No. 15-1151

IN THE

Supreme Court of the United States

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

Petitioner,

v.

FIRST COMMUNITY BANK, N.A., *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent does not dispute any of the significant factors that weigh heavily in favor of a grant of *certiorari*. It acknowledges the deep and abiding split over the constitutionality of conspiracy jurisdiction in the absence of general and specific jurisdiction. Opp. 9-11. And Respondent makes no effort to defend the Tennessee Supreme Court's holding that conspiracy jurisdiction may be exercised without a colorable claim to general or specific jurisdiction, much less argue that jurisdiction here comports with due process. Respondent does not even attempt to reconcile the decision below with this Court's recent admonition that due process permits only "two categories of personal jurisdiction," *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014), which must be established for each defendant "based on *his own affiliation* with the State," and not based on his "relationship with a plaintiff or *third party*," *Walden v. Fiore*, 134 S. Ct. 1115, 1123, 1126 (2014) (emphasis added). To the extent Respondent even touches upon the question presented, it simply highlights the confusion in the lower courts and underscores why this Court's review is urgently needed to ensure that *all* States consistently and uniformly enforce the constitutionally mandated limits on personal jurisdiction.

Respondent also does not deny the public importance of the question presented, which has the potential to nullify limits on personal jurisdiction in multi-defendant cases, and leads to increased discovery and unpredictability for litigants in all forums.

Instead, Respondent suggests non-existent vehicle problems that are not supported by the record or this Court's precedent. It claims that the question presented here was not raised below, but the very pages Respondent cites from Fitch's brief below show that Fitch directly and expressly raised the question presented here—Fitch argued that the use of conspiracy jurisdiction is unconstitutional *in the absence of specific and general jurisdiction*. Respondent's finality argument fares no better: the Tennessee Supreme Court's ruling could not have been more final on the question presented; it forecloses any argument on remand that conspiracy jurisdiction violates due process. No further proceedings are necessary for this Court to examine the question presented. Although interlocutory, this decision fits easily within the concept of "pragmatic" finality outlined in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), especially in light of the important federal policies at stake and the likelihood that the constitutional issue will be mooted through future proceedings.

This case presents an ideal vehicle for this Court's review of conspiracy jurisdiction. Unlike in some other conspiracy jurisdiction cases, the court below left no doubt that specific jurisdiction could not be established here, because Respondent could not establish even a colorable claim that Fitch's "conduct giving rise to the controversy underlying the instant case was purposefully directed toward Tennessee or established sufficient minimum contacts with Tennessee . . . ." Pet. App. 38a, 70a. This important and recurring issue very rarely makes its way to this Court for review so cleanly. The writ should be granted.

I. Fitch Properly Raised The Due Process Question Below.

The question presented for this Court's review is whether the due process clause permits the exercise of conspiracy jurisdiction where, as here, general and specific jurisdiction are lacking. Pet. i. This *exact* issue was raised below. Respondent's tortured attempt to reframe the issue in order to argue it was not raised below has no merit.

In the briefing before the Tennessee Supreme Court, Fitch made two arguments against the exercise of conspiracy jurisdiction. First, Fitch argued that Respondent had not presented sufficient facts to meet the test for conspiracy jurisdiction previously articulated by the Tennessee Supreme Court in *Chenault v. Walker*, 36 S.W.3d 45 (Tenn. 2001). Opp. App. 3-6. Second, Fitch argued that, to the extent the court found that the *Chenault* test could be met in the absence of purposeful conduct by Fitch directed at Tennessee, the exercise of jurisdiction would violate due process under this Court's precedents. In the latter section—aptly titled "Conspiracy Jurisdiction Cannot Be Used to Evade the Requirements of Due Process"—Fitch pointed out that *Chenault*, *unlike this case*, involved a conspiracy purposefully aimed at Tennessee[1] and highlighted this Court's intervening

