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 KABUSHIKI KAISHA,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Marc Fiedler
David M. Schloss
Kasey K. Murray
KOONZ MCKENNEY JOHNSON & DEPAOLIS LLP
2001 Pennsylvania Ave., N.W., Suite 530
Washington, DC 20006
Phone: (202) 659-5500

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, PC
1901 Connecticut Ave., N.W.
Suite 1008
Washington, DC 20009
Phone: (202) 944-2874
robert.peck@cclfirm.com

Additional Counsel for Petitioners on Inside Cover

Thomas Schoenbaum, JD, PH.D
2181 Jamieson Avenue
Unit 1409
Alexandria, VA 22314
Phone: (206) 364-3891
tjschoen@uw.edu

Counsel for Petitioners

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INTRODUCTION

Respondent Nippon Yusen Kabushiki Kaisha (NYK) opposes certiorari by asserting that the en banc Fifth Circuit majority did nothing more than apply binding precedent. But that is inconsistent with what this Court stated when answering questions about how the Fourteenth Amendment restricts personal jurisdiction in state courts; it has expressly left "open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." *Bristol-Myers Squibb Co. v. Sup. Ct.*, 137 S. Ct. 1773, 1784 (2017).

NYK also ignores the compelling circuit conflict addressed in the Petition and acknowledged by its own *amici*.[1] It further has no response to the Petition's assertion that the unwarranted at-home test superimposed below on Rule 4(k)(2) renders the rule so superfluous that it would not even reach the British defendant in *Omni Cap. Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987), the very fact pattern for which the rule was promulgated at this Court's suggestion. *Id.* at 111.

Petitioners have consistently asserted that categorizing Rule 4(k)(2) as either specific or general

[1] That brief recognizes the conflict within the circuits when examining personal jurisdiction in criminal cases with foreign defendants. Am. Br. of U.S. Terror Victims 5. This *amici's* opposition to certiorari highlights the importance of the Questions Presented and their propriety for this Court's decision. It just asks this Court to await its own still-undecided case in the Second Circuit, which it theorizes poses an easier question subsumed within the first Question Presented here.

personal jurisdiction overlooks alternative approaches to personal jurisdiction that do not fit those rigid categories. Requiring Rule 4(k)(2) nonetheless to meet the test for general jurisdiction renders the rule entirely superfluous.

In the end, the en banc Fifth Circuit's split decision means that servicemembers injured due to the negligence of a foreign defendant while deployed on a U.S. warship on the high sea, which is an extension of U.S. sovereignty wherever that ship is, cannot enjoy justice in U.S. courts. It even means that death or injury to U.S. citizens on the high seas due to a foreign party's negligence cannot be heard here even though every other maritime nation would entertain that claim. And it means that Rule 4(k)(2) is superfluous, incapable of constitutional application.

The issue is plainly of significant import, as demonstrated by the Fifth Circuit's willingness to consider it en banc, by the two amicus briefs supporting the Petition, and also NYK's amicus supporter, all of whom recognize the issue's outsized importance.

The en banc court also recognized the significant interest of the United States because it implicates the constitutionality of Rule 4(k)(2). It invited the Solicitor General to provide its views, but the request came on a short schedule and while the United States had only an acting solicitor general. This Court should consider this to be a case in which the constitutionality of a

federal law is challenged and therefore provide notice to the Attorney General under 28 U.S.C. § 2403.[2]

ARGUMENT

I. A Rule of Civil Procedure Can Supply the Basis for Personal Jurisdiction.

At least four times in its brief, NYK asserts that the exercise of personal jurisdiction is substantive, rather than procedural, and thus not a function of service of process. Br. in Opp. 14, 20, 32, 34-35. Precedent holds otherwise. Simply put, "[s]ervice of process is how a court gets jurisdiction over the person." *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987); *see also Ex parte Republic of Peru,* 318 U.S. 578, 587 (1943); *Cooper v. Reynolds*, 77 U.S. 308, 316-17 (1870); *Boswell's Lessee v. Otis*, 50 U.S. (9 How.) 336, 348 (1850).

For example, in finding "tag" jurisdiction constitutionally valid, this Court declared that "the Due Process Clause does not prohibit the California courts from exercising jurisdiction over petitioner based on the fact of in-state service of process." *Burnham v. Superior Ct.*, 495 U.S. 604, 628 (1990).

