No.

In the Supreme Court of the United States

JAMES J. MACKEY AND SAMUEL SEVERINO,

Petitioners,

v.

COMPASS MARKETING, INC.,

Respondent.

Petition for a Writ of Certiorari to the Maryland Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the so-called "conspiracy" theory of *in personam* jurisdiction that has been accepted by some courts but rejected as unconstitutional by others, a nonresident defendant who has no contacts with a forum state nonetheless may be subjected to personal jurisdiction if an alleged co-conspirator's acts in furtherance of an alleged conspiracy would permit personal jurisdiction to be asserted over the co-conspirator. The questions presented are:

1. Whether the "conspiracy" theory of *in personam* jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment and with this Court's repeated admonition that in the "minimum contacts" analysis "it is the contacts of the *defendant himself* that are determinative" (*Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980) (emphasis added)).

2. If so, whether the Due Process Clause permits the assertion of "conspiracy" jurisdiction over a nonresident defendant who (a) did not exercise agency-like control (or for that matter, *any* control) over the co-conspirator whose acts are attributed to him; (b) obtained no individual benefit from the alleged conspiracy (so that it cannot fairly be said that the nonresident defendant "purposely availed" himself of the "benefits" of doing business in the forum); and (c) is charged with acts of a co-conspirator that occurred *outside* the forum but allegedly had an "effect" within it.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (App., *infra*, 1a-32a) is reported at 892 A.2d 479. The order of the United States District Court for the District of Maryland certifying two questions of law to the Court of Appeals of Maryland (*id*. at 33a-39a) is unreported. The district court's prior letter orders (*id*. at 40a-43a) are also unreported.

JURISDICTION

The Maryland Court of Appeals' judgment was entered on February 9, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). This Court has jurisdiction even though "there has not yet been a trial on the merits." *Calder* v. *Jones*, 465 U.S. 783, 788 n.8 (1984) (citing *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 485 (1975)). If this Court were to grant review and reverse the judgment, that action "would be preclusive of any further litigation on the relevant cause of action" because the United States District Court for the District of Maryland would lack personal jurisdiction over petitioners. *Cox*, 420 U.S. at 482-83. For that reason, and because "a refusal immediately to review the state court decision might seriously erode federal policy" (*id*. at 483), this Court has repeatedly exercised review in "cases presenting jurisdictional issues in this posture." *Calder*, 465 U.S. at 488 n.8 (citing *Rush* v. *Savchuk*, 444 U.S. 320 (1980), *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), and *Shaffer* v. *Heitner*, 433 U.S. 186, 195-96 n.12 (1977)).

Moreover, the fact that the Maryland Court of Appeals' decision was rendered on certification from the federal district court makes it even clearer here than in cases like *World-Wide Volkswagen* – which involved interlocutory decisions of state appellate courts where further trial and appellate proceedings in state court were possible – that the decision below is "the final

word of a final court" in Maryland. *Market Street R. Co.* v. *Railroad Comm'n of California*, 324 U.S. 548, 551 (1945). In the decision below, Maryland's highest court has authoritatively rejected petitioners' federal due process challenge to the "conspiracy" theory of jurisdiction; that decision is now precedential in Maryland; and there will be no further occasion in this litigation for the Maryland courts to speak. For that reason as well, the decision below is a "final judgment[] * * * rendered by the highest court of a State in which a decision could be had" and thus reviewable by this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides, in pertinent part, that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." Pertinent provisions of the Maryland long-arm statute, MD. CODE, CTS. & JUD. PROC. § 6-103 (2005), are reprinted at App., *infra*, 44a.

STATEMENT

This case raises important and recurring issues of federal constitutional law on which – as the Maryland Court of Appeals expressly acknowledged – the state and federal appellate courts are sharply divided. Those issues include the validity, under the Due Process Clause of the Fourteenth Amendment, of the so-called "conspiracy" theory of *in personam* jurisdiction – as well as the necessary limits imposed by due process on that jurisdictional theory. Under the "conspiracy" theory of jurisdiction, a court may assert jurisdiction over a nonresident defendant who lacks the requisite minimum contacts with the forum state (and indeed may have *no* contacts at all with the forum) based solely on allegations that the nonresident conspired with others who allegedly *do* have minimum contacts with the forum.

Answering two questions certified by the United States District Court for the District of Maryland, the Maryland Court

of Appeals adopted the conspiracy theory and flatly rejected conflicting case law holding that the theory cannot be reconciled with elemental due process. To compound matters, the court below adopted a version of the conspiracy theory that sweeps more broadly than (and thus conflicts with) the formulations embraced even by those courts that accept the conspiracy theory in general. As a consequence of this extraordinary theory of personal jurisdiction, petitioners (two nonresident individual defendants, neither of whom has anything close to minimum contacts in his own right) now face a litigation in a distant forum based on nothing more than an allegation that they conspired with their corporate employers (and each others' employers) to cause an effect in Maryland.

A. Factual Background And Proceedings In The Trial Court

Respondent Compass Marketing, Inc. ("Compass") is a company based in Maryland and engaged in the business of marketing and brokering the sale of consumer health care products.[1] In May 2004, Compass initiated this litigation in the United States District Court for the District of Maryland. In its amended complaint, Compass advanced a variety of federal and state antitrust and other claims arising out of an alleged conspiracy to reduce the brokerage commissions paid to Compass. Specifically, Compass named as defendants Schering-Plough Corp., Schering-Plough Health Care Products, Inc., and Schering-Plough Health Care Products Sales Corp. (hereafter collectively "Schering-Plough"); Wyeth, Inc.; James J. Mackey, who during the relevant time period was (and remains today) the Senior Vice President of Sales at Schering-Plough; and Samuel Severino (who during the relevant time was the Director of Special Markets at Wyeth but who has since left the company). Mackey and Severino are the petitioners in this Court.

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[1] The facts are drawn from the district court's certification order, which in turn relied on the allegations in the unverified amended complaint filed on April 22, 2005. See App., *infra*, 2a-4a, 34a-37a.

