No. _____

In the
Supreme Court of the United States

STEPHEN DOUGLASS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SHINGO ALEXANDER DOUGLASS, *et al.*,

Petitioners,

v.

NIPPON YUSEN KABUSHIKI KAISHA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has specifically left open the question of whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court [as the Fourteenth Amendment imposes on state courts]," *Bristol-Myers Squibb Co. v. Sup. Ct.*, 137 S. Ct. 1773, 1783-84 (2017). It has also acknowledged that the "United States is a distinct sovereign [so that] a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality op.). This case provides an excellent vehicle to address this open issue in the context of death and injuries to U.S. Navy personnel when their ship was struck by a foreign container ship in the East China Sea. Two questions are presented:

1. Whether the Fifth Amendment's Due Process Clause requires a foreign defendant to be at home – the test for state-court general jurisdiction under the Fourteenth Amendment – when jurisdiction under Federal Rule of Civil Procedure 4(k)(2) is invoked, which would make that Rule a nullity.

2. Whether personal jurisdiction exists under Article III of the Constitution, which endows federal courts with admiralty jurisdiction, and the law of nations when a foreign ship collides with an American ship, in this instance an American warship, on the high seas.

PARTIES TO THE PROCEEDING

Petitioners Stephen Douglass, individually and as personal representative of the Estate of Shingo Alexander Douglass; Dora Hernandez, individually and as personal representative of the Estate of Noe Hernandez; Lan Huynh, individually and as personal representative of the Estate of Ngoc Truong Huynh; Darrold Martin, individually and as personal representative of the Estate of Xavier Alec Martin; Erin Rehm, individually and as personal representative of the Estate of Gary Leo Rehm, Jr.; Lloyd Wayne Rigsby, Jr., individually and as personal representative of the Estate of Dakota Kyle Rigsby; and Carmen Sibayan, individually and as personal representative of the Estate of Carlos Victor Ganzon Sibayan were plaintiffs in the district court in *Douglass v. Nippon Yusen Kabushiki Kaisha*, Civ. No. 19-13688 [App. 159] and appellants in the consolidated case before the court of appeals.

Petitioners Jhon Alcide, Richard Allen-Easmon, Dustin Angle, Jesus Arguello, Valerie Arguello, Francis Asuncion, Marissa Asuncion, Sascha Belin, Lee-Ann Bienaime, Lehonard Bienaime, Lakitra Burns-Jones, Deonte Carter, Carlos Clark, Ciera Clark, Christopher Delong, Elizabeth Felderman, Rod Felderman, Megan Fitzpatrick, Casey Frenzel, Richard Gant, Samantha Gant, Marnitta George, Rollin George, Lindsay Gonzalez, Raul Gonzalez, Rainford Graham, Terry Guidry, Megan Hrncir, Sherria Hughley, Jermaine Jones, Ana Kenebrew, Freddie

Kenebrew, Derrick Kennerly, Obra King, Anthonie LaMay, Erin LaMay, Gaylord Lawrence, Sydnee LeGrande, Daniel Lee, Tylor Locklear, Wilfred Marquis, Joshua Mason, Rel Mason, Matthew Matczak, John Mead, Antoinette Morton, Antonio Morton, Christian Nash, Jared Ogilvie, Valeria Reinoso, Christopher Rivera, Tuyuan Rivera, Jackson Schrimsher, Michael Sheppard, Joshua Tapia, Daniel Taylor, Michael Watson, Samuel Williams, III, TyQuail Williams, Timothy Winters, Rashad Wood, and Jacqueline Wrage were plaintiffs in the district court in *Alcide v. Nippon Yusen Kabushiki Kaisha*, Civ. No. 19-13691 [App. 204] and appellants in the consolidated case before the court of appeals.

Respondent Nippon Yusen Kabushiki Kaisha was defendant in both cases in the district court and appellee in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Douglass v. Nippon Yusen Kabushiki Kaisha,* No. 20-30382 consolidated with No. 20-30379, U.S. Court of Appeals for the Fifth Circuit. Rehearing en banc judgment entered August 16, 2022, vacating judgment entered April 30, 2021.

- *Douglass v. Nippon Yusen Kabushiki Kaisha*, Civ. No. 19-13688, U.S. District Court for the

Eastern District of Louisiana. Judgment entered June 4, 2020.

- *Alcide v. Nippon Yusen Kabushiki Kaisha*, Civ. No. 19-13691, U.S. District Court for the Eastern District of Louisiana. Judgment entered June 4, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Stephen Douglass, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the Fifth Circuit is reported at 46 F.4th 226 and included in the Appendix ("App.") at App. 1. The panel opinion of that court is reported at 996 F.3d 289 (App. 134). The district court's identical decisions granting Respondent's motions to

dismiss are reported at 465 F.Supp.3d 588 (App. 159) and 465 F.Supp.3d 610 (App. 204).

JURISDICTION

The Fifth Circuit entered its en banc judgment on August 16, 2022. App. 1. On November 3, 2022, Justice Alito extended the time to file this Petition to December 14, 2022. No. 22A386. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Federal Rule of Civil Procedure 4(k)(2) provides:

> (k) Territorial Limits of Effective Service.
>
> (1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
>
> * * *
>
> (2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

> (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
>
> (B) exercising jurisdiction is consistent with the United States Constitution and laws.
>
> U.S. Const., Article III, Section 2, cl. 1 provides:
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases of admiralty and maritime Jurisdiction, . . .

STATEMENT OF THE CASE

A. Underlying Facts.

Seven U.S. Navy sailors died and at least forty were injured on June 17, 2017, when a 730-foot long, 39,565-deadweight-ton commercial container vessel, the *ACX Crystal*, chartered to and within the fleet of Respondent Nippon Yusen Kabushiki Kaisha (NYK), struck the *U.S.S. Fitzgerald*, a Navy destroyer, some eighty nautical miles southwest of the U.S. Naval base at Yokosuka, Japan and within the territorial waters of Japan. App. 136.

