

No. 15-1151

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IN THE  
**Supreme Court of the United States**

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

*Petitioner,*

v.

FIRST COMMUNITY BANK, N.A., *ET AL.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF TENNESSEE,  
EASTERN DIVISION

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**BRIEF OF AMICUS CURIAE  
NEW ENGLAND LEGAL FOUNDATION IN  
SUPPORT OF PETITIONER**

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*Counsel for Amicus Curiae*

Benjamin G. Robbins

*Counsel of Record*

Martin J. Newhouse, President

New England Legal Foundation

150 Lincoln Street

Boston, Massachusetts 02111-2504

(617) 695-3660

benrobbins@nelonline.org

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## INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (“NELF”) seeks to present its views, and the views of its supporters, on whether certiorari should be granted in this case to decide whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution permits a court to exercise personal jurisdiction over a nonresident defendant with insufficient contacts of its own in the forum state, merely because the plaintiff alleges a civil conspiracy between the defendant and another party who engaged in conduct in the forum state in furtherance of the conspiracy.<sup>1</sup>

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF’s mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF’s members and supporters include both large and small businesses located primarily in the New England region.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), amicus states that it provided timely written notice of its intent to file this brief to counsel of record for all parties to this case, and that amicus has obtained written consent from all parties to this case, copies of which are filed herewith.

NELF is committed to preserving the due process protections afforded businesses when they are sued in remote and unanticipated forum states. In this case, NELF opposes an insupportably expansive interpretation of the Due Process Clause that would subject a nonresident defendant to personal jurisdiction in a state with which the defendant has insufficient contacts of its own, merely because the plaintiff alleges that the defendant engaged in a civil conspiracy with another party who committed acts in furtherance of the conspiracy in the forum state.

In this connection, NELF filed an amicus brief in both *Walden v. Fiore*, 134 S. Ct. 1115 (2014), and *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), arguing for reasonable due process limits on a court's exercise of specific and general jurisdiction over a nonresident defendant with insufficient purposeful contacts of its own with the forum state.

For these and other reasons discussed below, NELF believes that its brief will assist this Court in deciding whether to grant certiorari in this case.

### **SUMMARY OF ARGUMENT**

This Court should grant certiorari and decide that Tennessee's test for "civil conspiracy jurisdiction" violates due process. The test subjects a nonresident defendant to personal jurisdiction based on *someone else's* jurisdictional conduct, and it does so without even requiring the plaintiff to show that the defendant purposefully availed itself of the forum state through that third party, such as by directing and controlling the third party's in-state conduct.

Indeed, the very notion of personal jurisdiction by mere association is constitutionally suspect under any circumstances. The relationship between the nonresident defendant and the forum state must arise out of contacts that the defendant itself created with the forum state. A court should generally refuse to ascribe the jurisdictional conduct of a third party to the nonresident defendant because the defendant did not commit the conduct itself and, therefore, should not be held “jurisdictionally responsible” for someone else’s forum contacts. After all, due process protects the defendant’s personal liberty interest in not having to defend in a remote and unanticipated forum with which the defendant has no purposeful contacts of its own. For this reason alone, the constitutionality of the Tennessee test is suspect.

On the other hand, this Court has indicated, in dicta, that due process might occasionally permit a court to impute the forum contacts of a third party to the nonresident defendant, but only when the defendant has purposefully availed itself of the forum state through its direction of the third party’s forum conduct. But the Tennessee test requires no such purposeful availment by the nonresident defendant in Tennessee.

The real problem with the Tennessee test is that it impermissibly conflates the common law requirements for the imposition of vicarious *liability* under civil conspiracy law--a broad device to assist the plaintiff’s recovery--with the strict constitutional requirements for the exercise of so-called “vicarious” *personal jurisdiction* over a nonresident defendant

under the Due Process Clause. Under the common law, each coconspirator is an “agent” of the other coconspirators, but for liability purposes only, to allow the plaintiff to recover jointly and severally from each coconspirator. This “agency” designation does *not* mean, however, that a nonresident defendant has purposefully directed and controlled the forum conduct of an alleged coconspirator. A defendant may be liable in damages for a coconspirator’s forum conduct without being subject to the forum’s jurisdiction based on that same conduct.

Finally, even if the Tennessee test did include a purposeful availment requirement, it would not warrant recognition as a separate “civil conspiracy” test for personal jurisdiction. Such a test would be nothing more than a particular application of the standard *International Shoe* minimum contacts/purposeful availment test to a case of alleged civil conspiracy. The unitary *International Shoe* test should suffice to determine, in each case, whether or not personal jurisdiction can lie against a nonresident defendant based on a third party’s forum contacts, regardless of the nature of the parties’ relationship--conspiratorial or otherwise.

