

**CIVIL PROCEDURE—FOREIGN
CORPORATIONS “NOT AT HOME” ESCAPE
U.S. CLUTCHES UNDER AFFIRMATION
OF FIFTH AMENDMENT DUE PROCESS—
DOUGLASS V. NIPPON YUSEN KABUSHIKI
KAISHA, 46 F.4TH 226 (5TH CIR. 2022).**

The enactment of Federal Rules of Civil Procedure (FRCP) Rule 4(k)(2) filled the territorial service of process void by allowing a federal court to assert personal jurisdiction over a foreign defendant who is not a resident of the United States and is not amenable to the “state’s courts of general jurisdiction.”¹ Rule 4(k)(2) provides a limited avenue for plaintiffs to drag foreign defendants into court so long as the exercise of jurisdiction

1. See FED. R. CIV. P. 4(k)(2) (stating territorial limits for service of process). See also Dora A. Corby, *Putting Personal Jurisdiction within Reach: Just What Has Rule 4(k)(2) Done for the Personal Jurisdiction of Federal Courts*, 30 MCGEORGE L. REV. 167, 171–72, 181–83 (1998) (discussing history of personal jurisdiction and Congressional intentions behind enactment of Rule 4(k)(2)). The Judiciary Act of 1789 enabled federal courts to exercise personal jurisdiction over defendants located within the district where the court was located, but the later enactment of the Federal Rules of Civil Procedure (FRCP) expanded the courts’ scope. *Id.* at 171. The first enactment of the FRCP in 1938 allowed federal courts to assert personal jurisdiction over a defendant anywhere within the state, however, its revision in 1963 allowed the federal courts to exercise state long-arm statutes to bring an out-of-state defendant “back to the state where the defendant purposefully availed himself of the benefits and protections of that state’s laws.” *Id.* at 172. The perception of personal jurisdiction became that it was more than territorially fixed boundaries but rather a “function of the individual liberty interests preserved by the Due Process Clause.” *Id.* (quoting *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694,702–03 (1983)). Ensuing Supreme Court jurisprudence, however, “recognized that a gap existed in the exercise of personal jurisdiction.” *Id.* at 181. The enactment of FRCP 4(k)(2) was the first federal long-arm statute and a response to the recognition that “a foreign defendant, who violated federal law, was unreachable by any state long-arm statute and there was no federal statutory authorization for nationwide service of process.” *Id.* Congress adopted FRCP 4(k)(2) to “fill the gap” and provide a remedy to a specific scenario in which the defendant is not a U.S. resident and lacks the sufficient contacts to satisfy a state long-arm statute. *Id.* at 182–83. See also *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (establishing out-of-state service over nonresident defendant who has certain minimum contacts with forum state). See also Eugene Sokoloff, *Just How Long Is the Long Arm of U.S. Jurisdiction?*, BL (Aug. 4, 2021, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/just-how-long-is-the-long-arm-of-u-s-jurisdiction> (scrutinizing case-in-chief’s unique issues pertaining to efficacy of federal long-arm provisions). Federal long-arm statutes were designed to “fill in where state law leaves gaps,” specifically under circumstances where a nonresident defendant is “hale[d] into court for conduct unrelated to their activities in-state.” *Id.*

comports with due process, requiring the defendant have sufficient minimum contacts with the forum and jurisdiction comport with notions of “fair play and substantial justice.”² In *Dougllass v. Nippon Yusen Kabushiki Kaisha*,³ the Fifth Circuit Court of Appeals conducted a constitutional inquiry into whether the standard for general personal jurisdiction under Fifth Amendment due process mirrors the Fourteenth Amendment’s requirement that the defendant have minimum contacts with the forum that it considers itself “at home.”⁴ In a split opinion, the Court, sitting

2. See Corby, *supra* note 1, at 173–74 (explaining due process analysis ensures jurisdictional compliance). This two-part test limits the court’s ability to exercise personal jurisdiction. *Id.* See also Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4 (k)(2): A Way to (Partially) Clean Up The Personal Jurisdiction Mess*, 67 AM. U.L. REV. 413, 417 (2017) (reflecting on current implementation of Rule 4(k)(2)). Rule 4(k)(2)’s role in federal question cases is governed by the due process clause of the Fifth Amendment “[b]ecause federal courts are organs of the federal government,” while the Fourteenth Amendment governs the states. *Id.* See also Ingrid Brunk, *Personal Jurisdiction, Due Process and Transnational Litigation*, LAWFARE, (Aug. 20, 2021, 2:04 PM), <https://www.lawfareblog.com/personal-jurisdiction-due-process-and-transnational-litigation> (assessing unresolved state of Fifth Amendment due process); Ingrid Brunk, *Fifth Circuit Issues En Banc Opinion on Personal Jurisdiction over Foreign Defendants*, TRANSNAT’L LITIG. BLOG, (Aug. 17, 2022), <https://tlblog.org/fifth-circuit-issues-en-banc-opinion-on-personal-jurisdiction-over-foreign-defendants/> [hereinafter *Fifth Circuit Issues*] (providing holding in *Dougllass* case). While it is clear that most cases in federal court operate under state long-arm statutes and under the due process limits of the Fourteenth Amendment, cases involving foreign defendants under Rule 4(k)(2) have raised questions as to the “original meaning of the Fifth Amendment.” *Id.*

3. 46 F.4th 226 (5th Cir. 2022) (analyzing Fifth Amendment due process right relative to general personal jurisdiction).

4. See *id.* at 234 (stating case-in-chief’s issue). See also Robert E. O’Connor, *Establishing Personal Jurisdiction in US Court Over Foreign Defendants*, MONTGOMERY MCCRACKEN (Aug. 23, 2022), <https://www.mmwr.com/establishing-personal-jurisdiction-in-us-court-over-foreign-defendants/> (evaluating Court’s decision to exercise personal jurisdiction in *Dougllass*). The exercise of personal jurisdiction over foreign defendants is an “evolving” question following the Supreme Court’s decision in *Daimler*, which held that a defendant is subject to general jurisdiction when it is “at home” within the forum. *Id.* The rule crafted in *Daimler* recognized due process protections under the Fourteenth Amendment, but most federal courts have evaluated those same protections under the Fifth Amendment since the decision. *Id.* See also Borchers, *supra* note 1, at 413–14 (criticizing Supreme Court’s divided personal jurisdiction jurisprudence). Commentators have been divided over the Supreme Court’s handling of personal jurisdiction, but most agree that its failure to address miscellaneous categories of what constitutes a contact “has left lower courts trying to make sense out of nonsense.” *Id.* at 416. See also Adam Steinman, *Interesting Fifth Circuit Decision on Personal Jurisdiction: Dougllass v. Nippon Yusen Kabushiki Kaisha*, LAW PROFESSORS BLOGS NETWORK (May 3, 2021), <https://lawprofessors.typepad.com/civpro/2021/05/interesting-fifth-circuit-decision-on-personal-jurisdiction-dougllass-v-nippon-yusen-kabushiki-kaisha.html> (describing issue and holding of first Court of Appeals hearing). The issue before the Court was unique in that its line of inquiry implicated the Fifth Amendment rather than the Fourteenth Amendment. *Id.*

en banc, held that the Fifth Amendment due process test requires the same “minimum contacts” within the United States as the Fourteenth Amendment requires within a state.⁵

On June 17, 2017, Nippon Yusen Kabushiki Kaisha’s (NYK) 730-foot container ship collided with a U.S. naval destroyer, resulting in the death of seven American sailors and injury of many others.⁶ The Plaintiffs brought suit against NYK in federal court for wrongful death and survival claims under the Death on the High Seas Act, alleging that NYK was subject to jurisdiction under Rule 4(k)(2) based on its “substantial, systematic, and continuous contacts with the United States as a whole.”⁷ NYK, a global logistics company incorporated and headquartered in Japan, moved for dismissal for lack of personal jurisdiction under

5. See *Douglass*, 46 F.4th at 235 (stating case-in-chief’s holding). See also *FHM Prevails on Jurisdiction*, FREEHILL, HOGAN & MAHAR LLP, <https://www.freehill.com/fhm-prevails-on-jurisdiction-2/> (last visited Feb. 12, 2023), (reaffirming case-in-chief’s decision). The Court rejected Plaintiffs’ argument that Rule 4(k)(2) expanded the scope of jurisdiction, instead positing that the Federal Rules of Civil Procedure strictly govern service rather than any issues of constitutional due process. *Id.* Its holding reaffirms a notion long held by the majority of federal circuits “that there is no meaningful difference between the Fifth and Fourteenth Amendments’ minimum contacts analyses.” *Id.* See also O’Connor, *supra* note 4 (delineating between substantive constitutional protections and procedural rules). The Court’s “*en banc* analysis” that procedural rules under 4(k)(2) cannot supersede substantive constitutional protections in an admiralty case “is a masterclass in personal jurisdiction over foreign defendants.” *Id.* See also Daniel Wilson, *Full 5th Circ. Affirms Lack Of Jurisdiction Over Navy Collision*, LAW360 (Aug. 17, 2022, 6:19 PM), <https://www-law360-com.ezproxysuf.flo.org/articles/1521701/full-5th-circ-affirms-lack-of-jurisdiction-over-navy-collision> (describing extensive debate in 104-page decision). The majority affirmed that Rule 4(k)(2) is “‘expressly subservient’ to the constitutional limits of due process and cannot control a constitutional inquiry.” *Id.*

6. See *Douglass*, 46 F.4th at 230–31 (describing actions giving rise to dispute). Nippon Yusen Kabushiki Kaisha’s (NYK) ship, ACX Crystal, collided with a U.S. naval destroyer, USS Fitzgerald, in Japanese territorial waters. *Id.* at 230. When the collision occurred, the ACX Crystal flew a Philippine flag while traversing an intra-Asia trade route. *Id.* at 231. The cargo ship had never “called port in the United States.” *Id.* As a global logistics company, NYK had a “formidable fleet that includes bulk carriers, container ships (of all sizes), car transporters, tankers, cruise ships, shuttle tankers, drill-ships, and LNG carriers, among other vessels.” *Id.* at 229–30.