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[2] The United States has taken a position consistent with Petitioners' views and has argued that Fifth Amendment due process permits a more expansive assertion of personal jurisdiction than the Fourteenth Amendment does because the federal government's powers extend "outside its borders, and include authority over matters of foreign affairs and foreign commerce." *Fuld v. PLO*, Nos. 22-76(L), 22-496(CON) (2d Cir.), U.S. Br. 35-40.

NYK's argument also ignores what this Court said in *Omni Cap*. that brought Rule 4(k)(2) into being. This Court held that a means for *service of process* was absent over a British commodities broker, but should be supplied by "those who propose the Federal Rules of Civil Procedure and with Congress." *Omni Cap*., 484 U.S. at 111.

Plainly, either the process of the Rules Enabling Act *or* a congressional amendment to the Commodity Exchange Act (CEA) would have supplied a basis for personal jurisdiction over the non-resident third-party defendant. What the CEA was missing, which proved fatal to personal jurisdiction, was even an "implied provision for nationwide service of process in a private cause of action." *Id*. at 106. Thus, this Court advised that a "narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the CEA and other federal statutes." *Id*. at 111.

Rule 4(k)(2) serves that salutary end for existing federal causes of action. So NYK's criticism that it is merely a rule of procedure, incapable of supplying the missing element for existing causes of action, is erroneous.

Rule 4(k)(2) also does not violate the limitation that rules do "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Rule 4(k)(2) "'really regulate[s] procedure,—the judicial process for enforcing rights and duties recognized by substantive

law and for justly administering remedy and redress for disregard or infraction of them.'" *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (citation omitted). Its text demonstrates that it "governs the manner and the means by which the litigants' rights are enforced," rather than alters rules of decision. *Id.* (cleaned up; citations omitted).

It thus fits the requirements of the Rules Enabling Act and need not be the product of an affirmative act of Congress.

II. Personal Jurisdiction Consists of More than Specific and General Jurisdiction.

NYK denies that any category of personal jurisdiction exists outside of specific or general jurisdiction. Br. in Opp. 8-13. But this Court has not limited personal jurisdiction to those two. Pet. 13 (describing other forms).

In rebuttal, NYK claims every submission to a state's jurisdiction – consent, presence in a State, citizenship, incorporation or principal place of business for a corporation – constitutes a form of general jurisdiction. Br. in Opp. 12-13 (citing *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880-81 (2011) (plurality op.)). This Court, though, has explained that general jurisdiction requires the defendant to be "at home" within the jurisdiction, which means, absent special exceptions, that the corporation is incorporated or headquartered in the State. *See Daimler AG v. Bauman*, 571 U.S. 117, 127-28 (2014).

Yet, consent to personal jurisdiction does not make a person or corporation at home in the forum State. Consent, or failure to timely object, waives due-process objections. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982). "Tag jurisdiction" similarly does not satisfy general-jurisdiction's at-home requirement, as it involves transitory presence. *Burnham*, 495 U.S. at 628.

"Statutory personal jurisdiction" also exists and utilizes a minimum-contacts requirement. *See GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 814 (D.C. Cir. 2012) (discussing the Foreign Sovereign Immunities Act); *see also BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 409 (2017) (providing examples from the Clayton Act and the Federal Trade Commission Act); *Omni Cap.*, 484 U.S. 106-07 (discussing statutes with nationwide service of process).

None of these personal-jurisdiction varieties fits the special exception that *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437 (1952), exemplifies, where a temporary relocation of the corporation's principal place of business to Ohio qualified for general jurisdiction. *See Daimler*, 571 U.S. at 129-30. Serving a person passing through a State, even if they stay in a hotel overnight, does not render them "essentially at home" and is not just another form of general jurisdiction.

As Petitioners argued throughout this litigation, Rule 4(k)(2) supplies the authorization necessary to assert personal jurisdiction in this case and satisfies Fifth Amendment due process through its national contacts requirement.

III. The Decision Below Renders Rule 4(k)(2) Superfluous or Constitutionally Invalid.

NYK asserts that the en banc majority "did not hold that general jurisdiction could never apply to Rule 4(k)(2), nor did the court find that the rule had 'had at most limited application to specific jurisdiction.'" Br. in Opp. 7 (quoting Pet. 8). Yet, superimposing an at-home (general) or incident-based (specific) requirement on Rule 4(k)(2) would mean that resort to Rule 4(k)(2) would be unnecessary because personal jurisdiction would be otherwise satisfied and the defendant would surely be subject to some state court's jurisdiction. Thus, the additional requirements either render Rule 4(k)(2) superfluous or unconstitutional as a matter of due process because it could never be applied.