In response to Compass's complaint, Schering-Plough and Wyeth filed answers denying liability (but not disputing the district court's personal jurisdiction over them).[2] On July 27, 2004, petitioners Severino and Mackey moved to dismiss, arguing among other things that, because each lacked "minimum contacts" with Maryland, the district court could not exercise *in personam* jurisdiction over them either pursuant to the Maryland long-arm statute or consistent with the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[3] In response, Compass contended that personal jurisdiction could be exercised based on the so-called "conspiracy" theory of *in personam* jurisdiction – under which the forum contacts of co-conspirators may be attributed to other co-conspirators, including those with no contacts at all with the forum.[4]

The district court concluded that, apart from the conspiracy theory, there was no "plausible basis for personal jurisdiction over the individual defendants in this case." App., *infra*, 41a n.*. Because the existence and scope of the conspiracy theory was unsettled in Maryland, the district court on May 9, 2005, certified two questions to the Maryland Court of Appeals:

> (1) Whether Maryland recognizes the conspiracy theory of jurisdiction as a matter of state law?

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[2] "Some but not all of Schering-Plough and Wyeth goods brokered by Compass are delivered by those companies to customers in Maryland." App., *infra*, 3a, 35a.

[3] See Mem. of Law in Support of Def. Samuel Severino's Mot. to Dismiss the Cplt., at 7-18 (July 27, 2004); Def. James J. Mackey's Mem. in Support of His Mot. to Dismiss the Cplt. Against Him for Lack of Personal Jurisdiction, at 4-10 (July 27, 2004).

[4] See Pl. Compass Marketing, Inc.'s Opp. To Def. Severino's Mot. to Dismiss, at 13-18 (Aug. 13, 2004); Pl.'s Opp. To Def. James A. Mackey's Mot. to Dismiss for Lack of Personal Jurisdiction, at 4-13 (Aug. 13, 2004).

> (2) If Maryland recognizes the conspiracy theory of jurisdiction, what elements must a plaintiff allege for a court to have jurisdiction over the out-of-state defendant under that theory?

App., *infra*, 1a, 33a-34a.

In its certification order, the district court summarized the allegations set forth in Compass's amended complaint:

> In January 2001, Severino met with Compass in Maryland to negotiate a cut in the brokerage commission paid by Wyeth to Compass, but upon learning that Schering-Plough was paying Compass an even higher brokerage fee, Severino decided not to cut Compass' brokerage fee at that time. Shortly thereafter, Severino and Mackey communicated concerning cutting Compass' brokerage commissions. Mackey and Severino were long-time friends and/or business colleagues, and just prior to his employment at Schering-Plough, Mackey worked at Wyeth and was Severino's superior. Mackey told Severino to meet with Thomas Moeller, Vice President of Sales at Schering-Plough responsible for the division which included Compass, to discuss jointly cutting the brokerage fees that Wyeth and Schering-Plough were paying to Compass * * * . Sometime prior to March 30, 2001, Severino and Moeller met at a trade event, held at a location other than in Maryland, and reached an agreement for Wyeth and Schering-Plough to jointly cut the brokerage fees that Wyeth and Schering-Plough were paying to Compass.
>
> On March 30, 2001, Compass received a telephone call from Peggy Smith of Schering-Plough, informing Compass that its commissions from Schering-Plough were being cut to four percent for Compass' largest account only. Thereafter, Compass received a letter from Schering-Plough, dated April 5, 2001, confirming that Compass' commissions from Schering-Plough were cut to four percent,

> effective April 2, 2001, not only for Compass' largest account, but for all of Compass' business (excluding new customers for the first 6 months). On or about April 2, 2001, Compass received a letter from Wyeth, signed by Severino and dated March 30, 2001, informing Compass that its commissions from Wyeth were being cut to three percent for its largest account, effective May 1, 2001 (Compass' commissions on other existing Wyeth's [sic] accounts would be five percent).
>
> Compass sought to have Schering-Plough not put the commission cuts into effect, but was unsuccessful. The cuts went into effect in June and July 2001, when Compass received in Maryland the first reduced commission payments from Wyeth and Schering-Plough respectively.

App., *infra*, 3a-4a, 35a-37a.

B. The Decision Of The Maryland Court Of Appeals

The Court of Appeals accepted certification and, on February 9, 2006, issued its opinion answering the questions in respondents' favor. App., *infra*, 1a-32a.[5] The Court explained, at the outset, that the scope of the Maryland long-arm statute is co-extensive with – and therefore must be construed according to – the dictates of federal due process. *Id.* at 11a. Accordingly, the Court stated, the disposition of the certified questions "requires us to first consider whether the conspiracy theory is consistent with the Due Process Clause." *Id.* at 12a; see also *id.* at 24a n.5. Expressly disagreeing with the Texas Supreme Court, the intermediate appellate courts in both California and Washington, and at least five federal district courts (*id.* at 8a-9a n.3), the Court of Appeals held that the "conspiracy theory"

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[5] As in the district court (see note 3, *supra*), in the Maryland Court of Appeals petitioners raised their federal due process arguments concerning the validity and required elements of the conspiracy theory. See, *e.g.*, Joint Op. Br. For Appellants, at 3, 13-33. See S. Ct. Rule 14.1(g)(i).

accords with due process. The conspiracy theory, the Court of Appeals reasoned, is "[a]nalogous to the agency concept of jurisdiction," as well as to other situations where this Court (or the lower courts) have permitted the forum contacts of one party to be attributed to another for purposes of determining *in personam* jurisdiction. App., *infra*, 8a, 12a-15a. In reaching that conclusion, the Court of Appeals did not address petitioners' argument that the conspiracy theory should be rejected because it effectively merges jurisdiction with the merits.

Having embraced the conspiracy theory in general, the Court of Appeals – answering the second certified question – held (App., *infra*, 10a-11a) that it would "recognize" the "version" of the conspiracy theory of jurisdiction that had been adopted in *Cawley* v. *Bloch,* 544 F. Supp. 133 (D. Md. 1982). Under that iteration of the theory, even a co-conspirator with "no direct contacts with the forum" may be subjected to personal jurisdiction where:

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

App., *infra*, 11a (quoting *Cawley*, 544 F. Supp. at 135).