Despite the collision's location, NYK is no stranger to the United States. As succinctly stated by the five-judge principal dissent, NYK's:

> ships regularly call on at least thirty United States ports, averaging about 1,500 calls annually—more than four calls per day. In a highly fragmented market, it ranked tenth in United States containerized export trade and twelfth in import trade in 2013. Part of its fleet does nothing but deliver cars to the United States. NYK operates twenty-seven shipping terminals in United States ports and air-cargo service at six United States airports. Its employees work at the corporation's American subsidiaries. Shares of NYK stock are deposited at the Bank of New York Mellon and may be purchased by United States investors. All told, NYK reaps roughly $1.5 *billion* in annual revenue in North America.
>
> In the course of doing business here, NYK has frequently availed itself of the American legal system. The corporation has brought at least seventy-eight lawsuits in federal court since 1993 (almost three per year), thus invoking the power of our courts to demand over $22 million in damages.

App. 96-97 (Elrod, J., dissenting).

In addition, NYK opened its first office in the United States in 1920 and maintains employees here. App. 5. NYK's bills of lading and sea waybills specify "U.S. Law" applies and the United States District Court for the Southern District of New York has "exclusive jurisdiction to hear all disputes" relating to "shipments to or from the United States." App. 103.

NYK is also licensed and "highly regulated by the Federal Maritime Commission." App. 162.

B. Applicable Rule.

Rule 4(k)(2), widely described as a federal long-arm statute,[1] establishes personal jurisdiction through service if (1) the claim arises under federal law, (2) the defendant is not subject to jurisdiction in any state's court of general jurisdiction; and (3) exercising jurisdiction is consistent with Fifth Amendment due process. It provides personal jurisdiction based on contacts with the nation as a whole. *See* Fed. R. Civ. P. 4(k)(2) advisory comm. note of 1993 (explaining that the Fifth Amendment "requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party").

The rule was promulgated and approved by Congress in response to a gap recognized in *Omni Cap. Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987). There, this Court declined to exercise common-law authority to permit personal jurisdiction over a British commodities broker because the Commodity Exchange Act did not authorize the requisite service of process. It instead declared doing so "better rests with those who propose the Federal Rules of Civil Procedure and with Congress." *Id.* at 109, 111.

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[1] *See, e.g.*, *Compania de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.,* 970 F.3d 1269, 1282 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 2793 (2021).

Omni Cap.'s invitation to develop a rule resulted in Rule 4(k)(2). Fed. R. Civ. P. 4(k)(2), advisory comm. note of 1993. As the Fifth Circuit once put it, personal jurisdiction under Rule 4(k)(2) exists when the defendant "has continuous and systematic contacts with the United States as a whole" so that "subjecting [it] to suit here does not offend notions of fair play and substantial justice." *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 651-52 (5th Cir. 2004) (citations omitted). Every circuit at that time applied that same national minimum contacts as the due-process test for Rule 4(k)(2).

C. Proceedings Below.

1. District Court.

On November 18, 2019, two sets of plaintiffs brought separate actions against NYK in the District Court for the Eastern District of Louisiana based on the deaths and injuries resulting from the collision. The *Douglass* Plaintiffs brought wrongful death and survival claims under the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301 *et seq*. App. 6. The *Alcide* Plaintiffs brought personal-injury and loss-of-consortium claims. App. 6. Both sets of plaintiffs asserted personal jurisdiction over NYK under Fed. R. Civ. P. 4(k)(2). App. 6.

The district court granted NYK's motions to dismiss for lack of personal jurisdiction in both cases on identical grounds, holding that the Fourteenth Amendment due-process standards for exercising personal jurisdiction also apply under the Fifth

Amendment. Therefore, admiralty and other cases arising under federal law where there is no specific jurisdiction are limited to cases for defendants who are "at home" in the United States even when not subject to jurisdiction in state courts. App. 185, 229.

2. Court of Appeals.

Both the *Douglass* and *Alcide* Plaintiffs filed timely notices of appeal on June 18, 2020. The cases were consolidated, and on April 30, 2021, a panel of the Fifth Court rendered a *per curiam* decision affirming the district court's dismissal, but only because compelled to by a prior in-circuit precedent. App. 137. Nonetheless, the panel found "merit" in Petitioners' position. App. 147. Two panel members, Judges Elrod and Willett, specially concurred, making clear that "the case would be decided differently if we were not bound by [the in-circuit decision]." App. 154-55 (Elrod, J., concurring). The concurrence urged reconsideration en banc as a "good vehicle" "to correct our course on Rule 4(k)(2)." App. 155, 158.

3. En Banc Review.

En banc review was granted July 21, 2021. App. 132-33. The court requested the views of the Solicitor General, who declined. App. 124 n.4. As supplemental authority, Petitioners filed the United States' brief in *Fuld v. PLO*, Nos. 22-76(L), 22-496(CON) (2d Cir.), concerning federal jurisdiction under the Promoting Security and Justice for Victims of Terrorism Act of 2019. There, Intervenor United States expressed its view that "the Fifth Amendment allows a more expansive assertion of personal jurisdiction than the

Fourteenth Amendment" because the former is not "tied to states' limited territorial sovereignty" and because the federal government's powers extend "outside its borders, and include authority over matters of foreign affairs and foreign commerce." U.S. Br. 19; *see also id*. at 35-40. The U.S. brief also favorably cited the discussion of the Fifth Amendment's differences expressed by the panel *in this case*. U.S. Br. 39 (citing App. 140-47).

By a 12-5 vote on August 16, 2022, the en banc court affirmed, holding that the Fifth Amendment requires a plaintiff to show that a foreign defendant subject to Fed. R. Civ. P. 4(k)(2) and admiralty jurisdiction where the claim does not arise in this country be "essentially at home" to meet Fifth Amendment due process. It borrowed that requirement from the Fourteenth Amendment as applied to general jurisdiction in state courts. App. 14, 16, 30-32. Although it agreed that "NYK's contacts with the United States are, in absolute terms, substantial," neither the level of contacts nor Rule 4(k)(2) criteria mattered because NYK is "incorporated and headquartered in Japan." App. 32, 31. The majority further found that Rule 4(k)(2) had, at most, limited application to specific jurisdiction and could not apply to claims of general jurisdiction consistent with due process. App. 22, 27 n.27.

The majority also ruled that "no textual support in the Fifth Amendment . . . and no case law favor[] . . . an admiralty 'exception' to principles of personal jurisdiction." App. 29.