7. See *id.* at 230–31 (describing statistics of NYK’s U.S. operations). Between 2017 and 2019, approximately 7% of NYK’s port calls were made within the United States, amounting to 1,500 calls per year. *Id.* at 230. In fact, 25% of NYK’s approximately 1700 employees were seconded in NYK subsidiaries in the United States. *Id.* NYK’s business in the United States constituted less than 10% of its annual total revenue. *Id.* Since 2010, NYK has filed thirty lawsuits in federal courts for claims relating to freight charges owed for bills of lading. *Id.* NYK was also sued in various suits for damaged cargo from 2015–2016. *Id.*

Rule 12(b)(2).⁸ The Plaintiffs asserted that NYK's contacts are properly assessed under Fifth Amendment due process because it was an admiralty dispute arising under federal law rather than state law under the Fourteenth Amendment.⁹

The district court subsequently granted NYK's motion to dismiss for lack of personal jurisdiction, holding that NYK did not have sufficient minimum contacts within the United States to

8. See *Douglass v. Nippon Yusen Kabushiki Kaisha*, 465 F. Supp. 3d 610, 613–14 (E.D. La. 2020) (explaining basis for motion to dismiss). One of NYK's corporate officers, Yutaka Higurashi, declared that Japan was the “center of NYK Line's operations and corporate decision-making.” *Id.* at 613. The company's shareholders and board of directors meetings took place in Japan. *Id.* NYK had not operated a U.S. office since its New York branch closed in 1988. *Id.* One of NYK's 200 subsidiaries, NYK Line (North America) Inc., instead assumed the functions of the branch. *Id.* at 613–14. See also *Douglass*, 46 F.4th at 234–35 (analyzing NYK's contention Fourteenth Amendment general jurisdiction parallels Fifth Amendment). NYK refuted the exercise of personal jurisdiction on the basis that the Fifth Amendment due process test parallels the Fourteenth Amendment test under *Daimler*, and is only amended under the Fifth Amendment by analyzing a party's contacts with the entire United States rather than a single state under the Fourteenth Amendment. *Id.* The Court perceived NYK's arguments as advancing “the tried and true dichotomy between specific and general jurisdiction . . . under the Fifth Amendment.” *Id.*

9. See *Douglass*, 465 F. Supp. 3d at 613 (specifying allegations against NYK in Plaintiffs' amended complaint). The Plaintiffs filed an amended complaint asserting that NYK had significant contacts with the United States, including:

[O]perating air-cargo service at six U.S. airports and cargo transport by sea at twenty-seven shipping terminals in U.S. ports; regularly calling on at least thirty U.S. ports; and dedicating seven of its vessels exclusively for the delivery of Toyota automobiles to the United States. Plaintiffs assert that NYK Line has at least one bank account in the United States at HSBC Bank USA, N.A. in New York, and they highlight that shares of NYK Line stock, for which the Bank of New York Mellon operates as the depository, can be purchased by U.S. investors. Plaintiffs contend that NYK Line is a frequent litigant in U.S. courts, having initiated at least thirty lawsuits since 2010. Plaintiffs further assert that at least thirty-two cases have been filed against NYK Line in U.S. courts over the last ten years, none of which have been dismissed for lack of personal jurisdiction.

Id. at 613–14. See also *Douglass*, 46 F.4th at 231 (identifying Plaintiffs' multiple complaints). At no point during the litigation was it alleged that the injuries arose out of relation to NYK's contacts with the United States and instead proceeded on a theory of general personal jurisdiction. *Id.* See also Arthur Gribbin, *USS Fitzgerald and ACX Crystal collision: The Fifth Circuit Court of Appeals delineates the reach of personal jurisdiction*, GARD (Sept. 8, 2022), <https://www.gard.no/web/articles?documentId=34156916> (examining nature of claims raised by Plaintiffs). Since the Plaintiffs were unable to show that NYK was “at home” because it was incorporated and maintained its principal place of business in Japan, the Plaintiffs instead argued that an alternative “national contacts” test under the Fifth Amendment should apply. *Id.* The “national contacts” test would provide that NYK would be amenable to jurisdiction on the basis it had systematic and continuous contacts with the United States. *Id.*

consider itself “at home.”¹⁰ Moreover, the district court dismissed the plaintiffs’ contention that the “at home” test was inapplicable to admiralty cases and reaffirmed its circuit’s precedent that the Fifth and Fourteenth Amendment due process standards are the same.¹¹ The Fifth Circuit affirmed *per curiam*, however, suggesting it would reach a different result if not bound by circuit precedent.¹² Accordingly, the Plaintiffs’ petition for rehearing *en banc*

10. See *Douglass*, 465 F. Supp. at 629–30 (listing various reasons for finding lack of sufficient minimum contacts). The district court held that NYK was not considered “at home” in the United States “in the context of its entire operation.” *Id.* at 630. Specifically, the lower court was unconvinced that NYK maintaining less than six percent of its employees and generating less than ten percent of its revenue in the United States deemed them “at home.” *Id.*

11. See *id.* at 618–20 (outlining Plaintiffs’ Fifth Amendment argument regarding inapplicable use of *Goodyear* and *Daimler* in admiralty law). The Plaintiffs argued that the general jurisdiction test provided in *Goodyear* and *Daimler* was inapplicable in the current instance, having arisen under admiralty law. *Id.* Under federal law, the Plaintiffs also asserted a Fifth Amendment standard for due process. *Id.* The Plaintiffs proposed a “general fairness test incorporating *International Shoe’s* requirement that certain minimum contacts exist between the nonresident defendant and the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Id.* at 618. This proposed test was grounded in the extremely broad jurisdiction of the federal courts, particularly their exclusive jurisdiction for actions arising from “the high seas or navigable waters.” *Id.* at 618–19. The district court acknowledged that “the Supreme Court left open the question of whether the Fifth Amendment imposes the same constraints on the exercise of *persona jurisdiction*,” but found itself bound by the Fifth Circuit’s precedent “in the affirmative.” *Id.* at 619. See also *Douglass*, 46 F.4th at 231 (recounting procedural history accounting for *Patterson* precedent). The Fifth Circuit, upon rehearing, acknowledged its prior panel “suggested it would have reached a different result if not bound by *Patterson*.” *Id.*

12. See *Douglass v. Nippon Yusen Kabushki Kaisha*, 996 F.3d 289, 296–97 (5th Cir. 2021) (contemplating rule of orderliness). The Fifth Circuit reasoned that it had to follow judicial precedent concerning the application of Fourteenth Amendment caselaw. *Id.* at 297. They noted that “[h]owever persuasive we might find plaintiffs-appellants’ position persuasive” that Fifth Amendment due process is not bound by the Fourteenth Amendment, ultimately “it is well-settled in this circuit that the rule of orderliness prevents one panel of the court overturning another panel’s decision, absent an intervening change in law.” *Id.* at 297. The Court reasoned that the facts of *Douglass* were directly on point with its prior decision in *Patterson*, such as a collision that occurred in Russian waters and a defendant incorporated and maintaining its principal place of business in Norway. *Id.* The Court in *Patterson* applied the general jurisdiction test from *Daimler*, thus the Fifth Circuit found itself bound by this prior decision. *Id.* See *Douglass*, 46 F.4th at 231–32 (recounting procedural history after granting Plaintiffs’ petition for rehearing *en banc*). The Court’s opinion recited the previous decision’s criticisms by Judges Elrod and Willett, here two of five dissenting judges, in particular their perspective that *Patterson* was an “unnecessary limitation on Rule 4(k)(2).” *Id.* at 231.

was granted, and the Fifth Circuit, in a 12-5 majority, affirmed the Fifth Amendment's due process standard.¹³

The due process clauses in the Fifth and Fourteenth Amendments protect persons from the deprivation of "life, liberty, or property, without due process of law."¹⁴ The critical difference between the two clauses is the Fifth Amendment limits federal government action, while the Fourteenth Amendment limits the states' reach over defendants.¹⁵ Prior to the enactment of Rule 4(k)(2), the Supreme Court warned that "[g]reat care and reserve should be exercised when extending our notions of personal

