

Nos. 24-20, 24-151

IN THE
Supreme Court of the United States

MIRIAM FULD, ET AL.,
Petitioners,
v.
PALESTINE LIBERATION ORGANIZATION, ET AL.,
Respondents.

UNITED STATES,
Petitioner,
v.
PALESTINE LIBERATION ORGANIZATION, ET AL.,
Respondents.

**On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit**

**BRIEF OF ALAN MYGATT-TAUBER AS AMICUS CURIAE IN
SUPPORT OF NEITHER PARTY**

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INTEREST OF THE AMICUS CURIAE¹

Alan Mygatt-Tauber is an Adjunct Professor and Affiliated Scholar at the Seattle University School of Law and has published multiple articles on the extraterritorial application of the Constitution and the application of the Constitution to noncitizens in the United States. The interest of amicus is in the sound development of law on the extraterritorial application of the Constitution. He submits this brief to ask the Court to clarify the basis on which noncitizens can claim the protections of the Fifth and Fourteenth Amendments' Due Process Clauses.

SUMMARY OF ARGUMENT

Courts have struggled to identify when the Constitution applies to foreign actors. The application of the Due Process Clause to foreign defendants challenging the personal jurisdiction of domestic courts illustrates why the location of the alleged constitutional violation is key. The Court has long recognized that foreign corporations are entitled to the protections of the Due Process Clause when they are haled into domestic courts against their will. Under the Due Process Clauses of the 5th or 14th Amendments, this right will prevent a court from exercising jurisdiction over a foreign corporation unless that corporation has “minimum contacts” with the forum. This stands in stark contrast to other constitutional rights, such as the

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus or his counsel funded its preparation or submission.

Fourth Amendment, where a non-citizen must demonstrate “substantial connections” to the United States before claiming any protection. The reason for this difference is the location of the alleged constitutional violation.

The Court applies constitutional protections when the purported violation occurs within the United States. And when it comes to the assertion of judicial power by a domestic court over a non-consenting foreign defendant without “minimum contacts” with the forum, the due process violation occurs where the court sits—within the United States. The Due Process Clause seeks to protect a defendant from having to defend itself away from its home, because doing so, absent some action by the defendant to subject itself to suit in the forum, offends traditional notions of fair play and substantial justice. Thus, any harms are occasioned by the defendant having to appear and defend itself in U.S. courts.

Finally, the Court has long recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments apply to noncitizens within the United States. Because the location of the violation is a key consideration and because any violation occurs in the United States, the Court should use this case as an opportunity to clarify why the Due Process Clause protects foreign corporations and other noncitizens when they challenge a court’s personal jurisdiction.

ARGUMENT

I. THE COURT SHOULD CLARIFY WHY THE RESPONDENTS MAY INVOKE THE FIFTH AMENDMENT

For over seven decades, the Court has recognized the right of noncitizens, including foreign corporations, to claim the protections of the due process clause, typically under the Fourteenth Amendment. *See, e.g., Perkins v. Benguet Consolidated Mining Co., et. al.*, 342 U.S. 437 (1952), *Insurance Corp. of Ireland, Ltd., et. al v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694 (1982), *Helicopteros Nacionales de Columbia, S.A. v. Hall et. al*, 466 U.S. 408 (1984), *Asahi Metal Industry Co. Ltd. v. Superior Court of California, Solerno County*, 480 U.S. 102 (1987), *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler, AG v. Bauman*, 571 U.S. 117 (2014). But it has never explained the basis for such noncitizens to claim this right. It has merely held that corporations chartered outside the United States may not be haled into American courts unless they have “minimum contacts” with the forum.

At the same time, for over thirty years, the Court has held that before a foreign citizen outside the United States may claim certain constitutional rights, that individual must have “substantial connections” to the United States. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). This has created something of a paradox for lower courts and practitioners, which scholars have commented on: that to

claim a constitutional right, a noncitizen outside America must have substantial connections to the United States, but that due process is only offended by a lack of minimum contacts. *See, e.g.*, Robin J. Efron, *Solving the Nonresident Alien Due Process Paradox in Personal Jurisdiction*, 166 U. Mich. L. Rev. Online 123 (2018); Alan Mygatt-Tauber, *Determining Constitutional Extraterritoriality*, 84 Louisiana L. Rev. 532, 557-559 (2024).