Two members of the majority concurred to say that this Court had mandated identical treatment of the Fifth and Fourteenth Amendments because this Court had never said otherwise. App. 36 (Ho, J., concurring).[2] The concurrence dismissed original public understandings of the Fifth Amendment's limits on personal jurisdiction as fodder for "scholarly debate." App. 37 (Ho, J., concurring). The concurrence added that until the Supreme Court "embrace[s] the dissent's view that due process under the Fifth Amendment is indeed different from due process under the Fourteenth Amendment," imposition of an at-home test for Rule 4(k)(2) was required. App. 46-47.

Five judges dissented. The principal dissent undertook an original-public-meaning evaluation of the Fifth Amendment's import to personal jurisdiction. It concluded that, as a matter of the Fifth Amendment's text, history, and structure, due process imposed no restriction on Congress's ability to "authorize federal courts' personal jurisdiction over a foreign defendant" through the Rules Enabling Act process. App. 48, 52, 109 (Elrod, J., dissenting).[3]

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[2] The dissent challenged this assertion. App. 52-53, 55 & n.4 (citing cases), 59 ("there is no controlling Supreme Court precedent.") (Elrod, J., dissenting).

[3] Under that process, rules are promulgated by this Court, subject to congressional review. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010). Arguably, Congress further ratified Rule 4(k)(2) through enactment of Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, tit. IV, § 401, 102 Stat. 4642, 4648 (1988) (amending 28 U.S.C. § 2072).

The dissent also disagreed with the majority's glib treatment of admiralty jurisdiction, which substantially narrowed "our ability to hear many cases sounding in admiralty—an area of law in which we have long been empowered to adjudicate claims involving far-flung parties aboard vessels in far-flung places on the seven seas." App. 109.

Judge Higginson separately expressed confidence that "when the Supreme Court revisits the distinction [between the two Due Process clauses] it carefully has preserved, it will take cognizance of all pertinent scholarship, constitutional and foreign relations law," "the real world consequences . . . based both on Supreme Court precedent and also Congress's Rule 4(k)(2) . . . [to] allow[] more flexibility than the Fourteenth Amendment and permit[] jurisdiction over a non-US defendant that does systematic and continuous business in the United States." App. 125 (Higginson, J., dissenting) (cleaned up).

A final dissent said that the Fifth Amendment did not impose the same restrictions as the Fourteenth on the exercise of personal jurisdiction by a federal court and permitted Congress to expand any limits. App. 126 (Oldham, J., dissenting).

REASONS FOR GRANTING THE PETITION

There are two important reasons to grant this Petition. First, the overlay of an at-home requirement as a function of the Fifth Amendment renders the congressionally endorsed Rule 4(k)(2) a nullity except, possibly, in some theoretical cases not likely to exist, while creating doubt on the validity of other federal

laws dependent on worldwide service of process. Second, the Court can resolve the recent confusion about personal jurisdiction as it has long been practiced in admiralty and maritime cases.

I. THIS CASE PRESENTS RECURRING ISSUES OF GREAT NATIONAL IMPORTANCE.

The Fifth Amendment's Due Process Clause imposes no at-home requirement on Rule 4(k)(2) as a congressionally authorized means of asserting personal jurisdiction over foreign defendants. Yet, as the five en banc dissenters cogently stated:

> The majority today holds that the Fifth Amendment's Due Process Clause "immunizes" from suit in federal court a multinational corporation with extensive business dealings in the United States and which litigates here frequently as a plaintiff. . . . In the course of its substantial business here, NYK has invoked the power of our federal courts to protect *its* rights as a plaintiff over *seventy-five* times. But today, the *en banc* court holds that it would "offend 'traditional notions of fair play and substantial justice'" for injured United States servicemen and bereaved military families to sue NYK in United States federal court.

App. 48 (Elrod, J., dissenting).

This Court has not addressed whether due process is different under the Fifth and Fourteenth

Amendments. *See Bristol-Myers Squibb Co. v. Sup. Ct.*, 137 S. Ct. 1773, 1784 (2017) (explicitly leaving "open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court" as the Fourteenth Amendment does on a state court); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (plurality op.) ("It may be that . . . Congress could authorize the exercise of jurisdiction [over foreign defendants] in appropriate courts"); *Omni Cap.*, 484 U.S. at 102 n.5 (recognizing it is an open question); *Asahi Metal Indus. Co. v. Sup. Ct.*, 480 U.S. 102, 113 n.* (1987) (O'Connor, J., plurality op.) (same).

Most critically, the decision renders Rule 4(k)(2) facially unconstitutional, Petitioners submit, but indisputably unconstitutional as applied in most of its intended uses as a violation of Fifth Amendment due process. Such a ruling should not go unreviewed.

The two due-process amendments serve very different purposes in the personal-jurisdiction arena. Fourteenth Amendment due process is "an instrument of interstate federalism," *Bristol-Myers*, 137 S. Ct. at 1781, designed to order the competing interests of coequal States under the Constitution. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

The Fifth Amendment assures that personal jurisdiction is the product of a process that provides appropriate notice, but it does not weigh either the federal government's sovereignty and other interests, as a constitutional matter, against foreign policy or the

commercial interests of other sovereign nations because "foreign states are not 'persons' entitled to rights under the Due Process Clause." *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012), *aff'd sub nom. Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir.), *cert. denied*, 576 U.S. 1006 (2015).

That these issues arise out of a projection of American sovereignty abroad through a U.S. Navy warship and injuries to American servicemen renders the Questions Presented of particularly great national importance, separate and in addition to its implications for a global economy in which modern communications, transportation, and manufacturing systems are transnational in operation. The decision below, denying personal jurisdiction in an admiralty case, also represents a significant departure from the traditional law of nations as it was understood by the Framers when they specified that our federal courts would have plenary jurisdiction over maritime disputes, even between foreign parties.

Limiting personal jurisdiction to specific and general inaccurately conveys the variety of forms this Court has recognized as comporting with due process. Those forms include tag, *Burnham v. Sup. Ct.*, 495 U.S. 604, 619 (1990) (plurality op.); in rem, *Shaffer v. Heitner*, 433 U.S. 186, 208 (1977); consent jurisdiction, *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982); and legislative jurisdiction. *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1850). This case provides an ideal vehicle to examine whether Rule 4(k)(2) satisfies due process under the Fifth Amendment.

