No. 24-

IN THE

Supreme Court of the United States

SCANDINAVIAN AIRLINES SYSTEM
DENMARK-NORWAY-SWEDEN,

Petitioner,

v.

SUSAN HARDY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 4(k)(2) provides that the filing of a waiver of service establishes jurisdiction over a defendant if: (1) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (2) the exercise of jurisdiction is consistent with the United States Constitution. Fed. R. Civ. P. 4(k)(2).

The question presented is:

> Whether the Due Process Clause of the Fifth Amendment to the United States Constitution authorizes a federal court to exercise specific personal jurisdiction over a foreign corporation in a personal injury action arising from an alleged incident and conduct that occurred wholly outside the United States.

PARTIES TO THE PROCEEDINGS

Petitioner Scandinavian Airlines System Denmark-Norway-Sweden was the appellee below and the defendant in the trial court.

Respondent Susan Hardy was the appellant below and the plaintiff in the trial court.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Scandinavian Airlines System Denmark-Norway-Sweden is owned by the following three corporations: SAS Sverige AB (42.8%); SAS Danmark A/S (28.6%) and SAS Norge AS (28.6%). SAS AB is the parent company of SAS Sverige AB, SAS Danmark A/S and SAS Norge AS.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Hardy v. Scandinavian Airlines System*, No. 23-30632, United States Court of Appeals for the Fifth Circuit (Judgment entered on August 26, 2024); and

- *Hardy v. Scandinavian Airlines System*, No. 21-1591, United States District Court for the Eastern District of Louisiana (Judgment entered on August 11, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Scandinavian Airlines System Denmark-Norway-Sweden ("SAS") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 117 F.4th 252. Pet. App.1a-29a. The opinion of the United States District Court for the Eastern District of Louisiana, which granted Petitioner's motion to dismiss, is unreported but available at 2023 WL 5173793. Pet.App.30a-48a.

JURISDICTION

The court of appeals entered judgment on August 26, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISION INVOLVED

Federal Rule of Civil Procedure 4(k)(2) provides, in relevant part:

> Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

INTRODUCTION

In the case below, the court of appeals held that a Louisiana federal court has specific personal jurisdiction over a Scandinavian corporation in an action arising from a personal injury incident that occurred in Oslo, Norway, when a passenger fell on an allegedly misaligned jet bridge following the arrival of her international flight that originated in New Jersey. The Fifth Circuit's decision departs from the holdings of two other courts of appeals and one state court of last resort on whether a trial court has specific personal jurisdiction over a defendant arising from a personal injury that occurred outside the forum. Only this Court can resolve this split and the question presented, and this case is the ideal vehicle for doing so.

Over the last fifteen years, this Court has characterized specific personal jurisdiction as a doctrine focusing on "case-linked" behavior, *Walden v. Fiore*, 571 U.S. 277, 283 n.6 (2011), and has emphasized the importance of a connection between "'the *suit*'" and the forum. *Bristol-Myers Squibb v. Superior Ct. of CA.*, 582 U.S. 255, 262 (2017) (emphasis in original) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)). More specifically, specific personal jurisdiction requires that "the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden*, 571 U.S. at 284.

Here, the "suit-related conduct" was the alleged placement of a jet bridge in Oslo by Oslo-based airport ground staff. Respondent Susan Hardy was not injured in the United States and never alleged that any negligence or other culpable conduct occurred in the United States. Yet despite there being no question that (1) the incident, (2) the alleged wrongdoing, and (3) the harm occurred outside the forum, the Fifth Circuit held that a Louisiana federal court had specific personal jurisdiction over Petitioner SAS, a foreign entity. In doing so, the Fifth Circuit split from the Courts of Appeals for the Third and Fourth Circuits and the Supreme Court of Arkansas, all of which have explicitly held that courts *lack* specific personal jurisdiction over a defendant when the incident, the alleged wrongdoing, and the harm all occurred outside the forum state, regardless of any other unrelated business the defendant conducts in the forum state. *See Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 140 (4th Cir. 2020); *Malik v. Cabot Oil & Gas Corp.*, 710 F. App'x 561, 565 (3d Cir. 2017); *Lawson v. Simmons Sporting Goods, Inc.*, 569 S.W.3d 865, 871-72 (Ark. 2019).

Beyond creating a circuit split, the decision by the Fifth Circuit distorts this Court's precedent and runs roughshod over a defendant's Constitutional right to due process. Instead of connecting the underlying controversy or SAS's alleged suit-related conduct to the forum, the court of appeals shoehorned this case into an analysis under *Ford Motor Company*, a products liability case in which this Court held that certain state courts had specific personal jurisdiction over a massive American corporation in actions arising from injuries that *occurred in the forum states* and were caused by products that *malfunctioned in the forum states* and which were advertised "[b]y every means imaginable" in the forum states. *Ford Motor Co.*

v. Montana Eighth Judicial Dist. Ct., 592 U.S. 351, 365 (2021). By contrast, there is no dispute that Ms. Hardy fell in Norway allegedly due to actions of individuals in Norway, and SAS's contacts with the forum cannot be (and, in fact, were not) qualitatively or quantitatively compared with Ford's contacts in Minnesota and Montana. The Fifth Circuit's conclusory holding that Ms. Hardy's injury "arises out of SAS's minimum contacts with the United States," Pet.App.25a, was issued summarily, and the Fifth Circuit did not engage in any meaningful analysis of SAS's contacts with the United States or explain how SAS's "suit-related conduct . . . create[d] a substantial connection with the forum State." *Walden*, 571 U.S. at 284.

The question presented by this Petition is of critical importance because the lower courts and litigants need to know the circumstances in which the federal courts may exercise specific personal jurisdiction over foreign defendants in tort cases where it is undisputed that the suit-related conduct occurred outside the United States. In the aftermath of *Ford*, it has been "difficult, if not impossible, to articulate one consistent analytical framework . . . of *Ford Motor Co*'s relatedness test." Anthony Petrosino, *Rationalizing Relatedness*, 91 Fordham L. Rev. 1563, 1566 (2023). And if the decision below is left unreviewed, courts that adopt the Fifth Circuit's reasoning will subject foreign corporations to specific personal jurisdiction in personal injury cases with fact patterns that would not support the exercise of jurisdiction over a domestic corporation, *i.e.* where there is no relationship between forum and the suit-related conduct.

This case is an ideal vehicle for resolution of the questions presented because its fact pattern is emblematic

of the context in which these cases arise: a plaintiff who resides in the forum allegedly was injured outside the forum by a company that resides outside the forum. Additionally, the purely legal question of whether due process permits the exercise of personal jurisdiction over a non-resident defendant is outcome-determinative.

Rule 4(k)(2) implicates a due process analysis under the Fifth Amendment, not the Fourteenth Amendment, and this Court recently remarked that it has "le[ft] open the question whether the Fifth Amendment imposes the same restrictions [as the Fourteenth Amendment] on the exercise of personal jurisdiction by a federal court." *Bristol-Myers Squibb*, 582 U.S. at 269. Moreover, as the district court in this case observed: "jurisprudence surrounding the role of Rule 4(k)(2) has been plagued with confusion." Pet.App.35a. Furthermore, "confusion prevails" among the courts of appeals as to the application of the relatedness test articulated by *Ford*. Petrosino, *Rationalizing Relatedness*, 91 Fordham L. Rev. at 1566.

This Court should resolve that confusion by granting this Petition and reviewing the judgment of the Fifth Circuit.

STATEMENT OF THE CASE

I. Factual Background

This case arises from an incident that allegedly occurred in Oslo, Norway.

On August 23, 2019, Respondent Susan Hardy was disembarking SAS Flight SK 908 at Oslo Gardermoen

Airport when she fell while stepping from the aircraft to a passenger boarding bridge. Pet.App.3a.

In her complaint, Ms. Hardy alleges that she was injured because: (1) SAS employees in Oslo improperly positioned the passenger boarding bridge; (2) SAS employees failed to warn her of the condition at the Oslo Airport; and (3) SAS employees failed to offer her assistance as she disembarked the aircraft in Oslo. She sought damages under a treaty of the United States known as the Montreal Convention.[1] The jurisdiction of the district court was invoked under 28 U.S.C. § 1331.

SAS flight SK 908 was a non-stop flight between Newark, New Jersey, and Oslo, Norway. Ms. Hardy was traveling on a round-trip ticket for travel between Newark and Oslo. Ms. Hardy is a resident of Louisiana and purchased her ticket online there. Pet.App.46a.

SAS is a foreign air carrier organized under the laws of Denmark, Norway, and Sweden. It is headquartered in Stockholm, Sweden. Pet.App.3a n.2. SAS has no employees or property in the United States. Pet.App.19a.

II. Procedural Background

a. Proceedings in the District Court

The district court granted SAS's motion to dismiss for lack of personal jurisdiction. First, the district

1. Convention for the Unification of Certain Rules Relating to International Carriage by Air, Done at Montreal, Canada, on 28 May 1999 ("the Montreal Convention"), reprinted in S. Treaty Doc. 106-45, CCH Av. L. Rep. ¶ 27,400-59, 1999 WL 33292734 (1999).

court rejected Ms. Hardy's argument that the Montreal Convention confers personal jurisdiction over SAS in Louisiana because Ms. Hardy resides there. Pet.App.38a. Consistent with every federal court that has considered this issue, the district court held that Article 33 of the Montreal Convention confers only subject matter (treaty) jurisdiction in the courts of certain countries, and it does not provide an independent basis for personal jurisdiction. Pet.App.40a-43a.

The district court also rejected Ms. Hardy's argument that the filing of a waiver of service under Rule 4(k)(2) conferred personal jurisdiction over SAS. Observing that "jurisprudence surrounding the role of Rule 4(k)(2) has been plagued with confusion," Pet.App.35a, the court held that regardless of whether the forum with which SAS's contacts should be evaluated was Louisiana or the United States, Ms. Hardy failed to demonstrate that her cause of action arose from any such contacts. Pet.App.45a-46a. More specifically, although Ms. Hardy traveled on a ticket purchased in the United States, the cause of action arose from allegedly negligent conduct in Norway. Pet.App.45a-46a. The problem, explained the district court, is that the sale of a ticket is insufficient to endow the forum court with personal jurisdiction over a non-resident defendant "'because the defendant's alleged negligence and the plaintiff 's injury are too far removed from the business the defendant transacted in the forum.'" Pet.App.46a.[2] The court observed that the outcome may

2. Quoting *H.B. by Barakati v. China S. Airlines Co. Ltd.*, No. 20-CV-9106, 2021 WL 2581151, at *5 (S.D.N.Y. June 23, 2021); also citing *Luna v. Compania Panamena De Aviacion*, S.A., 851 F. Supp. 826, 832 (S.D. Tex. 1994) (holding the plaintiff 's death due to an airplane crash did not result from the fact that she

have been different if the cause of action was premised on a theory relating to the sale and purchase of the ticket, such as fraudulent inducement or false advertising. Pet. App.46a-47a. But here, the cause of action arose "out of [Ms. Hardy's] alleged injuries which occurred in Oslo, Norway, not from her purchase of the ticket in the United States." Pet.App.47a.

The district court also rejected the notion—which Ms. Hardy did not raise in her briefing—that the flight's origination in New Jersey served as a basis for personal jurisdiction, reasoning that the alleged negligence occurred not in New Jersey but in a foreign forum. Pet. App.47a n.67. The district court also reasoned that even if Ms. Hardy had shown that her cause of action arose from SAS's contacts with the forum, *i.e.* the sale of the ticket, the connection between the cause of action and the forum-related activity was "too attenuated" to comport with the Constitutional requirements of due process. Pet. App.47a n.68.

b. Proceedings in the Court of Appeals

The Fifth Circuit reversed. The court agreed that the Montreal Convention does not confer personal jurisdiction, Pet.App.10a-11a, but held that the district court had specific personal jurisdiction over SAS under Rule 4(k)(2). Pet.App.17a.

First, the Fifth Circuit held that the district court incorrectly considered SAS's contacts only in Louisiana, when it should have aggregated and considered SAS's

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purchased the ticket for her air travel in the forum state); and *Pesa v. Scandinavian Airlines System*, No. 2:19-cv-20415, 2021 WL 1660863, at *8 (D.N.J. Apr. 27, 2021) (collecting cases).

contacts with the United States as a whole. Pet.App.19a. The court reasoned that, under Rule 4(k)(2), a federal court may consider all of a defendant's contacts throughout the United States in a claim arising under federal law as long as the defendant is not subject to personal jurisdiction in any state court and the exercise of jurisdiction is consistent with the Constitution. Pet.App.20a.

The court of appeals then held the following contacts with the United States "more than meet the minimum-contacts test" for Constitutional due process: (1) SAS flies into seven metro areas in the United States; (2) SAS advertises to American buyers; (3) SAS participated in the Star Alliance with United Airlines; (4) SAS owns and operates a subsidiary in the United States; (5) SAS sells tickets online in the United States; and (6) SAS is regulated by the Federal Aviation Administration. Pet. App.22a.

Citing *Ford Motor Co.*, the court held that Ms. Hardy's claim arises out of or relates to SAS's contacts with the United States. Pet.App.24a. The court of appeals reasoned that while the connection between the injury and SAS's contacts with Louisiana may have been "overly attenuated," the connection between the injury and SAS's contacts nationally was not. Pet.App.25a.

REASONS FOR GRANTING THE PETITION

I. This Court should grant the Petition to resolve a conflict created by the Fifth Circuit on an important issue.

The Fifth Circuit stands alone in holding that a district court may exercise specific personal jurisdiction

over a non-resident corporation arising from an isolated incident that occurred outside the forum, let alone over a foreign corporation arising from an incident that occurred outside the United States. This Court should grant certiorari to resolve the conflict created by the Fifth Circuit's outlier position.

