NO. 24-587

# In the Supreme Court of the United States

SCANDINAVIAN AIRLINES SYSTEM, AKA SAS, DBA SCANDINAVIAN AIRLINES OF NORTH AMERICA, INCORPORATED,

*Petitioner,*

v.

SUSAN HARDY,

*Respondent.*

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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

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 under a United States treaty, where the corporation forms contracts, conducts advertising, derives revenue, staffs employees, and maintains an office in the United States, the injury occurs outside the United States during the provision of the services promoted by those activities, and the Plaintiff's only alternate forum is a foreign court.

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## BRIEF IN OPPOSITION

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## RELEVANT JUDICIAL RULES AND TREATY PROVISIONS

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

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 court of general jurisdiction; and

b) Exercising jurisdiction is consistent with the United States Constitution and laws.

**Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention"), May 28, 1999, S. Treaty Doc. No. 106-45, Art. 33 "Jurisdiction" (2000)**

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph

1 of this Article, or 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.

3. For the purposes of paragraph 2

(a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;

(b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the court seized of the case

## INTRODUCTION

If tomorrow morning, a Scandinavian Airlines Boeing 747 departs JFK Airport full of American passengers — all of whom purchased their tickets in the United States, departed from the United States, and intended to return to the United States — and that flight then crashes into the Atlantic Ocean, killing everyone on board, the Petitioner would require hundreds of grieving American families to seek justice in a Swedish court for the deaths of their loved ones. Ignoring the foreign airline's liability for the deaths of United States citizens, and despite the fact that foreign airlines have been standing for suit in American courts for nearly 100 years, Petitioner now asks this Court to upend precedent and force the families of American victims to litigate their cases abroad. The Court should deny certiorari and dismiss Petitioner's request.

At the heart of this case is the Montreal Convention, a multi-national treaty that provides an exclusive universal liability regime for injuries and deaths occurring on international flights.[1] If a claim that falls

[1] The Montreal Convention succeeded and replaced the Convention for the Unification of Certain Rules Relating to International Carriage by Air done at Warsaw, Oct. 12, 1929, ("Warsaw Convention"). It remained nearly identical to its predecessor in order to leave intact the body of case law that developed under the Warsaw Convention. *See Baah v. Virgin Atlantic Airways Ltd.*, 473 F.Supp.2d 591, 596 (S.D.N.Y., 2007 (citing S. Exec. Rep. 108-8, at 3 (2003)); *See also* 149 Cong. Rec. S10870 (daily ed. July 31, 2003) (statement of Sen. Biden). The Montreal Convention maintains the four bases of jurisdiction granted under the Warsaw Convention and adds a "fifth jurisdiction," providing

within the Montreal Convention's scope is not valid under the Convention, it is not available at all under any local law. *See Moore v. British Airways PLC*, 32 F.4th 110 (1st Cir. 2022); *Dagi v. Delta Airlines, Inc.*, 961 F.3d 22, 27-28 (1st Cir. 2020). The Montreal Convention has been ratified by 137 state parties, and prior to this Court's ruling in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), foreign airlines routinely and without objection submitted to suit brought pursuant to the Convention in U.S. courts. The problem of recent years — now squarely addressed by the Fifth Circuit — is that Montreal Convention jurisdiction against international carriers was virtually nullified by district courts around the country in the wake of *Daimler*'s limitation of access to general personal jurisdiction against foreign corporations.

Here, the Fifth Circuit held that Scandinavian Airlines' business activities within the United States relating to commercial air travel, and by chain of causation the potential negligence that could occur simultaneously thereto, were extensive enough to satisfy Fifth Amendment due process requirements, thereby justifying personal jurisdiction and the execution of service under Fed. R. Civ. P. 4(k)(2).

