

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,

Respondent.

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

**BRIEF AMICUS CURIAE OF
CIVIL PROCEDURE PROFESSORS
IN SUPPORT OF PETITIONERS**

Alan B. Morrison
(Counsel of Record)
2000 H Street NW
Washington D.C. 20052
202 994 7120
abmorrison@law.gwu.edu

January 18, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF
ARGUMENT 2

REASONS FOR GRANTING THE PETITION 5

 A. THE FIFTH CIRCUIT INCORRECTLY
 DECIDED A QUESTION EXPRESSLY LEFT
 OPEN BY THIS COURT AND DID SO IN A
 WAY THAT UNSETTLED A NUMBER OF
 AREAS OF LAW..... 5

 B. RULE 4(K)(2) ALLOWS FOR PERSONAL
 JURISDICTION IN THIS CASE WITHOUT
 ALLOWING IT WHERE THE DEFENDANT
 LACKS SUBSTANTIAL RELEVANT
 CONNECTION WITH THE UNITED STATES..
 13

CONCLUSION..... 17

TABLE OF AUTHORITIES

CASES

Adams v. Unione Mediterranea Di Sicurta, 364 F.3d 646 (5th Cir. 2004)	16
Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773 (2017)	5, 6, 15
Burnham v. Sup. Ct., 495 U.S. 604 (1990).....	7
Daimler AG v. Bauman, 571 U.S. 117 (2014).....	10
Ford Motor Company v. Montana Eighth Judicial District, 141 S. Ct. 1017 (2021).....	11
Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984)	7
In Plixer International, Inc. v. Scrutinizer GmbH, 905 F.3d 1 (1st Cir. 2018).....	15
International Shoe Co. v. Washington, 326 U.S. 310 (1946)	16
J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011)	7
Jones v. Flowers, 547 U.S. 220 (2006)	7
M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)	7
Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010)	13
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	7
Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd, 484 U.S. 97 (1987)	8, 10, 13, 14, 16

STATUTES

28 U.S.C. § 2073..... 8
28 U.S.C. § 2403..... 8
Commodity Exchange Act, 7 U.S.C. § 1 9
Death on the High Seas Act, 46 U.S.C. § 30302. 10

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4(k)(2).....2, 3, 4, 8, 9, 10, 12, 13, 14, 15, 16
Rule 4(k)(1)(C) 12

CONSTITUTIONAL PROVISIONS

Fifth Amendment.....2, 3, 4, 5, 7, 10, 11, 13, 16, 17
Fourteenth Amendment 3, 5, 6, 7, 9

OTHER AUTHORITIES

Brief of the United States in Support of Petitioner
in Bristol-Myers Squibb Co. v. Superior Court,
2017 WL 1046237.....6

Brief of the United States in Support of Petitioner
in Ford Motor Company v. Bandemar, 2020 WL
1478612.....12

Fed. R. Civ. P. 4 Advisory Committee Note, 1993
Amendments.9

INTEREST OF THE AMICI CURIAE¹

Amici are five law professors who teach civil procedure, including the doctrine of personal jurisdiction which is at issue in this case. Amici Professors Helen Hershkoff, Arthur R. Miller, and John E. Sexton teach civil procedure at New York University Law School. They are three of the named co-authors of a leading civil procedure casebook, Friedenthal, Miller, Sexton, Hershkoff, Steinman, & McKenzie, *Civil Procedure: Cases and Materials* (13th ed. 2022). Amicus Professor Adam N. Steinman teaches civil procedure at the University of Alabama School of Law, and he is also an author of the Friedenthal casebook. Professors Miller and Steinman are co-editors of the volume of the leading civil procedure treatise that covers personal jurisdiction, Charles A. Wright, Arthur R. Miller, and Adam N. Steinman, *4 Federal Practice & Procedure* (4th ed. 2015). Amicus Alan B. Morrison is an associate dean and teaches civil procedure and constitutional law at the George Washington University Law School. Amici filed briefs below in support of petitioners before both the panel and the en banc court of appeals.

¹ Notice pursuant to Rule 37.2(a) was provided to counsel of record for all parties more than 10 days before the brief in opposition is due. No counsel for a party has authored this brief in whole or in part, and no party or other person has made a monetary contribution intended to fund the preparation or submission of this brief.

