No. 20-7077

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSHUA ATCHLEY, ET AL.,

Plaintiffs-Appellants,

v.

ASTRAZENECA UK LIMITED, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
No. 1:17-cv-02136-RJL (Hon. Richard J. Leon)

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Tobias L. Millrood
President
Jeffrey R. White
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Attorneys for Amicus Curiae American Association for Justice

January 19, 2021

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), amicus curiae the American Association for Justice certifies as follows:

A. Parties and Amici. All parties, intervenors, and amici appearing in the district court and before this Court are listed in the Brief for Plaintiffs-Appellants.

B. Rulings Under Review. The rulings under review are listed in the Brief for Plaintiffs-Appellants.

C. Related Cases. Amicus curiae is not aware of this case having been previously before this Court or any other court, or of any pending related cases.

Date: January 19, 2021

/s/ Jeffrey R. White
JEFFREY R. WHITE
Attorney for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the American Association for Justice certifies that it is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns 10% or more of this entity's stock.

Date: January 19, 2021

/s/ Jeffrey R. White
JEFFREY R. WHITE
Attorney for Amicus Curiae

STATEMENT OF CONSENT AND RULE 29(d) CERTIFICATION

All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No person, other than amicus curiae, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

A separate amicus brief from the American Association for Justice ("AAJ") is necessary to provide the perspective of AAJ members. AAJ seeks only to discuss the specific points on which its interest in and expertise is most relevant. Other amici would not have the same credibility or interest making these points, and so the inclusion of these points in an omnibus amicus brief would not work. Similarly, amicus AAJ knows less about other legal issues in the case, and it would make little sense to address those in this brief.

Date: January 19, 2021

/s/ Jeffrey R. White
JEFFREY R. WHITE
Attorney for Amicus Curiae

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INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including Anti-Terrorism Act cases. Throughout its 75-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

This case is of acute interest to AAJ and its members. AAJ is concerned that were the district court's opinion allowed to stand, it would deprive plaintiffs of a judicial remedy under state law and federal causes of action in many contexts, including under the ATA, thereby upending principles of personal jurisdiction. The decision below would deny plaintiffs the right of access to court to seek redress for wrongful injury, a right guaranteed by the Due Process Clause. This violation of a fundamental right would impact plaintiffs across the country.

SUMMARY OF ARGUMENT

1. The district court's ruling dismissing Plaintiffs' action under the Anti-Terrorism Act ["ATA"] against the foreign Defendants for lack of personal

jurisdiction should be reversed. The district court erred in finding that the Defendants' contacts with the United States were not related to this litigation. The ATA authorizes Americans who have been injured by reason of international terrorism to bring an action for compensatory damages against those who provided substantial assistance to the terrorists in any U.S. district court where they reside. Plaintiffs have made specific and detailed allegations supporting the district court's jurisdiction over the foreign defendants in this case. These include detailed allegations that the foreign defendants, each of whom is part of a global enterprise marketing pharmaceuticals and medical devices, entered into contracts to sell drugs and devices to the Iraqi Ministry of Health. Plaintiffs alleged that the foreign Defendants knew that corrupt Iraqi officials would sell some of these medical supplies on the black market and that proceeds would be used to finance terrorist activities directed at Americans. Plaintiffs also alleged that the foreign Defendants used cash and drugs to bribe corrupt officials to enter the contracts. With respect to contacts with the forum, Plaintiffs alleged that Defendants worked with their affiliated companies in the United States, who manufactured some of the products sold under the contracts, to obtain documentation of FDA approval, which the buyers demanded to increase the value of the supplies on the black market. They also alleged that Defendants deposited funds in a New York bank account to pay for letters of credit, demanded by suppliers to guarantee payment under the contracts.

The district court ruled that these allegations failed to show sufficient connection between Defendants' in-forum contacts and this litigation, stating that Plaintiffs failed to show that Defendants' manufacturing and sourcing practices were themselves unlawful or could otherwise subject the Defendants to liability under the ATA. Nor did payments for letters of credit themselves fund the terrorist attacks that caused the harms alleged by Plaintiffs.