13. See *Douglass*, 46 F.4th at 234–36 (recounting textual and procedural reasoning for holding). The Ninth Circuit rejected the Plaintiffs' theory that the Fifth Amendment due process "general fairness" test was an appropriate inquiry, instead criticizing the language as a "general jurisdiction theory in specific jurisdiction garb." *Id.* At the same time, the Court accepted NYK's contention that the Fifth Amendment due process test parallels the Fourteenth Amendment test, merely differentiating that it looks at the defendant's contacts with the United States in its entirety. *Id.* at 234–35. See also Hannah Albarazi, *Decision Awash in Footnotes Reveals 5th Circ. Judges' Depth*, LAW360 (Aug. 22, 2022, 11:24 PM), <https://www-law360-com.ezproxysuf.fl.o.org/articles/1522497/decision-awash-in-footnotes-reveals-5th-circ-judges-depth> (emphasizing brevity of footnotes within split opinion as indication of tumultuous jurisprudence). Between a majority, one concurrence, and three dissents, the Fifth Circuit "battl[ed] over whether the Fifth Amendment due process test for personal jurisdiction requires the same minimum contacts with the U.S. as the Fourteenth Amendment requires with a state," and "did not arrive there quietly." *Id.* See also Steinman, *supra* note 4 (recounting first Court of Appeals decision in 2021). The first panel for the Fifth Circuit found "itself constrained by an earlier Fifth Circuit decision" and persuaded by NYK's argument that the Fourteenth Amendment due process caselaw bound the circuit to the general personal jurisdiction test elaborated on in *Daimler*. *Id.* The majority explained that "the rule of orderliness prevents one panel of the court from overturning another panel's decision, absent an intervening change in law." *Id.*

14. See U.S. CONST. amend. V (stating Fifth Amendment). As written, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor be deprived of life, liberty, or property, without due process of law . . ." *Id.* See also U.S. CONST. amend. XIV (stating Fourteenth Amendment). As written, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." *Id.*

15. See Corby, *supra* note 1, at 172–85 (comparing federal and state long-arm statutes). Before Congress enacted Rule 4(k)(2), federal courts could utilize one of three methods for service of process: (1) they could coopt the state's long-arm statute for service of process outside the state; (2) utilize a federal statute authorizing national service of process; or (3) where Rule 14 or Rule 19 were applicable it could extend service of process within 100 miles of the district court. *Id.* While federal courts were able to coopt the Fourteenth Amendment's limitation on state jurisdiction, the enactment of Rule 4(k)(2) provided a federal remedy for situations in which a defendant who violated federal law could not be served under options (1) or (2). *Id.* at 169–70.

jurisdiction into the international field.”¹⁶ As the territorial scope of personal jurisdiction expanded procedurally under Rule 4(k)(2), the Supreme Court grappled with the increasing substantive due process issues governing whether a foreign defendant is amenable to jurisdiction.¹⁷ Following Rule 4(k)(2)’s enactment in

16. See *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 115 (1987) (quoting *United States v. First National City Bank*, 379 U.S. 378, 404 (1965)) (acknowledging factor of “unique burdens” placed upon defendant in consideration of international long-arm statute). The Supreme Court reversed and remanded the Supreme Court of California’s exercise of jurisdiction under the Fourteenth Amendment due process clause over Asahi Metals, a Japanese corporation indemnified in a products liability action. *Id.* The Supreme Court held that exercising jurisdiction over Asahi Metals, who manufactured and sold tire valves to a Taiwanese company that produced tires sold in the United States, was “unreasonable and unfair” in violation of the due process clause. *Id.* at 116. The Supreme Court reasoned that Asahi Metals did not support a finding of minimum contacts where it had merely placed a product into the stream of commerce rather than having “purposefully directed [its products] toward the forum State.” *Id.* at 112. Asserting it would be unfair and burdensome for the defendant to appear in the forum, the Supreme Court emphasized the importance of foreign relations in the exercise of personal jurisdiction over a foreign defendant, accentuating the “careful inquiry into the reasonableness of the assertion of jurisdiction” where there are “procedural and substantive interest of other nations” involved. *Id.* at 115.

17. See *Omni Capital Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 99–100, 109 (1987) (declining to create common-law rule authorizing service of process). Louisiana investors brought suit under the Commodities Exchange Act against two New York corporations, Omni Capital Corporation and Omni Capital International, Ltd. (Omni). *Id.* The investors alleged that Omni had fraudulently induced them to participate in an investment program involving commodity-future trades on the London Metals Exchange. *Id.* Omni impleaded Rudolf Wolff & Co. (Wolff), a British corporation they had employed to handle the trades, and James Gourlay, a British citizen and representative for Wolff. *Id.* While the action was pending, the Supreme Court held in a concurrent decision that the Commodities Exchange Commission Act granted an implied private cause of action. *Id.* The district court dismissed for lack of personal jurisdiction, holding that the Commodities Exchange Act did not enable nationwide service of process for private causes of action and Louisiana’s long-arm statute requirements had not been satisfied to authorize service over Wolff and Gourlay. *Id.* The Court of Appeals and Supreme Court affirmed, holding that the district court did not have authorization under Rule 4(e), which provides for the long-arm statute of the State in which the District Court sits, to exercise jurisdiction over a foreign party where the Commodities Exchange Act did not authorize nationwide service. *Id.* In response to the Court of Appeals’ dissenting opinion advocating for the federal courts to “fill the ‘interstices in the law inadvertently left by legislative enactment’ by creating their own rule authorizing service of process in this litigation,” the Supreme Court reverted to Congressional authority, thinking it “unwise for a court to make its own rule authorizing service of summons.” *Id.* at 109. See also Corby, *supra* note 1, at 169 (explaining origin of federal long-arm statute). Following its decision in *Omni Capital*, the Supreme Court held that per the separation of powers, Congress was the appropriate governmental arm to create a federal long-arm statute authorizing service of process over a defendant who violated federal law. *Id.* *Omni Capital* illuminated the “gap” that each state’s long-arm statutes had created: defendants could escape litigation if they violated federal law but did not have sufficient contacts within any state to fall within its ambit. *Id.* at 177. See also Andrew

the 1990s, the Supreme Court never explicitly addressed whether the Fifth Amendment due process standard adheres to the same analysis as the Fourteenth Amendment.¹⁸ On the other hand, in

Rhys Davies, *Judicial Minority Would Alter Jurisdiction For Foreign Cos.*, LAW360 (Oct. 18, 2022, 3:26 PM), <https://www-law360-com.ezproxysuf.flo.org/articles/1539824/judicial-minority-would-alter-jurisdiction-for-foreign-cos-> (elaborating on Supreme Court jurisprudence following *International Shoe*). In determining whether any limitations existed on the Fifth Amendment’s due process clause, “[t]he Supreme Court has never addressed that question, as *International Shoe* and virtually all its progeny arose in the 14th Amendment context.” *Id.* This subsequently begs the question, “does the Fifth Amendment impose the same, different, or, perhaps, no limitations on the exercise of personal jurisdiction over foreign corporations?” *Id.*

18. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 920 (2011) (holding state court did not have general jurisdiction over foreign subsidiary without minimum contacts). In *Goodyear*, the issue before the Supreme Court was whether the foreign subsidiary of a parent company located in the United States could be amenable to general jurisdiction consistent with the Due Process Clause of the Fourteenth Amendment for an activity unrelated to the forum. *Id.* at 918. Goodyear USA and three of its foreign subsidiaries were named as defendants after an accident owing to a defective tire resulted in the deaths of two thirteen-year-old boys from North Carolina in Paris, France. *Id.* The Supreme Court held that the subsidiary’s connection to the forum state, North Carolina, was too attenuated that a tire manufactured and sold abroad was insufficient to demonstrate a “‘continuous and systematic’ affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation’s contacts with the State.” *Id.* at 920. From the outset of its decision the Supreme Court identified the Fourteenth Amendment Due Process Clause as the standard of review based on the “canonical” opinion of *International Shoe*, the decision that was responsible for “set[ting] the outer boundaries of a state tribunal’s authority to proceed against a defendant.” *Id.* at 915. The Supreme Court held that Goodyear’s foreign subsidiaries failed to satisfy the “minimum contacts” requirement iterated in *International Shoe* on the basis of its “sporadically made [sales]” into North Carolina. *Id.* at 917. See also Robert Ellis Stengel, *Boeing, Boeing, Gone: General Jurisdiction Over Corporations, Principal Place of Business, and a Second Look at the Total Activities Test*, 88 BROOK. L. REV. 275, 276–77 (2022) (summarizing evolution of Supreme Court general personal jurisdiction test). *Goodyear* held that corporations may be subject to general personal jurisdiction where it is considered “at home,” namely being its state of incorporation and principal place of business. *Id.* Where the lower courts have “lack[ed] clear guidance” from the Supreme Court is in a scenario where a corporation has extensive business operations in the United States but a foreign state of incorporation or principal place of business. *Id.* at 277, 295. Since the Supreme Court’s decision in *Goodyear*, the federal courts “have largely applied the same definition for personal jurisdiction purposes, limiting application of general jurisdiction over a corporation to its state of incorporation and the state containing its corporate headquarters.” *Id.* at 277. Supreme Court jurisprudence following *Goodyear* has not “definitively close[d] the door to exercising general jurisdiction over a corporation incorporated or having its ‘principal place of business’ outside the forum state,” however, “it has declined to do so every time the issue has been raised.” *Id.* at 287. See also Matthew F. Sturley & Matthew H. Ammerman, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 46 TUL. MAR. L. J. 531, 586–87 (2022) (reporting general personal jurisdiction limitations). Federal courts have continued to affirm that the “paradigmatic home for a corporation is (1) the state of incorporation and (2) where

Daimler, the Supreme Court assumed a minimum contacts analysis and held foreign corporations amenable to general personal jurisdiction under the Fourteenth Amendment test.¹⁹

its principal place of business is located,” and only in “exceptional case[s]” is general jurisdiction amenable outside of these two locations. *Id.* See also Tanya J. Monestier, *Where Is Home Depot “At Home”?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L. J. 233, 244–45 (2014) (explaining effect of *Daimler* and *Goodyear*’s introduction of “at home” language). Commentators responded to the Supreme Court’s “at home” application as effecting significant change, reducing jurisdiction by way of contacts only in “exceptional[ly]” rare cases. *Id.* at 251. *Goodyear*’s invocation of the new “at home” test was heavily debated, the majority applying the phrase to significantly limit the scope of general jurisdiction, whereas the concurrence took a broader stance, invoking the phrase to apply to a corporation that enjoys “extensive benefits” in the forum states. *Id.* at 260–61. One of the effects of *Daimler* was it signaled the “death knell for doing business jurisdiction in the United States.” *Id.* at 233. Instead, a corporation conducting business within a state is insufficient, and the courts apply “a comparative approach, that is, by assessing a corporation’s contacts with the forum in relation to its contacts with other forums.” *Id.* at 266. Having the effect of restricting assertions of general jurisdiction, criticism has been directed at the ease with which the Supreme Court protected foreign defendants from “expansive assertions of general jurisdiction.” *Id.* at 246, 258.

