No. 22-562

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 KABUSHKI KAISHA,
Respondent.

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

BRIEF IN OPPOSITION

ROBERT H. MURPHY
PETER B. TOMPKINS
MURPHY, ROGERS, SLOSS, GAMBEL & TOMPKINS
701 Poydras Street
Suite 400
Hancock Whitney Center
New Orleans, LA 70139
(504) 523-0400

THOMAS MARK CANEVARI
Counsel of Record
ERIC JOHN MATHESON
FREEHILL HOGAN & MAHAR, LLP
80 Pine Street
New York, NY 10005
(212) 381-3017
canevari@freehill.com

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Respondent Nippon Yusen Kabushiki Kaisha ("NYK") provides its counterstatement of the question presented.

1. Whether the United States District Court for the Eastern District of Louisiana correctly determined that it could not exercise general personal jurisdiction over Defendant NYK under the undisputed jurisdictional facts in this case.

RULE 29.6 DISCLOSURE

NYK is a foreign corporation registered in Japan, with a principal place of business in Tokyo. NYK's stock is publicly traded on the Prime Market of Tokyo Stock Exchange. As of March 21, 2022, The Master Trust Bank of Japan, Ltd. (Trust Account) owned more than 10% of NYK's stock, according to NYK's shareholder register.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

"You're making it up."[1] Those were the words that Circuit Judge Jones[2] used to characterize Petitioners' position arguing for a new test and new rule for general personal jurisdiction under the Fifth Amendment. Her astute observation remains true as to Petitioners' arguments here. Dissatisfied with how the facts[3] of this case fit within the controlling law, Petitioners ignore the Constitution and Laws of the United States, seeking to deny NYK due process. Petitioners have failed to present a compelling case for review.

---

[1] Recording of Oral Argument, 21 Sept. 2021 at time 09:57 *Available at* https://www.ca5.uscourts.gov/OralArgRecordings/20/20-30382_9-21-2021.mp3.
In the full exchange from 9:11-10:00 Petitioners' request for an alternative test is discussed.
The Fifth Circuit transcript of the Oral Argument was used by the Judges and cited in the *En Banc* Court's Decision, but Counsel has been advised that it is not available. *See* Pet.App.5-6 n.6 ("*See En Banc* Oral Argument at 25:20-25:57 . . . . 58:12-58:53").

[2] Judge Jones also participated in the *en banc* panel of the Fifth Circuit in *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (5th Cir. 1986), *aff'd Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987) which Petitioners and *Amici* misconstrue. *Omni* gave rise to Fed. R. Civ. P. 4(k)(2), but as the Fifth Circuit *en banc* continued to recognize more than 35 years later, the issue in *Omni* was procedural service of process, and not the substantive rights of a defendant and the Constitutional limits of personal jurisdiction.

[3] The relevant jurisdictional facts are set forth in the declaration of Yutaka Higurashi. Resp.App.1-11. The district court and the court of appeals relied on this document and Petitioners have never challenged its assertions.

At a minimum, a petition for *certiorari* should be a truthful recitation. This petition is not. The collision giving rise to Petitioners' death and injury claims occurred inside Japanese territorial waters, not in "the east china sea."[4] The collision was investigated by both the National Transportation Safety Board and the Japan Transport Safety Board. They looked only to the U.S. Navy, the owner of the U.S.S. FITZGERALD, and Sea Quest Ship Management, Inc., the operator of the ACX CRYSTAL, in making their findings and recommendations.[5] Importantly, NYK neither owned the ACX CRYSTAL nor controlled its navigation, but rather was a time charterer. As the time charterer, NYK did not have any legal liability for navigational operations, errors, or negligence.[6] Petitioners

---

[4] *Compare* Pet.i. *with* Pet.App.5.

[5] *See* Pet.App.5-6 n.6; National Transportation Safety Board, *Marine Accident Report: Collision Between US Navy Destroyer* Fitzgerald *and Philippine-Fleg Container Ship* ACX Crystal *Sagami Nada Bay off Izu Peninsula, Honshu Island, Japan July 17, 2017* (2020), https://www.ntsb.gov/investigations/AccidentReports/Reports/MAR2002.pdf (last visited Oct. 23, 2021); Japan Transport Safety Board, *Marine Accident Investigation Report* (Aug. 29, 2019), https://www.mlit.go.jp/jtsb/eng-mar_report/2019/2017tk0009e.pdf (last visited Oct. 23, 2021) (Links checked/corrected Jan 24, 2023).

[6] *Grand Famous Shipping Ltd. v. China Navigation Co.*, 45 F.4th 799, 802 (5th Cir. 2022) quoting Grant Gilmore & Charles L. Black, Jr., THE LAW OF ADMIRALTY 193-94 (2d ed. 1975) ("In a time charter the ship's carrying capacity is taken by the charterer for a fixed time for the carriage of goods on as many voyages as can fit into the charter period. Again, the owner retains all control for management and navigation.") *Grand Famous* was decided the day before the *en banc* Court's decision

brought suit against the vessel owner Olympic Steamship Company S. A. and its bareboat charter Vega Carriers Corporation S. A. in Tokyo, Japan.[7] Petitioners did not sue NYK in Japan.

Contrary to Petitioners' erroneous assertions, it is established that "NYK Line currently does not maintain a physical office in the United States, and it has not done so for over twenty-five years." Pet.App.161.[8]

Since only general personal jurisdiction over NYK is at issue, facts related to the Plaintiffs, the vessels, or the incident lack any probative value. Only NYK's contacts with the jurisdiction are relevant. The sole inquiry is whether a dispute blind[9] analysis of the relevant facts demonstrates that NYK is **not** at home in the United States, and therefore Constitutionally protected by the due process clause from the exercise of general personal jurisdiction. Petitioners' and *Amici*'s attempt to shift

---

in this case, but the same limitation was expressed in the *en banc* decision. Pet.App.5 n.5.

[7] Tokyo District Court Civil Division No. 5; Case No. Reiwa 2 (wa) 31332.