Applying this Court's precedent in *Bristol-Myers Squibb*, the Fourth Circuit holds that a company's widespread contacts in the forum are insufficient to establish specific jurisdiction when they "have nothing to do with the claims asserted by the [p]laintiffs in th[e] action." *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 139 (4th Cir. 2020). In *Fidrych*, the plaintiff alleged he was injured when a glass shower door shattered in his hand at a hotel in Italy that was part of the Marriott collection of properties. *Id.* at 129. Plaintiff sued Marriott in South Carolina, where he lived. *Id.* Marriott was licensed to conduct business in South Carolina; it franchised, licensed, or managed ninety hotels in South Carolina; and its website was accessible in South Carolina. *Id.* at 128-29. But plaintiff's lawsuit alleged negligence for Marriott's failure to inspect its properties and breach of implied warranty of safety, among other claims, and "none of the wrongs Marriott [was] alleged to have committed took place in South Carolina." *Id.* at 140. Thus, Marriott's contacts in South Carolina were "not relevant to [the] specific jurisdiction inquiry." *Id.* at 139.

Therefore, "the only arguable jurisdictional hook" was whether Marriott's operation of its website amounted to "activity purposefully directed at South Carolina residents." *Id.* at 141. The court answered in the negative, reasoning that Marriott's maintenance of an interactive website in South Carolina that allowed users to specify

that they lived in South Carolina does not mean that the website "target[s] South Carolina residents for commercial transactions any more than it targets any other state." *Id.* at 141. Under Fourth Circuit jurisprudence, a defendant has not "purposefully directed" its activities at residents of the particular forum in these circumstances. *Id.* at 142 (internal citations omitted). Thus, even if the *Fidrych* plaintiff 's claims arose from or were sufficiently related to Marriott's website, Marriott's operation of the website was insufficient to satisfy the minimum-contacts requirement. *Id.* at 140.

The Third Circuit confronted a similar fact pattern and reached the same conclusion in *Malik v. Cabot Oil & Gas Corp.*, 710 F. App'x 561, 565 (3d Cir. 2017). There, the court of appeals held that the district court could not exercise personal jurisdiction over corporate defendants in a case arising from a slip and fall on a drilling platform located in a neighboring state. *Id*. The plaintiff was a New Jersey resident who was injured when he slipped and fell on a drill rig located in Pennsylvania during the course of his employment. *Id.* at 562-63. He sued his employer and the property owner in New Jersey for negligence. The defendants had considerable contacts with New Jersey: the plaintiff 's employer recruited employees and advertised employment in New Jersey, and the property owner utilized several pipelines in New Jersey to transport its product throughout the eastern United States and was a significant producer of natural gas in the Marcellus Shale region, which includes portions of New Jersey. *Malik v. Cabot Oil & Gas Corp.*, No. 15-7078, 2016 WL 2930511, at *2 (D.N.J. May 19, 2016), *aff 'd*, 710 F. App'x 561 (3d Cir. 2017). Nonetheless, the Third Circuit affirmed the district court's dismissal because the plaintiff 's cause of action for negligence resulting in a slip and fall in Pennsylvania did

not arise out of or relate to the defendants' New Jersey-related activities. *Malik*, 710 F. App'x at 565.

Finally, in *Lawson v. Simmons Sporting Goods, Inc.*, the plaintiff was an Arkansas resident who slipped and fell in a sporting goods store in Louisiana. 569 S.W.3d 865, 867 (Ark. 2019).[3] The store advertised in Arkansas through promotional catalog inserts and display ads in Arkansas newspapers, promotional television ads, and online ads with the *Arkansas Democrat-Gazette*. *Id.* The store also contracted with an Arkansas printing company to produce its print ads, and held a contest in Arkansas. *Id.* But the Supreme Court of Arkansas held that these contacts were insufficient because "the controversy—Lawson's trip and fall—undisputedly occurred in Louisiana," as did any negligence relating to the incident. *Id.* at 871.[4]

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3. The trial court originally dismissed for lack of personal jurisdiction. The intermediate appellate court reversed, and the Arkansas Supreme Court declined defendant's petition for review. This Court granted defendant's petition for a writ of certiorari and remanded the case in light of its decision in *Bristol-Myers Squibb*. *Id.* at 868. On remand, the court of appeals affirmed the dismissal. *Id.*

4. Previously, the Arkansas state and federal courts applied a five-factor test when evaluating personal jurisdiction which included: (1) the nature and quality of the defendant's contacts with the forum state; (2) the quantity of those contacts; (3) the relationship of those contacts with the cause of action; (4) the forum's interest in providing tribunal for its residents; and (5) the parties' convenience. *Id.* (internal citations omitted). Reasoning that "*Bristol-Myers* emphasized that specific jurisdiction *must* arise out of or relate to the defendant's contacts with the forum state," the Arkansas Supreme Court held that it was no longer appropriate to apply a test that considered the third factor equally with the others. *Id.* (emphasis in original).

The Fifth Circuit's reasoning is a substantial departure from that of the Third Circuit, Fourth Circuit, and the Supreme Court of Arkansas, which all rejected a finding of personal jurisdiction where the incident occurred outside the forum. In each of those cases, the defendant's substantial, continuous contacts with the forum were not enough to overcome the lack of any connection between the contacts and the suit. Under the Fifth Circuit's reasoning, Marriott could be sued in South Carolina for an incident that happened in a bathroom in Italy; an employer and a property owner could be sued in New Jersey for an incident that happened in Pennsylvania; and a store owner could be sued in Arkansas for an incident that occurred in Louisiana.

This Court should grant certiorari to resolve the conflict created by the Fifth Circuit on the important question presented here.

II. The decision below is incorrect.

This Court's review is appropriate because the Fifth Circuit's outlier position is incorrect. Specific personal jurisdiction requires that "the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden*, 571 U.S. at 284. The Fifth Circuit did not even consider SAS's alleged suit-related conduct; there is no mention of the passenger boarding bridge or any aspect of the incident itself in the court of appeals' analysis. Instead, the Fifth Circuit highlighted SAS's unrelated contacts with the United States, eschewing the distinction between general and specific jurisdiction in an approach "resembl[ing] a loose and spurious form of general jurisdiction." *Bristol-Myers Squibb*, 582 U.S. at 264.

1. Specific personal jurisdiction is implicated in cases that involve acts "occurring or having their impact within the forum [s]tate." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). The requirement that a "defendant's suit-related conduct must create a substantial connection with the forum" is what distinguishes specific and general personal jurisdiction. *Walden*, 571 U.S. at 284. Specific jurisdiction "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear*, 564 U.S. at 919 (internal citations omitted). Central to establishing specific jurisdiction is a "controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* This Court has explained that specific jurisdiction focuses on "case-linked" behavior, *Walden*, 571 U.S. at 283 n.6, and requires a direct connection between "the *suit*" and the forum. *Bristol-Myers Squibb*, 582 U.S. at 262 (emphasis in original) (internal quotations omitted).

The suit-related conduct in this case unquestionably occurred outside the forum and did not create a connection with the forum. Relegating *Goodyear*, *Walden*, and *Bristol-Myers Squibb* to footnotes, the Fifth Circuit instead relied heavily on *Ford Motor Co.* In that case, this Court held that Ford, an American Fortune 500 company, was subject to specific personal jurisdiction in Minnesota and Montana, notwithstanding the lack of any causal relationship between the plaintiffs' suit and Ford's activities there, because "Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them *in those States*." *Ford Motor Co.*, 592 U.S. at 365 (emphasis added). Ford urged residents of those states, "[b]y

every means imaginable . . . to buy its vehicles." *Id.* Put another way by Justice Alito in concurrence, Ford "has long had a heavy presence in Minnesota and Montana," and the courts there appropriately exercised jurisdiction because plaintiffs in those states were "riding in vehicles purchased within *their* borders [and] were killed or injured in accidents on *their* roads." *Id.* at 372 (Alito, J., concurring) (emphasis in original). As one commentator has described it, "*Ford* may be categorized as a place of injury case." Jeremy Jacobson, *Getting "Arising out of" Right: Ford Motor Company and the Purpose of the "Arising out of" Prong in the Minimum Contacts Analysis*, 97 N.Y.U. L. Rev. 315, 348 (2022).

This Court also reasoned that it would be fair to require Ford to be subject to the safety laws of the forum states to ensure that the cars Ford marketed there were "safe for their citizens to use *there*." *Ford Motor Co.*, 592 U.S. at 368 (emphasis added). The Court emphasized that the relatedness inquiry "does not mean anything goes." *Id.* at 362. To the contrary, "the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum." *Id.*[5]

In its attempt to analogize this case to *Ford*, a case in which the defendant admittedly had "a veritable truckload of contacts" with the forums, 592 U.S. at 371, the court of appeals devoted a single paragraph to SAS's contacts with the United States, none of which had any connection

5. The Court contrasted *World-Wide Volkswagen v. Woodson*, in which this Court held that because Volkswagen had not extended its business into the forum state, it could not be held "accountable for a car's catching fire *there*." 592 U.S. at 363 (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980)) (emphasis added).

to the injury-causing incident. Pet.App.22a. First, the court observed that SAS flies into seven metro areas in the United States, though the court did not identify which ones. Second, the court asserted that SAS advertises to American buyers, though the court did not identify the medium, content, magnitude, or cost of the advertising, nor the markets in which the advertising takes place (likely because the record was devoid of any such information). Third, the court noted that SAS participated in the Star Alliance with United Airlines, though it did not explain the alliance's significance or explain what this means in practice—a significant oversight, as Ms. Hardy's SAS-issued ticket for travel to Oslo did not involve or implicate SAS's codeshare, alliance, or any other relationship with United Airlines.[6] Fourth, SAS owns and operates a subsidiary in the United States, though the court did not identify the nature or scope of the subsidiary's operations.[7] Fifth, SAS sells tickets online in the United States, though the court said nothing about the nature of SAS's website globally, and the court acknowledged that selling tickets online is not sufficient to establish personal jurisdiction. And sixth, SAS is regulated by the Federal Aviation Administration ("FAA"), which is true of all air carriers that operate to the United States, though the court did not mention whether the FAA regulates the conduct at issue here. Together, the court held, "these contacts more than meet the minimum-contacts test."[8]

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6. SAS is no longer a member of the Star Alliance.

7. The subsidiary is located in New Jersey and does not conduct any flight operations.

8. For this proposition, the Fifth Circuit cited *Kim v. Korean Air Lines Co., Ltd.*, which only proves SAS's point. There, the district court held that a New York court would have specific

But Ms. Hardy has never alleged that SAS's suit-related conduct created a substantial connection to its contacts anywhere in the United States, let alone in the forum state of Louisiana. Yet the Fifth Circuit summarily held that Ms. Hardy's injuries arose from SAS's contacts in the United States, and the court made no effort to link those contacts to any suit-related conduct. The wholly unsubstantiated contention advanced by the court of appeals that Ms. Hardy's claim "stems from" SAS's advertising in the United States (despite there being no evidence in the record regarding SAS's advertising) appears to be a misguided attempt to analogize this case with *Ford*, a case which involved a defendant who invested billions of dollars in advertising its products in the

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jurisdiction over a Korean air carrier arising from an incident involving a burn from hot soup on a flight from New York to Seoul because "some acts related to Kim's claim likely occurred *while at JFK*," such as the preparation and storage of the food in New York and decisions made "by attendants *before departure*" from JFK. 513 F. Supp. 3d 462, 474 (D.N.J. 2021) (emphasis added). Reasoning that not all of the aspects of the claim occurred during flight, the *Kim* court contrasted the case with *Bristol-Myers Squibb*, in which "all the conduct giving rise to the nonresidents' claim occurred elsewhere." *Id.* (quoting *Bristol-Myers Squibb*, 582 U.S. at 265); *see also Pesa*, 2021 WL 1660863, at *8 (holding the court lacked personal jurisdiction over SAS in New Jersey in a case arising from a slip and fall at a Swedish airport following a flight from New Jersey because "[a]ny negligence alleged by Plaintiff occurred in Stockholm," where she fell, and "not Newark," where "she boarded the plane without incident"); *Mali v. British Airways*, No. 17 Civ. 685, 2018 WL 3329858, at *7 (S.D.N.Y. July 6, 2018) ("Though [d]efendant inarguably engages in purposeful activities targeting airports and travelers located in New York, there exists no 'substantial relationship' between that business activity and [p]laintiff 's claims in this lawsuit," which arose "almost entirely out of [d]efendant's conduct in Mumbai.").

United States—products that eventually malfunctioned and injured the plaintiffs in the forums in which the plaintiffs brought their suit. *See Ford Motor Co.*, 592 U.S. at 372 (Alito, J., concurring). All told, the Fifth Circuit's conclusory holding that Ms. Hardy's injury "'arises out of' SAS's minimum contacts with the United States," Pet.App.25a, was in error because SAS's "suit-related conduct" did not "create a substantial connection with the forum." *Walden*, 571 U.S. at 284.