Inexplicably, the district court wholly ignored the Supreme Court's most recent and detailed decision regarding the relationship between a foreign defendant's alleged forum contacts and the litigation. In *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), the Court adhered to its consistently stated position that due process requires that the plaintiff's suit arise out of *or relate to* the defendant's forum contacts. The phrase "relates to" is very broad in scope. The Court specifically rejected the petitioner's argument that relevant forum contacts be limited to those that actually caused plaintiff's alleged injury.

Adoption of the lower court's novel view that forum contacts are litigation related only if they are themselves unlawful or would give rise to tort liability would not only deprive injured victims of their federal statutory cause of action under the ATA. It would also deny judicial remedy to plaintiffs under state law and federal causes of action in many other contexts, upending settled principles of personal jurisdiction. For example, it is settled that plaintiffs injured by dangerous products

have been able to establish jurisdiction over the foreign manufacturer who did not directly sell the product in the forum state, but through a distributor made a significant number of other sales or other contacts within the forum. Americans injured while staying at foreign hotels or resorts have established jurisdiction in their state of residence based on the hotel's advertising or promotional activities in the state. In other examples as well, it is settled that plaintiffs can establish personal jurisdiction by showing in-forum activities indicating that the defendant has purposely availed itself of the forum market, regardless of whether those activities were themselves unlawful or tortious.

2. Due process also requires that the court's assertion of personal jurisdiction in a particular case be reasonable. The factors that guide the court's due process assessment strongly support jurisdiction in this case. The burden on Defendants is minimal to nonexistent in this instance. The interest of Plaintiffs in litigating in this forum is compellingly strong. The ATA authorizes plaintiffs to bring damage actions in the U.S. district court in the district where any plaintiff resides. The decision below precludes Plaintiffs from suing the foreign Defendants in any American court. Nor is bringing suit in the various countries where the Defendants are located an alternative. The decision below wholly deprives Plaintiffs of their congressionally created remedy. As has been recognized by the Supreme Court from the earliest days of its constitutional jurisprudence, the right of access to

court to seek redress for wrongful injury is guaranteed by the Due Process Clause. The violation of that fundamental right in this case compels reversal of the decision below.

3. The district court's decision also ignored the strong interest of the United States in providing a judicial remedy to its residents who have been injured by international terrorism. The Supreme Court has consistently recognized the interest of states in providing legal redress for injury to its residents. That interest is especially forceful in this case, where the cause of action arises under federal law, and so the forum interest is not cabined by federalism concerns that protect the sovereignty of each state from the intrusion by another state's assertion of jurisdiction.

Indeed, Congress expressly made clear the strong national interest in providing a federal forum for Americans to assert claims against international terrorists and those who provide substantial assistance to them. Not only is international terrorism a serious and deadly problem, but only the federal government can protect Americans abroad. Congress has done so by seeking to deter financial support for those who endanger Americans. The lower court's failure to weigh that strong national interest in asserting jurisdiction over Defendants in this case also compels reversal of the decision below.

ARGUMENT

AAJ appears before this Court to address the question of personal jurisdiction over the foreign Defendants in this case. AAJ is concerned that the district court's unduly restrictive view of the jurisdiction of the courts of the United States is not only inconsistent with the principles of specific jurisdiction laid down by the Supreme Court, it also places an obstacle in the path of other wrongfully injured victims seeking to vindicate their rights to legal redress.

I. THE DISTRICT COURT ERRED IN RULING THAT THE FOREIGN DEFENDANTS' ALLEGED FORUM-RELATED CONTACTS WERE NOT RELATED TO THIS LITIGATION.

A. Plaintiffs Have Made Sufficient Specific Allegations Supporting Personal Jurisdiction in United States District Courts over the Foreign Corporate Defendants.