[8] Petitioners have rotely repeated that "NYK opened its first office in the United States in 1920 and maintains employees here." Pet.4.

[9] *Daimler AG v. Bauman*, 571 U.S. at 138-39 ("*See also* Twitchell, *Why We Keep Doing Business With Doing-Business Jurisdiction*, 2001 U. Chi. Legal Forum 171, 184 (2001) (*International Shoe* "is clearly not saying that dispute-blind jurisdiction exists whenever 'continuous and systematic' contacts are found."); *BNSF*, 137 S. at 1559 n.4 noting that *International Shoe*'s continuous and systematic contacts related to specific jurisdiction is inapplicable to "an exercise of general, dispute-blind, jurisdiction.").

the test away from the "at home" analysis is not supported by any existing decisions or precedent.

Petitioners' statements about "sovereignty" are irrelevant. There is neither a sovereign nor a sovereign's interest represented in this case. Nor is there a Circuit split present, and Petitioners' new argument is unsupported. The Circuits have neither applied different standards for general personal jurisdiction to cases under Maritime and Admiralty subject matter jurisdiction, nor have they "abandoned"[10] some alleged prior different standard that supports Petitioners' arguments as they now suggest for the first time here. Petitioners ignore the decisions and precedents which would have to be jettisoned to obtain their result driven outcome.

While the collision and the associated deaths and injuries are undeniably tragic, those facts have no bearing whatsoever on the question of whether NYK is subject to general personal jurisdiction in the United States. NYK is a Japanese corporation with its place of incorporation and principal place of business in Japan. As such it may not be sued for any and all claims, no matter where they may arise, in the Courts of the U.S.

The Petition does not address all of the relevant facts or the controlling law. Petitioners focus on only a few points, leaving an incomplete analysis. Conversely, the analysis of the courts below was both thorough and well-reasoned. Having lost on the facts below does not justify a wholesale change of law. The petition should be denied.

---

[10] Pet.16-17.

COUNTERSTATEMENT OF THE CASE

Why then is this case even here? Petitioners forum shopped their case to the Eastern District of Louisiana. There are no connections with any Plaintiff to that forum, and no connection between NYK as time charterer of the ACX CRYSTAL to that forum. Petitioners interpreted one out of step decision as justifying personal jurisdiction.[11] But, the district court that heard the instant cases explained that *O'Berry* was patently wrong.[12] In a thorough and well-reasoned opinion, District Judge Lance Africk applied controlling Fifth Circuit and Supreme Court precedent and found that NYK was not at home in the United States, and that there were no exceptional circumstances such that the U.S. had become its surrogate home.[13]

> Considering NYK Line's contacts combined with the contacts of its U.S. subsidiaries, in the context of its entire operation, the Court finds that NYK Line is not "at home" in the United States. NYK Line cannot be deemed "at home" in every country in which it operates a small fraction of its wholly owned subsidiaries, maintains less than six percent of its employees, and generates less than ten percent of its revenue. Even assuming that the contacts of NYK Line's U.S. subsidiaries

---

[11] *O'Berry v. ENSCO Int'l, LLC*, No. 16-3569, 2017 U.S. Dist. LEXIS 39260, at *9 (E.D. La. 2017).

[12] Pet.App.190-91 n.82.

[13] Pet.App.199-200.

> can be imputed to NYK Line for the purpose of general jurisdiction, NYK Line's contacts with the United States still represent only a fraction of its contacts worldwide. *See Daimler*, 571 U.S. at 139 n.20.
>
> The Court is constrained by Supreme Court and Fifth Circuit precedent from exercising personal jurisdiction over the defendant.

Pet.App.199-200.

At the same time, Petitioners pursued litigation in the Courts of Japan, bringing suit against the owner and bareboat charterer of the ACX CRYSTAL. Petitioners did not sue NYK in Japan. Instead, in the U.S. Courts they characterized the very remedy they are *already pursuing* in Japan as one "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. . . ." Pet.36. Petitioners, bizarrely, argue that the paltry compensation would, if the Fifth Circuit's decision stands, extend to "the United States for its claims of property damage to the U.S.S. FITZGERALD." Pet.36. The U.S. is a non-party, and thus the quantum of damages recoverable (in the U.S. or Japan) is simply not relevant to this case and NYK's due process rights. The U.S. has already settled its hull claims with the owner of the ACX CRYSTAL in

Japan in an agreement subject to Japanese law.[14] NYK was not a party to that agreement. The U.S. government has not become involved in this case.[15] Regardless of whether it does, under the maxim *acta non verba,* whatever the U.S. says about the ability to hale NYK into court for suits by its vessel crew arising from the collision is not consistent with its own acts in settling its claims for damage to the vessel's hull and equipment with another party, in another country, and subject to foreign law.

Petitioners appealed the district court's decision and a three-judge panel affirmed. Two judges concurred but expressed their view that the controlling law was wrong and urged re-hearing *en banc*. The *en banc* Fifth Circuit took up the case, and after further and extensive briefing concluded that its existing precedent was entirely correct.[16]

The *en banc* court did not hold that general personal jurisdiction could never apply to Rule 4(k)(2), nor did the court find that the rule had "at most a limited application to specific jurisdiction."[17] The Fifth Circuit's holding is limited to the parties' arguments and, with one exception, did not address "the dissents' wholly novel arguments, which pointedly divorce themselves from the parties' theory of the case" and "decline[d] to consider adversarially

---

[14] Navy Times, Jan 11, 2019 last visited Jan 26 2023 available at https://www.navytimes.com/news/your-navy/2019/01/11/ship-owners-to-pay-us-government-for-fitzgerald-collision/.

[15] Not only is the U.S. and the U.S. Navy not a party, but when the Fifth Circuit solicited the views of the Solicitor General in this case, the U.S. declined.

[16] Pet.App.24-27.