Amici have no financial or other interest in this case. They are filing this brief to point out the significant errors in the decision below and to explain why this Court's review is warranted. This brief also sets forth what amici believe to be the proper framework for assessing when a federal court, applying Federal Rule of Civil Procedure 4(k)(2), may exercise personal jurisdiction over federal admiralty claims for wrongful death or personal injuries against a non-U.S. defendant resulting from a collision in the territorial waters of another country. Amici are of the firm view that the decision below erred both in its understanding of Rule 4(k)(2) and its constitutional analysis. The majority's approach, if left uncorrected, threatens to undermine the ability of private parties, such as petitioners, to seek redress in the federal courts for claims arising outside of the United States, as well as the power of the United States to protect its own sovereign interests and the interests of its citizens.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition presents two questions, but they can be distilled into one:

Does the Fifth Amendment preclude federal district courts from exercising personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2), over federal claims by United States citizens against the foreign owner of a vessel that collided with a U.S. vessel outside U.S. waters, even though that

owner does substantial related business in the United States?

The en banc Fifth Circuit, by a vote of 12–5, answered that question in the affirmative, with the result that no court in the United States will be able to exercise personal jurisdiction over routine admiralty claims like these. If that ruling stands, petitioners may seek relief only in Japan, which is respondent’s home. Beyond the erroneous and unjust nature of this decision, there are a series of interrelated reasons, more fully discussed below, why this Court should grant review. In summary:

- The majority decided that the personal jurisdiction limits imposed on state courts by the Fourteenth Amendment are also imposed on federal courts by the Fifth Amendment, even though this Court has expressly reserved that question on several occasions (*infra* at 5-7);
- The majority erroneously narrowed the jurisdictional scope of Rule 4(k)(2) by imposing Fourteenth Amendment due process standards on a rule of *federal* court jurisdiction (*infra* at 7-10);
- The majority cast serious doubts on the continued viability of centuries of admiralty cases in which personal jurisdiction was found based on facts comparable to this case, including claims arising under the Death on the High Seas Act (*infra* at 10-11);

- The majority further deepened the conflict as to the limits of the Fifth Amendment Due Process Clause between federal criminal prosecutions and federal civil cases like this (*infra* at 11); and
- The majority's rationale would invalidate federal long-arm statutes that enable federal courts to adjudicate claims that arise outside the United States and instead require everyone, including the United States for its property damages claim in this case, to litigate in the home country of the defendant (*infra* at 11-12).

All of this could have been avoided if the Fifth Circuit had recognized—as amici urged below—that Rule 4(k)(2) can be read to contain the following limitation: the defendant must engage in substantial business in the United States that is related to the business in which the defendant was engaged when the federal claim arose. As so read, Rule 4(k)(2) would satisfy the Fifth Amendment, and those requirements would plainly have been met here since respondent's extensive U.S. business described in the petition (at 4–5) is the same shipping business in which respondent's vessel was engaged when it allegedly caused the deaths and/or injuries of petitioners.

REASONS FOR GRANTING THE PETITION

The heart of the difference between the majority and the dissent below is whether the identical words “due process of law,” as applied to the territorial limits of federal and state courts, must have the same meaning in the Fifth Amendment as they have in the Fourteenth Amendment. Taking the mechanical approach, without factoring in relevant differences in the two situations, the majority concluded that they must be read identically. Because no state court would have jurisdiction over petitioners’ claims, and because the court below concluded that the limitations of the Fourteenth Amendment also applied to the federal courts, petitioners’ claims were dismissed for want of personal jurisdiction.

A. The Fifth Circuit Incorrectly Decided a Question Expressly Left Open by this Court and Did so in a Way that Unsettled a Number of Areas of Law.

The most fundamental reason why review should be granted is that this Court expressly left open the very question decided below less than six years ago in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783-84 (2017): “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.” In that connection, we note that the amicus brief

filed by the United States in that case asked the Court to limit its ruling to state courts and not to decide the question of the reach of the federal courts that had been left open in prior decisions.² Moreover, as the petition points out (at 11–12), this Court has declined to decide the question presented by this case on several prior occasions because it was not necessary to the outcome of the case. By contrast, here the issue is squarely presented and unavoidable.

