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.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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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.

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INTRODUCTION

Four courts—three courts of appeals and one state supreme court—have considered the question of whether specific personal jurisdiction exists over a non-resident corporation in a premises liability case when (1) the incident, (2) the alleged wrongdoing, and (3) the harm occurred outside the forum. Only the Fifth Circuit has answered in the affirmative.

Ms. Hardy's arguments (at 7) about the 3-1 split created by the Fifth Circuit only further support review by this Court. Ms. Hardy protests that the three majority cases—decided in 2020, 2019, and 2017—should be disregarded because they "pre-date *Ford*." Although this Court in *Ford* expressly embraced and endorsed its holdings in *Walden* and *Bristol-Myers Squibb*, this Court's precedents appear to have left litigants and lower courts conflicted over the circumstances in which personal jurisdiction may be exercised over a non-resident defendant.

Ms. Hardy's other arguments against review lack merit. Ms. Hardy seems to suggest (at 4-5) that personal jurisdiction is somehow more complex in cases arising under the Montreal Convention. To the contrary, whether a court may exercise personal jurisdiction over a non-resident defendant is a purely constitutional question; that this case arises under a treaty makes no difference. Indeed, courts routinely analyze personal jurisdiction in cases arising under the Montreal Convention in accordance with the framework established by this Court.

Ms. Hardy's attempts to conflate treaty jurisdiction (which is conferred by the Montreal Convention) and personal jurisdiction (which is not) are simply unavailing.

This case remains an excellent vehicle for answering the question presented and creating uniformity among the lower courts on this important constitutional question. This Court should grant certiorari and reverse.

ARGUMENT

I. Ms. Hardy's arguments about the split only further support review.

There are three other premises liability cases from the courts of appeals or a state court of last resort in which a plaintiff sought damages arising from an incident that occurred outside the forum. In all of those cases, the defendant had pervasive contacts with the forum. Pet. 10-13. Yet in all of those cases, the court held that the activity by the defendant in the forum state was insufficient to support specific personal jurisdiction because both the subject incident and the alleged conduct that caused it occurred elsewhere. *Id.* Only the Fifth Circuit has held differently.

1. Ms. Hardy's explanation for the 3-1 split only underscores the need for review. She does not dispute that the Fifth Circuit decided differently than the Third and Fourth Circuits and the Arkansas Supreme Court, and she does not suggest there are any other cases on point, *i.e.* where both the fall and the conduct that allegedly caused it occurred outside the forum.

Rather, Ms. Hardy baldly asserts (at 7) that the three majority cases would have had a different outcome had they been decided after *Ford*. She offers no discussion of these three cases, nor any explanation of why *Ford* would have changed the outcome based on the facts of those cases. Instead, she argues that *Ford* somehow altered the personal jurisdiction landscape, and would have this Court hold that all three of the other courts that have considered this issue got it wrong.

Ms. Hardy's confusion is understandable. The question of whether a non-resident defendant's contacts with the subject forum are sufficient to satisfy the "relatedness" test frequently arises in the lower courts, which have expressed confusion and called for clarification. Pet. 27. Although this Court in *Ford* expressly embraced and affirmed its precedents in *Walden* and *Bristol-Myers Squibb* (*Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 592 U.S. 351, 369 (2021)), courts have "struggled to understand the consequences of *Ford Motor Co.*'s holding." Anthony Petrosino, *Rationalizing Relatedness*, 91 Fordham L. Rev. 1563, 1566 (2023).

2. Ms. Hardy's position also highlights how sorely clarification is needed as to whether and to what extent *Ford*, a products liability case, changed or otherwise affected the personal jurisdiction framework in cases that do not involve the use of a product, particularly one in which the plaintiff, defendant, and circumstances of the subject incident are so dissimilar from those in *Ford*. Indeed, the district court did not even consider *Ford* in granting SAS's motion to dismiss. App.30a-48a.