Petitioner asserts that the Fifth Circuit's ruling now creates a split amongst the Circuits. This is a false illusion of conflict, however, because the Petitioner contrasts the Fifth Circuit's opinion only with decisions that pre-date this Court's clarification of the specific

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access to U.S. courts for some American passengers whose international air travel occurs wholly outside of the continental United States. Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention"), May 28, 1999, S. Treaty Doc. No. 106-45, Art. 33 "Jurisdiction" (2000).

personal jurisdiction analysis in *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021) — a case that was integral to the Fifth Circuit's reasoning. Not only do the Petitioner's proffered cases pre-date *Ford*'s "relatedness" framework, but they are entirely unrelated to the Montreal Convention — the necessary "torso" that the Petitioner seeks to amputate from the body of relevant analysis.

To date, only the Fifth and Second Circuits have considered the question of whether Federal Rule of Civil Procedure 4(k)(2) affords an appropriate vehicle to assert specific jurisdiction over foreign airlines under the Montreal Convention. The Fifth Circuit said: yes. The Second Circuit said: maybe. *Lensky v. Turk Hava Yollari, A.O.*, 2023 WL 6173334, at *3 (C.A.2 (N.Y.), 2023). The Second Circuit remanded the question to the district level for consideration. The district court, while finding personal jurisdiction on other grounds, said, in dicta: very likely. *Dularidze v. Turk Hava Yallario A.O.*, 2024 WL 3567332, at *4 (S.D.N.Y., 2024). The circuit courts that have considered the question are substantially in agreement. There is no split.

Litigation governed by the Montreal Convention requires unique considerations in analyzing whether a U.S. court may exercise personal jurisdiction over a foreign airline, and the complexities involved in the consideration of Montreal Convention jurisdiction simply do not allow for a generic application of either Rule 4(k)(2) or *Ford*'s "relatedness" doctrine. This matter would be a poor vehicle for the Court to use if it desired to clarify either concept.

Nor is the question of how courts should handle the issue of personal jurisdiction in Montreal Convention claims ripe or urgent for this Court to consider.

The circuit courts are just beginning to develop a well-reasoned and contained approach, and contrary to Petitioner's fears, the application of Rule 4(k)(2) to Montreal Convention claims does not portend a new wild west of litigation against foreign defendants. The Montreal Convention is uniquely distinguishable from other causes of action.

Finally, The Petitioner's efforts to attract the Court's interest by claiming circuit confusion on the appropriate constitutional standard of due process for establishing general personal jurisdiction is dead on arrival. The issue was never raised or argued in the Fifth Circuit, nor was the argument maintained at the district level. Accordingly, it is waived. Either way, the Petitioner's concerns are overblown. The building consensus among the circuits is that the Fifth Amendment standard of due process for general personal jurisdiction should mirror that of the Fourteenth Amendment articulated by this Court in *Daimler*. The Fifth Circuit affirmed the same when it commended the Appellant for not raising the issue or arguing against it.

In sum: the Fifth Circuit's decision regarding due process does not create a conflict with any other circuit or with this Court's established law; it does not decide an important question of federal law that should better be left to this Court; and the issues that the Petitioner raises are ill-suited, inappropriate, and pre-mature to be considered in this vehicle. The Court should deny the petition.

## REASONS FOR DENYING THE PETITION

### I. THERE IS NO CIRCUIT SPLIT

#### A. The Petitioner Attempts to Portray a Circuit Split by Citing Pre-*Ford*, Non-Montreal Convention Case Law

The Petitioner claims that the Fifth Circuit's decision created a split from the unanimous agreement of the Third and Fourth Circuits and the Supreme Court of Arkansas, all of which "have explicitly held that courts lack specific personal jurisdiction 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." Pet.App.3a. To this end Petitioner cites *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124 (4th Cir. 2020); *Malik v. Cabot Oil & Gas Corp.*, 710 F. App'x 561 (3d Cir. 2017); and *Lawson v. Simmons Sporting Goods, Inc.*, 569 S.W.3d 865 (Ark. 2019).

The Petitioner's claimed conflict is illusory.

These cases, and the related fact patterns that Petitioner explores, all pre-date *Ford*. The *Ford* Court eased the rigid approach to specific personal jurisdiction previously employed by the lower courts when it clarified:

> [O]ur most common formulation of the rule demands that the suit arise out of or relate to the defendant's contacts with the forum . . . The first half of that standard asks about causation; but the back half, after the 'or,' contemplates that some relationships will

> support jurisdiction without a causal showing.

*Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021) (internal citations omitted).

If the cases referenced by Petitioner were decided today, with the benefit of *Ford*'s guidance, the outcomes likely would be different. Petitioner cites no instance where another circuit, or court of last resort, has applied *Ford*'s relatedness doctrine to a Montreal Convention case in a way contrary to the Fifth Circuit's application below.

### B. The Fifth and Second Circuits are the First to Squarely Consider the Question and they Substantially Agree.

Aside from the Fifth Circuit decision subject to this petition, only the Second Circuit *Lensky* Court has considered the question of whether Rule 4(k)(2) provides a pathway to personal jurisdiction for Montreal claims using Ford's "relatedness" rationale. *Lensky* said this:

> Especially after *Ford*, the fact that the plaintiffs were allegedly injured outside the United States cannot be the dispositive consideration in the specific jurisdiction analysis under Rule 4(k)(2)(B). The District Court must consider whether the plaintiffs' claims more broadly "arise out of or relate to" THY's contacts with the United States, including all of THY's activities referred to above.

*Lensky*, 2023 WL 6173334, at 3.

Upon remand, the district court indicated, albeit in dicta,[2] that specific personal jurisdiction likely would be found. *Lensky v. Turk Hava Yollari A.O.*, 2024 WL 4467347, at *1 (S.D.N.Y., 2024) ("In a footnote in the July Opinion, the Court noted that given the facts of this case, there may also be grounds for finding specific personal jurisdiction, consistent with the Second Circuit's directive.")

The Fifth Circuit and the Second Circuit do not have differences that require the Court's guidance to resolve because they are substantially in agreement. The Court should not intervene.

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[2] The district court ruled that THY was subject to general personal jurisdiction under existing Second Circuit precedent (*Porina v. Marward Shipping Co., Ltd.*, 521 F.3d 122, 128 (C.A.2 (N.Y.), 2008)), so it was unnecessary to reach the question of specific personal jurisdiction. It acknowledged that its ruling was based on law that may soon be obsolete:

> The Second Circuit has not yet had the occasion to rule on whether the Supreme Court's decision in Daimler supplants the "continuous and systematic" test under Rule 4(k)(2) with Daimler's "essentially at home" test. District Courts are "obliged to follow [Second Circuit] precedent, even if that precedent might be overturned in the near future."

*Lensky*, 2024 WL 3567332, at *4 (citing *Packer v. Raging Capital Mgmt., LLC*, 105 F.4th 46, 54 (2d Cir. 2024).

This is the opinion that the Petitioner cites when it claims that the Fifth Amendment due process standard must urgently be clarified due to conflict amongst the circuits. But clearly this opinion does not stake out a "conflict."

## II. THE FIFTH CIRCUIT WAS CORRECT ON THE MERITS.

The Supreme Court has set out three conditions for the exercise of specific jurisdiction over a non-resident defendant. *See Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 582 U.S. 255, 272 (2017). "First, the defendant must have purposefully availed itself of the privilege of conducting activities within the forum State or have purposefully directed its conduct into the forum State." *Id.* (quoting *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (plurality opinion)). "Second, the plaintiff's claim must arise out of or relate to the defendant's forum conduct." *Id.* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). "Finally, the exercise of jurisdiction must be reasonable under the circumstances." *Id.* (citing *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 113-114 (1987)).

### A. Purposeful Availment

The Fifth Circuit held, and Petitioner does not dispute, that SAS has purposefully availed itself of U.S. markets. Pet.App.23a. SAS markets, sells, supports, and provisions international air travel for American customers.

"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." Pet.App.22a. SAS maintains employees in the U.S., earns significant revenue in the U.S. and benefits from the protection of U.S. laws and access to

the U.S. legal system. *See e.g. Scandinavian Airlines System Denmark-Norway-Sweden v. McDonald's Corp.*, 129 F.3d 971 (C.A.7 (Ill.), 1997); *Scandinavian Airlines System v. United Aircraft Corp.*, 601 F.2d 425 (C.A. Cal., 1979).