This case offers the Court an opportunity to resolve this paradox, by clearly stating that any violation of due process—which arises from subjecting noncitizens (including corporations) to suit in U.S. courts—occurs in the United States, where the court resides.

All parties here agree that the Respondents are entitled to some measure of protection under the Due Process Clause of the Fifth Amendment—they merely disagree about what powers Congress has, consistent with that Amendment, to subject the Respondents to personal jurisdiction.² Likewise, the amici in support

² Plaintiffs in 24-20 disputed the proposition that the PLO and PA have due process rights in the trial court, but they made the argument only for appellate consideration, recognizing it was foreclosed by circuit precedent. *Fuld v. Palestine Liberation Organization*, 578 F. Supp. 3d 577, 585, n.5 (S.D.N.Y. 2022). However, they did not press this issue in the Court of Appeals and the lower court did not address it. Additionally, they make reference to an Office of Legal Counsel opinion indicating that the PLO lacks rights due to its status as an “independent sovereign entity.” Petition for Certiorari, *Fuld, et al. v. Palestine Liberation Organization, et al.*, No. 24-20, at 23. This is based on the argument that sovereign governments are not “persons” for purposes of the Fifth Amendment. Neither Petitioners nor the Office

of Petitioners acknowledge that noncitizens are entitled to due process rights.³

There is thus no question that Respondents have rights in this case. The Court should use this as an opportunity to explain precisely *why* foreign corporations (and noncitizens more broadly) are entitled to the protections of the Due Process Clause before being forced to litigate in forums far from home.

II. THE KEY QUESTION FOR ASSESSING THE APPLICABILITY OF THE CONSTITUTION IS WHERE THE ALLEGED VIOLATION OCCURS

In determining the applicability of the Constitution, courts have long held that one of the key questions is the location of the violation. As early as 1922, when discussing the applicability of the Sixth Amendment, the Court stated that “[i]t is locality that is determinative of the application of the Constitution, in

of Legal Counsel argued that the PLO lacks due process rights on the basis of being a foreign corporation. 11 Op. O.L.C. 104 (1987). Indeed, the Office of Legal Counsel acknowledges that “[r]eal or juridical ‘persons’ not United States citizens possess some constitutional rights while on American soil.” *Id.* at 105.

³ Amicus U.S. House of Representatives argues that Respondents are not entitled to due process protections, but it hinges its argument on Respondents’ role as governing entities for the Palestinian territories and people, thus making them not “persons” within the meaning of the Fifth Amendment. Brief for the U.S. House of Representatives as *Amicus Curiae* in Support of Petitioners, *Fuld et al v. Palestinian Liberation Organization, et al*, No. 24-20, pgs. 12-15. Amicus does not base its argument on Respondents’ status as noncitizens or foreign corporations.

such matters as judicial procedure, and not the status of the people who live in it.” *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922).⁴ The Ninth Circuit similarly has recognized that the location of a violation is key in its decision in *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967). In *Brulay*, the court was faced with challenges under both the Fourth and Fifth Amendments dealing with a search that occurred in Mexico and several statements made to Mexican police. *Id.* at 347-48. The court found that the Fourth Amendment did not apply to Mexican officials, but conducted an analysis under the Fifth Amendment. *Id.* at 347-49. It explained this differing treatment in a footnote. *Id.* at 349, n. 5. The court, relying on *Bram v. United States*, 168 U.S. 532 (1897), explained that the Fourth Amendment is violated when the search takes place, but for the Fifth Amendment, any violation of the self-incrimination clause is not complete until the statements are received in evidence. *Id.* See also, Alan Mygatt-Tauber, *Determining Constitutional Extraterritoriality*, 84 Louisiana L. Rev. 532, 540-544 (collecting cases).