19. See *Daimler AG v. Bauman*, 571 U.S. 117, 138–139 (2014) (rejecting general jurisdiction over foreign corporation for in-state subsidiary contacts under Fourteenth Amendment analysis). Citing an earlier decision, the Supreme Court affirmed the inquiry is “not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation’s ‘affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.” *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)). In *Daimler*, twenty-two Argentinian residents brought suit in federal court against DaimlerChrysler Aktiengesellschaft (Daimler), incorporated and headquartered in Germany, alleging its Argentinian subsidiary had committed several human rights violations. *Id.* at 121–22. Under a theory that Daimler had sufficient contacts with California via its U.S. subsidiary, incorporated in Delaware and its principal place of business in New Jersey, the issue was whether, under the Due Process Clause of the Fourteenth Amendment, the District Court could exercise general jurisdiction for claims involving foreign plaintiffs and actions that occurred outside the United States. *Id.* at 122. The Supreme Court was “instructed” by its prior decision in *Goodyear*, and thus adopted a Fourteenth Amendment analysis. *Id.* Unlike the facts of *Goodyear*, where the action was brought in the state of the victims’ domicile, it assumed a similar Fourteenth Amendment analysis for a foreign-incorporated and headquartered corporation where the claims arose entirely outside the United States. *Id.* Here, the Supreme Court narrowed its inquiry into whether the lower court’s holding that Daimler was at home in California by way of its subsidiary’s contacts in California, which distributed vehicles to dealerships throughout the United States and California, and held that the decision did not comport “with the limits imposed by federal due process.” *Id.* at 125. The Supreme Court applied a Fourteenth Amendment due process standard to a question of federal due process on the basis that California was unable to exercise personal jurisdiction imputable by Daimler’s subsidiary contacts. *Id.* It reasoned that Daimler’s limited contacts with California did not render it at home, thus, it was an “error for the Ninth Circuit to conclude that Daimler . . . was at home in California and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that

Most federal courts have followed the Supreme Court's implicit rule that "federal cases governed by Rule 4(k)(2) [are] measured with reference to the Fifth Amendment," meaning that in order to assert general personal jurisdiction over a foreign defendant, the "contacts with the United States must be so continuous and systematic as to render it essentially at home in the United States."²⁰ The Fifth Circuit embraced this governing rule

occurred or had its principal impact in California." *Id.* at 139. *See also* Davies, *supra* note 17 (reiterating Supreme Court jurisprudence under Fourteenth Amendment). In *Daimler*, the Supreme Court held that under the Fourteenth Amendment, corporations are subject to general jurisdiction only in the jurisdiction where incorporated and location of its principal place of business. *Id.* *See also* Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L. J. 101, 104–07 (2015) (criticizing *Daimler's* departure from "settled law"). Despite the *Daimler* majority basing its decision in the "historical roots" of general personal jurisdiction, *Daimler* is a departure from established law. *Id.* Prior to this decision, corporations were amenable to jurisdiction by way of maintaining a permanent presence or substantial level of business, but *Daimler* is a "game changer" that "advance[es] the policy goal of giving corporations the power to limit . . . where they must answer legal claims." *Id.* Relying on *Goodyear*, the majority did not explicitly restrict jurisdiction to solely the paradigm states of incorporation and principal place of business, but critics of the decision have questioned why *Daimler*, who had U.S. sales equal to one percent of Germany's GDP, was not found "at home" by such continuous and systematic contacts. *Id.* at 129–30. Advancing a scenario whereby multinational corporations may now forum shop, Justice Sotomayor's concurrences sharply criticized the majority's ruling as having "the ultimate effect . . . to shift the risk of loss from multinational corporations to the individuals harmed by their actions." *Id.* at 107, 134.

20. *See* *Patterson v. Aker Solutions Inc.*, 826 F.3d 231, 234 (5th Cir. 2016) (employing Fifth Circuit precedent for relevant due process inquiry). The Fifth Circuit considered the foreign corporation's contacts with the entire United States because "[t]he due process required in federal cases governed by Rule 4(k)(2) is measured with reference to the Fifth Amendment," therefore, the Fifth Circuit considered "[Aker Subsea's] contacts with the United States as a whole." *Id.* (quoting *Submersible Sys., Inc. v. Perforadora Cent., S.A. de C.V.*, 249 F.3d 413, 420 (5th Cir. 2001)). *Patterson* was a U.S. citizen who was injured while employed by Blue Offshore Projects BV aboard a Luxembourg-flagged vessel off the coast of Russia. *Id.* at 233. *Patterson* brought the action in the Eastern District of Louisiana against BlueShore Projects BV and two other companies, Aker Solutions, Inc., and FMC Technologies, Inc., that were involved in the operation. *Id.* The district court dismissed the action under Rule 4(k)(2), holding that Aker Solutions, Inc.'s place of incorporation and principal place of business were in Norway, and sending eleven employees to the United States did not qualify as sufficient contacts to render it at home. *Id.* at 233–35. Furthermore, there was no evidence Aker Solutions, Inc., maintained any offices, accounts, or other corporate activities in the United States. *Id.* at 235. The Fifth Circuit Court of Appeals affirmed the district court's holding, referencing the Supreme Court's decisions in *Daimler* and *Goodyear* as relevant authority for its inquiry, "Aker Subsea's contacts with the United States must be so continuous and systematic as to render it essentially at home in the United States." *Id.* at 234. (citing *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). Therefore, general personal jurisdiction was inappropriate where "[t]he record contains no evidence that Aker Subsea had any

in *Patterson*, holding that *Daimler's* unspoken extension to foreign defendants required that it determine whether a foreign corporation was amenable to general personal jurisdiction based on either (1) its jurisdiction of incorporation and its principal place of business, or (2) where its contacts with the entire United States were “so substantial and of such a nature to render it ‘at home.’”²¹ In more recent years, several federal circuits have simply followed this model.²²

The textual parallels in the Amendments’ respective due process clauses have easily induced the federal courts to adopt an unofficial, interchangeable standard.²³ Consequently, the

business contacts with the United States except for eleven secondment agreements.” *Id.* at 233–34.

21. See *Patterson*, 826 F.3d at 234 (finding no general personal jurisdiction under either standard). *Goodyear* and *Daimler* governed the Fifth Circuit’s inquiry into an assessment of personal jurisdiction under Rule 4(k)(2), thus due process was “‘measured with reference to the Fifth Amendment, rather than the Fourteenth Amendment.’” *Id.* (quoting *Submersible Sys., Inc. v. Perforadora Cent., S.A. de C.V.*, 249 F.3d 413, 420 (5th Cir. 2001)). Only in exceptional cases would it exercise general jurisdiction if its place of incorporation and principal place of business was outside U.S. territory. *Id.* *Aker Solutions, Inc.*, incorporated and maintaining its principal place of business in Norway, did not have contacts with the United States exceeding its eleven employees seconded there, thus did not have contacts so continuous and systematic to render it at home. *Id.* The Fifth Circuit distinguished its holding from two of its own previous decisions, noting that they preceded *Goodyear* and *Daimler AG*, which were both emblematic of an “access-restrictive trend” in the Supreme Court’s more recent personal jurisdiction jurisprudence. *Id.* at 236–37 n.7. See also *Davies*, *supra* note 17 (explaining significance of case-in-chief). The Fifth Circuit was guided by the “progeny” of the Supreme Court’s Fourteenth Amendment caselaw having never addressed whether Rule 4(k)(2) is governed by the Fifth or Fourteenth Amendment. *Id.* Thus, the Supreme Court’s “restrictive 14th Amendment” caselaw, including *Daimler*, would have the effect of precluding personal jurisdiction over a non U.S. defendant/corporation for claims arising outside its U.S. conduct. *Id.*

22. See, e.g., *Patterson*, 826 F.3d at 234 (relying on Fourteenth Amendment jurisprudence); *Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646, 651–52 (5th Cir. 2004) (holding foreign insurer had sufficient contacts via coverage and payment for hundreds U.S. companies); *System Pipe & Supply, Inc. v. M/V Viktor Kurnatovskiy*, 242 F.3d 322, 325 (5th Cir. 2001) (holding defendant’s fleet regularly called upon United States); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 54–55 (D.C. Cir. 2017) (emphasizing Supreme Court reliance on Fourteenth Amendment personal jurisdiction jurisprudence concerning Fifth Amendment question); *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 330 (2d Cir. 2016) (distinguishing *Daimler's* “at home” test applicable to foreign corporate civil defendants).