[17] *Compare* Pet.App.27-28 and n.28, *with* Pet.8.

untested propositions."[18] The Fifth Circuit held that "the principal dissent's criticism that NYK bore some burden—to anticipate and analyze personal jurisdiction without any reference to well-settled case law—is simply wrong. At the very least, it is the plaintiffs' burden to establish the court's jurisdiction in response to a Rule 12(b)(2) personal jurisdiction challenge by a defendant." *Id*. The *en banc* decision of the Fifth Circuit is compelling and consistent with every other court of appeals and this Court's precedent. This case presents no compelling reasons for review.

ARGUMENT

I. The Petition is devoid of merit.

a. The Petitioners' and their supporters' positions are contrary to clear law which they refuse to address and cannot refute on the facts of this case.

A few fundamental points are instructive to aid in understanding the petition and NYK's arguments against *certiorari*. The term "jurisdiction" standing alone is not descriptive because it can have more than one meaning. This case deals with general personal jurisdiction, one of only two subsets of personal jurisdiction this Court recognizes, the other being specific personal jurisdiction. Separately, jurisdiction is also used to describe subject matter jurisdiction, which relates to the court's power to hear and decide a case or controversy, but is unrelated to its powers over the parties to the proceeding. Petitioners' arguments mistakenly rely

[18] Pet.App.8-9 n.8.

on "admiralty jurisdiction," a form of subject matter jurisdiction. While the foregoing may seem at first glance elementary, and its recitation unnecessary, the distinction is of paramount importance in understanding why review is not warranted.

The Petitioners premise their arguments, here as below, on the notion that it is sufficient to use the term "jurisdiction" alone, and quote and cite sentences from cases that do so, without delving into or presenting the attendant context. They are not the first to use this tactic. No single case so thoroughly refutes this position and makes clear the dangers faced when these important distinctions are not maintained than *Insurance Corporation of Ireland v. Compagnie Des Bauxites De Guinee*, ("*Ins. Corp. of Ir.*") 456 U.S. 694 (1982).

> The concepts of subject-matter and personal jurisdiction, however, serve different purposes, and these different purposes affect the legal character of the two requirements. Petitioners fail to recognize the distinction between the two concepts -- speaking instead in general terms of "jurisdiction" -- although their argument's strength comes from conceiving of jurisdiction only as subject-matter jurisdiction. . . .

Id. at 701. The Petition and Amicus briefs are riddled with this same failure. In *Ins. Corp. of Ir.*, the Court explained that subject-matter jurisdiction derived from both U.S. Const. Art. III and statutes. 456 U.S. at 702. Subject matter jurisdiction "functions as a restriction on federal power, and

contributes to the characterization of the federal sovereign." *Id*. Comparing the characteristics of subject matter jurisdiction, Justice White explained, that "[n]one of this is true with respect to personal jurisdiction." *Id*.

> The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Thus, the test for personal jurisdiction requires that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co*. v. *Washington*, 326 U.S. 310, 316 (1945), quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940).

Id. at 702-03.

This Court has been clear "that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414 n.8 (1984). "When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be

exercising 'general jurisdiction' over the defendant." *Id*. at n.9.

This dichotomy has been consistently re-enforced. "Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). "*International Shoe* distinguished exercises of specific, case-based jurisdiction from a category today known as 'general jurisdiction,' exercisable when a foreign corporation's 'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.'" *Daimler AG v. Bauman*, 571 U.S. 117, 118 (2014). "Elaborating on this guide, we have distinguished between specific or case-linked jurisdiction and general or all-purpose jurisdiction." *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017).[19] "Since our seminal decision in *International Shoe*, our decisions have recognized two types of personal jurisdiction: "general" (sometimes called "all-purpose") jurisdiction and "specific" (sometimes called "case-linked") jurisdiction." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1779-80 (2017).

The rule creates a sensible dichotomy between general personal jurisdiction and specific personal jurisdiction; either the claims arise from the contacts,

---

[19] Citing *Daimler*, 571 U. S. at 127; *Goodyear*, 564 U. S. at 919; *Helicopteros*, 466 U. S. at 414, nn. 8, 9.

or the claims do not. Petitioners argue that "[l]imiting personal jurisdiction to specific and general inaccurately conveys the variety of forms this Court has recognized as comporting with due process." Pet.13. Petitioners are wrong. As Justice Kennedy explained in the plurality opinion in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), factually driven circumstances may vary within the dichotomy of specific personal jurisdiction and general personal jurisdiction, but jurisdictional assertions fall under one branch or the other.

> A person **may submit** to a State's authority in a number of ways. There is, of course, explicit consent. *E.g.*, *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). **Presence within a State** at the time suit commences through service of process is another example. *See Burnham*, *supra.* **Citizenship or domicile**--or, by analogy, **incorporation or principal place of business for corporations**--also indicates general submission to a State's powers. *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, *post*, p. ___, 564 U.S. 915, 131 S. Ct. 2846, 180 L. Ed. 2d 796. Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State. Cf. *Burger King Corp.* v.

> *Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). **These examples support exercise of the general jurisdiction** of the State's courts and allow the State to resolve both matters that originate within the State and those based on activities and events elsewhere. *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U.S. 408, 414, and n. 9, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). **By contrast, those who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.**

J. McIntyre Mach, 564 U.S. at 880-81 (emphasis added). Petitioners' citation to *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1851) does not support its position, as that case concerned the absence of service of process. *See also Burnham v. Superior Court of Cal.*, 495 U.S. 604, 616 (1990); *E. Denver Mun. Irr. Dist. v. Doherty*, 293 F. 804, 806 (S.D.N.Y. 1923) ("In *D'Arcy* [], the Supreme Court held that a judgment rendered under the Joint Debtor Act of the state of New York, against a partner who had not been served and who had not appeared, furnished no basis for an action in another jurisdiction against him.")

Further exemplifying Petitioners' misuse of the word "jurisdiction," they mistakenly identify "in rem" as a purported form of "personal jurisdiction." Pet.13.