In adopting the *Cawley* formulation, the Court of Appeals declined to impose additional limitations on the conspiracy theory that petitioners contended were required by the Due Process Clause. App., *infra*, 29a-32a. It refused to confine the theory to cases in which "one co-conspirator committed *an act in Maryland* that had an effect on the plaintiff in Maryland, and the defendant co-conspirator had actual prior knowledge that the

co-conspirator would commit this act in Maryland." *Id.* at 29a (emphasis added). The Court of Appeals also declined to limit the theory to instances in which the co-conspirator whose contacts were attributed to the defendant had acted "at the direction of the defendant co-conspirator in the context of a relationship 'tantamount to actual agency.'" *Ibid*. Finally, the Court of Appeals refused to cabin the theory to conspiracies that were "intended at least in part to benefit the defendant co-conspirator individually." *Ibid.*

REASONS FOR GRANTING THE PETITION

In *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny, this Court has made clear that the Due Process Clause imposes significant limits on the adjudicative power of the states to assert *in personam* jurisdiction over nonresident defendants. Before a state may hale such a defendant into court, it must be demonstrated that the defendant has "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id*. at 316 (internal quotations omitted). This case presents the Court with a valuable opportunity to resolve conflicts in the lower courts over the limits imposed by due process on a state's power to exercise personal jurisdiction pursuant to what has become known as the "conspiracy" theory of jurisdiction.

The Maryland Court of Appeals took the view that the attribution of one alleged co-conspirator's forum contacts to another is constitutionally permissible because, under state law, each co-conspirator is deemed for liability purposes to be an "agent" of all the others (even though this relationship does not satisfy the traditional requirements of a true agency). As the court below acknowledged, that decision is in sharp conflict with state and federal decisions elsewhere. The Maryland Court of Appeals' decision is also impossible to square with this Court's consistent refusal – outside of *true* agency relationships – to attribute the contacts of one individual or entity to another for purposes of determining whether the "minimum contacts"

test was satisfied. See *Rush* v. *Savchuk*, 444 U.S. 320, 331-32 (1980) (rejecting as "plainly unconstitutional" the proposed attribution of an insurer's forum contacts to an insured, where the insurer had a contractual duty to defend and indemnify the insured); *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333, 335, 337 (1925) (refusing to attribute the forum contacts of a subsidiary that is "not * * * [the parent company's] agent" to the parent, even though the parent "dominate[d]" the subsidiary, because the separate existence of the two entities was not "pure fiction").

But the conflicts run deeper still: In answering the second question – what are the requirements of the conspiracy theory – the Maryland Court of Appeals again departed sharply from the formulation adopted by those courts that do embrace the conspiracy theory. Indeed, by declining to adopt sensible limiting principles imposed in other jurisdictions, the Maryland Court of Appeals has endorsed the most far-reaching iteration of an already dubious theory (one that effectively merges the threshold jurisdictional issue with the merits). Further review is warranted to bring the lower court's decision into line with this Court's teachings, to resolve the pervasive conflict over the constitutionality (and elements) of the conspiracy theory, and to provide additional guidance on the limits imposed by due process on attribution rules relating to forum contacts.

I. The Court of Appeals' Decision Exacerbates An Acknowledged Conflict In The Lower Courts Over The Validity And Permissible Scope Of The "Conspiracy" Theory Of Jurisdiction Under The Due Process Clause

As the Court of Appeals expressly acknowledged, there is a deep conflict in the state and federal courts over the question whether the "conspiracy" theory of jurisdiction can be reconciled with the Due Process Clause of the Fourteenth Amendment. Relatedly, there is substantial confusion and conflict over the elements that the conspiracy theory must contain in order to pass muster under the federal Constitution. The lower courts' divergent holdings are traceable, at least in part, to disagreement

over the meaning of several of this Court's decisions – a disagreement that only this Court can resolve. This case is an ideal vehicle for resolving these various conflicts and dispelling this widespread confusion relating to the important and recurring issues of federal constitutional law that are presented.

A. *The Conflicts Over Whether The Conspiracy Theory Is Consistent With Due Process.* As the Maryland Court of Appeals correctly acknowledged, the Supreme Court of Texas, state appellate courts in both California and Washington, and numerous federal district courts have all "rejected the conspiracy theory" as "inconsistent with due process." App., *infra*, 9a n.3.

1. In *National Industrial Sand Association* v. *Gibson,* 897 S.W.2d 769 (Tex. 1995), former sandblasters who contracted silicosis brought suit against several manufacturers and sellers of sand as well as against a non-profit lobbying organization for the sandblasting industry that was based in Maryland. In addition to their negligence and product liability claims against the manufacturers and sellers (over which the Texas courts did have personal jurisdiction), the plaintiffs asserted a conspiracy claim and, on that basis, sought to obtain *in personam* jurisdiction over the Maryland-based trade group (whose "only contacts" with Texas were "periodic mailings of its letters, publications, and notices of acceptance of dues" to a member located in Texas). *Id.* at 772. According to the plaintiffs, personal jurisdiction could be asserted because the trade group had conspired with member companies for the purpose of "suppressing information on the dangers of silica" and "defeating" a "public health movement to ban the use of abrasives containing high levels of silica." *Id.* at 771-72. The Texas Supreme Court, however, categorically "decline[d] 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." *Id.* at 773. In so holding, the Texas Supreme Court explained that, in *Rush* v. *Savchuk*, 444 U.S. 320 (1980), this Court has made clear that

under the Due Process Clause "'it is the contacts of the defendant *himself* that are determinative.'" 897 S.W.2d at 773 (emphasis added) (quoting *Siskind* v. *Villa Foundation for Educ., Inc*., 642 S.W.2d 434 (Tex. 1982)).

Appellate courts in both California and Washington have also rejected the conspiracy theory as inconsistent with due process. In *Hewitt* v. *Hewitt*, 896 P.2d 1312 (Wash. Ct. App. 1995), the court refused to impute to alleged conspirators in Hawaii and Oregon the "in-state acts of resident" co-conspirators in Washington undertaken in furtherance of the alleged conspiracy. 896 P.2d at 1316. The Washington Court of Appeals pointed to this Court's decision in *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953), which rejected as "frivolous" the argument "that an in-state actor was an 'agent' of a nonresident co-conspirator for the purpose of providing venue under Section 4 of the Clayton Act, 15 U.S.C. Section 15." *Hewitt*, 896 P.2d at 1316 (quoting *Bankers Life*, 346 U.S. at 384). The Washington Court of Appeals further noted that other courts had "follow[ed] the reasoning" of *Bankers Life* in rejecting the conspiracy theory as inconsistent with due process. *Id.* at 1316. Accord *Mansour* v. *Super. Ct. of Orange County,* 38 Cal. App. 4th 1750, 1760-61, 46 Cal. Rptr. 2d 191 (Cal. Ct. App. 1995) (rejecting argument that "conspiracy" can be "a basis for acquiring personal jurisdiction over a party") (citing additional California cases); see also *Foley* v. *Marquez*, 2004 WL 603566, at *4 (N.D. Cal. Mar. 22, 2004) ("California courts consider the forum-related acts personally committed by the individual rather than the imputed conduct of a co-conspirator."). While not resolving the issue, the Vermont Supreme Court similarly has suggested that this Court's decisions in *Rush* v. *Savchuk* and *Calder* v. *Jones* "strongly suggest" that participation in an alleged conspiracy is "not enough" to attribute the forum contacts to a defendant consistent

with due process. See *Schwartz* v. *Frankenhoff*, 733 A.2d 74, 80 (Vt. 1999).[6]