1. In *Chenault*, there were detailed allegations and unrefuted sworn statements showing a civil conspiracy to harm the plaintiff *in Tennessee*. 36 S.W.3d at 47-50, 56-58. Specifically, an in-state defendant was an agent of some nonresident defendants, and the other nonresident defendant had multiple telephone conversations with the in-state plaintiff that formed part of the alleged fraud. *Id.* at 56-58.

decision in *Walden v. Fiore*, which makes plain that personal jurisdiction may not be predicated on third-party contacts alone. Opp. App. 6-8. Accordingly, Fitch explained, it "would be unconstitutional" for the Tennessee courts to use conspiracy jurisdiction where there was no indication that the defendant *itself* purposefully directed acts towards Tennessee. Opp. App. 7. This is, of course, the same argument Fitch makes in the petition.

Because the precise question presented here was briefed below, Respondent can only make the contrary argument by mischaracterizing the question at issue and Fitch's argument before the Tennessee Supreme Court. Respondent claims the issue is whether conspiracy jurisdiction is constitutional "per se," and argues that Fitch's citation to *Chenault* below somehow shows that Fitch conceded the constitutionality of conspiracy jurisdiction. *See* Opp. 15-17. As noted, the question presented here is whether conspiracy jurisdiction comports with due process *in the absence of specific jurisdiction*—not whether conspiracy jurisdiction is constitutional "per se." Respondent's reformulation is nonsensical—all questions of personal jurisdiction depend on the facts of a particular case, and we are aware of no cases distinguishing between "per se" and as-applied challenges to jurisdiction. And while Fitch did reference *Chenault* in its constitutional argument below, that reference simply noted that *Chenault*'s outcome may have been consistent with due process because—unlike here—it involved a conspiracy that was "purposefully directed" toward Tennessee.[2] Opp. App. 7; *see* U.S. Chamber *Amicus*

2. Fitch's counsel's statements at oral argument below are consistent with this and not the smoking gun Respondent presents

Br. 13. Indeed, Fitch also cited *Chenault* for its general statement that "the exercise of jurisdiction must comport with the United States Constitution." Opp. App. 7. Far from conceding the constitutional question presented here, these citations were in service of that argument and preserved it.[3]

Even assuming—counterfactually—that the precise question presented had not been explicitly argued below, Respondent's argument is still misplaced because preservation does not require that the *exact* same argument be made below. Rather, under this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992), it is sufficient for preservation purposes that the *general* constitutional claim be raised in the state courts.

In *Yee*, the petitioner made a regulatory takings argument to this Court that (in contrast to the facts here) appeared not to have been made before the state courts. *Id.* at 534-35. Nevertheless, this Court found the petitioners had raised some sort of Takings Clause argument below, and that this was sufficient to put the general claim that

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them to be. In particular, counsel distinguished *Chenault* as involving "targeting of an in-state" conspiracy victim and about "agency theory," neither of which apply to this case. Opp. App. 11.

3. To the extent that Respondent takes issue with the precise phrasing of the question presented in light of the arguments below (which are consistent), this Court rejects such quibbling, refusing to require magic words or limit questions to the exact formulations made below. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 86-87 n.9 (1980); *Braniff Airways, Inc. v. Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 598-99 (1954). Indeed, this Court permits issues raised below to be "enlarg[ed]." *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983).

there had been a Takings Clause violation properly before the Court. *Id.* at 534. The Court explained that

> [o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking. Having raised a takings claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.

Id. at 534-35; *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Here, as the lower court decisions make clear, a due process defense to personal jurisdiction over Fitch was raised and passed upon throughout the proceedings. Pet. App. 7a-8a, 15a-39a, 81a-83a, 87a, 94a-97a, 100a-108a, 125a-126a. Respondent even concedes that Fitch raised a particular due process defense to conspiracy jurisdiction "as applied to the facts of this case." Opp. 15-17. Because Fitch presented its due process claim below, that claim is properly before this Court and Fitch is free to make any argument in support of that claim before this Court, and to "frame the question to be decided in any way [it] chooses, without being limited to the manner in which the question was framed below." *Yee*, 503 U.S. at 535. As

it turns out, Fitch chose to frame the question the same way it did before the Tennessee Supreme Court: whether personal jurisdiction could be exercised on a conspiracy theory where the due process requirements for specific and general jurisdiction were not met.