> If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

Shaffer v. Heitner, 433 U.S. 186, 199 (1977).

As the *en banc* Fifth Circuit decision below correctly explained, Petitioners misunderstood *in rem* cases such as *The Belgenland*, 114 U.S. 355 (1885). "The plaintiffs have confused personal jurisdiction with subject matter jurisdiction, which the Supreme Court discussed in *The Belgenland*. In sum, the plaintiffs' proposed admiralty-exclusive extension of due process standards for personal jurisdiction standard is all wet."[20]

Petitioners confuse or intentionally blur the following distinct concepts: (1) subject matter jurisdiction with personal jurisdiction, (2) procedural law and substantive law, (3) the exercise of personal jurisdiction with service of process, and (4) specific personal jurisdiction with general personal jurisdiction. In doing so they stridently assert that it is somehow unfathomable that the suit cannot be heard here. But their argument is premised on the result they seek, and not a comprehensive and coherent analysis of the law.

---

[20] Pet.App.29-30.

For example, if *Ins. Corp. of Ir.* was either irrelevant or distinguishable, it should have been easily addressed. In several hundred pages of briefs, dissents, and *amicus* submissions, no author supporting Petitioners' position has addressed the substance of that case or its progeny. The Petitioners do not ask the Court to overrule *Ins. Corp. of Ir.* In contrast, the *en banc* Fifth Circuit **did address** all of the foregoing case law. The Petitioners' most prominent failure is that in avoiding the key language of the relevant cases they have not addressed the holdings of the Fifth Circuit and the district court. The court of appeals' rejection of Petitioners' arguments does not conflict with any decision of this Court, implicate any conflict among Circuits, or otherwise warrant this Court's intervention.

b. The Petitioners' questions presented are improperly premised and, in any event, cannot be decided within the confines of the irrefutable facts of this case.

i. The open question regarding contacts cannot be answered by this case.

Petitioners erroneously assert that the open question in *Bristol-Myers Squibb* (whether to aggregate nationwide contacts where the Defendant's Due Process Rights are analyzed under the Fifth Amendment), may be answered by this case. While cogent and powerful arguments might be made for either limiting a district court to the contacts within its geographic jurisdiction, or allowing it to look to

nationwide contacts, the Court will find none of those arguments here. The district court and the court of appeals' decisions do not turn on any difference in assessing NYK's "nationwide contacts" as opposed to its contacts within the state.[21]

ii. The origin of the "national contacts" question.

To understand why Petitioners' question cannot be answered, some background is helpful. The "open question" derives from language in *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987). *Asahi* was a specific jurisdiction case, involving the stream of commerce theory. *Id.* at 108-10.[22] Justice O'Connor explained in *Asahi* that defendant's mere awareness that some of its products might find their way into California, without more, was insufficient, and "[o]n the basis of these facts, the exertion of personal jurisdiction over *Asahi* by the Superior Court of California ***** exceeds the limits of due process." *Id.* at 112-13. Attached to the asterisk was the following footnote:

> We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits. *See*

[21] Pet.App.33, Resp.App.1-11.

[22] *See also Daimler*, 571 U.S. at 128 n.7.

> *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 293-295 (CA3 1985); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 283 (CA3 1981); *see also* Born, Reflections on Judicial Jurisdiction in International Cases, to be published in 17 Ga. J. Int'l & Comp. L. 1 (1987); Lilly, Jurisdiction Over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 127-145 (1983).

Id. at 113 n.*.

Max Daetwyler and *DeJames,* an admiralty case*,* considered national contacts in order to obtain personal jurisdiction. "Under the national contacts theory, the proper inquiry in determining personal jurisdiction in a case involving federal rights is one directed to the totality of a defendant's contacts throughout the United States." *Max Daetwyler Corp. v. A W. German Corp.*, 762 F.2d 290, 293 (3d Cir. 1985). The journal articles add some context, as *Asahi* predated the relevant precedent here. "[T]he overwhelming consensus among federal courts is to analyze questions of *in personam* jurisdiction over alien defendants by examining the relationship of the defendant, the litigation and the forum under traditional *International Shoe* principles." ARTICLE: REFLECTIONS ON JUDICIAL JURISDICTION IN INTERNATIONAL CASES, Gary B. Born, 17 Ga. J. Int'l & Comp. L. 1, 9-10.

In *DeJames*, the issue of the reach of service of process for federal cases was much less clear, perhaps foreshadowing the Court's decision in *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97

(1987) and Fed. R. Civ. P. 4(k)(2). *See also* Lilly, JURISDICTION OVER DOMESTIC AND ALIEN DEFENDANTS, 69 Va. L. Rev. 85, 127-145 (1983) (discussing national contacts and numerous issues with service that existed at that time and noting among other sources, the then recent decision in *Ins. Corp. of Ir.*).

That same year, the Court decided *Omni*, 484 U.S. at 102-03 (1987), which only addressed and decided a service of process issue. *Omni*, in footnote 5, cited *Asahi*'s footnote:

> Under Omni's theory, a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits. As was the case in *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987), "[w]e have no occasion" to consider the constitutional issues raised by this theory." *Id.*, at 113, n.

Omni, 484 U.S. at 102 n.5. The footnote makes sense, as the sole issue decided by the Court was one of service of process. The issue of aggregation of nationwide contacts was not considered and not decided.

J. McIntyre Mach. discussed *Asahi*, but not this particular footnote, and the relevant portions of *Asahi* in that case are discussed in I(a), *supra.*

In *Bristol-Myers Squibb*, Justice Alito explained that "settled principles regarding specific jurisdiction control this case." 137 S. Ct. at 1781. In the second to last sentence of the majority opinion, the Court held:

> In addition, since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.

137 S. Ct. 1783-84 (citing *Omni*'s note 5).

With this background, the "open question" comes into focus: it is the scope of contacts and not the underlying analysis.

iii. The Petition misapprehends the case law.