Moreover, an at-home requirement renders Rule 4(k)(2) a nullity. For specific jurisdiction, the Rule will only reach the rare (and possibly non-existent) case where a state long-arm statute does not extend to constitutional limits, and Rule 4(k)(2) can fill that narrow interstice for a federal action. For general jurisdiction, as the court below acknowledged, it will never apply. App. 27 n.27. It thus will not even reach the fact pattern from *Omni Cap*. that provided the impetus for the rule. No defendant will be both outside any state court's jurisdiction as required by the Rule and still "at-home" in the United States.

Adopting the Fifth Circuit's specific/general jurisdiction dichotomy for congressionally authorized personal jurisdiction may affect a variety of laws that do not meet Fourteenth Amendment criteria. Domestically, for example, the Interpleader Act provides for nationwide service of process, 28 U.S.C. § 2361, and establishes personal jurisdiction over a defendant "even if she lacks minimum contacts" with the forum state. *Mudd v. Yarbrough*, 786 F. Supp. 2d 1236, 1242-43 (E.D. Ky. 2011). RICO, 18 U.S.C. §§ 1961-1968, also uses nationwide service of process to overcome lack of sufficient contacts to satisfy specific jurisdiction and any at-home requirement to establish personal jurisdiction and venue. *See ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 621, 627-28 (4th Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998).

Transnationally, the Clayton Antitrust Act of 1914 authorized worldwide service of process "wherever [a corporate defendant] may be found." 15 U.S.C. § 22. *See, e.g., Phillip Gall & Son v. Garcia Corp*., 340

F. Supp. 1255, 1257 (E.D. Ky. 1972) ("In anti-trust suits there may be extraterritorial service of process.). *See also Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 424 (2d Cir. 2005) (recognizing the Clayton Act's "worldwide service of process," as long as venue requirements are met). Similar worldwide congressional authorizations of service exist in the securities acts, 15 U.S.C. §§ 77v(a), 78aa(a), 80a-43; the False Claims Act, 31 U.S.C. § 3732(a); and the Bankruptcy Act, 11 U.S.C. § 541(a), among other statutes.

In contrast to the breadth of congressional authorizations of personal jurisdiction without geographic limitation, state "legislative and judicial authority . . [a]re bounded by the territory of that state." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 655 (1829) (Story, J.).

Petitioners submit that Rule 4(k)(2) creates a constitutionally valid form of congressionally authorized personal jurisdiction untethered to the artificial categories of specific or general jurisdiction. This Court has long recognized that Congress has the authority to authorize personal jurisdiction in the federal courts where it does not otherwise exist. The Petition should be granted to uphold that power in Rule 4(k)(2).

II. THE CIRCUITS CHANGED THEIR UNDERSTANDING OF FIFTH AMENDMENT DUE PROCESS FOR PERSONAL JURISDICTION TO REFLECT FOURTEENTH AMENDMENT PRECEDENTS IN CIVIL CASES, IN CONFLICT WITH THE COURTS' TREATMENT IN CRIMINAL CASES.

A. Circuits that Have Examined Fifth Amendment Due Process and Personal Jurisdiction, Since *Daimler*, Have Reflexively Abandoned Fifth Amendment Analyses for Fourteenth Amendment Standards.

The early application of Rule 4(k)(2) recognized that sufficient national contacts satisfied Fifth Amendment due process. *See, e.g., World Tanker Carriers Corp. v. M/V Ya Mawla*ya, 99 F.3d 717, 721 (5th Cir. 1996) (describing the due-process question as "whether [defendants] have contacts with the nation as a whole sufficient to satisfy due process concerns."). *See also Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico,* 563 F.3d 1285, 1296 (Fed. Cir. 2009); *Porina v. Marward Shipping Co*., 521 F.3d 122, 127 (2d Cir. 2008); *BP Chemicals Ltd. v. Formosa Chem. & Fibre Corp*., 229 F.3d 254, 258 (3d Cir. 2000); *United States v. Swiss Am. Bank, Ltd*., 191 F.3d 30, 41 (1st Cir. 1999).

But, after this Court held that state-court exercises of personal jurisdiction under the Fourteenth Amendment must fit either specific and general jurisdiction, with the latter requiring that a defendant be

"essentially at home" in the forum, *see Daimler AG v. Bauman*, 571 U.S. 117, 127-28 (2014), many courts reflexively and without analysis on the point adopted the Fourteenth Amendment standard on Rule 4(k)(2). *See, e.g., Patterson v. Aker Sols. Inc.*, 826 F.3d 231 (5th Cir. 2016); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 54 (D.C. Cir. 2017), *cert. denied*, 139 S.Ct. 373 (2018) (holding both amendments require the same analysis, while recognizing that "neither the Supreme Court nor this court has expressly analyzed whether the Fifth and Fourteenth Amendment standards differ."); *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 330 (2d Cir. 2016), *cert. denied sub. nom*, *Sokolow v. Palestine Liberation Org.,* 138 S.Ct. 1438 (2018) (rejecting argument of United States and refusing to "upend settled law"); *Lyngaas v. Ag,* 992 F.3d 412, 422 (6th Cir. 2021); *Abelesz v. OTP Bank*, 692 F.3d 638, 660 (7th Cir. 2012).[4]

[4] Notably, in a companion case decided by the same panel at the same time, the Seventh Circuit found the *OTP Bank* personal-jurisdiction analysis inapplicable under FSIA. It held that the jurisdictional "inquiry under the FSIA is not congruent with a general personal jurisdiction inquiry." *Magyar Nemzeti Bank*, 692 F.3d at 694. It recognized that the personal-jurisdictional talisman under FSIA was the level of "commercial activity" and ordered the district court to permit jurisdictional discovery to that end. *Id.* at 666. Thus, the two Seventh Circuit decisions show the type of doctrinal confusion that the Fifth Circuit panel noted. App. 158 (Elrod, J., concurring).

B. Due Process for Extraterritorial Personal Jurisdiction in Criminal Cases Emphasizes U.S. Interests, Not Fourteenth Amendment Standards.