In short, the issue presented here was properly preserved.

II. The Decision Below Is Final And Presents An Ideal Vehicle To Address An Important and Recurring Question.

This is the right case for the Court to resolve the constitutionality of conspiracy jurisdiction in the absence of general and specific jurisdiction—the only two categories of jurisdiction this Court has recognized to date. The decision below clearly held that neither specific nor general jurisdiction could be exercised over Fitch consistent with due process, but that personal jurisdiction could nevertheless be obtained on a conspiracy theory. Pet. App. 17a-39a, 70a-71a. This is exactly the sort of interlocutory decision this Court regularly reviews, and makes this case the ideal vehicle for examining conspiracy jurisdiction.

This Court takes a "pragmatic approach" to the finality requirement of 28 U.S.C. § 1257(a). *Cox*, 420 U.S. at 486. Among other situations, an interlocutory state court decision can be reviewed by this Court where (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail . . . on nonfederal grounds, thus rendering unnecessary review of the

federal issue by this Court," (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (3) "a refusal immediately to review the state court decision might seriously erode federal policy . . . ." *Id.* at 482-83. All of these criteria are present here.

The decision below is final and binding on the federal question presented by the petition: whether conspiracy jurisdiction can constitutionally be exercised in the absence of specific and general jurisdiction. The decision was issued after argument on that exact question, *see supra* Part I, and establishes that Tennessee courts believe they *can* exercise conspiracy jurisdiction over Fitch even though due process would not otherwise permit these courts to exercise either general or specific jurisdiction. The holding below forecloses any argument on remand that Fitch should be dismissed on due process grounds. And the "further proceedings" that remain as to jurisdictional discovery and the ultimate *application* of conspiracy jurisdiction will not disrupt the finality of the State Supreme Court's holding on its constitutionality. *Cf. Cox*, 420 U.S. at 485-87; *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55-57 (1989) (state court's decision upholding constitutionality of application of state RICO statute was final, even though the petitioner's liability and sentence remained to be determined at trial); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988) (state court's decision that a state regulation was not preempted by federal law was final, even though the application of that regulation to petitioner's claim remained to be determined on remand).[4]

4. Respondent's reliance (Opp. 27-28) on *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997) is misplaced. That case did not hold

The decision below meets all other requisites for finality as well. Reversal on the issue presented would be dispositive of Respondent's cause of action against Fitch. *See Cox*, 420 U.S. at 482-83. And, as Respondent acknowledges, Opp. 28, many outcomes on remand could moot the constitutional issue, depriving this Court of an opportunity for review. *See Cox*, 420 U.S. at 482.

Lastly, delaying review poses serious risk to the federal—indeed, constitutional—policies that animate the doctrine of personal jurisdiction: "fair play and substantial justice," *International Shoe Co. v. State of Washington, Office of Unemployment Compensation & Placement*, 326 U.S. 310 (1945), "predictability" and uniformity, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), and state sovereignty and federalism, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980); *see also* New England Legal Foundation *Amicus* Br. 7-14. Much more is at stake here than mere discovery burdens, *see* Opp. 29, both within and beyond the contours of this case.