Bristol-Myers Squibb's reference to *Omni* and *Ashai*'s footnotes related to whether to aggregate national contacts or state contacts. The available information from these three <u>specific jurisdiction</u> cases points to the question being whether the court <u>*in applying* *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) *and its progeny*</u> looks to contacts of the defendant within the state or aggregates the defendant's nationwide contacts, under the Fifth Amendment, and determines whether the claim arises from those contacts. The text of these cases neither stated nor suggested that the Supreme Court left open the question of whether the due process analysis differed between the Fifth and Fourteenth

Amendments, or for a claim brought under Admiralty subject matter jurisdiction.

Daimler held that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." 571 U.S. at 137. The "at home" analysis looks to whether the relevant contacts demonstrate that the entity's "home" is located in the U.S. Pet.App.26 n.26. The *en banc* court recognized that "[n]o one here disputes the applicability of national contacts under the Fifth Amendment." Pet.App.26 n.26.

Petitioners' assertions that the right to due process is elevated under one amendment and denigrated under the other are difficult to take seriously considering the self-evident proposition that the Fifth Amendment came first. If the later Fourteenth Amendment was designed to allow or restrict the states' intrusion into the right in different manner, then the authors would surely have used different words. "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter J. Concurring).

Asahi's footnote addresses whether Congress could pass a statute so as to allow aggregation of national contacts. This case deals with no such statute. As discussed below, Petitioners fail to recognize that the service provision of Fed. R. Civ. P. 4(k)(2) is procedural, whereas *Asahi*'s footnote addresses a substantive jurisdictional statute.

The circuit courts' law is consistent,[23] and whether they are right or wrong to look to national contacts, that question is not live in this case. Neither Petitioners nor Respondents have ever argued, and the decisions below do not address, whether the "at home" analysis yields different results with NYK's national contacts than with its in-state contacts.

The *en banc* Fifth Circuit also explained that "[e]very Fifth Circuit decision addressing the scope of contacts required for personal jurisdiction under the Fifth Amendment has applied the **then-existing** Fourteenth Amendment framework." Pet.App.22 (emphasis added). *BMW of N. Am. LLC v. M/V Courage*, 254 F. Supp. 3d 591 (S.D.N.Y. 2017) did not apply a "pre-*Daimler*" analysis. Pet.25. It examined defendant's "discretion regarding whether to avail itself of the United States as a forum," i.e. *specific personal jurisdiction*. *Id*. at 599, 600.

All the courts of appeal which have spoken on the issue maintain a parallel Fifth and Fourteenth amendment due process analysis. Petitioners reject that personal jurisdiction has evolved, preferring instead that either an earlier standard be applied or it be rewritten altogether.

---

[23] "[T]he Second, Sixth, Seventh, Eleventh, Federal, and D.C. Circuits all agree that no meaningful difference exists between the Fifth and Fourteenth Amendments' minimum contacts analyses." Pet.App.24-25.

iv. The Court's *J. McIntyre Mach.* plurality opinion does not support Petitioners' position.

Petitioners quote *J. McIntyre Mach.*, in a reworded sentence, stating 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." Pet.i., *see* 564 U.S. at 884. That one dissociated line does not reflect what Justice Kennedy actually wrote in the plurality opinion. As the context here is critical, and as Justice Kennedy himself was articulating the specific and common missteps that were perceived to have resulted from misreading the Court's precedents, a look at the full section of that decision is instructive.

> Since *Asahi* was decided, the courts have sought to reconcile the competing opinions. But Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.
>
> The conclusion that jurisdiction is in the first instance a question of authority rather than fairness explains, for example, why the principal opinion in *Burnham* "conducted no independent inquiry into the desirability or fairness"

of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant. 495 U.S., at 621, 110 S. Ct. 2105, 109 L. Ed. 2d 631. (opinion of SCALIA, J.). As that opinion explained, "[t]he view developed early that each State had the power to hale before its courts any individual who could be found within its borders." Id., at 610, 110 S. Ct. 2105, 109 L. Ed. 2d 631. Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant's interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum. That such considerations have not been deemed controlling is instructive. See, e.g., *World-Wide Volkswagen*, supra, at 294, 100 S. Ct. 559, 62 L. Ed. 2d 490.

Two principles are implicit in the foregoing. First, personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning

that conduct. Personal jurisdiction, of course, restricts "judicial power not as a matter of sovereignty, but as a matter of individual liberty," for due process protects the individual's right to be subject only to lawful power. *Insurance Corp.*, 456 U.S., at 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it.

The second principle is a corollary of the first. Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution. Ours is "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995) (Kennedy, J., concurring). For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however. If the defendant is a domestic

> domiciliary, the courts of its home State are available and can exercise general jurisdiction. And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States. Furthermore, foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums.

J. McIntyre Mach., 564 U.S. at 883-85.

The decision explained that when: (1) a course of contact is directed at the forum, (2) there may be an "exceptional case" where the contacts are sufficient for the U.S. to have *specific jurisdiction*, but *not a state*. Justice Kennedy, citing *Ins. Corp. of Ir.* explicitly repeated the language that personal jurisdiction is a matter of individual liberty, not sovereignty. *J. McIntyre Mach.*, 564 U.S. at 884. *J. McIntyre Mach.* does not advance Petitioners' contentions, and the Fifth Circuit decision is consistent with it.

v. The Petitioners' arguments are inconsistent, disguising the questions they want the Court to decide.

The "Questions Presented" at page i and Petitioners' assertions at pages 36-37 are inconsistent. The body of Petitioners' brief states:

> 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.

Pet.36-37. The *en banc* court explained that *Adams* is a *specific personal jurisdiction* case and Petitioners' "reliance on *Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646 (5th Cir. 2004) is misplaced." Pet.App.24. The Fifth Circuit in *Patterson v. Aker Sols. Inc.*, 826 F.3d 231, 237 n.7 (5th Cir. 2016) noted its earlier precedents including "*Adams* predate *Goodyear* and *Daimler AG*. Scholars have viewed the Court's recent personal jurisdiction decisions as part of an access-restrictive trend."