## ARGUMENT

### I. THIS COURT SHOULD GRANT CERTIORARI AND DECIDE THAT TENNESSEE'S TEST FOR SO-CALLED "CIVIL CONSPIRACY JURISDICTION" VIOLATES THE DUE PROCESS CLAUSE.

At issue is whether this Court should grant certiorari and decide whether the Due Process Clause of the Fourteenth Amendment permits a court to exercise specific personal jurisdiction over a nonresident defendant with insufficient contacts of its own in the forum state, merely because the plaintiff alleges that the defendant took part in a civil conspiracy with a third party or parties who engaged in conduct in the forum state in furtherance of the conspiracy.<sup>2</sup>

The nonresident defendant here is Fitch Ratings, Inc., a financial products ratings agency incorporated in Delaware and headquartered in New York. Appendix to Petitioner's Petition for Certiorari ("Pet. App.") 21a. Fitch has insufficient minimum contacts of its own with the forum state, Tennessee, to justify the exercise of personal jurisdiction over Fitch in that state. Pet. App. 25a-39a. Instead, the plaintiff, First Community Bank, N.A., argues that Fitch should be imputed with the Tennessee contacts of certain of its alleged

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<sup>2</sup> The Fourteenth Amendment provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1.

coconspirators, various codefendant issuers and placement agents of investment products that Fitch had rated and the bank then purchased in Tennessee. Pet. App. 2a-6a, 39a, 44a-45a. The bank alleges that the defendants engaged in a conspiracy to over-value the worth of those securities in order to secure their sale to the bank, which purchased the investment products in reliance on Fitch's ratings and then suffered a substantial loss. Pet. App. 6a. The bank also alleges that certain of those codefendant issuers and placement agents are Tennessee corporations. Pet. App. 2a-3a. And the Tennessee Supreme Court has, in turn, permitted the bank to attribute the Tennessee contacts of those defendants to Fitch, if the bank can substantiate its claim that the defendants all engaged in a conspiracy to defraud the bank. Pet. App. 72a.

Under the Tennessee theory of so-called "civil conspiracy jurisdiction," a court may assert personal jurisdiction over a nonresident defendant with insufficient contacts of its own in Tennessee if

(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 . . . .

Pet. App. 40a.

By contrast, to establish personal jurisdiction over a nonresident defendant, “the constitutional touchstone remains whether the defendant purposefully established ‘minimum contacts’ in the forum State[.]” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Due process requires that “the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State,” such that the defendant can reasonably anticipate being sued in that state in a claim arising from those activities. *Burger King*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

At issue, then, is whether due process permits the forum state to exercise personal jurisdiction over a nonresident defendant based on *someone else’s* forum contacts, especially when, as here, the state does not require the plaintiff to show that the defendant purposefully availed itself of that state, such as by directing and controlling the third party’s conduct there. Due process should not permit the exercise of personal jurisdiction under these circumstances, primarily because the Tennessee test has omitted the essential purposeful-availment

requirement established under *International Shoe* and its progeny.

**A. The Tennessee Test Imposes Personal Jurisdiction On A Nonresident Defendant Based On Someone Else's Forum Contacts, But Without Even Requiring The Plaintiff To Show That The Defendant Purposefully Availed Itself Of The Forum State Through That Third Party, Such As By Directing And Controlling The Party's Forum Conduct.**

Tennessee's test for "civil conspiracy jurisdiction" violates due process. The test subjects a nonresident defendant to personal jurisdiction based on someone else's jurisdictional conduct, and it does so without even requiring the plaintiff to show that the defendant purposefully availed itself of the forum state *through* that third party, such as by directing and controlling the party's in-state conduct.

**i. Imposing personal jurisdiction by mere association is constitutionally suspect because a defendant is generally not responsible for someone else's jurisdictional contacts.**

First, the very notion of personal jurisdiction by proxy or association is constitutionally suspect under any circumstances. This is because "the relationship [between the nonresident defendant and the forum state] must arise out of contacts that the

defendant *himself* creates with the forum State. . . . [A] defendant’s relationship with a plaintiff or third party, standing alone, is an *insufficient basis* for jurisdiction.” *Walden v. Fiore*, 134 S. Ct. 1115, 1122-23 (2014) (emphasis added) (citation and internal quotation marks omitted).