United States military personnel and civilians who were injured in terrorist attacks against Americans in Iraq, and the families of Americans killed in those attacks, bring this action under the Anti-Terrorism Act ["ATA"], 18 U.S.C. § 2331 *et seq.* Congress enacted the ATA to provide a civil cause of action for any American national who is harmed "by reason of an act of international terrorism." *Id.* at § 2333(a). Secondary liability under the Act "may be asserted as to any person who aids and abets, by knowingly providing substantial assistance" to those committing such acts. *Id.* at § 2333(d)(2).

In this case, Plaintiffs' allegations of specific facts underlying their claims are voluminous, covering some 550 pages in their Third Amended Complaint. With respect to the foreign Defendants, Plaintiffs allege that these multinational corporations entered into contracts with the Iraqi Ministry of Health and the Ministry's state-owned importer, Kimadia, for the sale of pharmaceuticals and medical equipment manufactured by Defendants' U.S.-based affiliated corporations. Defendants also agreed to provide free drugs and medical supplies to Ministry officials. *Atchley v. AstraZeneca UK Ltd.*, 474 F. Supp. 3d 194, 201 (D.D.C. 2020) ["*Atchley*"]. Plaintiffs alleged that the foreign defendants knew that some of these goods would be sold on the black market and that the proceeds would be used to fund terrorist attacks specifically directed at Americans. *Id.* at 200.

Plaintiffs here do not rest on "[m]ere conclusions or bare allegation[s]" that are "unsupported by the facts" as the district court suggested. *Id.* at 202 (citation and quotation marks omitted). Plaintiffs' factual allegations are detailed and linked specifically to the contracts that served as vehicles for providing financial assistance to terrorists. For example, Plaintiffs set forth the details regarding five specific contracts entered into by defendant AstraZeneca, identifying the specific drug to be delivered, the drug's manufacturer, and the percentage of the shipment provided free of charge. *See* Third Amended Complaint ¶ 191 ["TAC"]. Similar details are set forth regarding the other foreign defendants. *See id.* at ¶ 238 (GE Healthcare), ¶¶

246 & 253 (J&J), ¶ 284 (Pfizer), and ¶ 312 (Roche). These summaries of specific contracts are accompanied by detailed descriptions of each foreign Defendant's contacts with the United States and explanations of how the supply contracts were structured to result in payments to Jaysh al-Mahdi agents. *Id.* at ¶¶ 188-332. Plaintiffs also documented the foreign Defendants' knowledge, or at least reckless disregard, that these payments would be used to finance Jaysh al-Mahdi terrorist activities. *Id.* at ¶¶ 180-87.

Plaintiffs also allege that Defendants made these sales pursuant to irrevocable letters of credit, which were essential to the transactions because they guaranteed payment. *Atchley*, 474 F. Supp. 3d at 206. Defendants paid for those letters of credit by making deposits into the New York bank account owned by the Trade Bank of Iraq. *Id.* at 206. Defendants also procured U.S. export certificates and documentation of FDA approval of drugs and medical devices, which enhanced their street value and was an important factor in awarding the contract to the Defendants. *Id.* at 205. Plaintiffs alleged in detail that the contracts at issue in this litigation would not have been executed and performed without these crucial American contacts. TAC at ¶¶ 124-127 (letters of credit) & 152 (FDA documentation).

B. The District Court Erred in Requiring that Plaintiffs Allege Contacts with the United States that Were Unlawful and the Direct Cause of the Injuries Giving Rise to Plaintiffs' Claims.

The district court, however, found no basis for an American court to assert jurisdiction over the foreign defendants under the ATA, even if defendants were "aware of [the terrorist group's] upcoming attacks or planned attacks on U.S. citizens in Iraq" and even assuming "that acts of violence committed against residents of the United States were a foreseeable consequence of the [foreign defendants'] alleged indirect funding of [JAM]."*Atchley*, 474 F. Supp. at 204. In the court's view, the U.S contacts, including the New York bank payments, and work with U.S affiliates to source the drugs and obtain FDA documentation, were too "peripheral to this suit" *Id.* at 206.