The Petitioners' questions presented relate to the "at home" analysis and Rule 4(k)(2). Pet.i. Petitioners did not ask the Court to decide whether the two statements above are true. These inquiries are neither part of nor inherent in the questions presented, which do not ask the Court for a new test. Nor do the questions presented ask the Court to

decide whether Rule Fed. R. Civ. P. 4(k)(2) is substantive law. Pet.i and 36-37.

Petitioners' proposed test is based only on "continuous and systematic contacts"[24] which relate to "specific jurisdiction." This is no different from the "loose and spurious form" of jurisdiction the Court already rejected in *Bristol-Myers Squibb*, 137 S. Ct. at 1776. Petitioners use the term "national contacts" to refer to an amorphous test where existence of national contacts, *vel non*, decides general personal jurisdiction conclusively without regard to any analysis. The Fifth Circuit properly rejected this alternate test, and that rejection does not present a compelling basis for this Court's review.

c. The general personal jurisdiction analysis was correctly applied by the courts below.

i. Petitioners misinterpret the "at home" case law.

The Petitioners assert that the "at home" analysis of *Goodyear*, *Daimler*, and *BNSF*, is "the test for state-court general jurisdiction under the fourteenth amendment." Pet.i. Writing for a unanimous court in *Goodyear*, Justice Ginsburg explained that the "North Carolina court's stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction." *Goodyear*, 564 U.S. at 927. "But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those

[24] Pet.36.

ties, the forum has general jurisdiction over a defendant." *Id.*

Two and a half years later in *Daimler*, 571 U.S. at 120, Justice Ginsburg's majority opinion explained that the matter "concern[ed] the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." The decision places no limits on its holding to only diversity cases, explaining that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Id.* at 127 (citing and quoting *Goodyear*, 564 U. S. at 919, and *Helicopteros*, 466 U.S., at 414, n.9).

This Court twice, in *Goodyear* and *Daimler*, used the phrase "a court may assert general jurisdiction." It did not limit its holdings to a state court or to a court sitting in diversity. That makes sense, since in *Daimler* the damages for "alleged human-rights violations were sought from Daimler under the laws of the United States, California, and Argentina." 571 U.S. at 121; *see also Bauman v. Daimler Chrysler Corp.*, 644 F.3d 909, 912 (9th Cir. 2011) ("Plaintiffs brought suit against DCAG in the District Court for the Northern District of California under the Alien Tort Statute ('ATS'), 28 U.S.C. § 1350, and the Torture Victims Protection Act of 1991 ('TVPA'), 106 Stat. 73, note following 28 U.S.C. § 1350."). *Daimler* was not applying a "state court"

standard; it was a suit in federal court alleging *inter alia* violations of federal law.

Three years later in *BNSF*, 137 S. Ct. at 1557, Justice Ginsburg's majority opinion explained that in a Federal Employers Liability Act ("FELA") case with concurrent subject-matter jurisdiction of state and federal courts, the result is the same.

> The Montana Supreme Court distinguished Daimler on the ground that we did not there confront "a FELA claim or a railroad defendant." 383 Mont., at 424, 373 P.3d, at 6. The Fourteenth Amendment due process constraint described in *Daimler*, however, applies to all state-court assertions of general jurisdiction over nonresident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued.
>
> *Id*. at 1558-59.

Thus, *BNSF* undermines any argument that the grant of jurisdiction over the type of claim informs whether there is general personal jurisdiction. The Court held that "in-state business, we clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general jurisdiction over claims like Nelson's and Tyrrell's that are unrelated to any activity occurring in Montana." *Id*. at 1559. The claims were federal claims under federal law, and nothing in *BNSF* stated or implied that they could have been heard in Montana simply by re-filing in a federal court located in Montana.

BNSF demonstrates that a plaintiff must sue where the defendant is amenable to personal jurisdiction. Where general personal jurisdiction is asserted, the entity must be "at home" based upon its place of incorporation or principal place of business, or under exceptional circumstances where its corporate home has been displaced and that jurisdiction is a surrogate for its place of incorporation or principal place of business. *See id.* at 1558 ("we suggested *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), exemplified such a case."). Petitioners make much of the fact that NYK has brought suit in the U.S., but like any plaintiff it must sue where the defendant may be found for personal jurisdiction and/or where the action arises. Contractually specifying U.S. jurisdiction and venue for U.S. shipments does not demonstrate that it is "at home" here. Similarly, an unrelated criminal action against NYK for acts or omissions which impacted U.S. markets and occurred within the U.S. likewise does not demonstrate NYK is at home in the U.S.

As the foregoing cases demonstrate, the "at home" standard is neither exclusive to diversity nor is it a "state-court" standard, undercutting the premise of Petitioners' first question. Here, the Fifth Circuit correctly applied the proper standard.

ii. Rule 4(k)(2) is not nullified by the decision below.

Nullity: Something that is void or has no legal force.[25] Petitioners' assertion in its first question that Fed. R. Civ. P. 4(k)(2) was nullified by the Fifth Circuit's decision is incorrect.

> This court and six other circuits apply Fourteenth Amendment due process analysis to determine personal jurisdiction in cases governed by the Fifth Amendment. Every Fifth Circuit decision addressing the scope of contacts required for personal jurisdiction under the Fifth Amendment has applied the then-existing Fourteenth Amendment framework. Relatedly, this court's Rule 4(k)(2) cases consistently recognize and invoke the general-specific jurisdiction dichotomy, which the plaintiffs dismiss as irrelevant to the Fifth Amendment.

Pet.App.21-22. "The plaintiffs' consequentialist argument, that adopting a certain due process test for personal jurisdiction under the Fifth Amendment would render Rule 4(k)(2) a nullity, is textually and logically unsound." Pet.App.14.

Petitioners and *Amici* avoid addressing important language within the text of Fed. R. Civ. P.

---

[25] Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/nullity (last visited Jan 17, 2023).