23. See Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1704–07 (2020) (expounding on widespread confusion surrounding federal personal jurisdiction jurisprudence). Proponents of an originalist understanding of the Constitution have criticized the federal court’s oversight of historical evidence in support of understanding the due process in the modern day. *Id.*

Fifth Circuit is among six other circuits that rely solely on the Supreme Court's preexisting Fourteenth Amendment caselaw to determine whether a nonresident defendant has minimum contacts with the United States and whether maintenance of the suit does not offend traditional notions of fair play and substantial justice.²⁴ In spite of this, doubt has pervaded the lower federal courts following the Supreme Court's more recent declaration in *Bristol-Meyers* that "we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."²⁵

Without Supreme Court precedent on point, the courts of appeals all agree that the Fifth Amendment requires at least the sorts of national contacts that the Fourteenth Amendment requires of a state. In other words, current doctrine treats the United States as a state, but larger; it take the Fourteenth Amendment as given, and remakes the Fifth Amendment in its image. This is all backwards. The Fifth Amendment came first, and the Fourteenth was modeled on it. We need to understand how personal jurisdiction was supposed to work—before the Fourteenth Amendment—if we want to understand what the Due Process Clauses actually do.

Id. at 1704–06. *See also* Brunk, *supra* note 2 (advocating for originalist revisitation of Fifth Amendment's meaning). There has been a suggestion that certain Supreme Court justices are "open to rethinking due process along originalist lines" that could move towards a "bright-line Fifth Amendment alternative," thus suspending all due process limits in a federal context. *Id.*

24. *See Patterson*, 826 F.3d at 234 (asserting "proper forum for exercising general jurisdiction over corporation where regarded at home."). *See also* *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 238 (emphasizing federal accord). Each "Fifth Circuit decision addressing the scope of contacts required for personal jurisdiction under the Fifth Amendment has applied the then-existing Fourteenth Amendment framework" in conjunction with "six other circuits." *Id.* *But see* Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 725–26 (criticizing *Daimler's* oversight of lower general personal jurisdiction cases). Justice Ginsburg, writing for the majority in *Daimler*, "failed to mention of the multitude of general jurisdiction cases decided by the lower courts." *Id.* at 725. Notably, "[m]any regarded the failure of the Court to grant certiorari in any of the lower court cases involving corporate-activities-based jurisdiction as an indication that the Court was willing to give states wide latitude in asserting that type of all-purpose jurisdiction." *Id.* at 725–26.

25. *See Bristol-Meyers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1777 (2017) (holding lack of specific jurisdiction). The Supreme Court held that *Bristol-Meyers Squibb*, a pharmaceutical company incorporated in Delaware and headquartered in New York, was not amenable to specific personal jurisdiction in California's state court in a suit brought by eighty-six California residents and nearly 600 residents from thirty-three other states. *Id.* at 1777–79. The plaintiffs alleged that a *Bristol-Meyers Squibb*-manufactured medication, *Plavix*, had injured their health. *Id.* *Bristol-Meyers Squibb* maintained research facilities in California and employed about 250 sales representatives there but did not specifically market *Plavix* in California. *Id.* The Supreme Court affirmed the California Supreme Court's lack of general jurisdiction in keeping with

In *Douglass v. Nippon Yusen Kabushiki Kaisha*, the Fifth Circuit affirmed its prior holding, finding that the Fifth Amendment requires the same minimum contacts with the United States as the Fourteenth Amendment requires with a state.²⁶ The Court began by rejecting the plaintiffs' "rule-centric" argument that Rule 4(k)(2) would be nullified by imparting the states' limits on the sovereign United States.²⁷ Instead, the Court reasoned that federalism

Daimler's application, but reversed its finding for specific jurisdiction. *Id.* The Supreme Court reasoned that while Bristol-Meyers Squibb has contacts with the forum state, its facilities and the presence of sales representatives were not affiliated with the nonresident plaintiffs' claims. *Id.* Furthermore, the nonresident plaintiffs neither purchased nor ingested Plavix in California, thus, the claims did not arise out of or relate to the forum. *Id.* at 1781–82. While the issue before the Supreme Court was whether California's exercise of personal jurisdiction violated the Fourteenth Amendment due process clause, its final words suggested it was unsettled whether similar restrictions under Fifth Amendment due process would govern specific jurisdiction by a federal court. *Id.* at 1784. *See also* Sokoloff, *supra* note 1 (illustrating unique circumstances of case-in-chief's procedural posture). The Court's decision in *Douglass* trailed a line of federal circuits that "assumed or held without much analysis that federal service-of-process provisions are subject to the same limits as their state-law counterparts" despite suggestions in *Bristol-Meyers* and *Ford v. Montana Eighth Judicial Dist. Ct.* that exercise of federal power under the Fifth Amendment does not comport with state power under the Fourteenth. *Id.* *See also* Davies, *supra* note 17 (highlighting unanswered questions in determining standard for general personal jurisdiction). The Supreme Court indicated it may reconsider the scope of personal jurisdiction relative to corporations as invited in its decision in *Ford v. Montana Eighth Judicial Dist. Ct.* *Id.*

26. *See Douglass*, 46 F.4th at 231–32 (applying standard of review). The Fifth Circuit on rehearing en banc considered the Rule 12(b)(2) dismissal for lack of personal jurisdiction de novo. *Id.* The Court considered two issues logically, first, rejecting the Plaintiffs' argument that NYK did not have any Fifth Amendment due process rights to contest the assertion of personal jurisdiction, and second, rejecting the Plaintiffs' theory that Fourteenth Amendment due process is strictly limited to principles of interstate federalism. *Id.* at 235. *See also* Davies, *supra* note 17 (explaining majority's rejection of relaxing Fifth Amendment standard to permit jurisdiction over foreign corporation). The significance of its decision means that "[i]f transplanted into the Fifth Amendment or Rule 4(k)(2) context, the Supreme Court's recent restrictive 14th Amendment specific and general-jurisdiction case law, such as the 2014 decisions in . . . *Daimler AG v. Bauman*, would preclude the exercise of personal jurisdiction over a non U.S. corporation for claims arising from its ex U.S. conduct." *Id.*

27. *See Douglass*, 46 F.4th at 233–36 (rejecting Plaintiffs' argument). The Court outright rejected Plaintiffs' contention that Fifth and Fourteenth Amendment due process requirements are fundamentally different on the basis that both Due Process Clauses were adopted using the same language and for the same purposes. *Id.* The Plaintiffs' argued that the Fourteenth Amendment Due Process Clause is "animate[d]" by interstate federalism governing the states' sovereign limits over an out-of-state defendant. *Id.* It contended that Rule 4(k)(2) would be void if the Fifth Amendment adopted a similar inquiry because the Fifth Amendment is respective to the sovereign authority of the United States. *Id.* The Plaintiffs proposed the Court adopted a "novel theory" where the Fifth Amendment due process inquiry calls for whether a defendant was doing "enough systematic and continuous business in the United States that it had fair

concerns are only relevant in the context of specific jurisdiction, and here, the Fifth Amendment functioned to promote “international comity” similarly to how the Fourteenth Amendment promotes interstate federalism.²⁸ The Court relied on three principal rationales for holding the Fourteenth Amendment’s “minimum contacts” standard is mirrored in the Fifth Amendment: (1) similar

notice it could be subjected to suit in federal courts.” *Id.* at 235. The Court criticized the Plaintiffs’ test as a “personal jurisdiction test . . . dress[ed] . . . in specific jurisdiction garb.” *Id.* In addition, the Court held that the Plaintiff’s “rule-centric view” of how Rule 4(k)(2) governs the territorial limits of service of process is not the central inquiry, instead overlooking “the purely constitutional nature of the personal jurisdiction question at issue here.” *Id.* at 233. Citing Rule 4(k)(2)’s adoption in response to *Omni Capital*, the Court emphasized that Rule 4(k)(2) functions in a strictly procedural manner to govern the scope of a court’s personal jurisdiction, rather than “abridg[ing], enlarge[ing] or modify[ing] any substantive right.” *Id.* at 234.