The en banc majority conceded as much with respect to general jurisdiction by suggesting it "may be true" that it could never apply and denying that national contacts were sufficient for due process. App. 23 & n.22, 27 n.27. The five dissenters also recognized the decision's implication, stating that the "severe and anomalous consequences of today's majority holding … will render most of Rule 4(k)(2)'s intended applications unconstitutional." Pet. App. 105.

But the issue is not whether general jurisdiction is satisfied by extensive national contacts. It is whether Rule 4(k)(2) provides a basis for personal jurisdiction, which obviates the need to apply the tests for general or specific jurisdiction, as courts held pre-*Daimler*. *See, e.g., World Tanker Carriers Corp. v. M/V/Ya*

Mawlaya, 99 F.3d 717, 721 (5th Cir. 1996); *Porina v. Marward Shipping Co.*, 521 F.3d 122 (2d Cir. 2008).

IV. The Fifth Amendment's Requirements for Personal Jurisdiction Remain an Open Question.

NYK insists that *Ins. Corp.* would need to be overruled and that other decisions control the disposition of the issues in this case, but neither assertion is correct. NYK chides Petitioners for not stating that *Ins. Corp.* is irrelevant or distinguishable in its Petition and for "not "asking the Court to overrule" the case. Br. in Opp. 15. Yet, *Ins. Corp.* predates Rule 4(k)(2) and does not address it in any way, so Petitioners have not cited it for any reason other than its approval of consent jurisdiction. Pet. 13.

As best as Petitioners can tell, NYK seems to suggest that Rule 4(k)(2) depends on subject-matter jurisdiction and is irrelevant to personal jurisdiction and cites *Ins. Corp.* for its stated distinctions between the two. But neither the rule nor Petitioners have conflated subject-matter and personal jurisdiction.

NYK also claims that Petitioners' first Question Presented has been answered and relies on this Court's general-jurisdiction Fourteenth Amendment decisions as if they self-evidently apply *sub silentio* to Rule 4(k)(2). However, this Court repeatedly said otherwise, leaving open whether the Fifth Amendment imposes the same due-process restrictions on personal jurisdiction as the Fourteenth Amendment does, and originalist research supports a different analysis. *See* Pet. 12, 31-33; Pet App. 53-55 (Elrod, J., dissenting);

Pet. App. 120-25 (Higginson, J., dissenting); Pet. App. 126 (Oldham, J., dissenting). NYK fails to address these cases or scholarship.

V. The Constitution's Grant of Admiralty Jurisdiction Provides Direction on Personal Jurisdiction.

NYK largely ignores the second Question Presented, concerning whether the Constitution's grant of admiralty jurisdiction to the federal courts has importance for personal jurisdiction in disputes that take place on the high sea.

A. The Constitution Grants Subject-Matter Jurisdiction, Which Provides Critical Direction on the Issue of Personal Jurisdiction.

NYK insists that Article III, § 2, cl. 1's grant of subject-matter jurisdiction means just that and nothing more. It also claims that general jurisdiction's at-home requirement applies.

Still, NYK does not deny that, in granting admiralty jurisdiction to the federal courts, the framers established that the federal courts would do dual duty as traditional courts and as specialized admiralty courts. *See The Lottawanna*, 88 U.S. 558, 565-66 (1874) (holding it was intended "to provide courts for the sole purpose of administering the general maritime law."); *see also* The Federalist No. 80, at 478 (Alexander Hamilton) (C. Rossiter ed., 1961) ("maritime causes . . . commonly affect the rights of foreigners)."

For that reason, admiralty courts were deemed international courts capable of adjudicating disputes arising on the high seas where no sovereign held dominion. *See* Patricia A. Krebs, *United States Admiralty Jurisdiction over Collisions on the High Seas: Forum Non Conveniens and Substantive Law*, 9 Mar. Law. 43, 45 (1984). Through adoption of the subject-matter directive in the Constitution, the maritime law "became a part of the common law of the United States," *Filartiga v. Pena-Irala*, 630 F.2d 876, 886–87 (2d Cir. 1980), with all that implies for personal jurisdiction.