Although the words in the two amendments are identical, they were written eighty years apart, and the limits on sovereignty that they protect in this context are very different. As Justice Samuel Alito pointed out in *Bristol-Myers*, there are several reasons not to apply limits on state court jurisdiction to federal courts. Among those he emphasized are the “territorial limitations on the power of the respective States;” the fact that the “sovereignty of each State ... implie[s] a limitation on the sovereignty of all its sister States;” and the fact that the Due Process Clause of the Fourteenth Amendment, “acting as an instrument of interstate federalism,” would restrain a state but not the federal government from exercising jurisdiction in certain cases. *Id.* at 1780-81 (citations omitted). Moreover, in equating federal and state courts for these purposes, the majority below acted contrary to the reminder of Justice Anthony Kennedy for the

² Brief of the United States in Support of Petitioner in *Bristol-Myers*, 2017 WL 1046237 at 31, n.4. In a more recent filing in the Second Circuit (Pet. at 7-8), the United States took the position that the Fifth Amendment has a broader jurisdictional reach than the Fourteenth.

plurality in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011): “personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign analysis.” Thus, the principal reason to grant review of the questions presented here is to correct the Fifth Circuit’s mistaken conclusion that due process of law for personal jurisdiction purposes has the same meaning for state as for federal courts.

In addition to its unwarranted conclusion that the personal jurisdiction authority of federal courts under the Fifth Amendment is no greater than that of state courts under the Fourteenth, the majority also assumed that personal jurisdiction came in only two types: specific and general jurisdiction. But that assumption is plainly wrong. See *Burnham v. Superior Ct.*, 495 U.S. 604 (1990) (tag jurisdiction); *Jones v. Flowers*, 547 U.S. 220 (2006) (in rem proceeding regarding tax liens); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (trust accounting affecting non-residents); and *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (consent). The need to correct the Fifth Circuit’s mistaken assumption further supports review in this case.³

³ The terms general and specific jurisdiction are not found in the text of the Constitution, but rather are derived from two footnotes in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 415, nn. 8 & 9 (1984), based on a law review article.

Second, the decision below seriously eviscerates a Federal Rule of Civil Procedure that was prompted by a decision of this Court, that went through the full rule making process commanded by 28 U.S.C. § 2073, that was approved by this Court, and that was not overridden by Congress. That alone should command review by this Court, as well as an invitation to the Attorney General of the United States under 28 U.S.C. § 2403 to defend the constitutionality of Rule 4(k)(2).

To be sure, the majority opinion did not specifically declare Rule 4(k)(2) unconstitutional, or even pronounce it a nullity, but that is the effect of the decision below at least as to cases like this where the facts relating to the claims did not arise in the United States. The Rule has three parts: (1) it applies only to claims under federal law, which includes admiralty claims like these; (2) it applies only where no state court has personal jurisdiction, which is undisputed here, because the claim arose outside the United States (thereby precluding specific jurisdiction) and because respondent is at home only in Japan (thereby precluding general jurisdiction); and (3) jurisdiction must not be precluded by statute (there is none) or by the Constitution, which is the reason why jurisdiction was found lacking here.

The history of Rule 4(k)(2) confirms that the result mandated by the Fifth Circuit is wholly inconsistent with what the rule makers intended. That history began with *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd*, 484 U.S. 97 (1987). The plaintiffs in *Omni* were residents of Louisiana who

bought tax shelters that the Internal Revenue Service disallowed. They sued Omni, the New York company that induced them to buy the shelters, in federal district court in Louisiana under the federal Commodity Exchange Act, 7 U.S.C. § 1 (“CEA”). Omni sought to implead the British company that handled its trades. The question was whether amenability to suit was limited by the forum-state’s long-arm statute, subject to the Fourteenth Amendment, or whether the federal court could imply such authorization under the CEA or “fashion[] a remedy to fill a gap in the Federal Rules of Civil Procedure.” 484 U.S. at 103. This Court held that, because neither the CEA nor any other federal statute or rule authorized service in the United Kingdom, service was limited by the jurisdiction of the state court where the federal court sat.