This Court made the same distinction between the Fourth and Fifth Amendments in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Citing to *Kastigar v. United States*, 406 U.S. 441, 453 (1972), the Court held that “[a]lthough conduct by law

⁴ Amicus recognizes that *Balzac* is one of the much maligned *In-sular Cases*, and does not favor the extension of their “territorial incorporation doctrine.” However, the Court correctly recognized that being in the United States is one key to the application of the Constitution, even while wrongfully determining that Puerto Rico was not within the United States.

enforcement officials prior to trial may ultimately impair [the right against self-incrimination], a constitutional violation occurs only at trial.” *Verdugo-Urquidez*, 494 U.S. at 264. By contrast, “a violation of the [Fourth] Amendment is ‘fully accomplished’ at the time of an unreasonable government intrusion.” *Id.* (citations omitted). Thus, the Court concluded, “if there were a Fourth Amendment violation, it occurred solely in Mexico.” *Id.*

Justice Kennedy, in his concurrence in *Verdugo-Urquidez*, also recognized the importance of place to determining whether the defendant had constitutional rights. “The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the Due Process Clause of the Fifth Amendment protects the defendant.” *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

Lower courts have likewise focused on the location of the alleged violation to determine whether the Constitution applied. The Second Circuit, in examining an Establishment Clause challenge to the funding of sectarian schools in foreign countries, contrasted the First Amendment with the Fourth Amendment. *Lamont v. Woods*, 948 F.2d 825, 834 (2nd Cir. 1991). “Unlike the Fourth Amendment violation in *Verdugo*, we hold that any alleged Establishment Clause violations in this case, if established, would have occurred in the United States – *i.e.*, at the time appellants granted money to United States entities for the benefit of foreign sectarian institutions – and not abroad – *i.e.*, at the time the money was received or expended.”

Id.

Finally, Judge Sand of the Southern District of New York recognized the importance of locating the situs of any alleged constitutional violation in *United States v. Bin Laden*. 132 F. Supp. 2d 168 (S.D.N.Y. 2001). Like this Court in *Bram* and *Verdugo-Urquidez*, he recognized that “any violation of the privilege against self-incrimination occurs, not at the moment law enforcement officials coerce statements through custodial interrogation, but when a defendant’s involuntary statements are actually used against him in an American criminal proceeding.” *Id.* at 181-82.

Thus, courts at all levels of the federal system have consistently held that the key question for determining the applicability of a constitutional right is not the citizenship of the person claiming the right, but rather the location of the alleged constitutional violation. When it comes to the application of the Due Process Clause to the question of personal jurisdiction, the violation occurs within the United States.

III. ANY VIOLATION OCCURS WITHIN THE UNITED STATES

The history of personal jurisdiction law within the United States has always been tied to place. From the earliest examinations of the reach of personal jurisdiction, location has played an outsized role. As the Court itself recognized in *International Shoe v. Washington*, “[h]istorically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant’s person. Hence his presence within the territorial jurisdiction of a court

was prerequisite to its rendition of a judgment personally binding him.” 326 U.S. 310, 316 (1945) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)).

But even after moving away from the strictly territorial notions of *Pennoyer*, place still matters. General jurisdiction is allowable where the corporation is found at home. *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915, 919 (2011) (“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 foreign state.”). Specific jurisdiction arises where the injury occurred. *Id.* (“In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of ‘issues deriving from, or connected with, the very controversy that establishes jurisdiction’” (citations omitted)). Tag jurisdiction lies where the defendant can be found. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 128-29 (2023) (plurality opinion). And personal jurisdiction based on litigation behavior results because the defendant appears and submits to the jurisdiction of the court. *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-705 (1982) (recognizing that the due process right can be waived).

This Court has consistently recognized that a court violates a defendant’s due process right when it inappropriately exercises jurisdiction. *See, e.g., International Shoe*, 326 U.S. at 317 (holding that the violation of due process arises from requiring the corporation “to defend the suit away from its home”); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (“Due process protects the defendants’

right not to be coerced except by lawful judicial power.”); *Id.* at 884 (“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.” (citing *Insurance Corp. of Ir.*, 456 U.S. at 702)); *Goodyear*, 564 U.S. at 918 (“A state court’s assertion of jurisdiction exposes defendants to the State’s coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause.”).

In every case, this Court has held that it was the act of being haled into a court where the defendant is not at home or lacks minimum contacts that offends “traditional notions of fair play and substantial justice” and thus violates the Due Process Clause. *International Shoe*, 326 U.S. at 316 (quoting *Milliken v Meyer*, 311 U.S. 457, 463 (1940)).