The Fifth Circuit's inaccurate contention that the district court failed to consider SAS's national contacts misses the mark. The district court did not fail to consider SAS's contacts throughout the United States; rather, the district court focused on the only contact that could conceivably have been connected to Ms. Hardy's transportation—the purchase of her ticket in Louisiana—and properly rejected it as insufficiently connected to the suit-related conduct. Pet.App.47a. To the extent the Fifth Circuit based its reasoning on SAS's sale of a ticket in the forum (and it is unclear that is what happened here, given the court's lack of explanation and its concession that selling tickets online is not sufficient to establish personal jurisdiction), the purchase of the ticket was a contact that *Ms. Hardy* created, not SAS, and this Court's precedent has long required a showing of contacts "that the 'defendant *himself*' creates with the forum." *Walden*, 571 U.S. at 284 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (emphasis in original));[9] *see also Fidrych*, 952 F.3d at 141 (holding

9. Even in the *Kim* case—the only aviation-related case cited throughout the section on specific jurisdiction in the court of appeals' decision, despite there being many such cases cited

that even though Marriott used its website to engage in commercial transactions, the website's availability in the forum state does not constitute "targeting its activities at that state").[10]

In addition, the court of appeals proclaimed in a footnote that although online ticket sales, operating a subsidiary, and participating in an airline alliance would not "individually suffice for personal jurisdiction," the court could still "consider the relevance of those factors, particularly in conjunction with SAS's other actions." This

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in SAS's briefing—the court held that the sale of the ticket in New Jersey through the defendant's interactive website was insufficient to confer personal jurisdiction there. 513 F. Supp. 3d at 471; *see also Rehman v. Etihad Airways*, No. 3:19-CV-00653, 2019 WL 12095414, at *2 (M.D. Pa. Nov. 14, 2019) (holding that despite plaintiff 's contention that he purchased the ticket for transportation in Pennsylvania, the court lacked specific jurisdiction over the defendant, an Emirati air carrier, in an action arising from the death of plaintiff 's decedent while traveling on board the carrier's flight from JFK to the United Arab Emirates), *report and recommendation adopted*, No. CV 3:19-653, 2021 WL 780302 (M.D. Pa. Mar. 1, 2021).

10. By contrast, the Fourth Circuit has held that a claim arose from a defendant's website activity in Virginia where the websites themselves were used for the copyright infringement and music piracy that was the "genesis of the dispute." *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344, 354-55 (4th Cir. 2020) (internal citations omitted). "Indeed, this is not a situation where a defendant merely made a website that happens to be accessible in Virginia." *Id.* at 355. Rather, defendant "made two globally accessible websites and Virginia visitors used them for alleged music piracy." *Id.* at 354. The defendant "actively facilitated the alleged music piracy" through Virginia website visitors, advertising broker, advertisers, and location-based advertising. *Id.* at 355.

Court has expressly rejected a "sliding scale approach" to specific jurisdiction in which the requisite connection between the forum and plaintiff's claims is "relaxed" if defendant has other forum contacts unrelated to those claims. *Bristol-Myers Squibb*, 582 U.S. at 264. "Our cases," this Court wrote, "provide no support for this approach, which resembles a loose and spurious form of general jurisdiction." *Id.* Aggregated or not, none of SAS's contacts in Louisiana or the United States have anything to do with the placement of a jet bridge in Norway or Ms. Hardy's fall in Norway.

The decision below cannot be squared with this Court's precedent.

2. Under the guise of aggregation of contacts under Federal Rule of Civil Procedure 4(k)(2), the court of appeals collapsed general and specific jurisdiction.

Rule 4(k)(2) was adopted in response to this Court's decision in *Omni Capital Int'l v. Rudolf Wolff & Co.*, in which this Court suggested that "[a] narrowly tailored service of process provision, authorizing *service* on an alien in a federal-question case . . . might well service the ends of . . . federal statutes." 484 U.S. 97, 111 (1997) (emphasis added); Fed. R. Civ. P. 4 advisory committee's note to 1993 amendment.

Service of process and personal jurisdiction are two separate concepts, both of which must be established to satisfy the requirements of personal jurisdiction. 4 Charles A. Wright, et al., *Federal Practice & Procedure* § 1063 (4th ed. 2024). "[T]he exercise of personal jurisdiction by federal courts under Rule 4(k)(2) is subject to limitations imposed by the Fifth Amendment Due Process Clause

with respect to affiliating contacts." 4B Charles A. Wright, et al., *Federal Practice & Procedure* § 1124 (4th ed. 2024).

Although this Court recently remarked that it is an "open[ ] question whether the Fifth Amendment imposes the same restrictions [as the Fourteenth Amendment] on the exercise of personal jurisdiction by a federal court," *Bristol-Myers Squibb*, 582 U.S. at 269, most of the courts of appeals have observed that "there is no meaningful difference in the level of contacts required for personal jurisdiction." *Livnat v. Palestinian Auth.*, 851 F.3d 45, 55 (D.C. Cir. 2017); *see also*, *e.g.*, *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 235-36 (5th Cir. 2022) (en banc) (noting that the Fifth and Fourteenth Amendments "use the same language and serve the same purpose," such that the Fifth Amendment would likely "require[ ] the same minimum contacts with the United States as the Fourteenth Amendment requires with a state" (internal quotation marks omitted)), *cert. denied*, 143 S. Ct. 1021 (2023) (mem.); *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1219 n.25 (11th Cir. 2009) (same); *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 449 (6th Cir. 2012) (same).

Accordingly, in those tort cases implicating Rule 4(k)(2) and specific jurisdiction since *Bristol-Myers Squibb* was decided, the courts of appeals have—until now—required that the suit-related conduct must be related to the defendant's contacts with the forum to avoid "collaps[ing] the core distinction between general and specific personal jurisdiction." *Bernhardt v. Islamic Republic of Iran*, 47 F.4th 856, 866 (2d Cir. 2022), *cert. denied*, 144 S. Ct. 280 (2023) (mem.); *see also Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 983 (9th Cir. 2021) (applying *Ford* and

holding that the exercise of specific personal jurisdiction over a skin care company was appropriate in an action for trademark infringement because defendant's "contacts with the United States include the very same promotions, sales, and distribution of which [plaintiff] complains"); *CGC Holding Co., LLC v. Hutchens*, 974 F.3d 1201, 1209 (10th Cir. 2020) (affirming the exercise of specific personal jurisdiction over alleged "equal partner in the business" accused of stealing from U.S. citizens inside the U.S. by preparing loan commitment letters and letters of intent directed at U.S. borrowers, because the "class's injuries arose out of [defendant's] forum-related activities, as a co-conspirator in the scheme"); *Herederos de Roberto Gomez Cabrera, LLC v. Teck Resources Ltd.*, 43 F.4th 1303, 1311 n.3 (11th Cir. 2022) (affirming dismissal for lack of specific jurisdiction over Canadian company arising from conduct in Cuba because plaintiff had not shown his claim arose from or related to defendant's contacts with the United States, reasoning that defendant "didn't take any action in this country *related to that harm*") (emphasis added), *cert. denied*, 143 S. Ct. 736 (2023) (mem.).[11]

11. A case like this one likely would not even make it to the "relatedness" inquiry in the Ninth Circuit. In the Ninth Circuit, which employs a "purposeful direction" test to evaluate personal jurisdiction in tort actions, the court must first make a preliminary determination that the defendant's action caused harm in the forum which the defendant knew was likely to be suffered there. *See Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002); *CollegeSource, Inc. v. AcademyOne, Inc.*, 652 F.3d 1066, 1076 (9th Cir. 2011). When a defendant's conduct occurs primarily outside the forum state, courts in the Ninth Circuit "look to whether the defendant expressly aimed acts at the forum state knowing that they would harm the plaintiff *there*." *Impossible Foods Inc. v. Impossible X LLC*, 80 F.4th 1079, 1088 (9th Cir. 2023) (emphasis added), *cert. denied*, 144 S. Ct. 2561 (2024) (mem). None of the

Yet under the guise of applying Federal Rule of Civil Procedure 4(k)(2), the Fifth Circuit in this case conflated general and specific jurisdiction when it found that SAS had systematic and continuous contacts in the United States without also evaluating the relationship between the claims and the defendant's U.S. contacts, *i.e.* without requiring that "the defendant's suit-related conduct . . . create a substantial connection with the forum State." *Walden*, 517 U.S. at 284. The Fifth Circuit considered SAS's "aggregated contacts" without linking those expanded contacts to a slip and fall on a passenger boarding bridge in Norway that allegedly was caused by conduct that took place in Norway.

The decision below contravenes this Court's precedent governing the exercise of specific jurisdiction and is an outlier among the decisions of the other courts of appeals regarding the degree of relatedness required to establish specific jurisdiction.

3. This Court has cautioned against an "uninhibited approach to personal jurisdiction" that would pose "risks to international comity." *Daimler*, 571 U.S. at 141. The doctrine of international comity promotes "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987).

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acts that are alleged to have harmed Ms. Hardy (*e.g.* the alleged positioning of the jet bridge in Oslo) were aimed at the United States, and they did not harm Ms. Hardy in the United States.

In *Ford*, this Court explained that principles of interstate federalism supported a finding of specific personal jurisdiction over Ford in Montana and Minnesota—the states in which the cars at issue malfunctioned and injured the plaintiffs. This Court recognized the need to consider both (1) the interest of the forum state in adjudicating controversies arising from "injuries inflicted by out-of-state actors, as well as enforcing its own safety regulations"; and (2) the interests of "the States in relation to each other," since one State's "'sovereign power to try' a suit . . . may prevent 'sister States' from exercising their like authority." *Ford Motor Co.*, 592 U.S. at 360 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980)).

The courts of appeals have observed that "an analogous 'federalism' dynamic may arise in the Fifth Amendment context under the rubric of 'international comity.'" *Douglass*, 46 F.4th at 237, 237 n.17; *see also Livnat*, 851 F.3d at 55 (noting that the sovereign concerns of other countries whose courts might adjudicate claims "weigh at least as heavily in the Fifth Amendment context").

Of course, a State has an interest in adjudicating the claims of its citizens. But unlike the resident plaintiffs in *Ford*, Ms. Hardy was not injured in an accident that occurred either in Louisiana or the United States. Rather, she fell and was injured at a Norwegian airport, which may well implicate "the laws and interests" of Norway. Yet the Fifth Circuit made no mention of whose regulations or substantive law would apply to an incident relating to aviation and airport safety in Norway.[12]

12. Article 17 of the Montreal Convention governs an air carrier's liability. However, it also operates as a "pass-through,

The court of appeals failed to consider the implications on international comity if a U.S. court adjudicates the actions of ground staff at a Norwegian airport. If the reasoning of the court of appeals is to be followed, any U.S. federal court could adjudicate a dispute arising from an incident at any other country's airport that has direct flights with the United States. And by that logic, any of the courts of any of those countries could adjudicate disputes arising from incidents that occur at U.S. airports—a troubling result, considering that "regulation of this country's airspace has a history of significant federal presence." *Montalvo v. Spirit Airlines*, 508 F.3d 464, 472 (9th Cir. 2007) (noting that the FAA pervasively regulates the field of aviation safety, particularly "the warnings and instructions which must be given to airline passengers"); *Abdullah v. Am. Airlines*, 181 F.3d 363, 365 (3d Cir. 1999) (noting that FAA regulations and standards "are not subject to supplementation by, or variation among, jurisdictions").

This Court has never addressed the question of whether specific jurisdiction exists over a foreign

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authorizing [a court] to apply the law that would govern in the absence of the" Convention. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996) (explaining that the Warsaw Convention, which was the predecessor to the Montreal Convention, "leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules"). Accordingly, issues concerning damages and SAS's affirmative defenses relating to comparative and third-party negligence under Articles 20 and 21 of the Montreal Convention would be governed by the applicable law under Louisiana's choice-of-law rules. And because SAS is domiciled in Norway, and "both the injury and the conduct that caused it occurred in" Norway, the law of Norway may apply to some of these issues. La. Civ. Code Ann. Art. 3544 (2024).

corporation arising from an incident that occurred wholly outside the United States, and the Fifth Circuit's perfunctory holding is incorrect and inconsistent with this Court's precedent and its current interpretative approach to specific personal jurisdiction. This Court should grant certiorari to resolve the conflict between the reasoning of the Fifth Circuit and the reasoning underlying this Court's holdings in *Walden*, *Bristol-Myers Squibb*, and *Ford*.

III. This Petition squarely presents important and recurring questions.

1. This petition raises important and recurring questions of Constitutional due process and specific personal jurisdiction. Every day, trial and appellate courts consider the outcome-determinative question of whether due process allows a court to exercise personal jurisdiction over a non-resident defendant. The reach of specific personal jurisdiction is of paramount importance, particularly as it relates to proper construction of the relatedness requirement, as this Court has previously recognized when granting certiorari to resolve it. *See*, *e.g.*, *Ford Motor Co.*, 592 U.S. at 358; *Bristol-Myers Squibb*, 582 U.S. at 261.

These questions are especially important as the courts of appeals and state courts of last resort wrestle with the "relatedness" requirement and issue decisions that are difficult to reconcile. In *Ford*, this Court did not define the level of "relatedness" needed to support the exercise of specific personal jurisdiction, holding only that Ford's "veritable truckload of contacts" with the forums were "related enough to the plaintiffs' suits" to justify the

exercise of specific jurisdiction. *Ford Motor Co.*, 592 U.S. at 362. Although the Court said that "the phrase 'relate to' incorporates real limits," *id.* at 362, Justice Alito observed that the Court did not identify what those limits are and predicted that lower courts may, as a result, struggle to implement the Court's holding. *Id.* at 374 (Alito, J., concurring).