Many federal district courts have also rejected the conspiracy theory on due process grounds. See, *e.g.*, *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 307 F. Supp. 2d 145, 157-58 (D. Me. 2004); *Hollar* v. *Philip Morris Inc.*, 43 F. Supp. 2d 794, 802 n.7 (N.D. Ohio 1998); *Insolia* v. *Philip Morris Inc.*, 31 F. Supp. 2d 660, 672 (W.D. Wis. 1998) ("it is clear that jurisdiction under this [conspiracy] theory would not comport with due process"); *Gutierrez* v. *Givens*, 1 F. Supp. 2d 1077, 1083 n.1 (S.D. Cal. 1998); *Hawkins* v. *Upjohn Co.,* 890 F. Supp. 601, 608-09 (E.D. Tex. 1994); *Karsten Mfg. Corp.* v. *United States Golf Ass'n,* 728 F. Supp. 1429, 1434 (D. Ariz. 1990); *Kipperman* v. *McCone*, 422 F. Supp. 860, 873 & n.14 (N.D. Cal. 1976); *Cascade Steel Rolling Mills, Inc.* v. *C. Itoh & Co. (American)*, 499 F. Supp. 829, 840-41 (D. Or. 1980); *I.S. Joseph Co.* v. *Mannesmann Pipe & Steel Corp.*, 408 F. Supp. 1023, 1024-25 (D. Minn. 1976). Still others have rejected use of the conspiracy theory of jurisdiction where the plaintiff failed to include sufficient allegations or proof to support the claim of conspiracy, while at the same time suggesting that the validity of the theory is open to doubt. See *In re Lernout & Hauspie Sec. Litig.*, 2004 WL 1490435, at *8 (D. Mass. June 28, 2004) (noting, as well, that conspiracy theory is "highly questionable" in the First Circuit) (citing *Glaros* v. *Perse*, 628 F.2d 679, 682 (1st Cir. 1980)); *Steinke* v. *Safeco Ins. Co. of America*, 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.").

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[6] State trial courts in Missouri and Maine have also rejected the conspiracy theory. See *City of St. Louis* v. *American Tobacco Co.*, 2003 WL 23277277, at *6-7 (Mo. Cir. Ct. Dec. 16, 2003); *Maine* v. *Philip Morris, Inc.*, 1998 Me. Super. LEXIS 250, * 16 (Me. Super. Ct. Oct. 14, 1998).

2. In conflict with these decisions, the Maryland Court of Appeals has now joined "the highest courts of the states of Delaware, Florida, Minnesota, Tennessee and South Carolina" in recognizing the conspiracy theory and rejecting (explicitly or implicitly) challenges to it as inconsistent with due process. App., *infra*, 7a n.3. See *Chenault* v. *Walker*, 36 S.W.3d 45, 53-54 (Tenn. 2001); *Execu-Tech Bus. Sys., Inc.* v. *New Oji Paper Co. Ltd.,* 752 So.2d 582, 583-84, 586 (Fla.), cert. denied, 531 U.S. 818 (2000); *Hammond* v. *Butler, Means, Evins & Brown,* 388 S.E.2d 796, 798-99 (S.C.), cert. denied, 498 U.S. 952 (1990); *Istituto Bancario Italiano SpA* v. *Hunter Eng'g Co.,* 449 A.2d 210, 225 (Del. 1982); *Hunt* v. *Nevada State Bank,* 172 N.W.2d 292, 311 (Minn. 1969), cert. denied, 397 U.S. 1010 (1970). Intermediate appellate courts in Illinois, New Mexico, Georgia, and New York have reached the same conclusion. See *Santa Fe Technologies*, *Inc.* v. *Argus Networks, Inc.*, 42 P.3d 1221, 1233-34 (N.M. Ct. App. 2002); *Cameron* v. *Owens-Corning Fiberglas Corp.,* 695 N.E.2d 572, 577-78 (Ill. App. Ct.), appeal denied, 705 N.E.2d 434 (Ill. 1998), cert. denied, 525 U.S. 1105 (1999); *Rudo* v. *Stubbs,* 472 S.E.2d 515, 517 (Ga. Ct. App. 1996); *Reeves* v. *Phillips,* 54 A.D.2d 854, 85, 388 N.Y.S.2d 294 (1976). Although the reasoning in many of these cases is cursory, the results are clear in endorsing the conspiracy theory as a constitutionally valid basis for the exercise of personal jurisdiction.

Some federal courts have reached the same conclusion. See, *e.g.*, *Textor* v. *Board of Regents*, 711 F.2d 1387, 1392-93 (7th Cir. 1983); *Remmes* v. *Int'l Flavors & Fragrances, Inc.,* 389 F. Supp. 2d 1080, 1093-95 (N.D. Iowa 2005); *In re Vitamins Antitrust Litig.,* 270 F. Supp. 2d 15, 27-29 (D.D.C. 2003); *Gen. Motors Corp.* v. *Ignacio Lopez de Arriortua,* 948 F. Supp. 656, 665 (E.D. Mich. 1996); *Cawley* v. *Bloch,* 544 F. Supp. 133, 135 (D. Md. 1982); *Vermont Castings, Inc.* v. *Evans Products Co.,* 510 F. Supp. 940, 944 (D. Vt. 1981); *Gemini Enterprises, Inc.* v. *WFMY Television Corp.,* 470 F. Supp. 559, 564-65 (M.D. N.C. 1979); *McLaughlin* v. *Copeland,* 435 F. Supp. 513, 529-33 (D. Md. 1977).