The district court explained that plaintiffs "do *not* allege that the foreign defendants' manufacturing or sourcing practices *were themselves unlawful or could otherwise subject the foreign defendants to liability under the ATA*." *Id.* at 205 (emphasis added). As for the New York bank deposits: "None of the payments for letters of credit are connected to any allegedly unlawful payments. Nor were they connected to the allegedly corrupt contracts with the Ministry. Indeed, plaintiffs make *no* allegations that those payments were redirected to JAM or used to fund any terrorist attacks. They are utterly divorced from the suit-related conduct underlying plaintiffs' claims." *Id.* at 206.

The court made clear that, in its view, the contacts are suit-related only if they were unlawful and directly caused the harms alleged by plaintiff in the lawsuit.

> [A]ll the relevant conduct that plaintiffs contend gives rise to liability under the ATA occurred *in Iraq*, not the United States. Perhaps most importantly, the alleged terrorist funding occurred in Iraq. As did the terrorist attacks that killed or wounded plaintiffs. So too foreign defendants' allegedly corrupt payments and in-kind donations to Iraqi officials. And with respect to the allegedly corrupt contracts, the terms were set in Iraq, the bids were submitted in Iraq, and the contracts were hand delivered in Iraq. None of that conduct has any substantial connection to the United States.

Id. at 203 (citations to the Complaint omitted).[1]

The district court correctly stated that the "minimum contacts" inquiry here "focuses 'on the relationship among the defendant, the forum, and the litigation.'"

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[1] The court also appears to view contacts as forum-related only if they occur in the forum jurisdiction itself. This Court's critique of the district court's denial of personal jurisdiction in *Mwani v. bin Laden*, 417 F.3d 1 (D.C. Cir. 2005), is instructive:

> [T]he fundamental problem with the court's analysis was its focus on specific, *physical* contacts between the defendants and the forum. Although "the constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum, the "foreseeability" of causing injury in the forum can establish such contacts where "the defendant's conduct and connection with the forum . . . are such that he should reasonably anticipate being haled into court there. Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum."

Id. at 12 (emphasis in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (other citations and quotation marks omitted).

Id. at 203 (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)). Inexplicably, however, the district court did not discuss – or even cite – the Supreme Court's latest and most detailed pronouncement on that relationship. In *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty*., 137 S. Ct. 1773 (2017) ["*BMS*"], the Supreme Court expressly rejected the narrow view espoused by the district court below.

In an unbroken line of cases, the Supreme Court has held that for a court to exercise specific jurisdiction, plaintiff's suit must be one that "aris[es] out of *or relate[s] to* the defendant's contacts with the forum." *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (emphasis added) (internal citation and quotation marks omitted). *See also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923-24 (2011); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), Justice Scalia, writing for a unanimous Court, observed that the Court has repeatedly emphasized that "relate to" has "broad scope," "expansive sweep," and is "conspicuous for its breadth." *Id.* at 384 (internal citations omitted). More recently, the Court stated that the phrase "related to," broadly means "having a connection with or reference to," "whether directly or indirectly." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (internal citations and quotation marks omitted). *See also Coventry*

Health Care of Missouri, Inc. v. Nevils, 137 S. Ct. 1190, 1197 (2017) (underscoring the "expansive" reach of the phrase "relates to"). The district court in this case essentially removed "or relates to" from the due process analysis prescribed by the Supreme Court.

Petitioner in *BMS* urged the Court to adopt the narrow view espoused by the district court in this case. *BMS*, 137 S. Ct. 1773. Bristol-Myers Squibb argued strenuously in support of a new rule that "specific jurisdiction requires a causal connection between the defendant's forum contacts and the plaintiff's claim." Brief for Petitioner, *Bristol-Myers Squibb Co. v. Superior Court of California for the Cty. of San Francisco*, No. 16-466, 2017 WL 908857, at 14 & 25-27 (U.S. Mar. 1, 2017). *See also* Amicus Brief of PLAC in *Bristol-Myers Squibb Co. v. Superior Court of California for the Cty. of San Francisco*, No. 16-466, 2017 WL 956640, at 7 (U.S. Mar. 8, 2017) ("PLAC agrees with BMS that assertions of specific jurisdiction ought to be limited to instances where the defendant's in-forum conduct is also the alleged proximate cause of the plaintiff's alleged injury or loss.").