28. See Davies, *supra* note 17 (explaining Court’s articulation of federalism concerns in case-in-chief). The Fifth Circuit’s response to the role of federalism in its decision offered that “the Fifth Amendment promotes international comity in the same way that the 14th Amendment promotes interstate federalism.” *Id.* See also *Douglass*, 46 F.4th. at 236–37 (tracing origins of Due Process clauses). The Fifth Circuit emphasized the textual similarities in both Amendments’ due process clauses, specifically that both refer to protecting persons from the deprivation of “life, liberty, or property, without due process of law.” *Id.* at 236. Their only distinction is the Fifth Amendment Due Process Clauses limits the federal government, while the Fourteenth limited the States. *Id.* While the Plaintiffs proffered that the Fourteenth Amendment “vindicat[es] federalism principles that are irrelevant under the Fifth Amendment,” the Court disparaged the Plaintiffs outlook as “miss[ing] the very core of due process.” *Id.* Instead, the Court referenced the Magna Carta as the foundation of due process, a substantive right at its core intended to protect individual liberties. *Id.* Citing *International Shoe*’s “minimum contacts” test, the Fifth Circuit echoed the Supreme Court’s justification for crafting a test that prevented defendants from having to litigate in either an inconvenient forum or a forum with an attenuated connection to the claims. *Id.* While the Fifth Circuit did not dismiss that federalism was relevant to the interpretation of the Fourteenth Amendment, it expressed that it was a “derivative concern” and in the context of the Fifth Amendment functions analogously “under the rubric of ‘international comity.’” *Id.* at 237. Analogizing that the Clauses guarantee individual liberties in their respective manners, the Court held that their standards have developed in conformity,

Just as a state court’s exercising coercive power over an out-of-state defendant offends Fourteenth Amendment due process when the relationship among the defendant, the state, and the litigation is insufficient, so, too, may a federal court’s exercising coercive power over a foreign non-resident defendant offend Fifth Amendment due process when the relationship among the defendant, the United States, and the litigation is insufficient. Either situation potentially infringes individual liberty, though the impact of foreign relations and national security surely can affect the United States’ “sovereign reach” in ways irrelevant to this case.

Id. Specific to NYK, the majority reasoned that even if NYK were amenable to federal jurisdiction, the Court acknowledged that it could ultimately be dismissed on the basis of “non conveniens” due to concurrent litigation in the Japanese courts. *Id.* at 237 n.17.

liberty interests are guaranteed and similar language is used in both amendments; (2) the Fifth Circuit has repeatedly relied on judicial precedent utilizing the Fourteenth Amendment framework from *Daimler* where the Fifth Amendment is invoked under Rule 4(k)(2); and (3) six other federal circuits apply a Fourteenth Amendment due process analysis in cases concerning the Fifth Amendment.²⁹ Applying the Fourteenth Amendment standard, the Court held that exercising personal jurisdiction over NYK did not comport with its Fifth Amendment due process rights.³⁰

In contrast, the five dissenting judges asserted that the majority textually, historically, and structurally failed to prove that the Fifth Amendment limits Congress's ability to exercise personal jurisdiction.³¹ The dissent concluded that adopting mirroring

29. See *Douglass*, 46 F.4th. at 237–39 (citing Fifth Circuit precedent). The Court emphasized that not only did the majority of federal circuits apply the Fourteenth Amendment due process case law to cases governed by the Fifth Amendment, but within its own circuit, “[e]very Fifth Circuit decision addressing the scope of contacts required for personal jurisdiction under the Fifth Amendment has applied the then-existing Fourteenth Amendment framework.” *Id.* at 237. Furthermore, it cited its circuit’s controlling decision in *Patterson*, which “squarely relied” on the Supreme Court’s decision in *Daimler*. *Id.* at 240. Agreeing with the Second, Sixth, Seventh, Eleventh, and D.C. circuits, the Court declined to “rig a novel personal jurisdiction test under the Fifth Amendment.” *Id.* Bound by the Supreme Court’s “reigning test for personal jurisdiction” and Fifth Circuit precedent in *Patterson*, the Court rejected “plaintiffs’ invitation to craft an atextual, novel, and unprecedented Fifth Amendment personal jurisdiction standard.” *Id.* at 243.

30. See *id.* at 242–43 (holding NYK did not have sufficient minimum contacts). Applying a Fourteenth Amendment analysis to NYK’s contacts, the Court held that NYK was not amenable to general jurisdiction. *Id.* NYK was considered “at home” in Japan, its place of incorporation and principal place of business, and did not have systematic and continuous contacts with the United States to render it at home. *Id.* at 243. The Court conceded that NYK’s contacts were “substantial” by way of its activity, including: calling on over 50 U.S. ports, generating \$1.47 billion in North American revenue via its North American entities, and operating twenty-seven shipping terminals and six cargo terminals in the United States. *Id.* at 242–43. Citing *Daimler*, the Court determined that these contacts did not satisfy the threshold for rendering NYK “at home” in the forum, instead constituting only a portion of its worldwide contacts. *Id.* at 243. “[T]he United States is hardly ‘the center of [NYK’s] activities’ or a ‘surrogate for [NYK’s] place of incorporation or head office.’” *Id.* The Court also referenced the district court’s findings that NYK’s port call in the United States represented “just six to eight percent” of its worldwide port calls, its “high-level decision-making” occurred in Japan, and less than 1.5% of its employees were located in North America. *Id.* The Court held that “despite its contacts with the United States,” comparatively speaking, NYK’s contacts did not sufficiently render NYK “at home.” *Id.*

31. See *id.* at 249–51 (Elrod, J., dissenting) (arguing for exercise of personal jurisdiction). In a lengthy and impassioned dissent, Judge Elrod accused the majority of failing to consider the original meaning of due process under the Fifth Amendment by “parrot[ing] what the Supreme Court has said about the Fourteenth’s.” *Id.* at 251. In a

standards nullifies Rule 4(k)(2) and provides significantly greater due process protections to foreign civil defendants.³² The dissent challenged the Court’s “silent” importation of Fourteenth Amendment jurisprudence and emphasized that the Supreme Court “itself has specifically flagged and repeatedly reserved the question before us for another day.”³³ Reasoning that originalist

heavily footnoted opinion, Judge Elrod vehemently criticized the majority’s failure to substantively engage in an originalist interpretation of the Fifth Amendment,

Lacking Supreme Court case law restricting federal courts’ exercise of personal jurisdiction under the Fifth Amendment, NYK must convince us, as a matter of text, history, and structure, that the Fifth Amendment’s Due Process Clause merely mimes the Fourteenth’s as to personal jurisdiction. But NYK has made no such argument, and nor has the majority opinion . . . In fact, the majority opinion expressly refuses to engage with the contrary arguments presented in this dissent, declining to address anything but “the exact arguments raised by the plaintiffs.”

Id. at 254 n.6. See also Josh Blackman, *The En Banc Fifth Circuit Sharply Divides on Personal Jurisdiction and the Fifth Amendment*, *VOLOKH CONSPIRACY* (Aug. 18, 2022, 3:26 PM), <https://reason.com/volokh/2022/08/18/the-en-banc-fifth-circuit-sharply-divides-on-personal-jurisdiction-and-the-fifth-amendment/> (emphasizing ideological and originalist divide among majority and dissenting opinions). In a lengthy and extensive dissent that “engages with all of the leading scholarship on the Due Process Clause of the Fifth Amendment,” Judge Elrod offered that it was the Court’s “duty” to ascertain the original meaning of the Fifth Amendment. *Id.*

32. See *Douglass*, 46 F.4th at 249. (Elrod, J., dissenting) (arguing for exercise of personal jurisdiction). The dissent accused the majority of affording greater benefits to foreign civil defendants than foreign criminal defendants, arguing that the decision offended “‘traditional notions of fair play and substantial justice’ for injured United States servicemen and bereaved military families . . .” *Id.* Without outright rejecting the notion of precedent, the dissent took aim at the majority’s willingness to overlook what it described as precedent “awash with confusion”; instead saying “[t]he full court accepted our invitation to reconsider the propriety of applying the Supreme Court’s Fourteenth Amendment precedents in the Fifth Amendment context. But today the majority opinion declines to chart a new course, leaving our precedent at sea and the plaintiffs high and dry.” *Id.* at 250.

33. See *id.* at 251–54 (criticizing Fifth Circuit adoption of Fourteenth Amendment jurisprudence into Fifth Amendment cases). One of the dissent’s primary criticisms of the majority opinion was its assumption that Fourteenth Amendment jurisprudence applied to Fifth Amendment, claiming the Fifth Circuit’s duty as a lower court is to “percolate the arguments raised by this novel constitutional issue for eventual Supreme Court review.” *Id.* at 252–53.

We are bound to apply controlling law as it stands. In this case, there is no controlling Supreme Court precedent. What controls is the Fifth Amendment Due Process Clause. If the en banc majority is convinced that the Fifth Amendment Due Process Clause, as originally understood, imposes the same set of jurisdictional rules that the Supreme Court has decreed pursuant to the Fourteenth Amendment, then it bears the burden of proving that with reference to the Fifth Amendment’s text, history, and structure. The majority opinion has made no such effort . . . The text, history, and structural implications of the Fifth Amendment

scholarship of the Fifth Amendment's due process clause indicates "due process of law" underwent a "linguistic drift" during the seventy-five years before the Fourteenth Amendment was enacted, the dissent contended that the Fifth Amendment was not designed to be governed by the interstate-federalism principles of the Fourteenth Amendment.³⁴ The impassioned dissent argued the majority's decision not only protects a multinational corporation that found itself at home in the United States, but "chart[s] a new course, leaving precedent at sea and the plaintiffs high and dry."³⁵

Due Process Clause suggest that its original public meaning imposed few (if any) barriers to federal court personal jurisdiction.

Id. at 253–55. The dissent relied on *Bristol-Meyer Squibb Co.* as illustrative that the Supreme Court had "flagged" the issue for its consideration. *Id.* at 252. *Contra id.*, at 243 (Ho, J., concurring) (disagreeing with dissent's proposition matter reserved). In advocating for the majority opinion, Judge Ho acknowledge the dissent's inability to "point to a single Supreme Court decision holding that we should interpret Fifth Amendment due process differently from Fourteenth Amendment due process." *Id.* at 244. Furthermore, the issue of whether the Supreme Court had reserved the issue was addressed as a possibility rather than a guarantee of whether the Amendments were to be constructed differently. *Id.* at 243. In the absence of a circuit split, "the Supreme Court repeatedly declined to address the question of divergence in personal jurisdiction cases" *Id.* at 248.