Ms. Hardy claims (at 7-8) that this Court in *Ford* "eased the rigid approach to specific jurisdiction" by establishing a "relatedness doctrine." Yet Ms. Hardy fails to account for the numerous critical factors at play in *Ford* that are absent here. For instance, the *Ford* plaintiffs used the allegedly defective product in the forum and were injured in the forum after the product malfunctioned in the forum. 592 U.S. at 365. The defendant had a "veritable truckload of contacts" in the forum and a long history of advertising, selling, and servicing the subject car model in the forum. 592 U.S. at 371. In those circumstances, the forum had a vested interest in adjudicating the case.

Here, there was no product, let alone one that was used, malfunctioned, and injured someone inside the forum. SAS's contacts in the forum cannot reasonably be compared with Ford's and, in any case, this Court has made clear that simply having a large volume of contacts in a forum does not, by itself, give the state a regulatory interest in addressing an injury that occurred elsewhere. *Bristol-Myers Squibb Co. v. Superior Ct. of CA*, 582 U.S. 255, 264-65 (2017).

That makes sense, since a forum state's interest in litigation "is at its zenith when either tortious conduct is committed in the forum or tortious injury occurs in the forum." *Adams v. Aircraft Spruce & Specialty Co.*, 284 A.3d 600, 620 (Conn. 2022) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984)). Neither of those circumstances is present here: neither the tortious conduct nor the tortious injury occurred in Louisiana or anywhere else in the United States.

This Court has granted certiorari "to resolve conflict among the lower courts and in the process resolve any ambiguity in [its] own opinions." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002). It should do so to resolve the conflict created by the Fifth Circuit and to clarify the circumstances in which its "relatedness" test affects the personal jurisdiction analysis, as it has been said that "'everything is related to everything else.'" *Ford Motor Co.*, 592 U.S. at 374 (Alito, J., concurring) (quoting *Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring)).

3. Ms. Hardy would have this Court believe (at 8) that there is harmony among the Fifth and Second Circuits on the application of Rule 4(k)(2) to claims arising under the Montreal Convention. To the contrary, the Second Circuit in *Lensky* expressly declined to define the requirements of Fifth Amendment due process, labeling it an "open question," and sent the case back to the district court. *Lensky v. Turk Hava Yollari, A.O.*, No. 21-cv-2567, 2023 WL 6173334, at *3 (2d Cir. Sept. 22, 2023) (citing *Bristol-Myers Squibb*, 582 U.S. at 269).

In fact, *Lensky* only further supports review because it demonstrates the illogical result reached by a New York district court when it determined it could not apply Fourteenth Amendment jurisprudence in a case governed by Rule 4(k)(2): the court held that it had general personal jurisdiction over a Turkish corporation. *See Dularidze v. Turk Hava Yallario A.O.*, No. 1:20-cv-4978, 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). Indeed, as Ms. Hardy acknowledges in a footnote (at 9 n.2), the district

court's ruling in *Lensky* "was based on law that may soon be obsolete."[1]

II. This case is a good vehicle for resolving an important question that frequently arises.

Ms. Hardy suggests two reasons to pass this case by. Neither has merit.

1. Ms. Hardy claims (at 4-5) that personal jurisdiction is somehow more complex in cases arising under the Montreal Convention.

That this case arises under the Montreal Convention has no bearing on the purely constitutional question of whether a court has personal jurisdiction over an air carrier. This Court has long confirmed that treaties are "[s]ubject . . . to the Constitution's guarantees of individual rights." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416 n.9 (2003); *Boos v. Barry*, 485 U.S. 312, 324 (1988) ("[I]t is well established that 'no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.'" (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957))); *The Cherokee Tobacco*, 78 U.S. 616, 620 (1870) ("It need hardly be said that a treaty cannot change the

1. Ms. Hardy argues (at 19) that SAS waived any argument concerning general personal jurisdiction. The question of general jurisdiction is not before this Court, and SAS is not raising any arguments concerning its applicability here. Rather, SAS is highlighting the illogical outcomes that result when courts consider a greater breadth of contacts of foreign defendants than they do of domestic ones, *i.e.* courts are finding foreign entities subject to personal jurisdiction—both specific and general—in circumstances in which domestic corporations would not be.

Constitution or be held valid if it be in violation of [the Constitution].").