Finally, the Maryland Court of Appeals is not the first to acknowledge the serious divisions in the lower courts over the constitutional validity of the conspiracy theory. See, *e.g.*, *Chenault*, 36 S.W.3d at 54; *Istituto Bancario Italiano SpA,* 449 A.2d at 223-24; *Santa Fe Technologies*, *Inc.*, 42 P.3d at 1233-34; *Remmes,* 389 F. Supp. 2d at 1093-94. "The issue of whether conspiracy provides an adequate constitutional foundation for personal jurisdiction has challenged courts throughout the country, with differing results." *Santa Fe Technologies*, *Inc.*, 42 P.3d at 1233; see also *Edmond* v. *United States Postal Service General Counsel*, 949 F.2d 415, 428 n.2 (D.C. Cir. 1991) (Silberman, J., concurring in part and dissenting in part) (noting the "increasing concern by judges and commentators about [the conspiracy theory's] constitutionality"), reh'g denied, 953 F.2d 1358 (1992); *Stetser* v. *TAP Pharmaceutical Prods. Inc.*, 591 S.E.2d 572, 575 (N.C. App. 2004) (noting "a division among our federal courts and perhaps some reticence in implementing the theory"); *Chirila* v. *Conforte,* 2002 WL 31105149, at *3 (9th Cir. Mar. 11, 2002) (unpublished) ("There is a great deal of doubt surrounding the legitimacy of this conspiracy theory of personal jurisdiction."). Commentators have also recognized these conflicts and suggested the need for this Court's intervention. See, *e.g.*, Donovan, *Conspiracy Jurisdiction Issue May Go To High Court*, NAT'L L.J., Nov. 9, 1998, at B8 ("[C]onspiracy jurisdiction theory raises due process issues that seem destined for Supreme Court review.").

B. *The Conflicts Over The Minimum Elements Of The Conspiracy Theory Required By Due Process.* In addressing the second certified question, petitioners asked the Maryland Court of Appeals to adopt three limitations on the conspiracy theory, assuming (for argument's sake) that the theory could pass constitutional muster in any form. First, petitioners contended that the theory should be confined to cases in which at least one co-conspirator actually committed an act in Maryland, with an effect on a Maryland plaintiff, and with the prior knowledge of the nonresident co-conspirator. Second, petitioners contended that the conspiracy theory should be available only where the

co-conspirator committed the in-state act at the direction of the nonresident co-conspirator, pursuant to a relationship that was "tantamount to actual agency." Finally, petitioners asked the court below to confine the conspiracy theory to instances in which the conspiracy was intended at least in part to benefit the nonresident co-conspirator individually.

The Court of Appeals rejected each of these limiting principles (App., *infra*, 29a). But here as well, the Court's decision deepens an existing conflict, this time among courts that have accepted the conspiracy theory in one form or another. For example, many lower courts have held, in contrast to the Court of Appeals' decision, that the conspiracy theory is valid only if based on an act committed by a co-conspirator *within* the forum state. See, *e.g.*, *Textor* v. *Board of Regents of Northern Illinois Univ.*, 711 F.2d 1387, 1393 (7th Cir. 1983) (to successfully plead conspiracy theory of jurisdiction a plaintiff must allege "a substantial act in furtherance of the conspiracy performed *in the forum state*") (emphasis added); *Glaros* v. *Perse*, 628 F.2d 679, 682 (1st Cir. 1980); see generally Riback, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506, 526 (1984) ("Most of the courts applying the theory do so only if an act in furtherance of the conspiracy was performed in the forum state.").[7] The Maryland Court of Appeals concluded that

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[7] See also *Gemini Enterprises* v. *WFMY Television Corp.*, 470 F. Supp. 559, 564 (M.D.N.C. 1979); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25073, at *49 (D.D.C. Oct. 30, 2001) ("in Minnesota, jurisdiction over a nonresident defendant is appropriate under the conspiracy theory if: * * * (3) an overt act in furtherance of the conspiracy took place within the state") (citing *Clim-A-Tech Indus, Inc.* v. *Quadna, Inc.*, Civ. No. 99-523, slip op. at 14 (D. Minn. May 18, 2000)); *Massachusetts School of Law at Andover, Inc.*, v. *American Bar Ass'n,* 846 F. Supp. 374, 379 (E.D. Pa. 1994) ("the co-conspirator jurisdictional theory is not applicable in this case because plaintiff has not alleged substantial acts * * * in Pennsylvania in furtherance of the conspiracy."); *Cameron* v. *Owens-Corning*

these decisions are refuted by *Calder* v. *Jones*, 465 U.S. 783 (1984), where this Court recognized an "effects test" under which an intentional tortfeasor, under certain circumstances, may be subjected to personal jurisdiction in a forum based on the effects there of conduct he undertakes outside the forum. App., *infra*, 29a. But *Calder* did not involve any allegation of conspiracy jurisdiction; it involved a nonresident defendant's *own conduct*. And other courts have disagreed with the Maryland Court of Appeals' suggestion that the sweeping conspiracy theory of jurisdiction can be readily combined with the broad "effects" test in a way that satisfies the Due Process Clause. See, *e.g.*, *City of St. Louis* v. *American Tobacco Co.*, 2003 WL 23277277, at *6-7 (Mo. Cir. Ct. Dec. 16, 2003).

The Court of Appeals' rejection of the additional two elements proposed by petitioners was equally mistaken – as well as in tension with the decisions of other courts. Other courts have allowed the conspiracy jurisdiction to be asserted only after determining that a true agency relationship existed between co-conspirators, or have rejected conspiracy jurisdiction where the conduct sought to be attributed was not intended to benefit the defendant co-conspirator individually. See, *e.g.*, *Istituto Bancario Italiano SpA* v. *Hunter Eng'g Co.,* 449 A.2d 210, 224 (Del. 1982) (citing *Leasco Data Processing Equipment Corp*. v. *Maxwell*, 468 F.2d 1326, 1343 (2d Cir. 1972) (Friendly, J.)); *Green* v. *McCall,* 710 F.2d 29, 33 (2d Cir. 1983) (noting that, under New York law, agents must act for the benefit of the principal); *Grove Press, Inc.* v. *Angleton,* 649 F.2d 121, 122-23 (2d Cir. 1981) (same).[8] Moreover, in *Burger*

Fiberglas Corp., 695 N.E.2d 572, 577 (Ill. App.), appeal denied, 705 N.E.2d 434 (Ill. 1998), cert. denied, 525 U.S. 1105 (1999).