This prediction has been realized, as one commentator has remarked that based on a review of state and federal cases, "[i]t is difficult, if not impossible, to articulate one consistent analytical framework . . . of *Ford Motor Co*'s relatedness test." Petrosino, *Rationalizing Relatedness*, 91 Fordham L. Rev. at 1566; *accord Yamashita v. LG Chem, Ltd.*, 62 F.4th 496, 506 n.1 (9th Cir. 2023) ("We note considerable confusion among district courts about how to apply *Ford* in cases highly similar to those at issue here."); *Baskin v. Pierce & Allred Constr., Inc.*, 676 S.W.3d 554, 576 (Tenn. 2023) (noting "the lack of a clear rule" on the meaning of "relate to" in *Ford*); *Adams v. Aircraft Spruce & Specialty Co.*, 284 A.3d 600, 615 (Conn. 2022) (noting that this Court "declined to elaborate on the contours of [the] limits" of relatedness in *Ford*). As similarly predicted by Justice Gorsuch, the "relatedness" test offers practical limitations; in the wide gulf between "the poles of 'continuous' and 'isolated' contacts lie a virtually infinite number of 'affiliations' waiting to be explored." *Ford Motor Co.*, 592 U.S. at 378 (Gorsuch, J., concurring).

This Court should grant certiorari to provide defendants with "a degree of predictability" as to what "conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

2. The relatedness question is particularly important in the context of Rule 4(k)(2) because the Rule applies exclusively to foreign entities and requires a due process analysis under the Fifth Amendment, the reach of which remains an open question yet to be decided by this Court.

Rule 4(k)(2) is a procedural rule that applies to claims arising under federal law when the defendant is not subject to personal jurisdiction in any state's courts of general jurisdiction. Fed. R. Civ. P. 4(k)(2). Accordingly, it applies exclusively to foreign entities. As discussed above, Rule 4(k)(2) does not create a substantive basis for personal jurisdiction; rather it is a procedural rule governing the territorial limits of service and its "'text is expressly subservient to the constitutional limits of due process.'" Pet.App.20a (quoting *Douglass*, 46 F.4th at 233).[13]

Since the Fifth Amendment governs due process constraints on the exercise of personal jurisdiction by federal courts adjudicating federal claims, it is critical to understand what is required under a Fifth Amendment due process analysis. But as expressly noted in *Bristol-Myers Squibb*, this Court has not yet decided "whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court" as does the Fourteenth Amendment on state courts. 582 U.S. at 269-70.[14]

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13. *See also* 28 U.S.C. § 2072(b) (The Federal Rules of Civil Procedure do not "abridge, enlarge, or modify any substantive right.")

14. This Court has also observed that it has not had an opportunity to consider whether the Due Process Clause of the Fifth Amendment authorizes "federal court personal jurisdiction

As discussed above, most of the courts of appeals have observed "there is no meaningful difference" between the minimum contacts analyses of the Fifth and Fourteen Amendments. *See*, *e.g.*, *Livnat*, 851 F.3d at 55; *Douglass*, 46 F.4th at 239. But the Second Circuit has recognized that this Court has not decided whether the protections of the Fifth Amendment reach as far as those under the Fourteenth Amendment. *Lensky v. Turk Hava Yollari, A.O.*, No. 21-CV-2567, 2023 WL 6173334, at *2 (2d Cir. Sept. 22, 2023). As a result, after the *Lensky* case was remanded, the district court determined that it could not

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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." *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 113 n.* (1987) (emphasis in original); *see also Omni Capital Int'l, Ltd. V. Rudolf Wolff & Co. Ltd.*, 484 U.S. 97, 102 n.5 (1987) (same). Although the majority of courts deciding personal jurisdiction have aggregated defendants' national contacts where Rule 4(k)(2) is invoked, it remains an open question whether such aggregation is indeed authorized by the Constitution. To the extent that it is authorized, it is also worth considering whether, and to what degree, due process is fulfilled when *specific* personal jurisdiction is derived from a defendant's diffuse contacts throughout the entire United States, rather than its contacts with a specific state. Given the burdens on a foreign defendant of litigating, in the United States, an action arising from an incident that occurred outside the United States, it would seem logical for due process to be afforded *more* weight—surely not less—when service is effectuated under Rule 4(k)(2) and the district court takes this as a cue to aggregate a defendant's contacts with the United States as a whole. As the *Douglass* court noted, historically, "the due process limitations on personal jurisdiction assumed greater independent significance" as "the territorial scope of service expanded." 46 F.4th at 234 (discussing the history of Rule 4(k)(2) and Supreme Court precedent on due process).

apply *Daimler*'s "essentially at home test" because of the "open question" as to how general jurisdiction could be evaluated in a Rule 4(k)(2) case. *Dularidze v. Turk Haa Yallario A.O.*, No. 1:20-cv-4978-GHW, 2024 WL 3567332, at *4 (S.D.N.Y. July 28, 2024), *motion to certify appeal denied*, No. 1:20-CV-4978, 2024 WL 4467347 (S.D.N.Y. Oct. 10, 2024)). Rather, the district court applied the "continuous and systematic test" previously articulated by the Second Circuit and determined that the defendant Turkish air carrier's contacts satisfied this test and authorized the exercise of general jurisdiction over the air carrier. *Id.*

As evinced in these cases involving Turkish and Scandinavian air carriers, when the Fifth Amendment's due process protections do not extend as far as the Fourteenth Amendment's, a foreign entity is subject to personal jurisdiction in cases in which a domestic corporation would not be. Had the Turkish airline in *Dularidze* been afforded the same due process as a domestic air carrier, it would not have been subject to general jurisdiction in New York because it is not "at home" there. Similarly, had SAS been afforded the specific jurisdiction analysis required by *Walden*, *Bristol-Myers Squibb*, and *Ford*, its diffuse contacts with the United States would have been insufficient to support jurisdiction given their lack of connection to any suit-related conduct.

In his dissenting opinion from the *en banc* decision in *Douglass*, Judge Higginson remarked that this is an "area of international comity and sensitivity" that calls for clarification "as to what nexus is sufficient for federal courts to assert adjudicative jurisdiction without entangling our legal system with those of other nations."

Douglass, 46 F.4th at 284 n.4 (5th Cir. 2022) (Higginson, J., dissenting). This Court should grant certiorari to resolve the question of whether Fifth Amendment protections extend as far as those granted by the Fourteenth Amendment, and whether a foreign entity is entitled to the same due process protections as a domestic entity.

3. This case squarely and cleanly presents this issue for review.

The only contested issue is one of law, and this case arises on typical, straightforward facts involving a single plaintiff and single defendant. This is the archetypal case involving a personal injury outside the products liability context: a plaintiff who resides in the forum alleges she was injured outside the forum by a company that resides outside the forum.

By granting certiorari, this Court can resolve the important jurisdictional questions based on simple facts frequently encountered by the lower courts. It should do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A — Opinion of the United States Court of Appeals for the Fifth Circuit, filed August 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-30632

SUSAN HARDY,

Plaintiff-Appellant,

versus

SCANDINAVIAN AIRLINES SYSTEM, ALSO KNOWN AS SAS, DOING BUSINESS AS SCANDINAVIAN AIRLINES OF NORTH AMERICA, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:21-CV-1591

Before SMITH, WIENER, and DOUGLAS, *Circuit Judges.*

JERRY E. SMITH, *Circuit Judge*:

Susan Hardy flew from Newark, New Jersey, to Oslo, Norway, to visit her daughter. As she stepped off the plane, she fell and fractured her leg. Hardy sued the airline, Scandinavian Airlines System ("SAS"), in the

Eastern District of Louisiana, contending that Article 33 of the Montreal Convention created both subject matter jurisdiction over the injury claim and personal jurisdiction over SAS.[1] The district court dismissed, concluding that the Convention grants only subject matter jurisdiction. Further, it rejected Hardy's claim that SAS's waiver of service created personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2).

This court has never answered whether the Montreal Convention independently creates personal jurisdiction over a defendant airline. On this matter of first impression, we hold that it does not. Article 33, despite being titled "Jurisdiction," uses "may be brought" and "must be brought" language, which is wording indicative of venue prescriptions. And venue prescriptions do not establish personal jurisdiction without language also authorizing the service of process. *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 408-10 (2017). Because the Montreal Convention lacks that language, it does not create personal jurisdiction.

We depart from the district court, however, on Hardy's Rule 4(k)(2) claim. The district court incorrectly considered whether SAS had minimum contacts with Louisiana. Instead, it should have analyzed SAS's contacts with the United States writ large. Per that analysis, we conclude that SAS has sufficient minimum contacts with the U.S. for the district court *à quo* to exercise personal jurisdiction over it for Hardy's claim. Therefore, we reverse and remand.

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1. *See* Convention for the Unification of Certain Rules for International Carriage by Air, art. 33, May 28, 1999, S. Treaty Doc. 106-45, 1999 WL 33292734 (the "Montreal Convention").

Appendix A

I.

Hardy lives in Mandeville, Louisiana, but her daughter and son-in-law live in Oslo. She and her husband flew there for a visit. Hardy purchased round-trip tickets from New Orleans to Newark on United Airlines and separately bought round-trip tickets from Newark to Oslo on SAS.[2]

As she disembarked the plane in Oslo, Hardy's foot dropped an unexpected five to six inches further than normal to the jet bridge, and she fell hard, breaking her right leg. She spent several days in a hospital in Oslo before recovering at her daughter's home. Later, she returned to Mandeville and continued to receive treatment.

Hardy sued SAS in the Eastern District of Louisiana, alleging strict liability under the Montreal Convention.[3] After the parties ironed out issues regarding Hardy's initial service on SAS's American subsidiary, SAS waived service per Federal Rule of Civil Procedure 4(d). Shortly thereafter, SAS moved to dismiss for want of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). At no place in that motion, or elsewhere, did SAS name a district within the United States where the court could exercise personal jurisdiction over it.

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2. SAS is a consortium of corporations headquartered in Stockholm and organized under the laws of Denmark, Norway, and Sweden.

3. *See* Montreal Convention, arts. 17, 20, 21 (creating strict liability up to 100,000 SDR (~$134,000) where the injury occurs "in the course of any of the operations of embarking or disembarking" and the injured does not cause or contribute to the injury).

The court granted SAS's motion and dismissed Hardy's complaint without prejudice. First, it rejected Hardy's claim that the Montreal Convention's Article 33 created personal jurisdiction over SAS. Recognizing that our court had yet to address that question, it found the Second Circuit's analysis in *National Union* persuasive and adopted it.[4] Second, the court rejected Hardy's contention that SAS's waiver of service brought SAS within the district court's personal jurisdiction by way of Federal Rule of Civil Procedure 4(k)(2). Specifically, it found that Hardy had failed to relate her claim to SAS's forum-specific actions because the alleged negligent conduct occurred in Oslo, not Louisiana. Buttressing its analysis, the court also concluded that the exercise of personal jurisdiction here would not be "fair and reasonable" because "the connection between her cause of action and Defendant's forum-related activities" was "too attenuated." Hardy appeals the dismissal.

II.

We review questions of personal jurisdiction *de novo.*[5] The party asserting jurisdiction "has the burden to make a *prima facie* showing that personal jurisdiction is proper."[6]

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4. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. UPS Supply Chain Sols., Inc.*, 74 F.4th 66 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 559 (2024).

5. *E. Concrete Materials, Inc. v. ACE Am. Ins. Co.*, 948 F.3d 289, 295 (5th Cir. 2020) (quoting *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d 576, 584 (5th Cir. 2014)).

6. *Id.* (quoting *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 431 (5th Cir. 2014)).

Appendix A

III.

Hardy presents three claims on appeal: first, that the Montreal Convention creates both personal and subject matter jurisdiction; second, that SAS waived any objection to personal jurisdiction by incorporating the Montreal Convention into its contract of carriage; and third, that SAS is subject to personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2) because it waived service. We reject the first and the second, but we agree with the third.

A.

Whether the Montreal Convention independently creates personal jurisdiction over a defendant is a question of first impression in this circuit. We conclude that the Montreal Convention's Article 33 does not create personal jurisdiction, joining the Second Circuit, though with a different rationale.

The Montreal Convention is a multilateral treaty signed in 1999 and adopted and ratified by the U.S. in 2003. The Convention "supersede[s] the Warsaw Convention" of 1929[7] and, as amended, it "represents a vast improvement over the liability regime established" thereunder.[8] *Inter alia*, it "provides for U.S. jurisdiction for most claims

7. *See* Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (the "Warsaw Convention").

8. Montreal Convention, Letter of Transmittal of President William J. Clinton, 1999 WL 33292734, at *2.

brought on behalf of U.S. passengers" by means of a new subsection of the Warsaw Convention's jurisdictional Article.[9] The parties' main dispute is whether that language of "jurisdiction" means personal jurisdiction as it is understood in American courts.

Hardy submits that the text of, the Letter of Submittal for, and the Senate Committee's Report on the Montreal Convention all "provide[ ] the clear and unambiguous intent of the United States" to create personal jurisdiction over SAS. In her telling, the district court erred in two key ways. First, interpretation of Article 33(2) cannot rely on prior interpretations of the Warsaw Convention because the Warsaw Convention lacked any analogue to Article 33(2). Second, the factual dissimilarities between her case, dealing with a personal injury, and *National Union*, dealing with cargo damage, make the Second Circuit's analysis inapplicable. Hardy contends that the parties to the treaty knew and accepted that it would open their national carriers to liability in the United States. So, the district court improperly interpreted the treaty.

SAS retorts that the Second Circuit correctly determined that Article 33 "speak[s] only to treaty jurisdiction as a form of subject-matter jurisdiction, not personal jurisdiction." *Nat'l Union*, 74 F.4th at 73. So, the factual dissimilarities between Hardy's and National Union's cases are irrelevant. Further, SAS cites a litany of Article 33 cases either focusing on subject matter

9. *Id.*; *see also* Letter of Submittal of Deputy Sec'y of State Strobe Talbott, 1999 WL 33292734, at *8, *23 (comparing Art. 33(2) to Warsaw Convention Art. 28).

jurisdiction or even expressly concluding that there is no personal jurisdiction. Finally, SAS defends the applicability of Warsaw Convention precedent because we routinely rely on caselaw interpreting the Warsaw Convention "to interpret corresponding provisions of the Montreal Convention."[10]

We agree with our prior panels that interpretation of the Warsaw Convention can and should inform our interpretation of the Montreal Convention.[11] But the parties to the Montreal Convention added Article 33(2) because the Warsaw Convention lacked something. Therefore, to understand what Article 33(2) does, we must turn to the traditional tools of treaty interpretation.