4(k)(2)(b)[26] which plainly provides "(B) exercising jurisdiction is consistent with the United States Constitution and laws." Petitioners' argument is that "[i]t provides personal jurisdiction based on contacts with the nation as a whole." Pet.5 (citing the comment to the rules). First, the rule is procedural so it does not and cannot define the substantive test for due process. Second, the quoted section of the note[27] cannot authorize a nationwide contacts approach because it is a comment to a procedural rule concerning service of process.[28]

Courts before and after *Douglass* have applied Rule 4(k)(2) without any difficulty, and none have stated that Rule 4(k)(2) was rendered null by *Douglass*. *See e.g. Crescent Towing & Salvage Co. v. M/V Jalma Topic*, No. 21-1331, 2022 U.S. Dist. LEXIS 187099 (E.D. La. 2022); *see also Herederos De Roberto Gomez Cabrera, LLC v. Teck Res. Ltd.*, 43 F.4th 1303 (11th Cir. 2022) (applying Rule 4(k)(2) and reaching the same conclusion four days before *Douglass* decision); *Schrier v. Qatar Islamic Bank*, No. 20-60075-CIV-ALTMAN/Hunt, 2022 U.S. Dist. LEXIS 179253, at *50 n.16 (S.D. Fla. 2022) (citing and quoting *Herederos* and *Douglass* and explaining that "No circuit has adopted [plaintiff]'s view" and

---

[26] Petitioners mistakenly interpret the third requirement under 4(k)(2) as "exercising jurisdiction is consistent with Fifth Amendment due process." Pet.5. Prof. Morrison argues that "jurisdiction must not be precluded by statute (there is none) or by the Constitution, which is the reason why jurisdiction was found lacking here." Morrison 8.

[27] Pet.5.

[28] The full 1993 Comments and Special Note makes clear that the rule does no more than it says. Resp.App.14-20.

every court that has considered these arguments applied the Fourteenth Amendment 'minimum contacts' standard in Fifth Amendment cases).

Fed. R. Civ. P. 82 clearly states that "[t]hese rules do not extend or limit the jurisdiction of the district court or the venue of actions in those courts." Resp.App.13. Rule 4(k)(2) is constrained by the Rules Enabling Act, 28 U.S.C. §2070 *et seq*., which provides at §2072(b): "[s]uch rules shall not abridge, enlarge or modify any substantive right. . . ." Resp.App.12. As the Supreme Court has explained, " . . . it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978). The Federal Rules of Civil Procedure are just that, procedural rules, not substantive law. *United States v. Sherwood*, 312 U.S. 584, 589-90 (1941).

The drafters of Rule 4(k)(2) recognized the potential for this type of mistake, and they included the 1993 "SPECIAL NOTE" which made clear that the rule was merely related to service of process. Rule 4 is entitled "Summons" and part K "Territorial Limits of Effective Service." It only closes the gap *in service of process* addressed in *Omni*. Resp.App.17-20. The rule works the way Congress intended it to. *See e.g. Ogden v. GlobalSantaFe Offshore Servs.*, 31 F.Supp.3d 832, 842 (E.D. La. 2014).[29] Contrary to the assertion in the Petition,[30] the Fifth Circuit did

---

[29] Examination of all the relevant contacts provided by the parties the court concluded that "[i]n fact, the record shows that the United States can be fairly regarded as GSF's 'home.'"

[30] Pet.27-28, Part IV.

not hold that general personal jurisdiction might never arise over a corporation with its place of incorporation or principal place of business overseas. The Fifth Circuit's decision correctly noted that:

> [I]t is hardly troubling that federal courts can rarely, if ever, exercise personal jurisdiction over foreign defendants in cases raising claims that do not "arise out of or relate to" their contacts with the United States. *Cf. Daimler*, 571 U.S. at 140-42, 134 S. Ct. at 762-63 (chastising Ninth Circuit for failing to give heed to the "risks to international comity its expansive view of general jurisdiction posed").

Pet.App.27 n.27. "[G]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115.

The *en banc* court correctly held that "[g]eneral jurisdiction is the sole avenue for exercising jurisdiction over NYK here, because that is the only theory argued to the district court." Pet.App.31. The Petition does not address the plain text of Fed. R. Civ. P. 4(k)(2) or the advisory committee notes. Rule 4(k)(2) is not the type of statute *Asahi*'s footnote contemplated. First, it is a procedural rule. Second, its text does not authorize a substantive test employing national contacts. Petitioners' argument that Rule 4(k)(2) cases provide the pre-requisites to *Asahi*'s footnote ignores the procedural nature of the

rule.[31] The *en banc* Fifth Circuit's application of Rule 4(k)(2) presents no conflict with any decision of this Court nor any other Circuit's precedent, and c*ertiorari* here is not warranted.

d. Personal jurisdiction does not arise from Article III.

Petitioners assert that "personal jurisdiction exists under Article III of the Constitution." Pet.i, 22-25. That is just wrong. *See supra* discussion of *Ins. Corp. of Ir.* and *Omni*. The petition does not ask the Court to overrule those cases, and that conclusively ends the issue under the controlling law. The Constitution's broad grant of Admiralty and Maritime *subject matter jurisdiction* has no relation to the scope of NYK's constitutional due process rights. The District Court correctly recognized that Petitioners "conflate[ed] subject matter jurisdiction with personal jurisdiction." Pet.App.176-77. The *en banc* court agreed and affirmed on the same basis. Pet.App.29-30.

---

[31] Petitioners reference *Fuld v. PLO*, 578 F. Supp. 3d 577 (S.D.N.Y. 2022) and the pending appeal *Fuld v. PLO* 22-76 (2d. Cir). That case *may* actually deal with a statute where congress did, or attempted to, create a jurisdictional statute in the Promoting Security and Justice for Victims of Terrorism Act ("PSJVTA"), Pub. L. No. 116-94, div. J, tit. IX, § 903, 133 Stat. 3082. District Judge Furman recognized that it was a Fifth Amendment case, applied the Court's precedent and struck down the statute as an attempt to circumvent due process, holding that "it would offend the fundamental principle that a statute cannot create personal jurisdiction where the Constitution forbids it." *Fuld*, 578 F. Supp. 3d at 591.