34. *See id.* at 254–65 (Elrod, J., dissenting) (tracing historical origins of Fifth Amendment due process). The dissent scathingly accused the majority of "hopscotch[ing] right over all this history, leaping from Runnymede in 1215 A.D. straight to Washington, D.C. in 1945." *Id.* at 262. Instead, the dissent highlighted the ratification of the Fifth Amendment in 1789, which preceded the Fourteenth Amendment by over seventy years, and the historical implications of their divergence. *Id.* at 263. Specifically, Judge Elrod advocates that Fifth Amendment due process has "little to do with jurisdiction" when read in an originalist manner. *Id.* at 258. Looking to nineteenth-century case law, the dissent conveys that "Fifth Amendment due process has no bearing on the extent to which Congress could authorize federal courts to issue process internationally." *Id.* at 260. Instead, Judge Elrod coins the term "linguistic drift" to refer to originalist scholarship examining how "due process of law" was understood in the eighteenth century to reflect a technical legal meaning "service of the proper writ—what we call 'service of process' today," but by the ratification of the Fourteenth Amendment came to refer to procedural fairness. *Id.* at 263. In keeping with its originalist meaning, Judge Elrod proposes that Fifth Amendment due process does not impose any constitutional limits on the federal courts' exercise of personal jurisdiction. *Id.* at 262. *Contra id.*, at 248–49 (Ho, J., concurring) (disagreeing with dissent's "linguistic drift" theory). Judge Ho does not accept the dissent's "linguistic drift" theory on the basis it would only complicate an existing body of substantive constitutional law, rendering the law "more byzantine." *Id.*

35. *See id.* at 250 (Elrod, J., dissenting) (finding NYK had sufficient contacts with United States). The dissent is particularly critical of the majority's finding that NYK did not have sufficient contacts by way of its 1,500 annual calls in U.S. ports, its significant revenue stream of \$1.5 billion, and the fact NYK had brought over 78 lawsuits in federal courts seeking damages over \$22 million. *Id.* at 273–74. Finding that NYK had availed itself significantly of the United States as a forum in previous litigation, Judge

The Fifth Circuit's decision in *Douglass v. Nippon Yusen Kabushiki Kaisha* appropriately applied governing precedent in *Patterson*.³⁶ The Court correctly relied on *Patterson* in analyzing whether general jurisdiction exists over a foreign defendant based on its contacts with the entire United States in accordance with the Supreme Court's adoption of this standard in *Daimler*.³⁷

Elrod was critical of the majority's holding, "[w]e can prosecute foreign pirates, arms traffickers, murderers, and terrorists in our federal courts for criminal conduct abroad; we can condemn them to life imprisonment; we can sentence them even to death; but we cannot . . . subject them to *civil* suit in United States federal courts without violating due process . . ." *Id.* at 269–70. *See also* Albarazi, *supra* note 13 (illustrating animated discussion in case-in-chief footnotes). The principal dissent authored by Justice Elrod wrote an impassioned forty-five footnotes, one of which listed all 78 cases NYK had brought in the United States, "illustrating her point that NYK should be considered 'at home' in the U.S. and should have to face the claims brought by the families of those killed and the injured survivors from the ship collision." *Id.*

36. *See Douglass*, 46 F.4th at 238–40 (relying on Fourteenth Amendment cases). The majority pointed to *Patterson*, an earlier Fifth Circuit decision that relied on the Supreme Court's formulations in *Daimler* to determine whether general jurisdiction over a foreign defendant existed based on its contacts with the United States. *Id.* Bound by the rule of orderliness, it noted that its circuit had "never found that a foreign corporation's contacts with the United States alone supported general jurisdiction over unrelated lawsuits." *Id.* at 238. *See also Patterson*, 826 F.3d at 235–36 (affirming circuit precedent). In *Patterson*, the Fifth Circuit reiterated that "to assert general personal jurisdiction under Rule 4(k)(2), Aker Subsea's contacts with the United States must be so continuous and systematic as to render it essentially at home in the United States." *Id.* at 235. Citing *Daimler* and *Goodyear* as instructive, the Fifth Circuit declined to find that eleven employment agreements represented any exceptional case for finding Aker Solutions, Inc. was "at home." *Id.*

37. *See Douglass*, 46 F.4th at 239 n.23 (clarifying Fifth Circuit interpretation of *Daimler*). In *Daimler*, the Supreme Court "laid to rest the pervasive fallacy" that *International Shoe's* use of the words "continuous and systematic" described the level of contacts necessary for specific jurisdiction. *Id.* The Court rejected the Plaintiffs' reliance on *Adams v. Unione Mediterranea di Sicurtà*, an earlier Fifth Circuit decision that held an Italian insurer had "continuous and systematic contacts with the United States" on the basis it was strictly an application of specific jurisdiction, not general jurisdiction. *Id.* at 239. *But see* Peterson, *supra* note 24, at 726–29 (criticizing Supreme Court's dismissal of federal court decisions). The Supreme Court's decision in *Daimler* suggested that questions concerning general jurisdiction were not considered as frequently as specific jurisdiction, but "[t]he relative infrequency of general jurisdiction cases in the Supreme Court is no indication of the importance of corporate-activities-based jurisdiction as an aid for a plaintiff seeking easy resolution of its claims." *Id.* The Supreme Court seemed more eager to diminish general jurisdiction by way of a corporation conducting business within the forum, and thus its holding narrowed the scope of general jurisdiction under the elusive "at home" test, "giving a huge tactical advantage to corporate defendants." *Id.* at 749. Importantly, "Justice Ginsburg essentially eliminated corporate-activities-based jurisdiction (and with it, hundreds of lower court cases basing jurisdiction on that standard) by limiting it to cases in which a corporation is 'at home,' by which she meant, the state of incorporation and principal place of business." *Id.* at 661–62.

Bound by both the Fifth Circuit's and the Supreme Court's controlling precedent, Justice Ho concurred, "the members of this court all agree that fidelity to Supreme Court precedent must trump fidelity to text and original public meaning."³⁸

Although Justice Elrod's dissent argued that the majority's opinion raised a "novel constitutional issue" that should be reserved for the Supreme Court, the majority properly declined to fashion a new personal jurisdiction test under the Fifth Amendment.³⁹ Looking to the majority of circuits that apply an equivalent personal-jurisdiction test under the Fifth and Fourteenth Amendments, the Court correctly noted the lack of a circuit split to require Supreme Court intervention in the matter.⁴⁰ Not only does this indicate that most circuits have embraced a similar theory of personal jurisdiction, but the Supreme Court has

38. See *Douglass*, 46 F.4th at 239 (describing other federal circuit jurisprudence). Relying on authority from at least six other federal circuits, the Fifth Circuit relied on the other circuits' interpretation that "no meaningful difference exists between the Fifth and Fourteenth Amendments' minimum contacts analyses." *Id.* Resting on a large body of authority from the other circuits, in addition to controlling authority from the Supreme Court, the Court recognized its posture in relying on precedent, "[f]ar be it this lower court to muddy the waters further on a critical issue that precedes litigation in every federal court." *Id.* at 239–40 (citing *Bristol-Meyers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1784 (2017); *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 (1987); *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 113 (1987)). *But see* Cornett & Hoffheimer, *supra* note 19, at 155–58 (questioning harmony within Supreme Court doctrine). While it is not explicitly clear to what extent the majority agreed with Justice Ginsburg's articulation of general jurisdiction under the "at home" theory, having tactfully stayed silent on an explicit form of contacts-based jurisdiction, it is apparent that recent Supreme Court decisions are "accompanied by unanimous and near-unanimous opinions that propound clear rules . . . [causing] a reduction of jurisdiction over nonresident corporations engaged in activity in more than one state or country." *Id.*

39. See *Douglass*, 46 F.4th at 239 (rejecting idea Supreme Court reserved question to lower courts). The Court rejected both the Plaintiffs' formulation of a "national contacts" test, in addition to the dissent's proposition that the Supreme Court had reserved the question to the lower courts on whether the Due Process standard differentiated under the respective amendments. *Id.* Instead, the Fifth Circuit stated, "[i]t appears that the Court reserved only the predicate question whether it is appropriate under the Fifth Amendment to consider 'national' contacts, rather than . . . the contacts between the defendant and the State in which the federal court sits." *Id.* at 240 n.26 (citing *Asahi Metals*, 480 U.S. at 113).