1. Interpretation of Article 33(2)

We construe treaties "more liberally than private agreements." *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 885 (5th Cir. 1996) (quoting *Air France v. Saks*, 470 U.S. 392, 396 (1985)) (cleaned up). "We begin with the text of the treaty and the context in which the words are used." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486

10. *Bridgeman v. United Cont'l Holdings, Inc.*, 552 F. App'x 294, 297 n.1 (5th Cir. 2013)). Separately, SAS contends that treaties may not create personal jurisdiction. But the Constitution is merely a floor, not a ceiling, so we reject that position.

11. *See id.*; *Bassam v. Am. Airlines*, 287 F. App'x 309, 313 n.5 (5th Cir. 2008) (per curiam) ("Although the Montreal Convention completely replaced the prior Warsaw Convention, courts interpreting the Montreal Convention rely on cases interpreting similar provisions of the Warsaw Convention." (cleaned up)).

U.S. 694, 699 (1988) (cleaned up). Then, if necessary "to ascertain their meaning[,] we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Potter*, 98 F.3d at 885 (citation omitted). "[W]here a treaty admits of two constructions, one restrictive of and the other favorable to the rights claimed under it, the latter is to be preferred." *Boehringer-Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc.*, 737 F.2d 456, 458 (5th Cir. 1984) (citation omitted).

We begin with the text of Article 33(2):

> In respect of damage resulting from the . . . injury of a passenger, an action may be brought before one of the courts . . . in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

Hardy contends that we ought to read "an action may be brought" to create personal jurisdiction in the plaintiff's home district over any defendant air-line governed by the Montreal Convention. She marshals several pieces of context to support her claim.

First, she asserts that the State Department's Letter of Submittal to the Senate demonstrates the Senate's understanding that the Treaty makes Article 33(2)'s "fifth jurisdiction" "available even if the accident occurs on a passenger journey and air service that did not include a point in the country of the passenger's principal and permanent residence, provided that the carrier had the contacts with that country required by this paragraph."[12] Second, the Senate Committee on Foreign Relations determined that "[u]nder Article 33, . . . U.S. courts will have jurisdiction in nearly all cases involving . . . personal injury to passengers who reside in the United States, thus eliminating the need for [them] to bring suit in foreign courts in order to obtain jurisdiction over air carriers."[13]

Hardy's interpretation of that ratification history also fits well with the stated goals of the replaced Warsaw Convention—"delegates voiced concerns about the possibility of major air crash cases being decided by courts

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12. Montreal Convention, Letter of Submittal of Deputy Sec'y of State Strobe Talbott, 1999 WL 33292734, at *23 (discussing Art. 33(2)).

13. S. Exec. Rep. 108-8, at 4, 108th Cong. (2003); *see also id.* at 21-22 (Deputy Assistant Secretary of State John R. Byerly explaining that the Convention allows an injured person to bring suit in "U.S. courts not only in cases against an airline that is domiciled or has its principal place of business here, or where the passenger's destination was the United States, or where the passenger made the contract for carriage in the United States, but in addition, where the passenger has his principal and permanent residence in all cases where the carrier serves the United States . . . and that carrier has a presence here.").

of nations whose legal systems trailed developments in many or most other nations. "To avoid the 'prospect of a junglelike chaos,' the Convention set forth rules for universal application." *Boehringer-Mannheim Diagnostics*, 737 F.2d at 458 (quoting *Reed v. Wiser*, 555 F.2d 1079, 1092 (2d Cir. 1977)).

But that interpretation runs contrary to Supreme Court precedent interpreting the same language in other contexts. Article 33 permits that suits "must be brought, at the option of the plaintiff," in certain territories, Art. 33(1), or that they "may be brought" in the passenger's residential territory, Art. 33(2). That language precisely mirrors the language we regularly see in venue-selection and prescription clauses.[14] But, unfortunately for Hardy, a venue prescription *sans* authorization of service of process does not independently create personal jurisdiction.[15] In

14. *Compare* Montreal Convention art. 33 *with* 28 U.S.C. § 1391(b) *and BNSF*, 581 U.S. at 408-09.

15. *See BNSF*, 581 U.S. at 408-09; *see also Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). There, the Supreme Court interpreted Section 27 of the 1934 Exchange Act. *See* 15 U.S.C. § 78aa. It, like Montreal Convention Article 33, has a title that includes the word "Jurisdiction," and it explains both that "[a]ny criminal proceeding *may be brought* in the district wherein any act or transaction constituting the violation occurred" and that "[a]ny suit or action to enforce any liability or duty created by this chapter . . . *may be brought* in any such district. . . . " 15 U.S.C. § 78aa(a) (emphasis added). Despite that, and even despite Section 27's discussion of service of process, the Court declared that "§ 27 of the 1934 [Exchange] Act does not provide a basis for personal jurisdiction. . . . " *Great W. United Corp.*, 443 U.S. at 180-81.

other words, Article 33 does not create any jurisdiction. Instead, it prescribes venue.[16]

Admittedly, this interpretation is novel. As far as we are aware, no other court has expressly answered the question of personal jurisdiction under Article 33(2) by calling it a venue prescription.[17] The Second Circuit is the only circuit to have definitively resolved the question, and it concluded that Article 33(2) affords only subject matter jurisdiction, not personal. *See Nat'l Union*, 74 F.4th at 73-74. So too have many district courts.[18]

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16. The title of Article 33, "Jurisdiction," is likely the result of harmonizing different legal systems. Regardless, the title of the section does not override the plain language of the Treaty. *See also supra* note 15.

17. The Eleventh Circuit at least implicitly endorsed our interpretation of Article 33 in *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009). There, in a *forum non conveniens* dispute, the court reviewed Article 33 as a "jurisdictional provision which specifies in which fora . . . suits can be brought" and found that Article 33 did not prevent the application of *forum non conveniens. Id.* at 1056-58.

18. *See*, *e.g.*, *Pesa v. SAS*, 2:19 Civ. 20415, 2021 WL 1660863, at *7 (D.N.J. Apr. 27, 2021); *Sampson v. Delta Air Lines, Inc.*, No. 2:12 Civ. 244, 2013 WL 6409865, at *1 (D. Utah Dec. 9, 2013); *Weinberg v. Grand Circle Travel, LCC*, 891 F. Supp. 2d 228, 237 (D. Mass. 2012); *Tucker v. British Airways PLC*, 2:16 Civ. 00618, 2017 WL 6389302, at *3 (W.D. Wash. Dec. 14, 2017); *Burton v. Air France-KLM*, No. 3:20-cv-1085, 2020 WL 7212566, at *7 (D. Or. Dec. 7, 2020); *Fisher v. Qantas Airways Ltd.*, 521 F. Supp. 3d 847, 855 (D. Ariz. 2021); *Bandurin v. Aeroflot Russian Airlines*, 19 CV 255, 2020 WL 362781, at *5 (N.D. Ill. Jan. 22, 2020); *Avalon Techs., Inc. v. EMO-Trans, Inc.*, Civ. A. No. 14-14731, 2015 WL 1952287, at *5 (E.D. Mich. Apr. 29, 2015).

Still, we must perform our judicial duty and interpret the text. In that endeavor, *Duplantier v. United States*, 606 F.2d 654 (5th Cir. 1979), is instructive. There, we accepted the contention that 28 U.S.C. § 1391(e)(2)'s service-of-process language created personal jurisdiction over the federal Executive Branch. But we rejected an extension of that subsection's reach to the Judicial Branch because the judiciary contained no officers or agencies. *Id.* at 663-64 (adopting *Liberation News Serv. v. Eastland*, 426 F.2d 1379 (2d Cir. 1970) (declining to extend § 1391 to the Legislative Branch)). Without language providing for service on judicial branch members, we could not exercise personal jurisdiction over the judicial defendants. *Id.*[19]

That so many courts reach the same conclusion might suggest that the answer is well settled. But, other than the Second Circuit's ruling in *National Union* and some Second Circuit cases on the Warsaw Convention such as *Campbell v. Air Jamacia, Ltd.*, 863 F.2d 1, 1 (2d Cir. 1988) (per curiam), and *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 800 (2d Cir. 1971) (addressing a motion to dismiss based on Rules 12(b)(1) and (3)), effectively every case offers some form of "other courts have said this is subject matter jurisdiction, not personal. *Q.E.D.*, we do the same." In other words, they forgo any kind of analysis. That reliance-without-analysis has no persuasive force, leaving us bound to perform an independent interpretation.

19. *See also* Fed. R. Civ. P. 4(k) (requiring service of a summons or waiver as a prerequisite to exercising jurisdiction); *In re McDonnell-Douglas Corp.*, 647 F.2d 515, 516 (5th Cir. Unit A May 1981) ("A court sitting in admiralty has personal jurisdiction over any defendant sued in personam whom the court can *reach with process.*" (cleaned up)); *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104-06 (1987); *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 385 (3d Cir. 2022), *cert. denied*, 143 S. Ct. 1001 (2023).

We interpret the Montreal Convention in the same way. It provides a cause of action—Articles 17 and 18[20]—and it provides a venue selection clause—Article 33—but it does not provide for service, so it does not create personal jurisdiction.[21] Therefore, the district court correctly concluded that Article 33(2) did not create personal jurisdiction over SAS.

B.

Hardy contends that, by virtue of reference to the Montreal Convention in its Contract of Carriage, SAS has waived its objections to personal jurisdiction in any court competent to hear a Montreal Convention claim.

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20. *See Boehringer-Mannheim Diagnostics*, 737 F.2d at 458.

21. We do not intend our interpretation to create any tension or conflict with other courts' interpretations, despite their differing language. Instead, it appears most likely that those courts have merely imprecisely used the term "subject matter jurisdiction" to describe Article 33. *See* 14D Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3801 (4th ed.) ("Wright & Miller") ("Sometimes venue is confused with subject matter jurisdiction. The two concepts are quite different. The jurisdiction of the federal courts is a grant of authority to them by Congress." (cleaned up)). Title 28 U.S.C. § 1331 specifically vests federal courts with subject matter jurisdiction over disputes arising out of treaties, so reading Article 33(2) to create subject matter jurisdiction also would create surplusage. *Cf. R J Reynolds Tobacco Co. v. FDA*, 96 F.4th 863, 879 (5th Cir. 2024) (declining to read surplusage into text). Therefore, we adopt a reading that gives Article 33 some other meaning, one that fits well with both the structure of the treaty and the intent of the signatory countries. *See* S. Exec. Rep. 108-8 at 3, 4.

But an acknowledgment of subject matter jurisdiction or statutorily permitted venue does not waive personal jurisdiction.

Contrary to SAS's claims, Hardy did not forfeit her waiver position.[22] Still, we reject it. Her position on appeal merely repackages her claim that the Montreal Convention creates personal jurisdiction. But if the Convention does not create personal jurisdiction, then SAS's acknowledging that it is bound by the Convention does not waive any objections to personal jurisdiction.

Made through an extremely oblique citation, Hardy appears primarily to assert that the Contract of Carriage's adoption of the Montreal Convention is akin to a forum selection clause—a "contractual waiver of personal-jurisdiction objections if litigation is commenced in the specified forum." *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 768 (5th Cir. 2016) (cleaned up). But a statutorily imposed forum prescription clause differs significantly from a contractual forum selection clause—one is imposed, the other is chosen—and a prescription does not create or imply personal jurisdiction. *Cf. BNSF*, 581 U.S. at 408.

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22. SAS avers Hardy raised this Contract of Carriage contention for the first time on appeal, and, of course, matters not raised to the district court are waived on appeal. *Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021). But on review of the record, we see several locations where Hardy raised this exact issue. True, she could have done so more clearly. But she did so sufficiently to at least alert the district court to the issue. Therefore, she has not forfeited her claim.

SAS must comply with numerous federal regulations, including 14 C.F.R. §§ 203.3 and 203.4.[23] Those require SAS to "include the [Montreal Convention's] terms as part of its conditions of carriage." 14 C.F.R. § 203.4(b). Hardy asserts those regulations support her claim that SAS has consented to jurisdiction anywhere in the United States. But that cannot square with *BNSF*.

Just as a train company may be obligated to apply the Federal Employer's Liability Act in an employment-contract dispute, so too has SAS been obligated to adopt the Montreal Convention in its contract of carriage. Therefore, the waiver claim cannot stand. Just as the venue-prescription provision in *BNSF* did not confer personal jurisdiction, the statutory venue prescriptions here, required to be adopted into contracts by law, do not create a waiver of personal jurisdiction.

Because the Montreal Convention does not create personal jurisdiction, we reject Hardy's claim. An acknowledgment of subject matter jurisdiction or of

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23. SAS appropriately points out that 14 C.F.R. § 203.4 addresses only the Montreal Agreement, which is distinct from the Montreal Convention. Even so, 14 C.F.R. § 203.3 requires the filing of signed counterparts to the "replacement" to the Montreal Agreement and is entitled "Filing Requirements for Adherence to Montreal Convention." Because we rule for SAS anyway, for the sake of this case we will assume that the subsequent section of the same regulation was similarly updated. *See also* 14 C.F.R. § 203.5; Montreal Convention Article 55(1)(e) (stating that "[t]his Convention shall prevail over any rules which apply to international carriage by air," including Montreal Protocol No. 4.).

statutorily-permitted venue is not a waiver of personal jurisdiction. So SAS did not waive its ability to object by referencing the treaty in the Contract of Carriage.