Although the en banc majority justified its treatment of Fifth and Fourteenth Amendment due process identically because of their identical text, the dissenters showed that *all circuits* abandon that uniformity when considering extraterritorial personal jurisdiction in criminal cases. App. 91-93 (Elrod, J., dissenting). This anomaly leads to the perverse result of a stricter standard being applied in civil cases. While the Fifth Circuit held NYK outside the personal jurisdiction of U.S. courts in this case, the Justice Department faced no similar obstacle to prosecuting NYK for price-fixing. App. 207. In fact, extraterritorial prosecutions date back to the seventeenth century and have been a continuous feature of American jurisprudence. *See* App. 90-93 (Elrod, J., dissenting) (reviewing history). This ongoing and recurring conflict in reading the Fifth Amendment's Due Process Clause is a further reason warranting this Court's review.

Due process limits a State's coercive power when it undertakes judicial process. *Nicastro*, 564 U.S. at 879. The clause plainly applies to criminal prosecutions as it does to civil lawsuits. Yet, in criminal cases, the circuits uniformly permit prosecution of foreign nationals under U.S. laws as long as U.S. interests are affected or some other U.S. nexus exists. International law also permits extraterritorial prosecution under two relevant principles that should equally apply in the civil context and, in particular, in this case.

The circuits are replete with decisions permitting extraterritorial applications of personal jurisdiction in criminal cases that run counter to this decision. At least the Second, Third, Fourth, Fifth, Sixth, Ninth, Eleventh, and D.C. circuits have found that the Fifth Amendment has less rigid due-process application for criminal personal jurisdiction. For example, in *United States v. Yousef*, 327 F.3d 56, 87 (2d Cir. 2003), a foreign national prosecuted for conspiracy to bomb United States commercial airliners in Southeast Asia was held within "the special aircraft jurisdiction of the United States," as authorized by 18 U.S.C. § 32(a)(1)). It adopted the Ninth Circuit's due-process standard to hold that the "substantial intended effect of their attack on the United States and its citizens" was not "so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair." *Yousef*, 327 F.3d at 111-12.

Other circuits have adopted similar or looser standards. *See United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (holding "nothing fundamentally unfair in [prosecution] exactly as Congress intended—extraterritorially without regard for a nexus between a defendant's conduct and the United States"), *cert. denied*, 510 U.S. 1048 (1994); *United States v. Mohammad-Omar*, 323 F. App'x 259, 262 (4th Cir.) (foreign national prosecution did not violate due process because the defendant should have "anticipate[d] being haled into court in the United States on account of his drug trafficking activity in Afghanistan, Dubai, and Ghana"), *cert. denied,* 558 U.S. 908 (2009); *United States v. Lawrence*, 727 F.3d 386, 396 (5th Cir. 2013) (extraterritorial application of statute to non-

U.S. defendants arrested while traveling between two foreign countries in connection with drug-running exercise of jurisdiction was not "arbitrary or fundamentally unfair."), *cert. denied*, 571 U.S. 1222 (2014); *United States v. Iossifov*, 45 F.4th 899, 914 (6th Cir. 2022) ("even assuming that the Fifth Amendment limits its congressional authority to criminalize extraterritorial conduct, . . . prosecution [of Bulgarian national who never stepped foot in the United States] did not run afoul of those limits because it was not arbitrary or fundamentally unfair"); *United States v. Medjuck*, 156 F.3d 916, 918 (9th Cir. 1998) ("extraterritorial application of United States penal statutes . . . satisfy the strictures of due process [when] there exists 'a sufficient nexus between the conduct condemned and the United States' such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant"), *cert. denied*, 527 U.S. 1006 (1999); *United States v. Cabezas-Montano*, 949 F.3d 567, 586-87 (11th Cir.) (rejecting argument that Fifth Amendment "due process prohibits the prosecution of foreign nationals for offenses bearing no 'nexus' to the United States."), *cert. denied*, 141 S.Ct. 814 (2020); *United States v. Ballestas*, 795 F.3d 138, 148 (D.C. Cir. 2015) (holding no due-process violation because "[t]here is no arbitrariness or fundamental unfairness" in prosecuting a Columbian citizen for drug running through vessels on the high seas), *cert. denied*, 577 U.S. 1166 (2016). *See also* App. 92-93 (Elrod, J., dissenting) (citing cases).

In holding that criminal and civil due-process considerations for personal jurisdiction are different, these circuits typically rely on two justifications. One theorizes that authority over a criminal prosecution is

warranted when the defendant's actions "'affected significant American interests'—even if the defendant did not mean to affect those interests," *United States v. Murillo*, 826 F.3d 152, 157 (4th Cir. 2016), *cert. denied*, 137 S.Ct. 812 (2017). Another distinction treats intent to "harm U.S. citizens and interests and to threaten the security of the United States" differently from "terror attacks" abroad unless there is "evidence the attacks specifically targeted United States citizens." *Waldman*, 835 F.3d at 341.

Neither rationale explains why Fifth Amendment due process requires a foreign defendant's liberty interests to vary depending on whether the case is criminal or civil. *See* App. 90 ("The majority opinion wholly neglects to explain why it elevates foreign *civil* defendants above criminal defendants for special due-process solicitude in this context."), 93 (Elrod, J., dissenting). The sovereign interests of the United States can be as acute in a civil matter as in a criminal one, especially here, where the United States would be as interested in compensation for the harm that befell its naval destroyer from the collision as for the harm to its personnel. Imposing an at-home requirement in addition to the strong nexus of interest evident here cannot be justified under the Fifth Amendment and warrants this Court's review.

III. THE FIFTH CIRCUIT'S DEPARTURE FROM THIS COURT'S PRECEDENTS AND THE CONSTITUTION'S INCORPORATION OF THE LAW OF NATIONS TO LIMIT ADMIRALTY JURISDICTION IS ANOTHER ISSUE OF GREAT NATIONAL IMPORTANCE.

A. Admiralty Incorporates International Custom and Law so that Settled Usages Permit Extraterritorial Personal Jurisdiction.

Admiralty is different, substantively and procedurally from other categories of U.S. law. *See Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion*, 773 F.2d 1528, 1535 (11th Cir. 1985); Fed. R. Civ. P. 9(h) (permitting plaintiff to identify a case as a maritime claim for certain purposes).

The Framers recognized the existence in international law of a vast body of preexisting admiralty law and procedure that secured to the federal government all dominion over it by assigning the judiciary the authority over "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1. As a result, it made the relevant international law part of our domestic law, *The Paquete Habana*, 175 U.S. 677, 700 (1900), "'subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require.'" *Detroit Trust Co. v. Barlum S.S. Co.*, 293 U.S. 21, 43 (1934) (quotation omitted).