Accordingly, it is well-settled that a treaty cannot and does not control or otherwise affect the constitutional inquiry of whether due process allows a court to exercise personal jurisdiction over a defendant. *See First Inv. Corp. of Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 750 (5th Cir. 2012) (citing *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002)) ("[J]urisdiction over subject matter comes from Article III, Section 2, Clause 1 of the Constitution, as well as through congressionally-conferred statutory grants of jurisdiction, while personal jurisdiction is based exclusively on the Due Process Clause."); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 212 (4th Cir. 2002) ("[W]hile the [New York] Convention confers subject matter jurisdiction over actions brought pursuant to the Convention, it does not confer personal jurisdiction when it would not otherwise exist.").

The notion (at 18) that this case somehow implicates "Montreal-specific jurisdictional arguments" is a farce that has been rejected by every court that has considered it, because the Montreal Convention confers only subject matter (treaty) jurisdiction and does not address, let alone confer, personal jurisdiction. *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh v. UPS Supply Chain Sols., Inc.*, 74 F.4th 66, 73 (2d Cir. 2023); Pet.App.11a. n.18. When adjudicating motions to dismiss for lack of personal jurisdiction in actions involving claims for personal injuries sustained while embarking or disembarking an aircraft at a foreign airport, courts throughout the country uniformly hold that Article 33 of the Montreal Convention confers

only subject matter (treaty) jurisdiction in the courts of certain countries, and go on to undertake a traditional personal jurisdiction analysis under the framework established by this Court. *See, e.g.*, *Pesa v. Scandinavian Airlines Sys.*, No. 2:19-cv-20415, 2021 WL 1660863, at *7 (D.N.J. Apr. 27, 2021) ("Because the Montreal Convention does not provide personal jurisdiction, the Court will now determine whether personal jurisdiction over SAS is otherwise proper."); *Fisher v. Qantas Airways Ltd.*, 521 F. Supp. 3d 847, 855 (D. Ariz. 2021); *Sampson v. Delta Air Lines, Inc.*, No. 2:12-cv-244, 2013 WL 6409865, at *2 (D. Utah Dec. 9, 2013).[2] In other personal injury cases, courts similarly conclude that the personal jurisdiction analysis is a "constitutional exercise" that is unanswered and unaffected by the application of the Montreal Convention. *Burton v. Air France-KLM*, No. 3:20-cv-1085, 2020 WL 7212566, at *7 (D. Or. Dec. 7, 2020); *Tucker v. British Airways PLC*, 2:16-cv-00618, 2017 WL 6389302, at *3 (W.D. Wash. Dec. 14, 2017); *see also* THE MONTREAL CONVENTION: A COMMENTARY 387 (George Leloudas, et al. eds., 2023) ("[E]ven if subject matter jurisdiction is established under the Montreal Convention 1999, courts must separately evaluate the issue of personal jurisdiction.").[3]

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2. The Fifth Circuit held that Article 33 of the Montreal Convention "prescribes venue," not treaty jurisdiction, and acknowledged that "this interpretation is novel." Pet.App.11a. The Fifth Circuit also expressly rejected Ms. Hardy's argument that the Montreal Convention confers personal jurisdiction. Pet. App.13a.

3. Ms. Hardy ignores this sweeping body of jurisprudence and remarks at the end of her brief (at 18 n.11) that "some courts have suggested that the Montreal Convention does not automatically confer personal jurisdiction."

Ms. Hardy's suggestion that this case is unworthy of review because it involves the Montreal Convention is a transparent attempt to muddy the question presented in this case.

2. Ms. Hardy claims (at 13-15) that the agreement between a passenger and an air carrier "uniquely relates to out-of-forum injuries" and that a passenger "automatically consents to be bound by the terms of the treaty" when she purchases a ticket. These claims appear to be premised on a misunderstanding of federal and international aviation law.

The Montreal Convention is a treaty between member states that governs the rights and liabilities of passengers and air carriers in international air transportation. A passenger does not "opt in" or otherwise agree to the Montreal Convention's applicability merely by purchasing a ticket whose terms are subject to the Convention. The Montreal Convention applies automatically and exclusively governs a passenger's claims for damages sustained during international air transportation. *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 160-61 (1999).[4]

As for the notion that the Montreal Convention is somehow incorporated into the contract of carriage pursuant to federal law, the first regulation on which Ms.