C.

Hardy submits that the district court had personal jurisdiction because SAS waived service and Hardy has met the other requirements of Rule 4(k)(2). We agree.

Federal courts' exercise of personal jurisdiction is governed by Federal Rule of Civil Procedure 4(k). This rule limits which federal court may hale a defendant into court, permitting to do so (1) a court that (A) sits in a state where the defendant is subject to the jurisdiction of that state's courts, (B) is within one hundred miles of where the joined defendant was served, or (C) is authorized by federal statute; or, (2) *any* federal court where the claim arises under federal law and (A) the defendant is not amenable to the jurisdiction of any state's courts but (B) where the exercise of personal jurisdiction by the federal courts would not violate the federal constitution and laws. FED. R. CIV. P. 4(k).[24]

24. Rule 4(k)(2) "was enacted to fill an important gap in the jurisdiction of federal courts in cases arising under federal law": those cases where "'a defendant may have sufficient contacts with the United States as a whole to satisfy due process concerns," but "insufficient contacts with any single state," such that the defendant "would not be amenable to service by a federal court sitting in that state.'" *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 651 (5th Cir. 2004) (quoting *World Tanker Carriers Corp. v. MV Ya Mawlaya*, 99 F.3d 717, 721-22 (5th Cir. 1996)); *see also* 4B WRIGHT & MILLER § 1124.

Hardy contends that SAS falls into the second group—defendants that maintain sufficient ties to the United States but not to any one state—such that SAS's waiver of service suffices for Rule 4(k)(2) to apply. SAS responds by disputing that Hardy's claims arise from its contacts in the United States and asserting that Rule 4(k)(2) provides no independent basis for personal jurisdiction.

But SAS, like the district court, misconstrues the standard we apply: We do not analyze whether SAS had minimum contacts with the Eastern District of Louisiana; instead, we analyze its contacts with the United States writ large. Taking each prong of the Rule 4 analysis in turn, we conclude that the district court had personal jurisdiction over SAS.

1. Whether the Claim Arises Under Federal Law.

A claim that arises from a treaty is a federal question. 28 U.S.C. § 1331. Hardy asserts liability under the Montreal Convention, meaning that her claim arises under federal law.[25]

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25. *See World Tanker*, 99 F.3d at 720-22 ("The use of the word 'any' to qualify 'federal law' suggests that the Advisory Committee intended Rule 4(k)(2) to reach not just federal questions arising under § 1331 but all claims arising under substantive federal law."); *see also Potter*, 98 F.3d at 883-85 & n.4 (interpreting the Montreal Convention's predecessor, the Warsaw Convention, and acknowledging such interpretation raised a federal question); *see also* 13D Wright & Miller § 3563 & nn.57-61.

2. Whether Hardy Served a Summons or SAS Waived Service.

SAS waived service and does not dispute this prong of the Rule 4(k)(2) analysis. Thus, we continue to Rule 4(k)(2)(A) and (B).

3. Whether SAS Is Subject to Jurisdiction in Any State's Courts of General Jurisdiction.

Whether SAS may be subject to specific jurisdiction in New Jersey for this case is uncertain. But it is ultimately irrelevant to our analysis because SAS has not claimed so in court.

In *Adams*, this circuit joined the Seventh in adopting a presumption that, "so long as a defendant does not concede to jurisdiction in another state, a court may use 4(k)(2) to confer jurisdiction." 364 F.3d at 651 (citing *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001)). Applied for the sake of judicial economy, this presumption applies to pretermit any "piecemeal analysis of the existence *vel non* of jurisdiction in all fifty states." *Id.*[26]

SAS has been on notice since, at least, Hardy's response to the motion to dismiss that, to rebut the application of Rule 4(k)(2), it bears the obligation to identify a jurisdiction within the U.S. where it is subject to personal jurisdiction. Yet it has declined to name any.

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26. *See also Nagravision SA v. Gotech Int'l Tech. Ltd.*, 882 F.3d 494, 499 (5th Cir. 2018).

Considering that SAS has no employees or property in the United States, no jurisdiction obviously has general jurisdiction over it. Further, like the defendant in *Adams*, SAS "has generally challenged the existence of minimum contacts with the United States as a whole," *id.*, by contending that it is not at home in the United States and that Hardy's claims do not arise from SAS's contacts in the U.S. at all. Therefore, Rule 4(k)(2)(A) does not bar a finding of personal jurisdiction.

4. Whether Exercising Jurisdiction Is Consistent with the United States Constitution and Laws.

Finally, we reach the key question: Whether the exercise of jurisdiction over SAS by the Eastern District of Louisiana comports with the federal Constitution and laws.

This is the only prong of the Rule 4(k) analysis that SAS contests, asserting both that it is not "at home" in Louisiana and that Hardy's claims do not sufficiently arise out of SAS's contacts with Louisiana to afford specific personal jurisdiction. SAS, like the district court, is correct that it is not "at home" in the United States, nor in Louisiana. But SAS copies the district court's error, analyzing the specific-personal-jurisdiction prong for connection with Louisiana, instead of connection with the United States writ large. Because SAS has sufficient minimum contacts with the U.S. so as not to offend the traditional notions of fair play and substantial justice, the exercise of specific personal by *a* federal district court is constitutionally permissible.

Appendix A

Rule 4(k)(2)(B)

"Rule 4(k)(2) is a procedural rule governing the territorial limits of service. The text is expressly subservient to the constitutional limits of due process." *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 233 (5th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 1021 (2023). To determine the constitutional limits of personal jurisdiction for federal claims, we analyze their comportment with the due process clause of the Fifth Amendment, not the Fourteenth. *Id.* at 231. But the process of analysis should be familiar—"the Fifth Amendment due process test for personal jurisdiction requires the same 'minimum contacts' with the United States as the Fourteenth Amendment requires with a state." *Douglass*, 46 F.4th at 235.[27]

Hardy does not assert that SAS is subject to the general personal jurisdiction of the district court. A wise choice, as the court correctly concluded that *Douglass* forecloses such a claim.[28] Thus, our only question is whether the court

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27. *See also* 46 F.5th at 238 & n.19 ("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." (footnote collecting cases)). Our practice also comports with most other circuits. *See id.* at 238 n.24 (collecting cases from the Second, Sixth, Seventh, Eleventh, Federal, and D.C. Circuits); 4 WRIGHT & MILLER § 1069.1, nn.10, 31 (collecting cases).

28. *See* 46 F.4th at 234-35, 238 (expressly limiting the extent of its analysis to general jurisdiction and distinguishing those cases that apply 4(k)(2) in specific jurisdiction contexts); *see also*

erred by finding that it could not exercise specific personal jurisdiction over SAS in connection with Hardy's claim.

> "This circuit applies a three-step analysis for the specific jurisdiction inquiry: (1) whether the defendant has minimum contacts with the forum state, i.e., whether it purposely directed its activities toward the forum state or purposefully availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable." If a plaintiff establishes the first two prongs, the burden shifts to the defendant to show that the exercise of personal jurisdiction would be unfair or unreasonable.[29]

Minimum Contacts and Purposeful Availment

As every first-year law student learns, personal jurisdiction depends on whether the defendant "ha[s] certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations

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Quick Techs., Inc. v. Sage Group PLC, 313 F.3d 338, 343-45 (5th Cir. 2002).

29. *E. Concrete Materials*, 948 F.3d at 296 (quoting and citing *Monkton*, 768 F.3d at 433).

and citations omitted). Those minimum contacts must show "some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[30] "For federal claims filed in federal courts, of course, the relevant minimum contacts are those with the entire United States, not a forum state."[31]

SAS flies into/out of seven different metro areas in the U.S. It also advertises to American buyers, participates in the Star Alliance with United Airlines, owns and operates a subsidiary in the United States, sells tickets online across the U.S., and is regulated by the FAA.[32]

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30. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *see also Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359 (2021) (first citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); and then citing *Walden v. Fiore*, 571 U.S. 277, 285 (2014)).

31. *Douglass*, 46 F.4th at 242; *see also Adams*, 364 F.3d at 651 (citing *World Tanker*, 99 F.3d at 723); *DISH Network, L.L.C. v. Elahmad*, No. 23-20180, 2024 WL 1008585, at *2 (5th Cir. Mar. 8, 2024) (per curiam) (unpublished).

32. *See* 49 U.S.C. §§ 41101, 41301-02; *cf. Ford*, 592 U.S. at 365 ("Small wonder that Ford has here conceded 'purposeful availment' of the two States' markets. By every means imaginable—among them, billboards, TV and radio spots, print ads, and direct mail—Ford urges Montanans and Minnesotans to buy its vehicles." (citation omitted)).

We do not suggest that selling tickets online would alone suffice for specific personal jurisdiction, nor would merely owning and operating a subsidiary or participating in an airline alliance. But we may consider the relevance of those factors,

Combined, these contacts more than meet the minimum-contacts test and show that SAS has purposefully availed itself of the protections of U.S. laws.[33]

Arises Out of or Results From

The next prong of the test asks whether Hardy's claims arise out of or result from SAS's minimum contacts. Contrary to the district court's rulings, they do. "[S]pecific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."[34] In other words, Hardy must provide a *prima facie* showing of a connection between SAS's actions in the United States and her injury.

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particularly in conjunction with SAS's other actions. *Cf. E. Concrete Materials*, 948 F.3d at 296-97. We similarly discount the personal-jurisdictional implications of SAS's participation in a multi-district class action as a plaintiff and its petitioning for bankruptcy in U.S. courts. *See Shambaugh & Son, L.P. v. Steadfast Ins. Co.*, 91 F.4th 364, 374 (5th Cir. 2024) ("The mere fact that a defendant participated in state court lawsuits in the putative forum, without more, cannot meet this court's standard for specific personal jurisdiction." (citation omitted)).

33. *Cf. Kim v. Korean Air Lines Co.*, 513 F. Supp. 3d 462, 473-74 (D.N.J. 2021) (finding sufficient minimum contacts and a causal relationship between New York and an injury sustained midflight out of JFK Airport).

34. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *see also id.* at 923-24 ("Adjudicatory authority is 'specific' when the suit 'arises out of or relates to the defendant's contacts with the forum.'" (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)) (alterations accepted)).

In *Ford*, the Supreme Court described the standard as having two prongs. First, we look to causation. But, if we do not find causation, we may also "contemplate[ ] that some relationships will support jurisdiction without a causal showing."[35]

The district court focused solely on SAS's selling the ticket to Hardy in Mandeville. That, it determined, showed insufficient causation of her injury, nor was it the type of relationship that would otherwise support jurisdiction. But that narrow focus was improper. Hardy's claim arises out of the ticket sale, yes, but it also stems from SAS's advertising in the United States and its operation of a flight out of Newark. That her injury occurred during the flight's disembarkation in Oslo does not resolve the matter. Instead, we must review those facts as pieces of a whole. Put together, we see that SAS's purposeful contacts in the U.S. combined to create an unbroken causal chain that ends with Hardy's injury.

In other words, the district court erred because it considered only the contacts with the Eastern District of Louisiana, but it should have considered whether the claim arose out of SAS's intentional contacts with the United

35. *Ford*, 592 U.S. at 362; *see id.* ("In the sphere of specific jurisdiction, the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—*i.e.*, proof that the plaintiff 's claim came about because of the defendant's in-state conduct.").

States as a whole.[36] The connection between Hardy's injury and SAS's contacts with Louisiana may have been overly attenuated, but the connection to its contacts with the U.S. was not. Thus, Hardy's injury "arises out of" SAS's minimum contacts with the United States.

Fairness and Reasonableness

Finally, we turn to the fairness and reasonableness prong of the analysis. As with the "arises out of or results from" prong, the district court ruled that the connection between Hardy's claims and SAS's contacts was "too attenuated." This too was error.

Now that we have determined that Hardy has met her *prima facie* burden on the first two factors, SAS must prove the unfairness of the exercise of personal jurisdiction. *E. Concrete Materials*, 948 F.3d at 296, 299. But SAS has made no such showing—nor even attempted to make one. Even if the burden had not shifted to SAS, though, the exercise of jurisdiction would be reasonable and fair.

International Shoe derives its limitation of personal jurisdiction to those forums that would not offend the traditional notions of fair play and substantial justice from the Due Process Clause's protection of individual liberty. *Douglass*, 46 F.4th at 236. We weigh five factors

36. *Cf. Walden*, 571 U.S. at 284 (holding that, for specific jurisdiction, "the relationship must arise out of contacts that the 'defendant [*it*]*self*' creates with the forum State" (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985))).

to determine whether such an exercise is fair and just: "(1) the burden on the nonresident defendant, (2) the forum state's interests, (3) the plaintiff's interest in securing relief, (4) the interest of the interstate judicial system in the efficient administration of justice, and (5) the shared interest of the several states in furthering fundamental social policies."[37]

The first factor is the most important, *E. Concrete Materials*, 948 F.3d at 299 (citation omitted), and the burden on SAS is weighty: It is based in the Scandinavian countries, not the United States. Also, Hardy's injury occurred in Norway, and many of the relevant witnesses and evidence will be located there. At the same time, though, SAS regularly litigates in the U.S., including having declared bankruptcy here. Further, that SAS is an international airline suggests it may be better able than many other defendants to mitigate the burden of litigating this case in the United States.[38]

But the second factor counters the first here. The United States has a weighty interest in the dispute because the plaintiff is an injured American citizen and

37. *E. Concrete Materials*, 948 F.3d at 298 (quoting *Luv N' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 473 (5th Cir. 2006)); *see also Douglass*, 46 F.4th at 236 (first quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980); and then quoting *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017)).