It certainly implies far more than subject-matter jurisdiction. Maritime disputes were adjudicated under different rules that reflected the common understanding that "the seas are the joint property of nations, whose right and privileges relative thereto, are regulated by the law of nations and treaties." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475 (1793); *see also Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 91 (1795) (Iredell, J.) (declaring a "prize court is, in effect, a court of all the nations in the world, because all persons, in every part of the world, are concluded by its sentences."); *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Peter) 511, 545-46 (1828) (" A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. . . . [T]he law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise."). Due process considerations were palpably different given the courts' status.

The result of the en banc majority's decision "threatens to sink 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 about vessels in far-flung places on the seven seas." Pet. App. 109 (Elrod, J., dissenting). *See also* Pet. App. 110 (Elrod, J., dissenting) (listing examples of cases).

B. Personal Jurisdiction Did Not Bar Adjudication of a Foreign Defendant's Liability.

Relying on the en banc majority's limitation of the lessons of *The Belgenland*, 114 U.S. 355 (1985), to *in rem* actions, Pet. App. 29-30, NYK argues the decision says nothing of import for this case. Resp. Br. 14. However, *The Belgenland* endorsed the idea that maritime courts could adjudicate collision cases involving ships of different nationalities. *The Belgenland*, 114 U.S. at 369 (citing *The Russia*, 21 F. Cas. 86, 88 (S.D.N.Y. 1869) (Blatchford, J.)),

It further established that, for both salvage disputes and collisions "on the high seas, between persons of different nationalities," cases were to be decided by "any court of admiralty which first obtains jurisdiction of *the rescued* or offending ship." *Id*. at 362-63 (emphasis added). The Court's mention of *"the rescued"* plainly recognizes authority even in the absence of *in personam* jurisdiction over the offending ship or its masters. The absence of an ability to attach the offending ship simply rendered a judgment more difficult to enforce, because "'a remedy in personam would

be impracticable,'" rather than legally flawed. *Id.* at 367 (citation omitted). Courts then attached other property, not part of the dispute, within the forum jurisdiction to assure a remedy. *See Thomassen v. Whitwell*, 23 F. Cas. 1003, 1004 (E.D.N.Y. 1877) (No. 13,928), *aff'd sub nom. The Great Western*, 118 U.S. 520 (1886). *Cf. Gkiafis v. S. S. Yiosonas*, 387 F.2d 460, 463 (4th Cir. 1967) (considering the "'quality' of the contacts with the state to exercise personal jurisdiction over a Panamanian registered ship owned by Greek citizens).

C. NYK Fails to Address Petitioners' Cases.

Rule 4(k)(2) provides the quintessential basis for admiralty litigation. NYK ignores cases that applied it pre-*Daimler*, such as *World Tanker* and *Porina*. But *Daimler* did not address admiralty and did not involve the Fifth Amendment, so it does not directly apply here.

Moreover, when *Porina* was applied in *BMW of N. Am. LLC v. M/V Courage*, 254 F. Supp. 3d 591, 599-600 (S.D.N.Y. 2017), stating that "there are sufficient minimum contacts between [the third-party defendants] and the United States for it to exercise jurisdiction over the remaining parties' claims," NYK's only response was that the court "did not apply a 'pre-*Daimler*' analysis," ignoring the decision's explicit reliance to *Porina* and national contacts without imposing an at-home requirement to find jurisdiction pursuant to Rule 4(k)(2).

In short, NYK fails to address an argument that Petitioner has consistently made throughout this

litigation on the special status of admiralty law and Rule 4(k)(2)'s consistency with it. Because the decision below also fails to come to grips with that issue, in clear conflict with *Porina* and its progeny, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted, or this Court provide notice under 28 U.S.C. § 2403 or seek the views of the United States because the decision below challenges the constitutionality of a federal law.

Respectfully submitted,

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1901 Connecticut Ave., NW
Suite 1008
Washington, DC 20009
Phone: (202) 944-2874
Fax: (646) 365-3382
robert.peck@cclfirm.com

Marc Fiedler
David M. Schloss
Kasey K. Murray
Koonz McKenney Johnson & DePaolis LLP
2001 Pennsylvania Ave. N.W., Suite 530

Washington, DC 20006
Phone: (202) 659-5500

Thomas Schoenbaum, JD,
PH.D
2181 Jamieson Avenue
Unit 1409
Alexandria, VA 22314
Phone: (206) 364-3891
tjschoen@uw.edu

Counsel for Petitioners