The Tennessee test contravenes this language precisely because it imposes personal jurisdiction on the nonresident defendant based on someone else’s forum contacts, merely because the plaintiff alleges a conspiratorial relationship between the defendant and the third party with forum contacts. In so doing, the test also flouts the Court’s instruction that “[t]he *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.” *Walden*, 134 S. Ct. at 1122 (emphasis added) (citation and internal punctuation marks omitted).

This clear language from *Walden* establishes that a court should generally not ascribe the jurisdictional contacts of a third party to the nonresident defendant, even if the parties had maintained some kind of relationship at the time of the third party’s forum conduct, conspiratorial or otherwise. And this is simply because the nonresident defendant did not commit the conduct itself and, therefore, should generally not be held “jurisdictionally responsible” for someone else’s forum contacts. After all, due process protects the defendant’s personal liberty interest in not having to defend in a remote and unanticipated forum with

which the defendant has no purposeful contacts of its own:

The purpose of this [minimum contacts] test, of course, is to protect a defendant from the travail of defending in a distant forum, unless the *defendant's contacts* with the forum make it just to force him to defend there. . . . [This test] comes from the Due Process Clause's protection of the defendant's personal liberty interest . . . .”

*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (emphasis added).

In most cases, then, the nonresident defendant cannot reasonably expect to be sued in the forum state for someone else's conduct there. For this reason alone, the constitutionality of the Tennessee test is suspect. As one lower court observed, in rejecting the theory of civil conspiracy jurisdiction, “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.” *Kipperman v. McCone*, 422 F. Supp. 860, 873 n. 14 (N.D. Cal. 1976) (emphasis added).

- ii. **Jurisdictional contacts should only be imputed, if at all, when the nonresident defendant has purposefully availed itself of the forum state by directing and controlling the third party's forum conduct.**

On the other hand, however, this Court has indicated, in dicta, that due process might occasionally permit a court to impute the forum contacts of a third party to a nonresident defendant, but only when there is a substantial agency relationship between the two parties that is sufficiently controlling to justify such an extraordinary move. “Agency relationships, we have recognized, may be relevant to the existence of *specific* jurisdiction. . . . [A] corporation [for example,] can purposefully avail itself of a forum *by directing its agents or distributors to take action there.*” *Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (emphasis added and supplied by Court). *See also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011) (discussing, but declining to reach, respondents’ untimely assertion of “single enterprise” theory, under which jurisdiction over foreign subsidiaries could be based on parent’s forum contacts, by piercing corporate veil and thereby merging separate entities); *Burger King*, 471 U.S. at 479 n.22 (“[W]hen commercial activities are carried on in behalf of an out-of-state party[,] those activities *may sometimes be ascribed to the party*, . . . at least where he is a *primary participant in the enterprise* and has *acted purposefully in directing those activities* . . . .”)

(emphasis added) (citations and internal punctuation marks omitted).

These cases instruct that a court should decline to impute the forum contacts of one party to another *unless* the nonresident defendant has purposely availed itself of the forum state through a third party, such as by directing that party to take action there, *Daimler AG*, 134 S. Ct. at 759 n.13, or by acting as a primary participant in the enterprise and purposefully directing the in-state activities. *Burger King*, 471 U.S. at 479 n.22.

**iii. The Tennessee test fails to require any such purposeful availment by the nonresident defendant.**

The Tennessee test contravenes this guidance from the Court, however, because the test imposes personal jurisdiction without requiring the plaintiff to show that the defendant purposefully availed itself of the forum state through a third party, such as by directing that party's forum conduct. App. 40A.<sup>3</sup> Nor has the plaintiff in this case alleged or established any such purposeful availment on the part of Fitch in Tennessee.

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<sup>3</sup> In fact, the Tennessee Supreme Court expressly *rejected* the Tennessee Court of Appeals' effort in this case to inject a purposeful availment requirement into that state's test for civil conspiracy jurisdiction. App. 42A (Tennessee Supreme Court rejecting Court of Appeals' denial of personal jurisdiction over Fitch and other nonresident ratings agencies based on fact that "the record is devoid of evidence that [the ratings agencies] *purposefully targeted Tennessee* to the extent that they *should reasonably anticipate being haled into court here.*") (emphasis added) (citation and internal quotation marks omitted).

In fact, the Tennessee test merely requires the plaintiff to allege that the defendant engaged in a civil conspiracy with foreseeable consequences in Tennessee, and that a coconspirator engaged in forum conduct in furtherance of the conspiracy. App. 40A. But these factors merely identify “[t]he *unilateral activity of another party* or a third person [and are therefore] not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.” *Walden*, 134 S. Ct. at 1122 (emphasis added) (citation and internal punctuation marks omitted).