The decision in *Omni* resulted in the promulgation of Rule 4(k)(2), which was specifically designed to fill that void.⁴ However,

⁴ See Fed. R. Civ. P. 4 Advisory Committee Note, 1993 Amendments. To ensure that this Court and Congress focused on Rule 4(k)(2), the Committee added the following Special Note when it forwarded its recommendation:

“Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule, with subdivision (k)(1) becoming simply subdivision (k). The Committee Notes would be revised to eliminate references to subdivision (k)(2).”

under the decision below, the jurisdictional gap recognized in *Omni* would remain. That is because there was admittedly no specific jurisdiction on those facts, and *Omni* could not use general jurisdiction because the UK defendant would not be “essentially at home” in the United States. *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014). Thus, if the majority is correct that the constraints of due process in personal jurisdiction cases are identical for federal and state courts, Rule 4(k)(2) does not solve the problem that prompted its promulgation.

Third, as the petition details (at 25-26), the history of admiralty cases in the federal courts is one in which there is no arguable claim of either specific or general jurisdiction, and yet the courts have never questioned their authority to entertain those cases, even without Rule 4(k)(2). Admiralty cases, like all cases heard in federal courts, are subject to the limits of the Due Process Clause of the Fifth Amendment. But if the majority below is correct, all of those admiralty cases are at risk of being dismissed for lack of personal jurisdiction.

The problem also extends to the ability of district courts to hear cases specifically authorized by the Death on the High Seas Act, 46 U.S.C. § 30302:

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a

civil action in admiralty against the person or vessel responsible.

The principal role for that provision is to confer subject matter jurisdiction in the district courts on those claims, but if the Fifth Circuit is correct, subject matter jurisdiction is irrelevant because in most cases, there will be no personal jurisdiction over the defendant. The Fifth Circuit's failure to reconcile its limits on personal jurisdiction with the longstanding expansive jurisdiction in admiralty cases further supports granting review in this case.

Fourth, the Due Process Clause applies to both criminal and civil cases, yet as the petition points out (at 18-21), the courts have never imposed limits on the reach of federal criminal law remotely similar to the shackles that the majority applied to civil cases. Indeed, given the stakes in most criminal cases versus those in a routine civil damages action, it seems perverse to give criminal defendants less due process protections than respondent is accorded here.

Fifth, there are a number of federal statutes that provide for nationwide and worldwide service of process and hence personal jurisdiction (Pet. at 14-15). In its amicus curiae brief in support of the petitioner in *Ford Motor Company v. Montana Eighth Judicial District*, 141 S. Ct. 1017 (2021), the United States explained the basis and importance of having a broad reach under the Fifth Amendment:

In addition, the United States' constitutional powers and special competence in matters of foreign affairs and international commerce, in contrast to the limited and geographically cabined sovereignty of each of the several States, would permit the exercise of federal judicial power in ways that have no analogue at the state level.⁵

However, if the Fifth Circuit were correct, the extraterritorial reach of these laws would be eliminated in many or even most cases, depending on how narrowly specific jurisdiction were confined, for example, by excluding the effects in this country of conduct arising abroad. Because there are federal statutes that provide broader reach for a federal court than would be available when a state court exercises specific jurisdiction, the decision below would undermine those statutes and Rule 4(k)(1)(C), as well as Rule 4(k)(2).

⁵ 2020 WL 1478612 (2020) at 32.

*B. Rule 4(k)(2) Allows for Personal
Jurisdiction in this Case Without Allowing
it Where the Defendant Lacks Substantial
Relevant Connection with the United States.*

There is a sensible understanding of the Fifth Amendment's limits on Rule 4(k)(2) that would permit personal jurisdiction in federal court over the claim in this case, as well as that in *Omni* and other cases for which Rule 4(k)(2) was intended. The Rule should be read to require that the defendant must have substantial connections with the United States as a whole and that those connections be related to the activity in which the defendant was engaged when the claim at issue in the case arose.

Here there is no question that respondent has substantial business in the United States and that most of it is related to the transportation of goods by water that was the business of respondent's vessel that collided with the *USS Fitzgerald* on which petitioners and/or their decedents were serving. Respondent will doubtless argue for a closer relation to the United States — for example that the vessel was headed here — but that would leave Rule 4(k)(2) almost as lifeless as did the Fifth Circuit. Moreover, because Rule 4(k)(2) is limited to claims arising under federal law, and federal law is generally not applicable outside the United States,⁶ the number of potential

⁶ *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (discussing presumption against extraterritoriality).

non-admiralty cases in which a foreign defendant has both substantial connections with the United States as a whole, and is sued on a federal claim, is not likely to be large.