The Court rejected that narrow view and reaffirmed that the proper due process standard is that the foreign corporation's contacts with the forum state be simply "related to" the litigation. *BMS*, 137 S. Ct. at 1780. Justice Sotomayor, in her dissent, specifically noted that the majority had rejected any "rigid requirement that

a defendant's in-state conduct must actually cause a plaintiff's claim." *Id.* at 1788 & n.3 (Sotomayor, J., dissenting).

In this case, even if Plaintiffs' cause of action did not "arise out of" the foreign corporations' U.S. contacts, those contacts are plainly "related to" this ATA litigation. The district court's dismissal of their cause of action against the foreign defendants for lack of jurisdiction was based on a radical alteration of the due process test that the Supreme Court of the United States has already rejected.

C. Adoption of the District Court's Novel Requirement that a Defendant's Forum Contacts Be Tortious or "Unlawful" Would Upset Accepted Principles of Specific Personal Jurisdiction in Cases Quite Apart from the ATA.

The district court espoused a novel and highly restrictive view of the due process minimum contacts requirement. The district court required plaintiffs to allege not only that those contacts relate to the United States, but also allege that such forum-related contacts "were themselves unlawful or could otherwise subject the foreign defendants to liability under the ATA." *Atchley*, 474 F. Supp. 3d at 205. *See also id.* at 203 (where the district court limits "suit-related conduct" to conduct that which could "give[] rise to liability under the ATA.").

Amicus curiae AAJ submits that this view upends settled principles in many different contexts apart from the ATA. One such context is product liability actions by persons harmed by unreasonably dangerous products manufactured abroad. Even if the foreign defendant did not sell the offending product in the forum state,

plaintiffs may be able to establish personal jurisdiction through other forum contacts, including sales of other products or advertising directed to the forum. *See generally*, C. Wright, A. Miller, & A. Steinman, 4A Fed. Prac. & Proc. Civ. § 1069 (4th ed.) (Oct. 2020). Due process does not require a showing that such contacts are unlawful or would give rise to liability, but rather a showing that "the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Burger King Corp.*, 471 U.S. at 475 (internal citation and quotation marks omitted). For example, in *Knox v. MetalForming, Inc.*, 914 F.3d 685 (1st Cir. 2019), the First Circuit in an action by a worker who was injured by a metal folding machine, upheld jurisdiction over the German manufacturer. The company itself had no contacts within Massachusetts, but through its American distributor had sold 45 machines over 16 years to purchasers in that state. *Id.* at 692.[2] The Fifth Circuit in *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d 576 (5th Cir. 2014),

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[2] The Supreme Court's fractured decision in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), points in the same direction. The Court held that a single isolated sale in New Jersey of one of defendant's metal-shearing machines by an independent distributor, which injured Mr. Nicastro, was not enough to show that J. McIntyre purposefully availed itself of the New Jersey market. *Id.* at 886 (plurality opinion). No rationale for this result garnered a majority, but it is clear that a majority would have agreed that plaintiff could have established sufficient minimum contacts by showing additional sales or promotional efforts in the state, which would be neither unlawful nor the basis for liability. *See id.* (Defendant did "not have a single contact with New Jersey short of the machine in question ending up in this state.") and *id.* at 888 (Breyer & Alito, J.J., concurring in judgment) ("None of our precedents finds that a single isolated sale . . . is sufficient.").

held that a Chinese manufacturer of allegedly defective drywall was subject to jurisdiction in Virginia, though it engaged in no direct sales there. The Fifth Circuit explained that, in addition to placing its drywall into the stream of commerce, the manufacturer also labeled it with the name and phone number of its Virginia distributor. These actions were not illegal and did not give rise to liability for damage, but they "ensured that the product's end-users would identify its product with a Virginia resident," supporting personal jurisdiction. *Id.* at 589.