Moreover, this Court has long rejected the notion that the exercise of personal jurisdiction can be based on the mere foreseeability of effects or consequences in the forum state. Indeed, “foreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). And, to the extent that foreseeability could even be a relevant consideration in the personal jurisdiction inquiry,

the 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.

*Id.*, 444 U.S. at 297 (emphasis added).

As applied here, personal jurisdiction cannot arise from the bare fact that certain financial products that Fitch had rated in New York would foreseeably wind up in the Tennessee financial market, or in the financial market of any other state, for that matter. But the Tennessee test essentially imposes personal jurisdiction on this impermissible basis.

In short, merely alleging, or even proving, a civil conspiracy that has effects in Tennessee does not, by itself, satisfy the due process requirement that the nonresident defendant purposefully availed itself of the forum state, such as by directing and controlling an alleged coconspirator's conduct in Tennessee. Stated otherwise, nowhere does the test require that the defendant, as an alleged intentional tortfeasor, has "expressly aimed" the third party's conduct at the forum state. *See Walden*, 134 S. Ct. at 1124 n.7 (discussing "express aiming" requirement for exercise of personal jurisdiction over nonresident intentional tortfeasor, under *Calder v. Jones*, 465 U.S. 783, 789 (1984)). Accordingly, certiorari should be granted to invalidate the Tennessee test for civil conspiracy jurisdiction.

- iv. **The Tennessee test impermissibly conflates vicarious liability under the common law of civil conspiracy with “vicarious” personal jurisdiction under the Due Process Clause.**

The real problem with the Tennessee test is that it impermissibly conflates the common law requirements for the imposition of vicarious *liability* under civil conspiracy law--a broad device to assist the plaintiff's recovery-- with the strict constitutional requirements for the exercise of so-called “vicarious” *personal jurisdiction* over a nonresident defendant under the Due Process Clause. Under the common law of civil conspiracy, each coconspirator is vicariously liable for the conduct committed by all other coconspirators in furtherance of the conspiracy. Pet. App. 41a (Tennessee Supreme Court noting that “the acts of one co-conspirator are attributable to all co-conspirators.”). *See also* 15A C.J.S. *Conspiracy* § 19 (Westlaw 2016) (“In a civil conspiracy, the acts of coconspirators are attributable to each other. Coconspirators are each responsible for the damage that the conspiracy caused. . .”).

In other words, each coconspirator is an “agent” of the other coconspirators, but for liability purposes only, to allow the plaintiff to recover jointly and severally from each coconspirator. *See* 16 Am. Jur. 2d *Conspiracy* § 57 (Westlaw 2016) (“A civil conspiracy claim operates to extend, *beyond the active wrongdoer*, liability in tort to actors who have merely assisted, encouraged, or planned the

wrongdoer's acts. It is a *theory of mutual agency*, and therefore, the fact of a conspiracy, if proved, makes the act of any one conspirator chargeable to all and allows for the imposition of *joint and several liability* for the actual damages resulting from acts in furtherance of the conspiracy.” (emphasis added) (footnotes omitted). This broad common law “agency” relationship among coconspirators, then, is really just a tool to assist the plaintiff by allowing her to recover damages from a larger number of implicated defendants, even from those who were not actively involved in the unlawful activity.

This “agency” designation does *not* mean, however, that a nonresident defendant has truly acted as a principal for jurisdictional purposes, such as by purposefully directing and controlling the forum conduct of a coconspirator. *See* Stuart M. Riback, Note, *The Long Arm And Multiple Defendants: The Conspiracy Theory Of In Personam Jurisdiction*, 84 Colum. L. Rev. 506, 524 (1984) (“A conspiracy creates an agency among the conspirators . . . . This agency, however, is more fictional than real. Since agreement to only a general plan is sufficient for 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 a conspiracy cannot be thought of in the same way as an ordinary agency*. In conventional agency, the focus is on 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.”) (emphasis added) (footnotes omitted). *See also* 15A C.J.S. *Conspiracy* § 19 (“*It is*

*not essential that each conspirator be shown to have acted in concert with his or her coconspirators. The fact that a conspirator did not actively participate in every act done in furtherance of the conspiracy does not absolve that conspirator from liability. Each action that is performed in a civil conspiracy is imputed to each coconspirator regardless of who actually performed the act. A conspiracy claim serves merely to expand liability for the underlying wrong to persons who are not directly involved in the wrongful actions, and includes those who merely plan, assist, or encourage the wrongdoer's acts . . . .")* (emphasis added) (footnotes omitted); *Daimler AG*, 134 S. Ct. at 759 (“One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose.”) (quoting 2A C. J. S., *Agency* § 43, p. 367 (2013)).