Under this approach to Rule 4(k)(2), but not the Fifth Circuit's, the plaintiff in *Omni* would have been able to obtain personal jurisdiction over the third-party defendant from the United Kingdom. That defendant had a substantial connection with the United States through the transaction at issue, as well as through other similar transactions. Yet it lacked sufficient connection with any one state to obtain specific jurisdiction. The Court in *Omni* found that there was no personal jurisdiction only because there was no rule or other law that allowed service on a non-US defendant in those circumstances. At no time did the Court suggest that due process would be a barrier to subjecting the UK defendant to jurisdiction in a federal court. If it had been, then the Court would never have urged Congress or this Court's rules process to cure the problem. Yet due process is precisely what the Fifth Circuit concluded was the reason that Rule 4(k)(2) could not be used by petitioners here.

Amici suggest calling their approach "national jurisdiction" because the defendant's connections would have to be with the nation as a whole, and because the substantive laws would be those of the nation and not of any one state. Recognizing a concept of national jurisdiction, which is implicit in this Court's approach to admiralty disputes, would solve many significant jurisdictional problems that have arisen in federal

court cases involving federal claims against non-US defendants. In *Plixer International, Inc. v. Scrutinizer GmbH*, 905 F.3d 1 (1st Cir. 2018), and *AMA Multimedia LLC v. Wanat*, 970 F.3d 1201 (9th Cir. 2020), the non-US defendant was alleged to have violated the federal trademark and/or copyright rights of a US-plaintiff through the use of the Internet. General jurisdiction was not available because the defendant was neither incorporated nor had its principal place of business in the United States, and under *Bristol-Myers* specific jurisdiction is available only if the defendant's conduct in the forum relates to the claim at issue. However, as *AMA* and its dissent show, disagreement exists on how to apply this Court's rulings on specific jurisdiction to the concept of purposeful availment of the United States as a whole.

Under amici's national jurisdiction approach, the courts would ask whether a non-US defendant, sued on a federal claim and not amenable to suit in any state court, was doing substantial business in this country and whether the claim was related to that business. In *AMA*, nearly 20% of defendant's worldwide online pornography sales were in the United States, and those sales were part of its alleged copyright violations of plaintiff's materials across this country. A comparable US connection was also alleged in *Plixer*. Taking a national jurisdiction approach to Rule 4(k)(2), that Rule could be easily and reasonably applied to obtain jurisdiction over the defendants in both cases consistent with respect for the distinct sovereign concerns of the United States. The national jurisdiction approach

would also apply to cases in which Congress has provided for extraterritorial application of federal statutes because the same Fifth Amendment due process limitations that constrain Rule 4(k)(2) apply there as well.

Amici are not wedded to a test based on the defendant's "substantial connection with the United States as a whole" although a number of courts have used it. *See* Pet. at 16. In an earlier admiralty case involving Rule 4(k)(2), *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 651-52 (5th Cir. 2004), the Fifth Circuit found that due process was satisfied where the defendant "has continuous and systematic contacts with the United States as a whole." That standard was first articulated in *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1946), as one that assured "that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316 (citation and internal quotations omitted). *See also* Pet. at 16 (citing other cases adopting that standard under Rule 4(k)(2)).

But whatever the name and the precise standard, the test must assure that cases like this one and *Omni* can proceed in district court. Amici's proposed test would do so without necessarily eliminating all limits on the reach of Rule 4(k)(2). Jurisdiction would not be available over cases in which the claim arose abroad and defendant either had no connection whatsoever with the United States, or any connections were not substantially related to the kind of activity on which the claim was based.

There is no question that respondent does very substantial shipping business in the United States and that its business is the same business in which its ship was engaged when it was involved in the collision that is at issue in these cases. Because the Fifth Circuit nonetheless held that the Due Process Clause of the Fifth Amendment precluded the exercise of jurisdiction over respondent, this Court should review that ruling.

CONCLUSION

For the foregoing reasons and those contained in the petition, the petition should be granted.

Respectfully Submitted

Alan B. Morrison
(Counsel of Record)
2000 H Street NW
Washington D. C. 20052
202 994 7120
abmorrison@law.gwu.edu

January 18, 2023