38. *See Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 382 (5th Cir. 2002), *abrogated on other grounds by Water Splash, Inc. v. Menon*, 581 U.S. 271 (2017).

resident, and her claim arises under a treaty to which the U.S. is a signatory. Further, as discussed earlier, her flight took off from the United States.

The third factor, the plaintiff 's interest, also weighs heavily toward maintaining the case in the United States: Hardy received her initial medical treatment in Norway, but she received follow-up treatment here, and she remains plagued by her injury. Moreover, she lives in and had her lifecare plan prepared in the U.S. In other words, Hardy has a vested interest in being able to pursue her claim in the forum she has chosen, one where she will not be unduly inconvenienced if she wishes to attend any of the proceedings and where some of her experts may be more readily available.

The fourth and the fifth factors are much less easily weighed in this context.[39] American courts handle personal injury cases every day, so we can presume our courts will be efficient and competent. But neither party has submitted evidence as to the efficiency or competence

39. One district court has even called into question whether "the last two factors . . . logically appear to pertain to an action where the relevant forum is the United States rather than any one particular state." *Cambria Cnty. Employees' Ret. Sys. v. Venator Materials PLC*, 532 F. Supp. 3d 440, 448 (S.D. Tex. 2021) (citing *Am. Dredging Co. v Miller*, 510 U.S. 443, 447-49 & n.2 (1994)). Because we can estimate the balance of the factors regardless of these two, and SAS has not even attempted to meet its burden, we take no position on the pertinence of the fourth and fifth factors. Instead, we note that the question remains open and that another panel, dealing with a case that more squarely presents the issue, may need to resolve it.

of the Norwegian courts. Similarly, the impact on social policies of the United States and Norway, both being signatories to the Montreal Convention, is unclear. Additionally, as mentioned earlier, most of the evidence and many witnesses are in Norway. In other words, these factors could tilt either way.[40]

Despite that opacity on the fourth and fifth factors, the second and the third factors lean heavily in favor of a finding of fairness and reasonableness, outweighing the "most important" first factor.[41] Moreover, SAS bears the burden of rebutting the *prima facie* case the first two prongs establish and has not done so. Therefore, the district court had specific personal jurisdiction over SAS.

* * * * *

We sum up our ruling as follows:

The Montreal Convention's Article 33 may be entitled "Jurisdiction," but it is only a venue prescription. We do not stretch SAS's incorporation of the Convention in its contract of carriage into a waiver of personal jurisdiction in countless fora because SAS only did as it was required by law and the Treaty. *See* Montreal Convention art. 3(5). The district court properly rejected Hardy's Montreal Convention claim.

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40. *See also Kim*, 513 F. Supp. 3d at 475-76 (weighing the same factors).

41. *Cf. Burger King*, 471 U.S. at 475-76 (discussing purposeful availment).

The district court erred in rejecting Hardy's Rule 4(k)(2) claim. It incorrectly analyzed SAS's contacts with the state of Louisiana, where it should have analyzed SAS's contacts with the United States writ large. SAS has sufficient minimum contacts with the United States that the exercise of personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2) is appropriate.

The judgment of dismissal is REVERSED and REMANDED. We place no limitation on the matters that the district court might address on remand, and we indicate no view on what rulings it should make.

Appendix B — Order and Reasons of the United States District Court for the Eastern District of Louisiana, filed August 11, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL DOCKET NO. 21-1591
SECTION: "E" (3)

SUSAN HARDY,

Plaintiff,

versus

SCANDINAVIAN AIRLINES SYSTEM,

Defendant.

Filed August 11, 2023

ORDER AND REASONS

Before the Court is Defendant Scandinavian Airlines System Denmark-Norway-Sweden's motion to dismiss for lack of personal jurisdiction.[1] Plaintiff Susan Hardy filed an opposition.[2] Defendant replied.[3] Defendant also

1. R. Doc. 31.

2. R. Doc. 32.

3. R. Doc. 35.

filed a notice of supplemental authority.[4] Plaintiff filed a response.[5] On February 28, 2023, the Court held Oral Argument on Defendant's motion.[6]

BACKGROUND

This action arises from an incident at the Oslo Gardermoen Airport on August 23, 2019.[7] Plaintiff departed on a United Airlines flight from New Orleans to New Jersey.[8] In New Jersey, Plaintiff transferred to a flight operated by Defendant, departing from New Jersey to Oslo, Norway.[9] Plaintiff alleges that she fell to the ground while disembarking the aircraft in Oslo, due to a five-to-six-inch gap between the bottom of the aircraft door and the passenger boarding bridge.[10] As a result of the fall, Plaintiff alleges she sustained severe fractures to her right femoral shaft.[11] On August 20, 2021, Plaintiff filed suit in this Court, seeking to recover for her injuries.[12] Defendant now seeks dismissal of Plaintiff's claims on

4. R. Doc. 44.

5. R. Doc. 45.

6. R. Doc. 47.

7. R. Doc. 25 at p. 5.

8. *Id.* at p. 3.

9. *Id.* at pp. 4-5.

10. *Id.* at pp. 5-6.

11. *Id.* at p. 6.

12. R. Doc. 1.

the basis that the Court lacks personal jurisdiction over Defendant.[13]

LEGAL STANDARD

The Due Process Clause of the Fourteenth Amendment "operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant."[14] For a court's exercise of personal jurisdiction over a non-resident defendant to be constitutional under the Due Process Clause, (1) "that defendant [must have] purposefully availed himself of the benefits and protections of the forum state by establishing 'minimum contacts' with the forum state"; and (2) "the exercise of jurisdiction over that defendant [must] not offend 'traditional notions of fair play and substantial justice.'"[15]

Satisfaction of the "minimum contacts" test depends on the type of jurisdiction the court seeks to exercise over the defendant: general jurisdiction or specific jurisdiction.

I. General Jurisdiction

A court may exercise general jurisdiction over a non-resident defendant when that defendant's contacts with the

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13. R. Doc. 31.

14. *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 271 (5th Cir. 2006) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984)).

15. *Eddy v. Printers House (P) Ltd.*, 627 F. App'x 323, 326 (5th Cir. 2015) (quoting *Alpine View Co. v. Atlas Capco AB*, 205 F.3d 208, 215 (5th Cir. 2000)).

forum state are "continuous and systematic," regardless of whether such contacts are related to the plaintiff's cause of action. Stated differently, "[g]eneral jurisdiction will attach, even if the act or transaction sued upon is unrelated to the defendant's contacts with the forum state, if the defendant has engaged in 'continuous and systematic' activities in the forum state."[16] In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Supreme Court stated that, "for an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation it is an equivalent place, one in which the corporation is fairly regarded as at home."[17] That is, the corporation must have substantial, continuous, and systematic contacts with the forum state so as to "render [it] essentially at home in the forum state."[18] "It is, therefore, incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business."[19]

II. Specific Jurisdiction

When the defendant's contacts are less pervasive, a court may exercise specific jurisdiction over a non-

16. *721 Bourbon, Inc. v. House of Auth, LLC*, 140 F. Supp. 3d 586, 592 (E.D. La. 2015) (citations omitted).

17. 564 U.S. 915, 924 (2011).

18. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014).

19. *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) (citing *Daimler AG*, 134 S. Ct. at 760; *Helicopteros*, 466 U.S. at 411-12).

resident defendant in a suit arising out of or related to the defendant's contacts with the forum. The Fifth Circuit has enunciated a three-factor analysis to guide courts in assessing the presence of specific personal jurisdiction:

> (1) whether the defendant has minimum contacts with the forum state, i.e., whether it purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable.[20]

To make a *prima facie* showing of specific personal jurisdiction, the plaintiff need only satisfy the first two factors.[21] If the plaintiff makes a *prima facie* showing, the burden of proof with respect to the reasonableness factor shifts to the defendant to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[22]

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20. *Libersat v. Sundance Energy, Inc.*, 978 F.3d 315, 319 (5th Cir. 2020) (quoting *Seiferth*, 472 F.3d at 271).

21. *Athletic Training Innovations, LLC v. eTagz, Inc.*, 955 F. Supp. 2d 602, 613 (E.D. La. 2013); *see also 721 Bourbon*, 140 F. Supp. 3d at 592-93; *Autogenomics, Inc. v. Oxford Gene Tech.*, 566 F.3d 1012, 1018-19 (Fed. Cir. 2009).

22. *Athletic Training Innovations*, 955 F. Supp. 2d at 613.

III. Service Pursuant to Federal Rule of Civil Procedure 4(K)(2)

If service is conducted pursuant to Federal Rule of Civil Procedure Rule 4(k)(2), the jurisdictional analysis is slightly different. Rule 4(k)(2) states that, "[f]or a claim that arises under federal law, serving a summons . . . establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's court of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws."[23]

While jurisprudence surrounding the role of Rule 4(k)(2) has been plagued with confusion, the United States Court of Appeals for the Fifth Circuit recently clarified its role in a court's jurisdictional analysis.[24] In *Douglass v. Nipon Yusen Kabushiki Kaisha* the Fifth Circuit clarified that, rather than an independent basis for jurisdiction, "Rule 4(k)(2) is a procedural rule governing the territorial limits of service."[25] Thus, a summons pursuant to Rule 4(k)(2) establishes personal jurisdiction only when the exercise of that jurisdiction is consistent with the United States Constitution and laws—the traditional due process analysis.

The Court explained: "the valid exercise of jurisdiction through a summons requires (1) notice of the command and

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23. Fed. R. Civ. P. 4(k)(2).

24. *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226 (5th Cir. 2022)

25. *Id.* at 233.

(2) amenability to the command. The notice requirement is procedural, and the amenability requirement is substantive."[26] "Historically, those requirements were inextricably intertwined because federal courts had jurisdiction over only defendants that voluntarily appeared or where personally served in the district."[27] "After *International Shoe*, states began authorizing out-of-state service, and "[a]s the territorial scope of service expanded, the due process limitations on personal jurisdiction assumed greater independent significance."[28]

Since its inception, Rule 4(k)(2) has undergone a series of amendments resulting in its current wording, although it retained the original rule's caption, "Territorial Limits of Effective Service."[29] However, the Fifth Circuit has clarified that, "[n]otwithstanding the amendments, Rule 4(k) is still just a procedural rule about issuing summonses."[30] "No doubt service of a summons under Rule 4(k0(2) establishes personal jurisdiction *when procedurally authorized by the Federal Rules and consistent with the Constitution.*"[31] "But as the rule expresses, the efficacy of service remains subject to the constitutional question whether a defendant is amenable to the Constitution."[32]

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26. *Id.*

27. *Id.*

28. *Id.* at 233-34.

29. *Id.*

30. *Id.* at 234.

31. *Id.* (emphasis added).

32. *Id.*

In other words, where a summons is issued pursuant to Rule 4(k)(2), a plaintiff must demonstrate the following in order for the Court to conclude it can properly exercise of personal jurisdiction over a defendant: (1) the claims against the defendant arise under federal law; (2) the defendant "does not concede to jurisdiction in another state;" and (3) the defendant has sufficient ties to the United States as a whole to satisfy due process concerns.[33] When applying Rule 4(k)(2) in the context of general or specific personal jurisdiction, although the limits of due process are measured under the Fifth Amendment, the Fifth Circuit has affirmed courts are to adhere "to the same legal standard developed in the Fourteenth Amendment context—the 'now-familiar minimum contacts analysis'—but with one significant distinction."[34] "[W]here Rule 4(k)(2), and thus Fifth Amendment due process, is at issue, the Fifth Circuit looks to the sufficiency of a party's ties with the United States as a whole, rather than to the sufficiency of its ties with any individual state, in order to determine whether the requisite showing of minimum contacts has been made."[35]

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33. *Id.*

34. *Patterson v. Blue Offshore BV*, No. 13-337, 2015 WL 4096581, at *9 (E.D. La. July 6, 2015), affirmed by *Patterson v. Aker Solutions Inc.*, 826 F.3d 231 (5th Cir. 2016). *See also Douglass*, 46 F.4th at 242 ("For federal claims filed in federal courts, of course, the relevant minimum contacts are those with the entire United States, not a forum state.") (affirming *Patterson*).

35. *Id.*

Appendix B

LAW AND ANALYSIS

Plaintiff's amended complaint sets forth a claim against Defendant under the Montreal Convention.[36] Defendant argues the Court lacks personal jurisdiction over Defendant with respect to Plaintiff's claim.[37] In opposition, Plaintiff argues the Court has (1) personal jurisdiction over Defendant provided by the Montreal Convention, and (2) specific personal jurisdiction over Defendant, under a traditional theory and because summons was issued pursuant to Rule (4)(k)(2).[38] The Court will address each of Plaintiff's grounds for personal jurisdiction in turn.

I. The Montreal Convention

Plaintiff contends the Montreal Convention provides an independent basis for exercising personal jurisdiction over Defendant in this action.[39] In response, Defendant

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36. R. Doc. 25.

37. R. Doc. 31.

38. R. Doc. 32. While Plaintiff initially argued the Court had general jurisdiction over Defendant, Plaintiff seems to withdraw this argument in its supplemental briefing. R. Doc. 45 at p. 2 ("[T]he Fifth Circuit's reasoning in *Douglass* must be applied to the facts of this case in the context of Plaintiff's assertion of specific personal jurisdiction over SAS, not general jurisdiction."). However, even if Plaintiff did not intend to withdraw its argument, the Court does not have general jurisdiction over Defendant following the Fifth Circuit's decision in *Douglass.* 46 F.4th 226.