**B. "Arise Out of or Relate to"**

Importantly, every one of SAS's in-forum activities relates to the international flights that SAS markets and operates. Petitioner argues that there are critical distinctions between *Ford* and the facts of this case, but the opposite is true: Ford advertised and provided support services in Montana for a car in which the plaintiff became injured; SAS advertised and provided support services in the United States for a commercial flight during which the plaintiff sustained damages. But SAS went even further: it also entered into a contract with the plaintiff to sell and deliver its product in the United States.

The Fifth Circuit, using *Ford*'s rationale, determined that Scandinavian Airlines' activities in the United States — advertising flights, contracting for flights, supporting flights, providing and deriving revenue from flights, staffing and maintaining premises to support the same — were of sufficient quantity and relationship that they properly belonged on the causal chain that led to Ms. Hardy's injury:

> 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.

Pet.App.24a.

In agreement, the *Lensky* Court in the Second Circuit explained a similar rationale:

> Where the defendant has had only limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts. Where the defendant's contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury.

*Lensky*, 2024 WL 3567332, at *4 (quoting *SPV OSUS, Ltd. v. UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018)).[3]

Rather than accept this reasonable and equitable application of *Ford*'s guidance that restores the Montreal Convention to its intended purpose, the Petitioner would like to see the Court modify its ruling in *Ford* to place determinative weight upon where the

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[3] Fourth Circuit courts pioneered a similar approach even prior to this Court's ruling in *Ford*. *See Broadus v. Delta Air Lines, Inc.*, 101 F. Supp. 3d 554, 561 (M.D.N.C. 2015) ("[b]ut for Delta operating its airline business in North Carolina and picking up [plaintiff] in Greensboro, [plaintiff] would not have been injured during her layover in Atlanta."); *see also Selke v. Germanwings GmbH*, 261 F. Supp. 3d 666, 669-70 (E.D. Va. 2017).

injury occurs. This requirement would swallow *Ford*'s "relatedness" doctrine entirely. After all, if *Ford* theoretically requires the injury to occur in-forum, then what would it matter if other in-forum activities relate to it? The site of the injury already satisfies the "arises under" prong of the inquiry.

Petitioner asks the Court to modify its *Ford* ruling not to seek due process or justice or fairness: rather, it seeks to preserve the brief window of immunity from wrongdoing that *Daimler* unintentionally provided to foreign airlines. But the approach to causation that *Ford* provides, and the Fifth Circuit applied, is entirely reasonable. It does not, as Petitioner claims, collapse the distinction between general and specific personal jurisdiction.

## III. This Case is a Particularly Poor Vehicle for this Court to Consider the Reach of Ford's Relatedness Inquiry and of Rule 4(k)(2) Generally.

Petitioner incorrectly claims that courts need guidance on the proper application of Rule 4(k)(2) and that there has been confusion in the wake of *Ford* about the correct application and boundaries of the "relatedness" principles. Even if these contentions were true, this case is a poor candidate for the Court to provide clarification of either.

### A. The Contractual Relationship between Passenger and Air Carrier Uniquely Relates to the Out-of-Forum Injuries.

As a condition to be licensed as a foreign air carrier with permission to operate in the United States, the U.S. Department of Transportation and

federal law require that foreign carriers incorporate the Montreal Convention into the airline-passenger contract and conditions of carriage. *See* 14 C.F.R. § 203.4;[4] 14 C.F.R. § 221.105(a)(1).[5]

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[4] 14 C.F.R. § 203.4

> (a) As required by the Montreal Agreement, carriers that are otherwise generally required to file tariffs shall file with the Department's Pricing and Multilateral Affairs Division a tariff that includes the provisions of the counterpart to Agreement 18900.
>
> (b) As further required by that Agreement, each participating carrier shall include the Agreement's terms as part of its conditions of carriage. The participating carrier shall give each of its passengers the notice required by the Montreal Agreement as provided in § 221.105 of this chapter.

[5] C.F.R. § 221.105(a)(1).