In short, the common law of civil conspiracy says nothing about the purposeful availment requirement of the Due Process Clause. A defendant may be liable in damages for a coconspirator's forum conduct without being subject to the forum's jurisdiction based on that same conduct, simply because the defendant did not direct or control the coconspirator's forum conduct. *See Daimler AG*, 134 S. Ct. at 759 n.13 (stating, in dicta, that third party's jurisdictional contacts may be imputed to nonresident defendant when defendant has directed third party's forum conduct); *Burger King*, 471 U.S. at 479 n.22 (same). In such a case, then, the forum state could not exercise personal jurisdiction over the defendant, and the plaintiff would have to sue the defendant in another state. Simply put, “the law

of civil conspiracy casts a far wider net over potential defendants than the purposeful availment test” under the Due Process Clause. *Youming Jin v. Ministry of State Sec.*, 335 F. Supp. 2d 72, 80 (D.D.C. 2004).

And so, while civil conspiracy law protects the plaintiff’s interest in recovering damages, the Due Process Clause protects the defendant’s constitutional liberty interest in not having to defend in a remote and unanticipated forum based on someone else’s contacts there. The Tennessee test apparently conflates these two unrelated principles and therefore should be invalidated under the Due Process Clause.

**II. IN ANY EVENT, A SEPARATE “CIVIL CONSPIRACY” TEST FOR PERSONAL JURISDICTION IS UNNECESSARY BECAUSE THE UNITARY *INTERNATIONAL SHOE* TEST SHOULD SUFFICE TO DETERMINE, IN EACH CASE, WHETHER PERSONAL JURISDICTION CAN LIE AGAINST A NONRESIDENT DEFENDANT BASED ON THE JURISDICTIONAL CONTACTS OF A THIRD PARTY.**

Finally, even if the Tennessee test *did* include a purposeful availment requirement, it would not warrant recognition as a separate “civil conspiracy” test for personal jurisdiction. Such a test would be nothing more than a particular application of the standard *International Shoe* minimum contacts/purposeful availment test to a case of alleged civil conspiracy. That is, the unitary

*International Shoe* test should suffice to determine, in each case, whether or not personal jurisdiction can lie against a nonresident defendant based on a third party's forum contacts, regardless of the nature of the parties' relationship--conspiratorial or otherwise.

As one lower court has observed, in rejecting the conspiracy theory of personal jurisdiction, "adoption of the [purposeful availment] test would . . . cause the traditional minimum contacts approach to *swallow the conspiracy theory in whole*. The reason why, of course, is that requiring a showing of purposeful availment remedies the constitutional flaw." *Brown v. Kerkhoff*, 504 F. Supp. 2d 464, 518 n.36 (S.D. Iowa 2007) (emphasis added). *See also Youming Jin*, 335 F. Supp. 2d at 80 n.5 ("Admittedly, once the more rigorous purposeful availment requirement is applied to the three traditional elements of conspiracy jurisdiction, it becomes *quite difficult to articulate the purpose of conspiracy jurisdiction--or indeed, the point of continuing to complicate cases with the additional analytical framework of civil conspiracy.*") (emphasis added).

In fact, when this Court recently discussed the possibility of imputing the jurisdictional contacts of one party to another, the Court gave no indication that such a theory would fall outside the standard *International Shoe* test for establishing specific personal jurisdiction over the nonresident defendant. *See Daimler AG*, 134 S. Ct. at 759 n.13 ("Agency relationships, we have recognized, may be relevant to the existence of *specific* jurisdiction.").

In short, a separate category of “civil conspiracy jurisdiction” is both unnecessary and confusing. Its recognition would only distract courts from the essential purposeful-availment inquiry under the Due Process Clause. Under that inquiry, whenever a plaintiff seeks to assert personal jurisdiction over a nonresident defendant based on someone else’s forum contacts, the plaintiff should have to show, in each case, that the defendant purposefully availed itself of the forum state by directing and controlling the third party’s forum conduct. It should not matter what the relationship between the defendant and the third party is called--conspiratorial or otherwise. In each case, the plaintiff should be required to satisfy the minimum contacts/purposeful availment test of the Due Process Clause.

## CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant the petitioner's petition for certiorari.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,

Benjamin G. Robbins

*Counsel of Record*

Martin J. Newhouse, President

New England Legal Foundation

150 Lincoln Street

Boston, Massachusetts 02111-2504

(617) 695-3660

benrobbins@nelonline.org

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