40. See *id.* at 240 (deferring to federal circuits). Specifically, the Court declined to intervene into the issue and was "not encouraged to do so because the Supreme Court has occasionally reserved deciding the question 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." *Id.* (citing *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1784).

also rejected “the theory of divergence” proffered by the dissent.⁴¹ The Fifth Circuit’s decision leans heavily in favor of a precedential comparative interpretation of the “at home” standard despite NYK availing itself of the U.S. legal system.⁴²

41. *See id.* at 248 (Ho, J., concurring) (rejecting suggestion of circuit split requiring Supreme Court intervention). *See also* Cornett & Hoffheimer, *supra* note 19, at 119–20 (clarifying issues in *Daimler* analysis). Though the Supreme Court did not explicitly state it was considering the question of whether the Fourteenth Amendment due process test is imparted into the Fifth Amendment, the framing of issues pertaining to the Fourteenth Amendment, coupled with the international aspect of the defendant, *Daimler*, meant the case was about “the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.” *Id.*

42. *See* Cornett & Hoffheimer, *supra* note 19, at 106–07 (criticizing *Daimler* holding). Note that “in a rush to protect defendants from the perceived evils of forum shopping, the Court gives corporations unprecedented power to predetermine what states or countries they can be sued in — and what law will apply to them.” *Id.* *See* Monestier, *supra* note 18, at 253–55 (criticizing comparative approach under *Daimler*). *Daimler*’s comparative approach of a corporation’s contacts is “untethered” in its analysis of “the relative magnitude of [in-state contacts] in comparison to the defendant’s contacts with other States [or countries]” and should not hinge on the defendant’s “interactions elsewhere.” *Id.* In *Daimler*, the Supreme Court did not discredit *Daimler*’s presence of multiple offices in the United States and its distribution of products accounting for billions in sales, but its contacts were not considered significant enough in California against the backdrop of its worldwide operations. *Id.* Therefore, “[t]he Court’s adoption of a comparative test functions to create a much higher standard for the assertion of general jurisdiction than previously existed.” *Id.* at 256. Moreover, “[n]ot only does the defendant have to have continuous and systematic contacts with the forum, but those contacts must be more significant than the contacts it has with other states or countries.” *Id.* *See also* *Douglass*, 46 F.4th at 242–43 (comparing NYK’s international contacts). Applying a comparative approach, the majority considered NYK’s contacts relative to its international presence. *Id.* “[C]omparatively, NYK’s contacts with the United States comprise only a portion of its worldwide contacts.” *Id.* at 243. Finding that NYK’s port calls in the United States constituted six to eight percent of its worldwide calls, and its U.S. employees less than one and a half percent, the Court held like in *Daimler* NYK was not “at home.” *Id.* *See also* *Patterson v. Aker Solutions Inc.*, 826 F.3d 231, 236–37 (5th Cir. 2016) (finding *Aker* had only eleven secondment agreements). *Contra* *Adams v. Unione Mediterranea di Sicurta*, 364 F.3d 646, 651–52 (5th Cir. 2004) (finding sufficient contacts). Here, a foreign insurer was found to have sufficient contacts based on having paid over 100 claims to U.S. companies, shipped over 200 shipments to the United States, and paid numerous individuals to conduct its business in the United States. *Id.* *But see* *Douglass*, 46 F.4th at 273–75 (Elrod, J., dissenting) (arguing NYK had sufficient contacts). NYK “regularly call[s] on at least thirty United States ports, averaging about 1,500 calls annually,” “operates twenty-seven shipping terminals in United States ports,” “[s]hares of NYK stock are deposited . . . and purchased by United States investors,” and “NYK reaps roughly \$1.5 billion in annual revenue in North America.” *Id.* at 273. “In the course of doing business here, NYK has frequently availed itself of the American legal system. The corporation has brought at least seventy-eight lawsuits in federal court since 1993 (almost three per year), thus invoking the power of our courts to demand over \$22 million in damages.” *Id.* “It is hardly too distant or inconvenient for NYK to litigate here as a plaintiff; why, then, is

Given the striking similarities between the due process Clauses' protections from the deprivation of life, liberty, or property, the Court's examination of the guarantees provided by both Clauses was a critical step in determining that the Clauses function analogously in their reach over a foreign defendant.⁴³ Analyzing how the Fourteenth Amendment functions as a limit over the state's coercive power over out-of-state defendants, the Court clarified that the Fifth Amendment acts comparatively to limit the federal government's reach over a foreign nonresident defendant under the guise of "international comity."⁴⁴ Although the dissent

it too distant and inconvenient as a defendant?" *Id.* at 274. *Contra Patterson*, 826 F.3d at 234–35 (finding no evidence of Aker maintaining U.S. bank accounts or corporate activities). *See also* Peterson, *supra* note 24, at 731 (suggesting "at home" test increases burdens on plaintiff while protecting defendants). Furthermore, "[t]he Supreme Court does not need to establish a rule that limits jurisdiction in cases involving American plaintiffs against domestic corporations and prevents such plaintiffs from suing in the most convenient forum when that forum would not impose a significant burden on the defendant." *Id.* *See also* Wilson, *supra* note 5 (describing dissent's criticisms). Justice Elrod was particularly troubled by the majority's decision, which essentially immunized a company with "extensive business dealings" in the United States, was diametrically opposed to Fourteenth Amendment precedent. *Id.*

43. *See Douglass*, 46 F.4th at 243 (Ho, J., concurring) (agreeing with majority interpretation of due process). Judge Ho's concurrence emphasizes that "[t]here's no denying the textual parallel between the Fifth and Fourteenth Amendments. That's why the majority today understandably construes 'due process of law' to mean the same thing under the Fifth and Fourteenth Amendments alike." *Id.*

44. *See id.* at 237 n.17 (questioning slippery slope of Plaintiffs' national contacts theory). The Court warned that, "[u]nder the plaintiffs' theory, virtually every foreign corporation with more than a nominal amount of business in the United States can be haled into federal court for any federal claim." *Id.* The Court emphasized that Plaintiffs' federalism concerns are more relevant in the context of specific jurisdiction, where the state is exercising its power over individual liberties, but under the Fifth Amendment this theory analogously extends to foreign defendants. *Id.* at 236 n.16 (citing *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 592 U.S. 1017, 1025 (2021); *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1780–81). The Court reasoned that infringement on an individual's liberty is threatened by a federal court exercising "coercive power" over a foreign nonresident defendant where the defendant's relationship with the forum is too attenuated. *Id.* *See also* Peterson, *supra* note 24, at 730–31 (interpreting "transnational context" of *Daimler*). In *Daimler*, the Supreme Court took into consideration the role of "international rapport" and comity in considering whether *Daimler* was amenable, holding that it did not comport with "fair play and substantial justice." *Id.* at 730. There were specific concerns that under an expansive reading of general personal jurisdiction, this would threaten the implementation and recognition of international agreements and judgments if foreign corporations feared being dragged into U.S. courts. *Id.* *But see* Cornett & Hoffheimer, *supra* note 19, at 163 (condemning judicial consideration of international policy). Notably, "[r]equiring constitutional deference to expectations of jurisdictional immunity by foreign corporations rests on questionable economic policy." *Id.* "Grounding such limitations in the Due Process Clause reveals a laudable concern with the liberty interest of out-of-state defendants." *Id.*

argued that the Fifth Amendment bars this invocation of federalism, the Court's decision clarified that federalism is a derivative concern to the matter, and the security of individual liberty interests is properly prioritized by the adoption of analogous general jurisdiction tests under the Fifth and Fourteenth Amendments.⁴⁵

In *Douglass v. Nippon Yusen Kabushiki Kaisha*, the Fifth Circuit Court of Appeals accurately affirmed that the proper standard to evaluate personal general jurisdiction under Rule 4(k)(2) is to evaluate whether the foreign defendant's contacts within the United States be "so continuous and systematic as to render it essentially at home." Relying on precedent from the Supreme Court and Fifth Circuit, the Court held that Fourteenth Amendment precedent governing personal jurisdiction applies under the Fifth Amendment inquiry. In the interest of securing fundamental protections of life, liberty, and property, without due process of law, the Court's decision faithfully endeavors to uphold a body of constitutional law that prioritizes "traditional notions of fair play and substantial justice."

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45. See *Douglass*, 46 F.4th at 236 (illustrating individual liberties at heart of due process interpretation). The majority highlights that "[d]ue process of law traces its origins to the Great Charter of individual liberty, Magna Carta. Individual liberty is what the Supreme Court emphasizes as the foundation of the personal jurisdiction requirement." *Id. Contra id.*, at 263 (Elrod, J., dissenting) (declining majority's interpretation of Magna Carta). The dissent cautioned that "[t]his is anachronism. Case law applying the Fourteenth Amendment construes a different text directed at a different audience, and which was written at a different time in our history and, accordingly, under different circumstances." *Id.* Justice Elrod implores "[t]o imbue the older Fifth Amendment with newer glosses on the more recent Fourteenth Amendment is to put new wine in an old wineskin." *Id.* The dissent criticized the majority's reliance on protecting individual liberty interests as justification for extending Fourteenth Amendment due process case law into the Fifth Amendment, reasoning that federalism is a necessary facet of the conversation to avoid "competing assertions" between state and federal systems. *Id.* at 264. See also *Fifth Circuit Issues*, *supra* note 2 (considering ramifications of case-in-chief's holding). The Court's holding is "bad news for the plaintiffs in *Douglass* who used a federal statute to sue a foreign corporation with *many* contacts to the United States – just not contacts that gave rise to the litigation nor contacts that allowed for general jurisdiction." *Id.* See also *Davies*, *supra* note 17 (explaining significance of holding). In deciphering whether the Fourteenth Amendment controls the Fifth Amendment due process analysis, the Court reaffirmed significant circuit precedent, providing foreign corporations significant protections from U.S. courts. *Id.* *Davies* notes "[b]ut the *Douglass* ruling's 60 pages and five opinions highlight that this protection rests on a stark set of jurisprudential and ideological disagreements about the place of U.S. courts in international disputes." *Id.*