It is significant that federal courts sit as common-law courts in admiralty, *Exxon Shipping Co. v. Baker*,

554 U.S. 471, 507 (2008), and exercise that common-law authority "[s]ubject to direction from Congress." *Air & Liquid Sys. Corp.*, 139 S. Ct. at 992 (citation omitted). Still, "[a]dmiralty law is a species of international law, administered by the courts of maritime nations, including specifically the courts of the United States." *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 636 (9th Cir. 1982).

Unlike cases that are subject to the Fourteenth Amendment, admiralty involves a largely unique interplay between subject-matter and personal jurisdiction. The Constitution specifies that admiralty subject-matter jurisdiction is plenary. U.S. Const. art. III, § 2, cl. 1. In fact, admiralty is the only instance where the Constitution extends judicial power to a body of law that predates the Constitution. *See The Ship Catherina*, 23 Fed. Cas. 1028, 1030 (D. Pa. 1795) (holding the "laws of nations" binding).

The "framers drafted Article III['s provision about admiralty jurisdiction] with this full body of maritime law clearly in view," a "venerable law of the sea" that was "well-known and well-developed which arose from the custom among 'seafaring men,'" and applied "for 3,000 years or more." *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999). *See also Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 512 (1828) (Marshall, C.J.,) (maritime jurisdiction is "as old as navigation itself"),

Courts thus view maritime law as an amalgam of federal statutory and common law that occasionally uses the laws of states and, on rare occasions, of

foreign jurisdictions to fill its interstices. 14A Charles Alan Wright & Arthur Miller, FED. PRAC. & PROC. § 3671.3 (4th ed.). Still, federal substantive law uniformly governs and defeats state or foreign legal interests that would otherwise require a departure from the uniformity that it imparts. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 27 (2004); *see also Yamaha Motor Corp., U.S.A. v. Calhoun,* 516 U.S. 199, 210 (1996) ("[I]n several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision.") (citations omitted)). *See generally* 14A FED. PRAC. & PROC. § 3671.3 ("The same concern about the uniformity of maritime law that limits the application of state law also limits the importance and applicability of foreign law sources.").

Moreover, as opposed to other federal interests governed by the Fifth Amendment, federal courts' "inherent powers in admiralty" justify due process flexibility when applied to admiralty. *Merchants Nat'l Bank of Mobile v. Dredge Gen. G. L. Gillespie*, 663 F.2d 1338, 1346 (5th Cir. 1981).

The bottom line is that our courts have recognized exceedingly broad admiralty jurisdiction, covering any action arising from torts committed upon "the high seas or navigable waters." *Atl. Transp. Co. of W. Va. v. Imbrovek*, 234 U.S. 52, 59-60 (1914) (quoting *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865)); *see also* 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1659, 1663 (1833) (admiralty jurisdiction "extends to all acts and torts done upon the high seas, and within the ebb and flow of the sea," including "cases of collision, or running of ships

against each other"). That broad authority includes the tools necessary to effectuate it.

B. Most Circuits Erroneously Followed Daimler to Change their Personal Jurisdiction Approach to Admiralty Cases.

Although nothing in *Daimler* suggested it was intended to overrule existing Fifth Amendment personal-jurisdiction decisions, courts nonetheless largely changed their views. The Fifth Circuit abandoned its more generous approach in *World Tankers* by adopting, without briefing on the subject, a more restrictive approach in *Patterson*.

The Second Circuit, however, adheres to a more traditional due-process test in admiralty cases alone, as other circuits did pre-*Daimler*. Applying Rule 4(k)(2) in an admiralty case, it held that due process was satisfied if the foreign defendant "has sufficient affiliating contacts with the United States in general," and "whether the assertion of personal jurisdiction 'is reasonable under the circumstances of the particular case.'" *Porina*, 521 F.3d at 127 (citation omitted). In that case, the lawsuit concerned the sinking of a Latvian fishing vessel in Swedish waters in which all six crew members perished after a collision with a Cypriot cargo ship. *Id*. at 124. Neither Rule 4(k)(2) nor due process was met because the defendant's only U.S. contacts were that the cargo ship, while chartered by parties other than the defendant, had made repeated visits to various U.S. ports. *Id*. at 128. More significant contacts, as exist here, would have satisfied the Second Circuit's maritime application of "general

jurisdiction." *Id.* Courts within the Second Circuit continue to utilize the *Porina* test in admiralty. *See BMW of N. Am. LLC v. M/V Courage*, 254 F. Supp. 3d 591, 599-600 (S.D.N.Y. 2017).

Similarly, the Ninth Circuit recognized that the "longstanding custom in American admiralty law is that courts have discretion to assert in personam jurisdiction in suits between foreign parties" in a case where a Chinese company brought suit for a lost cargo against a Chilean carrier. *Complaint of Damodar Bulk Carriers, Ltd.*, 903 F.2d 675, 678 (9th Cir. 1990). It held that general jurisdiction exists in admiralty "over a non-resident defendant [i]f the defendant's activities in the state are substantial or continuous and systematic, ... even if the cause of action is unrelated to those activities." *Id.* at 679 (quoting *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986)) (cleaned up, footnote omitted).

In another lost cargo case, the Seventh Circuit affirmatively declared, anticipating the issue subsequently raised with respect to Rule 4(k)(2), that "[w]hen a national court applies national law, the due process clause requires only that the defendant possess sufficient contacts with the United States." *United Rope Distributors, Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534 (7th Cir. 1991).

In the case below and in *Patterson*, the Fifth Circuit alone has explicitly required the foreign defendant to be at home in the United States to establish personal jurisdiction in an admiralty case. Still, the implications in admiralty are significantly broader than

the number of collisions at sea between ships of different flags because it harms the international law canvas upon which admiralty jurisdictional issues are painted, throws the constitutionality of DOHSA into question because it depends on the same personal jurisdiction considerations, and warrants review in this Court.