[8] The Court of Appeals brushed aside *Grove Press* on the ground that it turned on the insufficiency of evidence concerning the existence of a conspiracy rather than the absence of any showing that New York-based CIA officials were acting to benefit the defendants, their supposed principals and co-conspirators. App., *infra*, 31a-32a. But

King v. *Rudzewicz*, 471 U.S. 462 (1985), this Court observed that "when commercial activities are carried on *in behalf of* an out-of-state party those activities may sometimes be ascribed to the party [for personal jurisdiction purposes], at least where he is a *primary* participan[t] in the enterprise and has acted *purposefully in directing* those activities." *Id.* at 480 n.22 (internal quotations omitted; emphasis added). The Court of Appeals' rejection of the "actual agency" requirement makes clear its conclusion that the "conspiracy theory" allows attribution even in the absence of the "single or multi-directional control" that principals have over their agents. App., *infra*, 30a.

C. *The Confusion Over The Meaning Of This Court's Decisions in* Bankers Life *and* Rush. As the foregoing discussion suggests, much of the conflict in the lower court decisions relating to the constitutionality of the "conspiracy" theory is traceable to disagreements about the proper interpretation of this Court's decisions. First, many of the lower courts that have rejected the conspiracy theory have relied on this Court's observation that a similar argument relating to venue under the Clayton Act was "frivolous." *Bankers Life*, 346 U.S. at 384. See, *e.g.*, *Hewitt*, 896 P.2d at 1316; *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 307 F. Supp. 2d 145, 158 (D. Me. 2004); *Karsten Mfg. Corp.*, 728 F. Supp. at 1434; *Kipperman*, 422 F. Supp. at 873 & n.14 (compared to the "theory of vicarious venue" rejected in *Bankers Life*, "the contention that personal jurisdiction, the exercise of which is

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the Second Circuit itself read the *Grove Press* decision differently. See *Green*, 710 F.2d at 33 (stating that, in *Grove Press*, "[w]e reversed *because* the district court had found nothing to suggest that these appellants *expected to benefit as individuals* from the wrongdoing alleged in the complaint") (internal quotations omitted; emphasis added). While it is true that neither Second Circuit case holds that "due process invariably requires a showing of intended 'individual benefit'" (App., *infra*, 32a), both cases suggest that the New York courts will not permit jurisdiction based on the conspiracy theory in the absence of such a showing.

governed by strict constitutional standards, may depend upon the imputed conduct of a co-conspirator" is "[t]hat much more frivolous"); *Mansour,* 38 Cal. App. 4th at 1761.

In sharp contrast, in the decision below the Maryland Court of Appeals concluded that any reliance on *Bankers Life* in this setting was "misplaced" because that case hinged "not * * * on the Due Process Clause, but rather on" statutory construction, and because the critical language in *Bankers Life* was "dicta." App., *infra*, 21a n.4. Other courts have read *Bankers Life* the same way, rejecting arguments that it undercuts the validity of the conspiracy theory of personal jurisdiction. See, *e.g.*, *Istituto Bancario Italiano SpA,* 449 A.2d at 225.

In addition to this pervasive disagreement over the meaning of *Bankers Life*, the lower courts have divided over the import of this Court's decisions in *Rush* v. *Savchuk* and other cases that have emphasized the need for courts to "assess[] individually" the forum contacts of "[e]ach defendant." *Calder* v. *Jones*, 465 U.S. 783, 790 (1984). Some courts have concluded that the conspiracy theory is inconsistent with these teachings. See, *e.g.*, *National Indus. Sand Ass'n* v. *Gibson,* 897 S.W.2d 769, 773 (Tex. 1995); *Siskind*, 642 S.W.2d at 437-38; *Mansour*, 38 Cal. App. 4th at 1761; *Allen* v. *Columbia Fin. Mgmt., Ltd.*, 377 S.E.2d 352, 357 (S.C. App. 1988); *Gutierrez*, 1 F. Supp. 2d at 1083 n.1; *Karsten Mfg. Corp.*, 728 F. Supp. at 1434. See also *Schwartz* v. *Frankenhoff*, 733 A.2d 74, 80 (Vt. 1999) (suggesting same without resolving issue). The Maryland Court of Appeals, in contrast, has flatly rejected this view. See App., *infra*, 21a-22a n.4. In the lower court's view, these decisions "rest[] on a misreading of *Rush.*" *Ibid*. Only this Court can resolve these disagreements over the meaning of its decisions.

II. The Issues Presented Are Recurring and Important

As the large number of cases cited above suggests, questions concerning the constitutional validity and limits on the conspiracy theory of jurisdiction arise with great regularity in

the state and federal courts.[9] There are a number of reasons why this is so. First, the theory is exceedingly easy to raise: a plaintiff need only include a claim of civil conspiracy in his complaint and then assert (or argue, when the defendant moves to dismiss) that personal jurisdiction can be exercised on this basis. Since making such a claim is completely within the plaintiff's control, it is no wonder that conspiracy jurisdiction is invoked in a wide array of cases (including in many state and federal antitrust actions). This case illustrates the problem. On the basis of mere "information and belief" allegations, two nonresident defendants with no sufficient contacts of their own have been haled into Maryland because of the contacts of two other defendants (their corporate employers) with whom they allegedly "conspired."

Second, and more generally, the issue of personal jurisdiction, which arises (and must be challenged or else forfeited) at the threshold of civil litigation, has "become one of the most litigated issues in state and federal courts." Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 & n.5 (1995) (taking note of more than 2300 cases involving "minimum contacts" test in 1990-95 alone). It is not surprising that claims based on the conspiracy jurisdiction would proliferate given the large number of cases in which

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[9] In addition to the cases cited above, there are a number where the courts avoided a decision on the validity of the conspiracy theory because of deficiencies of pleading. See, *e.g.*, *Chirila* v. *Conforte*, 2002 WL 31105149 (9th Cir. Mar. 11, 2002) (unpublished) (no need to pass on validity of conspiracy theory because theory was wholly unsupported by factual allegations); *Stauffacher* v. *Bennett*, 969 F.2d 455, 460 (7th Cir.) (same), cert. denied, 506 U.S. 1034 (1992); *Underwager* v. *Channel 9 Australia*, 69 F.3d 361, 364 (9th Cir. 1995) (same); *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1237 (6th Cir.) (no need to adopt or reject conspiracy theory "as a general principle of law" because in that case it was deficient because based on "totally unsupported allegations of conspiracy"), cert. denied, 454 U.S. 893 (1981). Unfortunately, these pleading deficiencies are often relatively easy to remedy.

personal jurisdiction is litigated, the ease with which plaintiffs may invoke the conspiracy theory, and the expansive jurisdictional reach of the theory.