Petitioners' emphasis on the underlying facts is inapposite to a "dispute blind" analysis of general personal jurisdiction. The *en banc* decision correctly explained, "there is no textual support in the Fifth Amendment for the plaintiffs' proffered distinction and no case law favoring their theory. About an admiralty 'exception' to principles of personal jurisdiction, no more need be said: The Due Process Clauses contain no exception." Pet.App.29.

The *en banc* court of appeals rejected Petitioners' argument, holding that "[i]f personal injury and wrongful death claims caused in foreign waters by a foreign logistics company's chartered, foreign-registered vessel bound for a foreign country are sufficiently related to that corporation's shipping-related contacts with the United States, then what isn't?" Pet.App.16. The Fifth Circuit and district court's rejection of these arguments does not require this Court's review.

II. The Amici's arguments are erroneous and do not present any compelling reason to grant the petition.

a. The Association of Transportation Litigation Professionals' brief suffers from the same defects as the Petition.

The Association of Transportation Litigation Professionals ("ATLP"), like the Petitioners, misreads the law. It confuses Admiralty subject matter jurisdiction with personal jurisdiction, and Rule 4(k)(2) with a jurisdictional statute. ATLP 4-11. It erroneously asserts that Admiralty subject matter jurisdiction, treaties, and the Death on the High Seas

Act ("DOHSA") 46 U.S. Code §30301 *et seq*. all mean the district court should have heard this case on the merits. ATLP 11-23. These arguments likewise fail. *See infra* discussion of *J. McIntyre Mach.* and *Ins. Corp. of Ir.*

ATLP's brief asserts "most of the corporate shipowners involved in global maritime commerce are not 'at home' in the United States." ATLP 24. This Court has already held "[a] corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." *Daimler*, 571 U.S. at 139 n.20.

Its brief repeats the phrase "traditional contacts" but only to invoke a "loose and spurious" form of jurisdiction that the Court already rejected in *Bristol-Myers Squibb,* 137 S. Ct. at 1776. Contrary to its suggestion, *Daimler* did not affect Admiralty subject matter jurisdiction; its holding relates only to personal jurisdiction. ATLP 11. ATLP's cite to the Convention for International Regulations for Preventing Collisions at Sea, 33 U.S.C.S. §1601 *et seq.* ("COLREGS") and the Convention for the Safety of Life at Sea, 32 U.S.T. 47 ("SOLAS") are irrelevant. ATLP 14-16. Those conventions govern collision avoidance and safety, not personal jurisdiction. DOSHA is irrelevant as that statute does not relate to personal jurisdiction. ATLP fails to advance any showing of why there is any important issue to address in this case and its arguments are

inconsistent with the caselaw.[32] Just like the Petition and Professor Morrison's brief, the ATLP brief has no substantive discussion of *Ins. Corp. of Ir.*

b. Prof. Morrison's brief re-argues theories already rejected by this Court.

Professor Morrison merely revisits arguments this Court already rejected. Prof. Morrison previously submitted an amicus brief in *Bristol-Myers Squibb*, arguing that the Court erred in construing *International Shoe*'s personal jurisdiction requirement as arising from the Due Process clause of the Fourteenth Amendment.[33] Here, he incorrectly asserts that *Bristol-Myers Squibb* supports his position, but the sections cited on page 5 of his brief are clearly in the context of specific jurisdiction and are not germane to a general personal jurisdiction analysis. *Bristol-Myers Squibb*, 137 S. Ct. at 1780-81 ("Our settled principles regarding specific jurisdiction control this case.").

---

[32] Part E.(2) of the ATLP's brief refers to *Feres v. United States*, 340 U.S. 135, 146 (1950). That decision is not at issue here, as the Petitioners' brought no claim against the U.S. *Feres* bars claims against the US Navy (Petitioners' employer). Justice Thomas has repeatedly pointed out how that judicial doctrine is patently unjust and unfair, noting "if two Pentagon employees—one civilian and one a service member—are hit by a bus in the Pentagon parking lot and sue, it may be that only the civilian would have a chance to litigate his claim on the merits." *Doe v. United States*, 141 S. Ct. 1498, 1499 (2021) (Thomas J. dissenting).

[33] Supreme Court, No. 16-466, Brief of Amicus Curiae Alan B. Morrison, In Support of Respondents at 1.

Strikingly, he mistakenly refers to "federal claims by United States citizens against the **foreign owner** of a vessel that collided with a U.S. vessel outside U.S. waters." Morrison 2. (emphasis added). The owner of the ACX CRYSTAL is not a party to this case. Equally mistaken is the argument that "centuries of admiralty law" and the DOHSA were cast in doubt. Morrison 3. Subject matter jurisdiction is not relevant and DOHSA provides a cause of action and not personal jurisdiction.

As the Panel decision below accurately summarized, Petitioners' and *amici's proposed* test "shifts the focus away from federalism concerns and instead accounts for any sovereignty concerns that might arise in an international context." Pet.App.144. This Court rejected sovereignty as a basis for personal jurisdiction analysis in *Ins. Corp. of Ir.*, 456 U.S. at 701. Prof. Morrison never addresses *Ins. Corp. of Ir.*

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

THOMAS MARK CANEVARI
Counsel of Record
ERIC JOHN MATHESON
FREEHILL HOGAN & MAHAR, LLP
80 Pine Street
New York, NY 10005
(212) 381-3017
canevari@freehill.com

ROBERT H. MURPHY
PETER B. TOMPKINS
MURPHY, ROGERS, SLOSS,
GAMBEL & TOMPKINS
701 Poydras Street
Suite 400
Hancock Whitney Center
New Orleans, LA 70139
(504) 523-0400