4. The Montreal Convention expressly provides that claims for damages, whether stated in contract or tort, are subject to the terms of the Convention. Convention for the Unification of Certain Rules Relating to International Carriage by Air, Done at Montreal, Canada, on 28 May 1999 ("Montreal Convention"), *reprinted in* S. Treaty Doc. 106-45, CCH Av. L. Rep. ¶ 27,400-59, 1999 WL 33292734 (1999), arts. 26, 29.

Hardy relies plainly states that carriers must include in their conditions of carriage the terms of the Montreal *Agreement*, which is a contract that is wholly distinct from and unrelated to the similarly named Montreal *Convention*, which is a treaty. 14 C.F.R. § 203.4.[5] The second regulation Ms. Hardy invokes merely states that air carriers must furnish notice to passengers that the provisions of a treaty may apply to their journey; it says nothing about air carriers incorporating the terms of the Montreal Convention into their conditions of carriage. 14 C.F.R. § 221.105(a)(1).

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5. The Montreal Convention of 1999 is a treaty between member States. The Montreal Agreement of 1966 is an agreement between air carriers and the former U.S. Civil Aeronautics Board (the predecessor to the U.S. Department of Transportation). Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by Executive Order No. E-23680, 31 Fed. Reg. 7302 (1966). The purpose of the Montreal Agreement was to increase the liability limits under a treaty of the United States known as the Warsaw Convention. *Id.*; *see Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 123 (1989). Pursuant to the Montreal Agreement, air carriers operating transportation with a stopping place in the United States increased their liability limit to $75,000. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, 31 Fed. Reg. 7302 (1966).

The Fifth Circuit "assume[d]" *arguendo* that Section 203 has been "updated" to refer to the Montreal Convention, relying on a typographical error in the title of Section 203.3 that refers to the "Montreal Convention." Pet.App.15a. That was wrong. The liability limits under the Montreal and Warsaw Conventions materially differ, and Section 203 is intended to address only the Warsaw Convention's liability limit. 14 C.F.R. § 203.1.

To the extent Ms. Hardy claims (at 17) that it would be reasonable to hale SAS into a U.S. court because air carriers historically were sued in the United States "without objection," nearly all of the cases she cites in support of this proposition (at 17 n.18) pre-date *Daimler*. Indeed, as Ms. Hardy herself emphasizes (at 4), it was only "prior to this Court's ruling in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), [that] foreign airlines routinely and without objection submitted" to the jurisdiction of U.S. courts.[6]

3. This case remains an ideal vehicle for providing this much-needed clarification because it involves a personal injury outside the products liability context, a single forum-resident plaintiff, and a single foreign defendant.

The recurring nature of the important question presented weighs in favor of certiorari. In addition to the cases that have considered *Ford* and struggled with its application (Pet. at 27), there are, as of the date of this filing, over a dozen cases pending in the courts of appeals arising from motions to dismiss for lack of personal jurisdiction.[7]

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6. Without citing any authority, Ms. Hardy claims (at 10) that "SAS maintains employees in the U.S." To the contrary, the Fifth Circuit observed that "SAS has no employees or property in the United States." Pet.App.19a. As for the proposition (at 10-11) that SAS "benefits from . . . access to the U.S. legal system," Ms. Hardy cites: (1) a case from 1997 arising from SAS's contractual relationships with vendors at a Chicago airport; and (2) a case from 1979 in which the defendant was a U.S. manufacturer.

7. *See, e.g.*, *Doe v. Deutsche Lufthansa AG*, *appeal docketed*, No. 24-2829 (9th Cir. May 3, 2024); *B.D. v. Samsung SDI Co.*, *appeal docketed*, No. 24-2444 (7th Cir. Aug. 20, 2024).

This Court has granted certiorari when "a considerable number of suits are pending in the lower courts which will turn on resolution of these issues." *Massachusetts Trustees of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 237 (1964). It should do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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