The same principle operates in cases, like the action before this Court, where both the wrongful conduct and the resulting harm to the plaintiff occurred outside the forum. Due process requires that the defendant's forum contacts be related to the litigation, not that they be unlawful or that they give rise to the litigation. Suits against foreign hotels arising out of injuries to traveling Americans are a frequent example. In *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312 (3d Cir. 2007), a Barbados hotel was held to be amenable to jurisdiction in Pennsylvania in a suit by a by Pennsylvania resident who was injured when he fell at the hotel. Jurisdiction was based on defendant's mailing of promotional brochures to Pennsylvania residents. *Id.* at 323-24.

Similarly, *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708 (1st Cir. 1996), was a suit against the owner of a Hong Kong hotel for the wrongful death of a Massachusetts resident who drowned in the hotel swimming pool during a business

trip. The court found that correspondence from the hotel to Mrs. Nowak's employer, soliciting their business and promoting the hotel's amenities such as the pool, constituted sufficient minimum contacts to establish jurisdiction. The First Circuit noted that, while the correspondence was not a proximate cause of decedent's death, "it does represent a meaningful link" between defendant's forum contacts and the harm suffered. *Id.* at 716. In *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (7th Cir. 1990), the Seventh Circuit upheld jurisdiction in Indiana over the operator of a Cayman Islands hotel in an action brought by an Indiana resident who alleged that she was assaulted while staying as a guest. Defendant advertised in Indiana and had entered into a long-term commercial relationship with an Indiana tour company with the expectation that its rooms would be purchased in connection with tour packages that departed from Indiana. *Id.* at 1244.

Examples could be multiplied from other contexts. In *Coats v. Penrod Drilling Corp.*, 5 F.3d 877 (5th Cir. 1993), in which the court of appeals affirmed judgment in favor of a Mississippi resident who was injured while working on an oil rig in the United Arab Emirates, the court held that plaintiff's employer, a UAE corporation, was amenable to jurisdiction in Mississippi, based on its recruitment efforts in the state which resulted in hiring plaintiff. *Id.* at 884. In *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com de Equip. Medico*, 563 F.3d 1285 (Fed. Cir. 2009), the assignee of a U.S. patent for a "a bone plating system" for repair of fractures

brought an infringement action against a Brazilian medical device manufacturer. The Federal Circuit held that defendant's contacts with the United States, including attendance at an American Association of Orthopaedic Surgeons trade show to display defendant's products, were sufficient contacts to assert personal jurisdiction under the Fifth Amendment Due Process Clause. *Id.* at 1298.

If upheld, the district court's novel restrictive view of relevant minimum contacts in this case would not only deprive Plaintiffs of the federal remedy intended by Congress (see Part III), but would also deprive other plaintiffs of their state law and federal remedies in a wide variety of other contexts.

II. THE DISTRICT COURT'S DECISION DISREGARDED PLAINTIFFS' DUE PROCESS RIGHT OF ACCESS TO THE COURTS FOR JUDICIAL REMEDY FOR WRONGFUL INJURY.

A. The Due Process Factors Determining Whether Jurisdiction is Reasonable Strongly Support Jurisdiction in this Case.

In enacting the ATA, Congress expressly created a federal damages remedy for the victims of terrorist attacks outside of the U.S. against those to commit such those acts and against those who provide "substantial assistance" to them. 18 U.S.C § 2333. Congress also provided that such actions may be brought "in the district court of the United States for any district where any plaintiff resides." 18 U.S.C. § 2334. This is not to say that any plaintiff has a constitutional right to maintain a civil action in a district court that lacks personal jurisdiction over the defendant. As

discussed in Part I, Plaintiffs have alleged sufficient minimum contacts "related to" both the United States and this litigation.