> "In addition to the other requirements of this subpart, each air carrier and foreign air carrier which, to any extent, avails itself of the limitation on liability to passengers provided by an international treaty, shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the international treaty and whose place of departure or place of destination is in the United States, the following statement in writing:
>
> **ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATIONS OF LIABILITY**
>
> Passengers embarking upon a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that the provisions of an international treaty (the Warsaw Convention, the 1999 Montreal Convention, or other treaty), as well as a carrier's own contract of carriage or tariff provisions, may be applicable to their entire journey, including any

When a U.S. passenger purchases a ticket from her home in the United States to travel abroad via a foreign air carrier, the passenger automatically consents to be bound by the terms of the treaty. Among other restrictions, the Montreal Convention preempts all foreign and domestic laws. It limits jurisdiction to five possible venues.[6] It limits damages to those permitted under the Convention.[7] And it limits remedies — pre-empting all other potential causes of action and imposing a strict exoneration provision.[8]

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> portion entirely within the countries of departure and destination. The applicable treaty governs and may limit the liability of carriers to passengers for death or personal injury, destruction or loss of, or damage to, baggage, and for delay of passengers and baggage."

6 *See supra* "Provisions Included," Montreal Convention, May 28, 1999, S. Treaty Doc. No. 106-45, Art. 33 "Jurisdiction" (2000).

7 Montreal Convention, May 28, 1999, S. Treaty Doc. No. 106-45, Art. 29 "Basis of Claims." (2000).

> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable

8 Montreal Convention, May 28, 1999, S. Treaty Doc. No. 106-45, Art. 20 "Exoneration." (2000)

> If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or

Similar to an insurance policy or waiver of liability, the passenger and the carrier contemplate the potential for injury and agree upon how it will be handled — all within the confines of the forum where the ticket is purchased. As a result, these in-forum contracts are uniquely connected to an injury suffered abroad because they control in advance how the injury will be addressed.

### B. *Asahi* "Reasonableness" Factors Uniquely Favor Montreal Convention Claims.

In assessing reasonableness, courts use the five-factor test set forth in *Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano Cty.*, 480 U.S. 102, 113 (1987). These factors are: (1) the burden on the defendant; (2) the interests of the forum State; (3) the plaintiffs' interests in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the Several States in furthering substantive social policies.

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the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.d.

In cases arising under the Montreal Convention, the first three factors weigh heavily in favor of a U.S. passenger's claim: (1) the burden on the defendant air carrier was bargained for and expected: for many decades, foreign airlines expected to be haled into U.S. courts to answer Montreal Convention claims and responded to those lawsuits without objection.[9] As foreign air carriers, the burden of transporting witnesses to U.S. courts is minimal, and with the advent of remote depositions via online platforms, in-person depositions are rarely necessary at all. (2) The interest of the United States in adjudicating the matter in a U.S. forum is the very reason that the Montreal Convention was negotiated in the first place: U.S. policymakers felt a responsibility to ensure that U.S. citizens had the protection of U.S. courts when they placed their safety in the hands of foreign airlines. And (3) the Plaintiff's interest in adjudication in a U.S. court is enormous: the United States has the most reputable, efficient court system and the most beneficial damages laws in the world. It would be inherently unfair to American citizens to force them to be restricted by inefficient legal systems and inferior damages

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[9] Accordingly, the Petitioner's arguments about the endangerment of international comity if personal jurisdiction is exerted over foreign airlines are considerably overwrought. *See, e.g. Schmidkunz v. Scandinavian Airlines System*, 628 F.2d 1205, 1207 (C.A.Cal., 1980); *Rabinowitz v. Scandinavian Airlines*, 741 F.Supp. 441, 442 (S.D.N.Y., 1990); *Narkiewicz-Laine v. Scandinavian Airlines Systems*, 587 F.Supp.2d 888, 889 (N.D.Ill., 2008); *Meirer v. Scandinavian Airlines System*, 2021 WL 148240, at *3 (N.D.Cal., 2021); *Doering v. Scandinavian Airlines System*, 329 F.Supp. 1081, 1082 (D.C.Cal. 1971) (presciently agreeing with the Fifth Circuit that the enumerated places to bring suit under Article 28(1) of the Warsaw Convention are venue provisions.)

frameworks in a completely unfamiliar country where they may not even speak the language. American citizens have an overwhelmingly compelling interest in being permitted to seek justice in U.S. courts.[10]

Not only do Montreal Convention claims require a unique approach to Rule 4(k)(2) and the *Ford* doctrine that does not lend itself easily to wider extrapolation, but if the Court were to directly address the proper treatment of Montreal Convention claims, it would be required to resolve additional Montreal-specific jurisdictional arguments that were raised below but are now mooted by the Fifth Circuit's ruling.[11]

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[10] As to factors 4 and 5: as the Fifth Circuit remarked, those are "much less easily weighed in this context." Pet.App.27a.