IV. THE DECISION BELOW IS INCORRECT.

The Fifth Circuit held that the Fifth Amendment's Due Process Clause renders Rule 4(k)(2) either superfluous or useless. It cannot apply to general jurisdiction because no foreign defendant is at home here. App. 3, 27 n.27. Instead, according to the majority, Rule 4(k)(2) is a form of specific jurisdiction, which would require that the incident took place inside the United States and thus the defendant would be amenable to some state court's jurisdiction, which contradicts the text of Rule 4(k)(2).[5]

In the majority's view, the Fifth and Fourteenth Amendment's Due Process Clauses exhibit no substantive differences: one simply applies to the federal

[5] The majority below cited six cases where Rule 4(k)(2) was applied to specific jurisdiction. App.28. Yet, each involved a fact pattern where the foreign defendant purposely availed itself of activity within a state or states and would fall within a state long-arm statute. The cited cases, were comparable with *Fortis Corporate Ins. v. Viken Ship Mgmt.*, 450 F.3d 214 (6th Cir. 2006), where the court applied Rule 4(k)(2) because the foreign shipowner had sufficient contacts with *Ohio*, while denying that was the case. If the contacts with Ohio sufficed, then Ohio's long-arm statute, rather than Rule 4(k)(2) applied.

courts and one to state courts. App. 17. That is not correct.

It is true that, in either locus, due process's "minimum contacts test secures defendants' individual liberty by protecting them against (1) the concrete burden of 'litigating in a distant or inconvenient forum,'" and (2) the abstract burden of "submitting to the coercive power of a [forum] that may have little legitimate interest in the claims in question." *Bristol-Myers*, 137 S. Ct. at 1781 (internal citation omitted). But by adding the at-home requirement, the majority ignored the overriding interest of the United States in its military personnel killed or injured through the negligence of others while on the high seas in the service of their country.

For these reasons, treating Rule 4(k)(2) as creating nothing more than a federal form of general or specific jurisdiction, rather than an independent congressionally authorized species of personal jurisdiction, means that the rule accomplishes nothing other than to add extraneous requirements. A plaintiff, then, would be foolhardy in invoking Rule 4(k)(2) because it would unnecessarily force the plaintiff to muster aggregate national contacts and deny state-court jurisdiction to no end when the defendant is at home in the United States (meaning, a State), or has purposely availed itself of the forum. The majority's application of due process to Rule 4(k)(2) would not even reach the British party in *Omni Cap.*, which the Rule was specifically drafted to reach. The *Omni Cap.* Court saw no issue with exercising jurisdiction over that party,

provided there was a Rule or statute by which service of process could be accomplished. 484 U.S at 106.

If Fifth Amendment due process requires a foreign defendant to be essentially at home in the United States, as the majority requires, and the language of Rule 4(k)(2)(A) requires the defendant "not [be] subject to jurisdiction in any state's court of general jurisdiction," then due process renders Rule 4(k)(2) unconstitutional in all or nearly all applications, including applications within the contemplation of its drafters.

The reflexive treatment of due process the same way regardless of whether derived from the Fifth or Fourteenth Amendment ignores the history and customary usage of due process that applies differently to each. Due process cannot be "reduced to any formula" or any "mechanical yardstick." *Poe v. Ullman*, 367 U.S. 497, 542, 544(1961) (Harlan, J., dissenting from dismissal of appeals). Its "'very nature . . . negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Goss v. Lopez*, 419 U.S. 565, 578 (1975) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

Instead, a historical approach informs the analysis, just as it was used to find personal jurisdiction over a transient presence in *Burnham*. There, recognizing a form of personal jurisdiction that is neither specific nor general, Justice Scalia wrote that "tag" jurisdiction comported with "due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'" *Id.* at 619

(plurality op.). The assertion of judicial authority over out-of-state persons just passing through a state was also "[a]mong the most firmly established principles of personal jurisdiction in American tradition." *Id*. at 610.

The historical approach invoked in *Burnham* helps shape the spacious concept of due process. At least as early as 1855, this Court described the quest for understanding due process as requiring a "look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 277 (1855); *see also Rochin v. California*, 342 U.S. 165, 168 (1952) (describing due process as "a historical product") (citation omitted)).

Even *Pennoyer v. Neff* lodged its understanding of due process in "those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." 95 U.S. 714, 733 (1877), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977). *See generally* Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 356 (1868).

Indeed, every exposition of due process in the context of personal jurisdiction looks to history and tradition to define its application. The seminal decision in

International Shoe Co. v. Washington defines the due-process inquiry in terms of "'*traditional notions* of fair play and substantial justice.'" 326 U.S. 310, 316 (1945) (emphasis added) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (emphasis added); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (stating that "the interest of each state in providing means to close trusts . . . is so insistent and rooted in custom" that assertion of jurisdiction by state courts to determine interests of nonresidents in trusts does not violate due process) (emphasis added).

The upshot of this long line of due-process decisions is that practices settled under the common law predating the Constitution comply with the requirements of due process. Those practices support providing defendants with adequate notice, *id*. at 320, an opportunity to be heard, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and a fair tribunal. *In re Murchison*, 349 U.S. 133, 136 (1955). The link between personal jurisdiction and a "defendant's 'contacts' with the forum developed in state litigation." *Bd. of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000). Similarly, the link between due process and personal jurisdiction was developed under state constitutions. *See, e.g., Ex parte Woods*, 3 Ark. 532, 536-37 (1841) (articulating dicta that the state constitution's "law of the land" clause could restrict personal jurisdiction); *Beard v. Beard*, 21 Ind. 321, 324 (1863).

New scholarship on the original public meaning of Fifth Amendment due process as it relates to personal jurisdiction confirms that personal jurisdiction was

achieved through validly authorized service of process. *See* Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 467 (2022). Thus, both English antecedents and understandings from the framing era establish that due process of law, as used in the Fifth Amendment, only "forbids the federal government to deprive any person of life, liberty, or property if they have not been served process in accord with the law." Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 Ala. L. Rev. 483, 524 (2022); *see also* Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703 (2020). The dissent below also provided an extensive and unanswered originalist examination of the Fifth Amendment's applicability. App. 53-54, 61-79.

