] The Supreme Court refused to examine that question, denying certiorari without comment.[412]

The petition likely failed, in part, because it was fact-bound in its question presented. While petitioners may have felt compelled to tailor a narrow approach for tactical reasons, focusing on the alleged mistake by the *Schwab II* court instead of the deep circuit split on the fundamental questions may have hurt their petition.[413] Specifically, the petitioners posited that the *Schwab II* decision wrongly "held that a court can exercise personal jurisdiction over a foreign defendant based merely on an alleged third party co-conspirator's ties to the forum—even if the defendant did not direct, control, or supervise its supposed co-conspirator."[414] However, the petitioners' plea for a requirement that an out-of-state defendant controls, directs, or supervises his co-conspirator does not capture the full breadth of the doctrine.[415] Those requirements are concomitant with agency law, not conspiracy jurisdiction.[416] If required in the conspiracy jurisdiction context, the parameters sought by the defendants in *Schwab II*—control, direction, or supervision—would prevent plaintiffs from adequately pleading a conspiracy when the conspirators are more like peers than agent-principal or parent-subsidiary.[417]

Most recently, petitioners BASF Metals Ltd. and ICBC Standard Bank Plc sought review of a very similar question, presented as "Whether due process permits a court to exercise specific personal jurisdiction over a defendant based on the forum contacts of an alleged co-conspirator, even when the defendant did not direct, control, or supervise the activities of that alleged co-conspirator."[418] The petitioners sought to cure the deficiencies in the *Schwab II* petition by focusing on the breadth and the purported unfairness of the Second Circuit's test and by emphasizing the depth of the circuit split.[419]

As was the case in *Schwab II*, however, the petitioners maintained that agency law is the right venue for attribution and that conspiracy jurisdiction can only be constitutional if cabined by the requirement that a defendant

411. Petition for Writ of Certiorari at i, Lloyds Banking Grp. PLC v. Berkshire Bank, 143 S. Ct. 286 (2022) (No. 21-1503), 2022 WL 1810977.

412. *Lloyds*, 143 S. Ct. at 286 (denying petition for writ of certiorari).

413. *See* Petition for Writ of Certiorari, *supra* note 411, at 1.

414. *Id.*

415. *See supra* notes 139, 168 and accompanying text.

416. *See id.*

417. *See* Dixon v. Mack, 507 F. Supp. 345, 351-52 (S.D.N.Y. 1980).

418. Petition for Writ of Certiorari at i, BASF Metals Ltd. v. KPFF Investments, Inc., No. 23-232 (Sept. 11, 2023), 2023 WL 6012563.

419. *See generally id.*

"direct, control, or supervise" fellow conspirators.[420] We think that is why this petition, too, was denied by the Supreme Court.

The more fundamental question the Supreme Court should eventually answer is not whether the doctrine survives even if there is no evidence of control, supervision, or direction, but rather whether it survives where there is only a joint wrongful venture, as conspiracy is meant to address. Thus, we expect the court to eventually grant certiorari on the question of whether a remote defendant engaged in a conspiracy is subject to personal jurisdiction in a forum state where the aims and effects of the conspiracy are felt and where the defendant took acts in furtherance of that conspiracy—but no more than that.

When the Supreme Court does answer that or a similar question, we advocate for the Court to adopt our test.[421] On one hand, our proposed test preserves the plaintiff's interests in a reasonable forum to secure jurisdiction over remote wrongdoers fundamentally engaged in a wrongful enterprise. On the other hand, our test protects defendants who did not know or act in furtherance of a conspiracy, the effects of which were felt at the forum state, while remaining consistent with the holdings of *Walden* and *Ford*. Clearly articulated and properly restrained, conspiracy jurisdiction can also embrace the reasonableness requirement by relieving plaintiffs from unfair efforts to compel them to litigate in a forum that is not reasonable, accessible, and fair to them, while protecting defendants from unreasonably being haled into court where they did not contribute meaningfully to the conspiracy's wrongful aims.

420. *Id.* at 22, 37. We acknowledge that the *Schwab II* court held that conspiracy jurisdiction did not require that a defendant direct, control, or supervise co-conspirators, and thus that the petitioners felt compelled to appeal the decision on this basis. Nevertheless, we maintain this question does not present the ideal vehicle through which the Court should determine the constitutionality of conspiracy jurisdiction. *See supra* notes 139, 177-78, 280 and accompanying text.

421. *See supra* notes 408-09 and accompanying text. Again, our proposed test would require plaintiffs to (1) allege a conspiracy in which the defendants actively participated where defendant knew (2) the object of the conspiracy's effects were directed at and felt in the forum state.