Third, "the globalization of the U.S. economy has led to more suits against foreign corporations in jurisdictions in which they do not do business directly." Donovan, *Conspiracy Jurisdiction Issue May Go To High Court*, NAT'L L.J., Nov. 9, 1998, at B8. Foreign companies thus are often the target of "conspiracy" jurisdiction, which allows the states to reach even companies with no contacts whatsoever (except, of course, for the conspiracy alleged by the plaintiff).

Fourth, the specific issue of the conspiracy jurisdiction's constitutional validity and limits arises with regularity because fully thirty-two out of fifty states authorize the assertion of personal jurisdiction to the maximum extent permitted by due process. See McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended The Limits Of Due Process*, 84 B.U. L. REV. 491, 525-30 (2004). In those jurisdictions, the questions of what limits are imposed by the U.S. Constitution and by the terms of the applicable state long-arm statute collapse into a single question. Of course, even in the minority of states that have not expressly extended their long-arms to the fullest extent permitted by the Due Process Clause, the constitutional issue can arise after a determination that the conspiracy theory comes within the state long-arm statute. Thus, the due process issues relating to the conspiracy theory arise with regularity not only in the state courts but also in the federal courts that sit in those states (in diversity as well as federal-question cases). See *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 104-05 (1987).

The sheer number of personal jurisdiction cases that raise issues of contact attribution also shows why the Court's resolution of the issues raised herein could have a substantial positive impact in reducing the confusion in the lower courts. Knowledgeable commentators have remarked on the need for greater guidance from this Court concerning how attribution

issues should be resolved more generally in the personal jurisdiction setting. See Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1, 1-8 (1986). As explained above, the lower courts have reached conflicting decisions on that subject in cases involving the conspiracy theory and its constitutional limits. A grant of review in this case will permit the Court to bring greater clarity to multiple fronts.

Finally, the national significance of the issues presented in this petition cannot seriously be disputed. This case concerns the fundamental limits placed on state authority to hale nonresident defendants into court and force them to defend lawsuits. The questions raised are of surpassing importance to many defendants across the country (and throughout the world) that would not be subject to *in personam* jurisdiction but for the availability of the conspiracy theory.

III. The Decision Below Is Mistaken

Review is also warranted because the Court of Appeals' decision is wrong and, if left uncorrected, will encourage the Maryland courts to assert personal jurisdiction beyond the limits allowed by the Due Process Clause.

A. The conspiracy theory simply cannot be reconciled with fundamental due process principles recognized by this Court. This Court has repeatedly said that the forum contacts of each defendant must be assessed *individually*. See *Rush*, 444 U.S. at 332 (requirement of minimum contacts "must be met as to *each defendant* over whom a state court exercises jurisdiction") (emphasis added); *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) (same); *Calder* v. *Jones*, 465 U.S. 783, 790 (1984) ("Each defendant's contacts with the forum State must be assessed individually."). Yet the conspiracy theory assesses one defendant's contacts by reference to another's. This Court has also repeatedly held that personal jurisdiction may be exercised only over a defendant who has "purposefully

avail[ed himself] of the privilege of conducting activities within the forum." *World-Wide Volkswagen*, 444 U.S. at 297 (internal quotations omitted). The conspiracy theory, however, bases jurisdiction over one defendant on whether *another* defendant has "purposefully availed" himself of some state benefit.

The conspiracy theory is also sharply at odds with the independent "reasonableness" requirement imposed by due process. See *Burger King*, 471 U.S. at 477-78. There are good reasons for holding that, as a categorical matter (or at least in the vast majority of cases), the conspiracy theory of jurisdiction flunks the reasonableness test. Conspiracies, by their nature, are far-flung, circumstantially proved, and often alleged on the thinnest of evidence. The decision below is also wrong because it gives insufficient weight to this Court's teaching in *Bankers Life* that the closely analogous conspiracy theory of venue is "frivolous."

B. The Maryland Court of Appeals mistakenly believed that the conspiracy theory is supported by this Court's prior decisions and by "analogous" situations in which attribution has been accepted in the lower courts. App., *infra*, 13a-15a. Contrary to the lower court's suggestion, however, this Court has never endorsed the attribution to an individual defendant of the forum contacts of another individual in the absence of a true agency relationship. Certainly *International Shoe* – on which the Court of Appeals relied (App., *infra*, 13a) – provides no support at all. There, this Court held that a corporation (a juridical entity that is capable of acting *only* through its agents) may be the subject of attributed contacts based on the activities of its agents in the forum. But it hardly follows that attribution is permissible in the opposite direction – the company's forum contacts (as principal) generally are *not* attributable to its employees (agents) individually, or else every employee of a large national corporation such as Wal-Mart would be subject to *in personam* jurisdiction in every state. See *Keeton*, 465 U.S. at 781 n.13 (explaining that jurisdiction over a corporate employee "does not automatically follow from jurisdiction over

the corporation which employs him"); *Stuart* v. *Spademan*, 772 F.2d 1185, 1197 (5th Cir. 1985) (recognizing "general rule" that "jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation" unless one is merely the alter ego of the other). Still less does *International Shoe* support the attribution of one individual's forum contacts to another individual in the absence of an actual agency relationship (and in situations where the co-conspirator whose forum contacts are sought to be attributed is not acting for the benefit of the defendant resisting jurisdiction). See also Riback, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506, 524 (1984) ("[T]he focus should be not on labels such as 'agency,' but on actual authorization or control").[10]

Nor does it matter that Maryland law treats co-conspirators as "agents" of one another for purposes of determining *liability*. "Agency" in the liability setting

> is more fictional than real. Since agreement to only a general plan is sufficient for [conspiracy] liability, and since a defendant may be liable without knowing all the details of or all the participants in the scheme, the agency created by conspiracy cannot be thought of in the same way as ordinary agency. In conventional agency, the focus is on

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[10] Respondent's theory of liability (and jurisdiction) in this case is that Schering-Plough and its employee (petitioner Mackey) conspired with Wyeth and its employee (petitioner Severino) to harm respondent by reducing brokerage commissions. Respondent's efforts at attribution, however, go beyond charging the individual respondents with the contacts *of their respective employers*. Thus, respondent contends that *Wyeth*'s contacts with Maryland are attributable to *Mackey* (Schering-Plough's employee) and that *Schering-Plough*'s contacts are attributable to *Severino* (Wyeth's employee). Respondent's expansive use of conspiracy jurisdiction in this case not only illustrates its potentially boundless reach but also makes the far-reaching and absurd Wal-Mart example given in text seem relatively tame by comparison.