Useful insight is provided by early cases. In *Picquet v. Swan*, 19 F. Cas. 609 (C.C.D. Mass. 1828), Justice Story examined the extent of authority under the Judiciary Act of 1789 to assert personal jurisdiction over a non-inhabitant. He said that because "congress never had any such intention" to extend process that far, "no suit would lie against any person, who was not locally present, either as an inhabitant, or in transitu in the United States." *Id.* at 613. However, if Congress chose to expand service of process, there was no bar to a federal court's authority to have "a subject of England, or France, or Russia . . . summoned from the other end of the globe to obey our process, and submit to the judgment of our courts." *Id.* Regardless of any objections that might be mustered, a federal court

"would certainly be bound to follow it, and proceed upon the law." *Id.* at 614-15; *see also Toland v. Sprague*, 37 U.S. 300, 330 (1838) (adopting *Picquet's* reasoning and holding that "positive legislation" could authorize process on non-inhabitants as long as it provides notice of suit). Authorized process of the kind that Congress could, but had not yet undertaken, was dubbed "legislative jurisdiction." *D'Arcy v. Ketchum*, 52 U.S. (11 How.) at 176. Indeed, more recently, this Court recognized that Congress could authorize personal jurisdiction where it does not presently exist. *Nicastro*, 564 U.S. at 885; *cf. Blackmer v. United States*, 284 U.S. 421, 438 (1932) (finding no Fifth Amendment problem with a congressional enactment that extended in personam jurisdiction over a U.S. citizen domiciled abroad as long as "appropriate notice of the judicial action and an opportunity to be heard" occurred.

Applying that common-law usage, history and tradition to admiralty, it becomes clear that admiralty courts exercised personal jurisdiction under the law of nations for collisions at sea since before the nation's founding and before *Pennoyer* made due process a consideration for personal jurisdiction. Nothing in the law or in precedent has rendered that exercise of personal jurisdiction infirm. Thus, just as *Burnham* established that tag or transient jurisdiction, as a continuous feature of American jurisprudence, comports with due process, so the admiralty jurisdiction asserted here must as well.

Indeed, a century ago, this Court held that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country" and that "in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law." *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917). Thus, a congressionally authorized rule, such as Rule 4(k)(2), as well as the exercise of the federal courts' common-law authority in maritime cases provide a strong basis to demonstrate that the notice and opportunity to be heard that is at the heart of Fifth Amendment due process is satisfied.

As this Court recently recognized, admiralty courts acted within an "'enlarged and liberal jurisprudence of courts of equity'" with "'the power to . . . dispose of [a case] as justice may require.'" *The Dutra Grp. v. Batterton*, 139 S. Ct. 2275, 2279 (2019) (quoting *The Resolute*, 168 U.S. 437, 439 (1897)). Relying on "medieval and renaissance law codes that form the ancient foundation of maritime common law," courts adopted an approach that treated seamen as "emphatically the wards of the admiralty" and entitled to enhanced judicial protections. *Id*. (quoting *Harden v. Gordon*, 11 F.Cas. 480, 485 (No. 6,047) (C.C.D. Me. 1823) and *Brown v. Lull*, 4 F.Cas. 407, 409 (No. 2,018) (C.C.D. Mass. 1836) (Story, J.).

In *The Belgenland*, 114 U.S. 355 (1885), this Court opined, "where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured . . . should ever

be denied justice in our courts." 95 U.S. at 68-69. After all, "[m]aritime law has always recognized a 'special solicitude for the welfare' of those who undertake to 'venture upon hazardous and unpredictable sea voyages,'" *Air & Liquid Sys.*, 139 S. Ct. at 995 (citation omitted), and reflects admiralty law's elevated responsibility "as 'protector' of seamen." *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1125 (5th Cir. 1995).

It is also significant that the deaths and injuries in this case took place on the U.S.S. Fitzgerald while the victims served their country. The ship belongs to the United States Navy and, more generally, the United States. *United States v. Conroy*, 589 F.2d 1258, 1267 (5th Cir. 1979). Courts have long recognized the principle that a ship belonging to the United States as a sovereign is "deemed to be a part of the territory of that sovereignty, and [does not] lose that character when in navigable waters within the territorial limits of another sovereignty." *United States v. Flores*, 289 U.S. 137, 155-56 (1933) (citations omitted); *see also The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812) (Marshall, C.J.) (describing a warship as "part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects" and remains within the sovereign's jurisdiction even when within another sovereign's territory).

As such, the *U.S.S. Fitzgerald* was a projection of U.S. sovereignty, and the collision with it was an intrusion upon U.S. territory. *See* Alexander Porter Morse, *The International Status of a Public Vessel in Foreign Waters*, 50 Albany L.J. 204, 205 (1894) ("the

ship is conceived as a portion of the floating sovereign State, floating in the high sea or elsewhere").

The interest of the United States as a sovereign, historically as a measure of due process and practically as a projection of American interests and property around the world, is second to none in the dispute before this Court. Plainly, U.S. interests here are predominant in the same way that the Court discussed States having "significant interests at stake" in order to provide their "'residents with a convenient forum for redressing injuries inflicted by out-of-state actors.'" *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1030 (2021) (quoting *Burger King,* 471 U.S. at 473). Denying a federal-court forum, on the other hand, would impose the "unique burdens" of litigating in a "foreign legal system," *Asahi Metal*, 480 U.S. at 114, where compensation would be paltry, upon U.S. Navy sailors and their families, whose injuries and deaths are a result of service to this country, as well as the United States for its claims of property damage to the U.S.S. Fitzgerald.

The only proper measure of due process under Rule 4(k)(2) is a national-contacts rule. Under that rule, personal jurisdiction exists when a defendant "has continuous and systematic contacts with the United States as a whole" so that "subjecting [it] to suit here does not offend notions of fair play and substantial justice." *Adams*, 364 F.3d at 651-52 (citations omitted).

Rule 4(k)(2) creates a constitutionally valid form of congressionally endorsed personal jurisdiction that

is untethered to the artificial and less-than-comprehensive categories of specific or general jurisdiction.

The Fifth Circuit has, effectively, declared a congressionally authorized Rule to be unconstitutional in virtually every case where it could be useful. It also has raised serious constitutional doubts about the reach of the Death on the High Seas Act. If the majority's ruling that the Fifth and the Fourteenth Amendments are coterminus stands, it has called into question the validity of the many federal statutes that enable federal courts to adjudicate wrongs committed outside the United States. For those reasons, this Court should consider this to be a case in which the constitutionality of a federal law is challenged and therefore must provide notice to the Attorney General under 28 U.S.C. 2403.

CONCLUSION

The petition for a writ of certiorari should be granted.

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