39. R. Doc. 32 at pp. 9-14.

argues the Montreal Convention provides the Court with only subject matter jurisdiction, not personal jurisdiction.[40]

"The Montreal Convention sets forth the types of claims that can be brought relating to international air carriage."[41] "It is well established that the treaty 'preempts state law and provides the sole avenue for damages claims that fall within the scope of its provisions.'"[42] "The treaty also includes jurisdictional provisions dictating *where* such claims can be brought."[43]

> The Montreal Convention's primary jurisdictional provision, Article 33, provides that "an action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties . . . before the court of " [1] the carrier's domicile, [2] the carrier's principal place of business, [3] the place where the contract was made, [4] the place of destination, or [5] in certain actions, a passenger's principal and permanent residence.[44]

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40. R. Doc. 35 at pp. 1-2.

41. *Nat'l Union Fire Ins. Co. of Pittsburgh v. UPS Supply Chain Sols., Inc.*, No. 21-2867, 2023 WL 4610772, at *4 (2d Cir. July 19, 2023).

42. *Id.* (quoting *Cohen v. Am. Airlines, Inc.*, 13 F.4th 240, 246 (2d Cir. 2021)).

43. *Id.*

44. *Id.* at *5 (quoting Montreal Convention art. 33(1)-(2)).

"Article 33 also dictates that 'questions of procedure shall be governed by the law of the court seised of the case.'"[45]

Although Article 33 of the Montreal Convention provides federal courts with subject matter jurisdiction, a growing body of case law recognizes the Montreal Convention does not provide the Court with personal jurisdiction over all defendants merely because a suit is brought pursuant to its terms. Although the United States Court of Appeals for the Fifth Circuit has not yet considered the issue, the United States Court of Appeals for the Second Circuit addressed this exact question in detail in *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. UPS Supply Chain Solutions, Inc.*[46] In *National Union Fire Insurance Co.*, the Second Circuit held the Montreal Convention does not provide an independent basis for personal jurisdiction, but rather provides only a basis for subject matter jurisdiction in the United States.[47] The Second Circuit undertook a detailed analysis of treaty interpretation, looking both to the text of the treaty and the intent of the drafters.[48] Because "[t]he interpretation of a treaty, like the interpretation of the statute, begins with its text," the court first looked to the language of the Montreal Convention itself:[49]

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45. *Id.* (quoting Montreal Convention art. 33(4)).

46. *Id.* at *4.

47. *Id.* at *5.

48. *Id.* at *5-7.

49. *Id.* at *5-6.

> [N]othing in the text of the Montreal Convention says or implies that it gives rise to personal jurisdiction—that is, a court's power to exercise control over a particular party. While Articles 33 and 46 state that actions "must be brought" in one of the specified fora, they do not state that the courts of those fora must entertain such actions without regard for other potential barriers to jurisdiction. To the contrary, . . . Article 33 specifies that "questions of procedure shall be governed by the law of the court seised of the case." The inclusion of these clauses indicates that while the Montreal Convention permits claims arising under the treaty to be brought in particular nations, it does not guarantee plaintiffs the unconditional right to litigate in those nations' courts. Rather, the treaty expressly leaves room for nation-states to impose their own venue, jurisdictional or other procedural requirements. We conclude that personal jurisdiction is such a requirement.[50]

Next, the Second Circuit noted that precedent also supported its "conclusion that the Montreal Convention's jurisdictional provisions do not pertain to domestic personal jurisdiction."[51] The Court interpreted "the Montreal Convention's provisions 'in accordance with case law arising from substantively similar provisions of

50. *Id.* at *6.

51. *Id.*

its predecessor, the Warsaw Convention.'"[52] The Montreal Convention was drafted in 1999 to replace the Warsaw Convention, and, although it "improved upon essential aspects of its predecessor, the drafters tried 'to retain existing language and substance of other provisions to preserve judicial precedent related to other aspects of the Warsaw Convention, in order to avoid unnecessary litigation over issues already decided by the courts under the Warsaw Convention.'"[53] Article 28 of the Warsaw Convention served as the predecessor to the Montreal Convention's Article 33(1) and is similar "in both language and substance."[54] The Second Circuit addressed in detail its previous decisions holding that Article 28 of the Warsaw Convention did not convey personal jurisdiction.[55]

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52. *Id.* (quoting *Cohen*, 13 F.4th at 245).

53. *Id.* (quoting *Cohen*, 13 F.4th at 244).

54. *Id.*

55. *Id.* (quoting *Campbell v, Air Jam., Ltd.*, 863 F.2d 1, 1 (2d Cir. 1988) ("'[C]ompliance with Article 28(1) gives a nation *treaty jurisdiction* over the claim, so that the nation is an appropriate site for litigation,' but '*domestic jurisdiction* and venue questions still may require further analysis.'"); *and Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 800 (2d Cir. 1971) ("In a Warsaw Convention case there are two levels of judicial power that must be examined to determine whether suit may be maintained. The first level . . . is that of jurisdiction in the international or treaty sense under Article 28(1). The second level involves the power of a particular United States court, under federal statutes and practice, to hear a Warsaw Convention case—jurisdiction in the domestic law sense.")).

On these bases, the Second Circuit held "the Montreal Convention's jurisdictional provisions speak only to treaty jurisdiction as a form of subject-matter jurisdiction, not personal jurisdiction. Therefore, the Montreal Convention does not confer personal jurisdiction on United States courts in actions arising under the treaty."[56] "The power to assert jurisdiction over a *claim* is distinct from the power to assert jurisdiction over a *party*, which must be separately established."[57]

The Court finds the Second Circuit's decision in *National Union Fire Insurance Co.* highly persuasive in the instant matter. Because the Fifth Circuit has not yet considered the issue, and the Court agrees with the reasoning employed by the Second Circuit, the Court expressly adopts it herein. Moreover, the Second Circuit's well-reasoned decision is consistent with the body of district court cases around the country rejecting Plaintiff's argument.[58] On this basis, the Court rejects Plaintiff's arguments and holds the Montreal Convention does not provide the Court with an independent basis for personal jurisdiction over Defendant.

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56. *Id.* at *5.

57. *Id.*

58. *See, e.g.*, *Diab v. British Airways, PLC*, No. 20-3744, 2020 WL 8970607, at *3 (E.D. Penn. Nov. 23, 2020) ("Courts have consistently concluded that the jurisdictional article of the Montreal Convention addresses subject matter jurisdiction, not personal jurisdiction.") (finding jurisdiction on other grounds, thereby not reaching the merits of the issue, but collecting cases).

II. Specific Personal Jurisdiction

Plaintiff has failed to demonstrate that this Court has specific personal jurisdiction over Defendant under a traditional theory or because summons was issued pursuant to Rule (4)(k)(2). The Fifth Circuit has enunciated a three-factor analysis to guide courts in assessing the presence of specific personal jurisdiction:

> (1) whether the defendant has minimum contacts with the forum state, i.e., whether it purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable.[59]

To make a *prima facie* showing of specific personal jurisdiction, the plaintiff need only satisfy the first two factors.[60] If the plaintiff makes a *prima facie* showing, the burden of proof with respect to the reasonableness factor shifts to the defendant to "present a compelling case that

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59. *Libersat v. Sundance Energy, Inc.*, 978 F.3d 315, 319 (5th Cir. 2020) (quoting *Seiferth*, 472 F.3d at 271).

60. *Athletic Training Innovations, LLC v. eTagz, Inc.*, 955 F. Supp. 2d 602, 613 (E.D. La. 2013); *see also 721 Bourbon*, 140 F. Supp. 3d at 592-93; *Autogenomics, Inc. v. Oxford Gene Tech.*, 566 F.3d 1012, 1018-19 (Fed. Cir. 2009).

the presence of some other considerations would render jurisdiction unreasonable."[61]

Where Rule 4(K)(2) is at issue, the specific personal jurisdiction inquiry is the same, except that courts in "the Fifth Circuit look[ ] to the sufficiency of a party's ties with the United States as a whole, rather than the sufficiency of its ties with any individual state, in order to determine whether the requisite showing of minimum contacts has been made."[62] Said differently, when Rule 4(k)(2) is at issue, the Fifth Circuit's three-step analysis to determine specific jurisdiction is as follows: (1) whether the defendant has minimum contacts with the [United States as a whole]; (2) whether the plaintiff 's cause of action arises out of or results from the defendant's forum-related contacts [with the United States]; and (3) whether the exercise of personal jurisdiction is fair and reasonable.

Whether the forum is the state of Louisiana or the United States as a whole, Plaintiff has failed to demonstrate her cause of action arises out of Defendant's

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61. *Athletic Training Innovations*, 955 F. Supp. 2d at 613.

62. *Patterson*, No. 13-337, 2015 WL 4096581, at *9; *see also CGC Holding Co., LLC v. Hutchens*, 974 F.3d 1201, 1208-09 (10th Cir. 2020) (considering a defendant's contacts with the United States as a whole in its specific personal jurisdiction inquiry under 4(K)(2)). Moreover, the defendant must not be "subject to jurisdiction in any state's court of general jurisdiction." Fed. R. Civ. P. 4(k)(2). However, because the Court concludes that Plaintiff 's cause of action does not arise out of or result from Defendant's forum-related contacts with the United States as a whole, the Court need not reach this issue.

forum-related contacts—element two of the specific personal jurisdiction inquiry. Plaintiff contends her claim arises out of Defendant's sale of a plane ticket to her in her home state of Louisiana.[63] However, as aptly noted by Defendant, Plaintiff 's claim does not arise out of Defendant's sale of the plane ticket. Instead, Plaintiff 's cause of action arises out of the alleged negligent conduct which occurred in Oslo, Norway.[64] Courts have consistently held, in the context of personal injury suits, that "the fact that the plaintiff purchased a ticket in [the forum state] is insufficient to endow a [forum] court with personal jurisdiction over a non-resident defendant, because the defendant's alleged negligence and the plaintiff 's injury are too far removed from the business the defendant transacted in [the forum]."[65] Had Plaintiff 's claim arisen from "fraudulent inducement, false advertising, or any other theory relating to the sale and purchase of the

63. R. Doc. 32 at p. 8.

64. *Kelly v. Syria Shell Petrol. Dev. B.V.*, 213 F.3d 841, 855 (5th Cir. 2000) (affirming the district court's decision concluding there was no specific jurisdiction where the defendant's claims did not arise out of contractual contacts with the United States but instead arose out of alleged tortious acts committed by the defendant in Syria).

65. *H.B. by Barakati v. China S. Airlines Co. Ltd.*, 20-CV-9106 (VEC), 2021 WL 2581151, at *5 (S.D. N.Y. June 23, 2021); *Luna v. Compania Panamena De Aviacion, S.A.*, 851 F. Supp. 826, 832 (S.D. Tex. 1994) (holding the plaintiff 's death due to an airplane crash did not result from the fact that she purchased the ticket for her air travel in the forum state); *Pesa v. Scandinavian Airlines System*, No. 2:19-cv-20415, 2021 WL 1660863, at *8 (D. N.J. Apr. 27, 2021) (collecting cases).

ticket," the outcome may be different.[66] However, that is not the case here.

Whether the forum is Louisiana, under a traditional theory, or the United States as a whole, because Rule 4(k)(2) is implicated, the outcome is the same. Plaintiff 's cause of action arises out of her alleged injuries which occurred in Oslo, Norway, not from her purchase of the ticket in the United States.[67] Plaintiff 's argument fails on this point.[68]

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66. *Bavikatte v. Polar Latitudes, Inc.*, A-15-CV-00437-LY-ML, 2015 WL 8489997, at *6 (W.D. Tex. Dec. 8, 2015); *see also Huzinec v. Six Flags Great Adventure, LLC*, 2018 WL 1919956, at *6 (D. N.J. Apr. 24, 2018) (finding the analysis of a party's jurisdictional exposure "would have presented a closer call if the underlying claims centered on allegations related to those tickets").

67. Plaintiff did not argue that the New Jersey origin of the flight alone provides the Court with jurisdiction. However, even if she did make such an argument, the mere fact that a flight originates in a forum in still insufficient to establish specific jurisdiction over an airline for personal injury claims based on negligence in a foreign forum. *See id.*

68. Even if the Court found Plaintiff had satisfied the second element, Plaintiff would also fail on the third element. Plaintiff failed to demonstrate that the connection between her cause of action and Defendant's forum-related activities is not "too attenuated," making the exercise of jurisdiction unreasonable. *Benson v.* Rosenthal, 116 F. Supp. 3d 702, 711-12 (E.D. La. 2015). Courts have held that the connection between a plaintiff 's cause of action for a personal injury occurring in another forum and a defendant's ticket sale to a plaintiff in the forum are too attenuated to make the exercise of jurisdiction over a defendant reasonable. *Bavikatte*, A-15-CV-00437-LY-ML, 2015 WL 8489997, at *6

Accordingly, Plaintiff has failed to carry her burden of demonstrating that this Court has personal jurisdiction over Defendant based on traditional theories of personal jurisdiction.

CONCLUSION

IT IS ORDERED that Defendant's motion to dismiss is **GRANTED**.

New Orleans, Louisiana, this 11th day of August, 2023.

/s/
Susie Morgan
United States District Court

("Plaintiff 's allegations do not relate to fraudulent inducement, false advertising, or any other theory relating to the sale and purchase of the ticket. Instead, Plaintiff alleges he suffered a fall due to unsafe conditions in his cabin. . . . The circumstances of Plaintiff 's injury are far too attenuated from the sale of the cruise package in Texas to support specific personal jurisdiction here."). Accordingly, Plaintiff fails on the third element as well.