[11] The Fifth Circuit rejected two arguments that the Appellants made for personal jurisdiction under the Montreal Convention: a contractual, ticket-based waiver of personal jurisdiction and Treaty-intrinsic personal jurisdiction. To the first: at least one concurrence in the Second Circuit suggests that there may be situations where foreign airlines are deemed to have waived personal jurisdiction under the Montreal Convention. *See National Union Fire Insurance Company of Pittsburgh, Pa. v. UPS Supply Chain Solutions, Inc.*, 74 F.4th 66, 76-77 (C.A.2 (N.Y.), 2023) (Judge Lohier concurrence). And, as to the second: even if some courts have suggested that the Montreal Convention does not automatically confer personal jurisdiction, the Respondent maintains it to be equally true that the executive and legislative branches of government, as well as the treaty negotiators, and every nation that agreed to be bound, expected it to do so.

Respondent raises these arguments only to preserve them.

## IV. THE PETITIONERS HAVE WAIVED THE QUESTION OF WHAT STANDARD OF DUE PROCESS GOVERNS GENERAL PERSONAL JURISDICTION UNDER THE FIFTH AMENDMENT.

During the course of the litigation below, the Fifth Circuit ruled explicitly that *Daimler*'s Fourteenth Amendment standard is equally applied to Fifth Amendment claims. *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226 (5th Cir. 2022). Consequently, the Plaintiff dropped her argument for general personal jurisdiction at the district level.

On appeal, the Fifth Circuit recognized that the Respondent made no argument for general personal jurisdiction under any standard:

> 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. Thus, our only question is whether the court erred by finding that it could not exercise specific personal jurisdiction over SAS in connection with Hardy's claim.

Pet.App.20a-21a.

The Petitioner asks this Court to resolve an argument that was never made to the Fifth Circuit, and the Court should decline to do so.[12]

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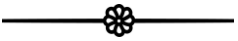
[12] In any event, the Court should be reassured that despite the Petitioner's claims to the contrary, there seems to be little conflict between the Fifth and Second Circuits on this issue. *See Fuld v. Palestine Liberation Org.*, 82 F.4th 74 (2d Cir. 2023) ("For these very reasons, several courts of appeals, including ours, have rejected the notion that federalism's irrelevance in the Fifth Amendment context justifies a 'more lenient' standard for personal



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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jurisdiction.") The *Douglass* Court also noted that the Circuits are overwhelmingly in agreement that the Fifth Amendment standard of due process should mirror that of the Fourteenth Amendment. *Douglass v. Nippon Yusen Kabushiki Kaisha,* 46 F.4th 226, 239 (C.A.5 (La.), 2022)("Furthermore, the Second, Sixth, Seventh, Eleventh, Federal, and D.C. Circuits all agree that no meaningful difference exists between the Fifth and Fourteenth Amendments' minimum contacts analyses.") citing *Livnat v. Palestinian Auth*., 851 F.3d 45, 54-55 (D.C. Cir. 2017); *Waldman v. Palestine Liberation Org*., 835 F.3d 317, 330 (2d Cir. 2016); *Carrier Corp. v. Outokumpu Oyj,* 673 F.3d 430, 449 (6th Cir. 2012); *Abelesz v. OTP Bank*, 692 F.3d 638, 660 (7th Cir. 2012); *Oldfield v. Pueblo de Bahia Lora, S.A*., 558 F.3d 1210, 1219 n.25 (11th Cir. 2009); *Porina*, 521 F.3d at 127-29; *Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found*., 297 F.3d 1343, 1350 (Fed. Cir. 2002).

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