> the principal's control or authorization. In conspiracy, however, "authorization" is attenuated at best; indeed, a conspirator can be held to have "authorized" acts he did not know about by persons he did not know about.

Riback, *supra*, 84 COLUM. L. REV. at 524. By contrast, an *actual* agency relationship requires that the principal exercise control over the agent. See RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) ("Agency is the fiduciary relation 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.").

More generally, the Court of Appeals erred in overlooking the "diametrically opposed purposes of the law of civil conspiracy and the law of *in personam* jurisdiction." Riback, *supra*, 84 COLUM. L. REV. at 530. The purpose of the former – as well as of other forms of joint liability for torts – is to "broaden[] the pool of resources to which an injured plaintiff may look for recovery." *Ibid*. Thus, it is a "mechanism to aid the plaintiff," whereas constitutional "restrictions on *in personam* power" are aimed at "protecting the *defendant*'s liberty interest." *Ibid*. (emphasis added). Given that "the focus of jurisdiction law is the opposite of conspiracy law," it seems questionable at best to import concepts from the former for use in the latter setting. *Ibid*. See also Thomson, *Tennessee Perspective: Civil Procedure – The Conspiracy Theory of Personal Jurisdiction – Imputation of Jurisdictional Contacts to Co-Conspirators*, 69 TENN. L. REV. 221, 239 (2001) (arguing that the "analogy of liability to jurisdictional contacts is dubious" because "[d]ue process does not limit liability in the same manner that it limits personal jurisdiction"); accord *Leasco Data Processing Equipment Corp*. v. *Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972) (Friendly, J.) ("attaining the rather low floor of foreseeability necessary to support a finding of tort liability is not enough to support *in personam* jurisdiction").

C. Nor does the conspiracy theory of jurisdiction find any support in "traditional practice," which is "a touchstone for

constitutional analysis" under the Due Process Clause. *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415, 430 (1994). On the contrary, the conspiracy theory evidently is an invention of the Ninth Circuit, which adopted it without analysis in almost the same breath that it adopted the later-discredited conspiracy theory of venue. See *Giusti* v. *Pyrotechnic Industries*, 156 F.2d 351, 354-55 (9th Cir.), cert. denied, 329 U.S. 787 (1946); see also *Piedmont Label Co.* v. *Sun Garden Packing Co.*, 598 F.2d 491, 494-95 (9th Cir. 1979) (overruling *Giusti* after observing that "[e]lsewhere, rejection of *Giusti* and the co-conspirator theory of venue has been nearly universal"). See generally Riback, *supra*, 84 COLUM. L. REV. at 531-35 (describing the "illegitimate genesis" of the conspiracy theory of jurisdiction and arguing that its continuing use is "anomalous" in light of the rejection of the conspiracy theory of venue).

Moreover, the theory largely lay fallow for the next twenty-five years, until Judge Friendly's opinion in *Leasco Data Processing Equipment Corp*. v. *Maxwell*, 468 F.2d 1326, 1343 (2d Cir. 1972), which restated the general rule "that the mere presence of one conspirator" in the jurisdiction "does not confer personal jurisdiction over another alleged conspirator" but also observed that "the matter could be viewed differently when the relationship was the closer one between a senior partner * * * and a junior partner to whom he has delegated the duty of carrying out an assignment over which the senior retains general supervision." Unfortunately, Judge Friendly's careful identification of the possibility that "the earmarks of an ordinary agency relationship" might exist (and be a proper basis for the exercise of conspiracy jurisdiction) was lost on many later courts, which "viewed *Leasco* as opening the door to a conspiracy theory of jurisdiction quite distinct from conventional agency." Althouse, *The Use of Conspiracy Theory To Establish In Personam Jurisdiction: A Due Process Analysis*, 52 FORD. L. REV. 234, 238 (1983). The Maryland Court of Appeals was wrong to reject the careful limitations endorsed by Judge Friendly's opinion.

D. Finally, the conspiracy theory of jurisdiction should be rejected because of the serious practical problems it creates. As Judge Posner has observed, a serious "problem" with the theory "is that it merges the jurisdictional issue with the merits." *Stauffacher* v. *Bennett*, 969 F.2d 455, 459 (7th Cir.), cert. denied, 506 U.S. 1034 (1992). See also Donovan, *Conspiracy Jurisdiction Issue May Go To High Court*, NAT'L L.J., Nov. 9, 1998, at B8 (describing this as a "significant concern"). As Judge Posner explains:

> It would be more than awkward to postpone the jurisdictional issue to the merits; it would dissolve the issue. If the plaintiff won on the merits, the jurisdictional issue would be automatically resolved in his favor, while if he lost the defendant would waive the defense of personal jurisdiction and take the judgment for its preclusive value in subsequent suits. But to resolve the jurisdictional issue in advance would require the district court to conduct an evidentiary hearing as extensive as, and in fact duplicative of, the trial on the merits – either that or permit a nonresident to be dragged into court on mere allegations.

969 F.2d at 459.

Beyond that, the conspiracy theory can be raised by any plaintiff through the simple expedient of including conspiracy allegations in the complaint. For that reason, the theory is uniquely susceptible to abuse. This case provides a telling illustration of the expansive and troubling reach of the conspiracy theory of jurisdiction. Petitioners Mackey and Severino do not live in Maryland; they have clearly insufficient contacts with the state (as the district court expressly concluded, see App., *infra*, 41a n.*); they are not alleged to have profited in their individual capacities from the conduct alleged. And yet they have been labeled "co-conspirators" – and summoned into Maryland – on the strength of little more than "information and belief" allegations of conspiracy. These are precisely the types of burdens on individuals that the Due Process Clause – as interpreted by this Court – was intended to foreclose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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