The D.C. Circuit provided the best explanation, showing that any violation of the Due Process Clause occurs in the United States, in *GSS Group Ltd. v. National Port Authority*, 680 F.3d 805 (D.C. Cir. 2012). As the court explained:

When a foreign corporation is summoned into court, it is being forced to defend itself. To do so, the corporation must appoint a representative to act for it – that is, an attorney. In opposing personal jurisdiction on due process grounds the corporation, through its attorney, makes itself present. And since it has been forced to appear in the United States, at least for that limited purpose, it is entitled to protection of the due process clause as interpreted in *International Shoe* and later

decisions involving foreign corporate defendants. An alternative reconciliation might lie in the idea that when a United States court exercises jurisdiction over a foreign corporate defendant it inflicts damage on that defendant (at a minimum in the form of legal costs, but possibly in the form of a judgment) *in the United States*.

Id. at 816 (internal citations and footnotes omitted, emphasis in original). As the court so cogently explained, the foreign corporate defendant is entitled to constitutional protections because the violation happens in the United States. This is because, like a violation of the Self-Incrimination Clause, a violation of the Due Process Clause in these cases is complete only when the U.S. court exercises *in personam* jurisdiction over the corporation. See Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 L. & Contemp. Probs. 11, 33 (1987) (“It is local litigation that triggers the constitutional protection.”).

IV. THE COURT HAS LONG RECOGNIZED THE DUE PROCESS RIGHTS OF NONCITIZENS WITHIN THE UNITED STATES

The Court has never denied that noncitizens, whether individuals or corporations, are entitled to due process rights within the United States. Indeed, the very confusion that amicus is requesting the Court to clear up arises because of its consistent recognition that the Due Process Clause of the Fourteenth Amendment, which is identical in wording to

the Fifth, applies to foreign corporations. *See Perkins v. Benguet Consolidated Mining Co., et. al.*, 342 U.S. 437 (1952), *Insurance Corp. of Ireland, Ltd., et. al v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694 (1982), *Helicopteros Nacionales de Columbia, S.A. v. Hall et. al*, 466 U.S. 408 (1984), *Asahi Metal Industry Co. Ltd. v. Superior Court of California, Solerno County*, 480 U.S. 102 (1987), *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Daimler, AG v. Bauman*, 571 U.S. 117 (2014). In each of these cases, when a lower court attempted to exercise jurisdiction over a foreign corporate defendant, this Court held that the Due Process Clause applied to limit how far the lower court could reach.

Even in cases applying the Fifth Amendment, as opposed to the Fourteenth Amendment, this Court has recognized that Due Process would require Congress to enact some positive law that allowed the lower courts to exercise jurisdiction. *See, e.g., Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 330 (1838); *Picquet v. Swan*, 19 F. Cas. 609, 613 (C.C.D. 1828) (Story, Circuit Judge) (“Such an intention [to submit nonresident noncitizens to personal jurisdiction in the US], so repugnant to the general rights and sovereignty of other nations, ought not to be presumed, unless it is established by irresistible proof.”); *Arbitron Austria GmbH v. Hetronic Int’l, Inc.*, 600 U.S. 412, 418 (2023) (“If Congress has provided an unmistakable instruction that the provision is extraterritorial, then claims alleging exclusively foreign conduct may proceed.”).

Thus, even under a Fifth Amendment standard, Respondents would still be entitled to raise a Due Process Clause claim if a court attempted to exercise jurisdiction over them in the absence of congressional legislation creating such jurisdiction. *See, e.g., Omni Cap. Int'l v. Rudolph Wolff & Co.*, 484 U.S. 97, 101 (1987) (holding that because no federal law authorized the federal court's exercise of personal jurisdiction, the court was bound by the state long-arm statute). Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1704 (2020) ("A federal court's writ may run as far as Congress, within its enumerated powers, would have it go."). Likewise, they may claim a due process violation if they do not receive notice. *Id.* at 1709-10 ("Due process may still require that defendants receive adequate notice, that the forum not be so burdensome as to render the proceedings a sham, and so on." (internal citations omitted)); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 320 (1950).

CONCLUSION

The Court has long recognized that the Due Process Clause (and other constitutional provisions) protects noncitizens when they are in the United States. The Court has also recognized the importance of recognizing where an alleged constitutional violation occurred when determining if a right applies. The Court should use this case to clarify that the reason foreign corporations (and other noncitizens) can claim the protection of the Due Process Clause in personal jurisdiction cases is because any violation of that clause

occurs in courts which are located within the United States.

Respectfully submitted,

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