Delayed review will necessarily result in an ongoing violation of Fitch's constitutional entitlement to due process, and subject countless others to the same risk. The Tennessee courts are *currently* exercising jurisdiction over Fitch on remand. Although Fitch may ultimately prevail, "there should be no [remand proceedings] at all." *Cox*, 420 U.S. at 485. If Fitch is correct on the merits, the further proceedings themselves are an unconstitutional assertion of jurisdiction and violate Fitch's due process

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that the decision below was not final on the relevant federal issue, but that the case did not meet the other requisites for finality under *Cox*. *Id.* at 82-84.

rights. Like other situations where delayed review itself causes constitutional violations, this alone damages federal constitutional policy. *Cf. Harris v. Washington*, 404 U.S. 55 (1971) (constitutional right against double jeopardy); *Neb. Press Ass'n v. Stuart*, 423 U.S. 1327 (1975) (Blackmun, J., in chambers) (First Amendment right of free speech).

Moreover, the "policy underlying the requirement of finality" itself is served by "determin[ing] now [at the outset] in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught . . . ." *Mercantile Nat'l Bank at Dall. v. Langdeau*, 371 U.S. 555, 558 (1963); *see also Cox*, 420 U.S. at 505-06 (Rehnquist, J., dissenting). For these reasons, this Court often reviews the exercise of personal jurisdiction on interlocutory appeals at the outset of a case before the damage is done. *See Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984) (citing cases); *cf. Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (allowing future proceedings in state court would erode federal policy vesting the NLRB with exclusive jurisdiction).

More broadly, failing to decide the question presented now will "leave unanswered" an important and recurring question about the constitutional limits on personal jurisdiction, requiring litigants in Tennessee and nationally to operate in the shadow of a decision that *very explicitly* (and unconstitutionally) authorizes the exercise of personal jurisdiction in the absence of either specific or general jurisdiction. *See Cox*, 420 U.S. at 485-86. This directly impacts multiple constitutional policies. As previously explained, the theory adopted below can result in prolonged due process violations when litigants are subjected to expansive jurisdictional discovery and

evidentiary hearings that merge with the merits, only for the court to determine that it never had jurisdiction to begin with. U.S. Chamber *Amicus* Br. 9-12; Pet. 20-21. Absent intervention by this Court, the holding below would seriously interfere with state sovereignty and federalism by effectively making territorial limitations irrelevant in many cases. Pet. 19-20. And the uncertainty caused by the decision below standing alongside the widely varying decisions of courts around the country, U.S. Chamber *Amicus* Br. 5-8, itself undermines the "predictability" that due process limitations on personal jurisdiction are intended to protect. *Burger King*, 471 U.S. at 472.

And if the constitutional issue were ultimately mooted through future proceedings, "there would remain in effect the unreviewed decision of the State Supreme Court" permitting the exercise of conspiracy jurisdiction in the absence of specific and general jurisdiction. *Cox*, 420 U.S. at 485. As explained by *amicus* the United States Chamber of Commerce, this is a very likely outcome, and a particularly problematic one. U.S. Chamber *Amicus* Br. 13-16. Use of this unconstitutional theory is rapidly spreading, but because the due process issue is easily mooted or obfuscated by other rulings later in litigation, opportunities for this Court to review the issue are exceedingly rare. *Id.* at 5, 14-15; *see also* Pet. 22. When the issue does make its way through the appellate courts, it is rarely presented as cleanly as it is here, where it has been established that specific jurisdiction is lacking—in contrast to some other conspiracy cases where it might be said that a defendant's acts were purposefully directed at the forum and specific jurisdiction has not been ruled out. *Id.* at 13-14; *see supra* Part I.A.

The decision below presents an ideal vehicle for this Court to review the constitutionality of conspiracy jurisdiction where specific and general jurisdiction are lacking. If the Court bypasses this opportunity to address the question presented, it may be a long time before another suitable vehicle presents itself to dispel this unconstitutional judicial overreach and restore uniformity to the states' exercise of personal jurisdiction. This Court can and should intercede now to address this issue of paramount and recurring importance.

CONCLUSION

For the foregoing reasons, those in the petition, and those in the briefs of *amici*, the petition should be granted.

Dated: June 6, 2016

Respectfully submitted,

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