Due process also requires that the court determine that assertion of jurisdiction in this particular case is reasonable by considering several other factors. Primary among these is the "burden on the defendant" in litigating in this forum. *BMS*, 137 S. Ct. at 1780. As in BMS, however, that burden in this case is minimal to nonexistent. "Each Defendant is part of a globally integrated company with a significant presence in the United States, and all but AstraZeneca and Roche maintain their worldwide headquarters in the United States." TAC at ¶ 12. Each of these global enterprises sells millions of dollars' worth of medical supplies to the U.S. market, under the protection of U.S. laws. There is no allegation that defendants would be at all inconvenienced by having to defend their conduct in an American court.

Two additional factors that courts must consider are the interest "of the plaintiff in proceeding with the cause in the plaintiff's forum of choice" and the interest "of the forum." *BMS*, 137 S. Ct. at 1780.[3] Both factors strongly support the assertion of jurisdiction in this case.

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[3] The Supreme Court has previously listed two other factors: "the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Burger King Corp.*, 471 U.S. at 477-78. See also *BMS*, 137 S. Ct. at 1786 (Sotomayor, J., dissenting) (citation and quotation marks omitted). However, the

B. Plaintiffs' Interest in the Availability of a Forum to Vindicate their Federal Statutory Right to a Remedy for Wrongful Injury is Protected by the Due Process Guarantee.

The Founders were familiar with the bedrock common-law principle: "Every right, when withheld, must have a remedy, and every injury its proper redress" by access to "a legal remedy by suit or action at law." William Blackstone, 3 Commentaries on the Laws of England *23 & *109 (1765). Indeed, as Justice Powell wrote for the Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Founders intended to incorporate into the Due Process Clause those rights which "Blackstone catalogued among the 'absolute rights of individuals.'" *Id.* at 661. These include the right of personal security against wrongful bodily injury. William Blackstone, 1 Commentaries on the Laws of England *120, *125 & *134-35 (1765). Indeed, the protection of those absolute rights is "the principal aim of society." *Id.* at *120.

Chief Justice John Marshall, echoing Blackstone, restated this principle in a cornerstone decision for Americans:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

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interests of the "interstate judicial system" and of the "several States" are inapplicable in connection with this federal statutory cause of action. To the extent it is relevant, the shared interest of foreign countries in furthering the fundamental policy of holding multinational corporations accountable for providing financial support to terrorists is plain.

For that reason, the "Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property *or as plaintiffs attempting to redress grievances*." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (emphasis added). In *Logan*, the Court held that plaintiff's cause of action was a property interest protected by due process, *id.* at 431-32, and that he was deprived of due process by a state procedural rule that effectively made it impossible for him to meet the filing deadline for his state-law employment discrimination claim. *Id.* at 437. In *Christopher v. Harbury*, 536 U.S. 403 (2002), the Court explicitly declared that "a separate and distinct right to seek judicial relief for some wrong" is a fundamental right grounded in multiple provisions of the Constitution. *Id.* at 415 & n.12.

The *BMS* Court determined that "the due process rights of plaintiffs," though recognized, had "no bearing on" the outcome in that case. *BMS*, 137 S. Ct. at 1783. Plaintiffs who were California residents were not deprived of access to the California courts to press their claims. *Id.* at 1782 (relying on *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770 (1984)). Nor were the nonresident plaintiffs deprived of due process because they "could probably sue together in their home States." *BMS*, 137 S. Ct. at 1783.

That is not the case here, and the difference requires reversal. The ATA authorizes plaintiffs to bring their civil action "in the district court of the United

States for any district where any plaintiff resides." 18 U.S.C. § 2334. But the ruling below is that no U.S. district court has personal jurisdiction over these foreign Defendants. In the courts of other nations, Plaintiffs would fall into the *BMS* category of nonresidents, and a foreign court may be expected to "have little legitimate interest in the claims in question." *BMS*, 137 S. Ct. at 1780. Essentially, the lower court has held that Plaintiffs have a right, but no remedy.

It is no answer to suggest that Plaintiffs could travel to Europe and file separate actions in the various places where the various defendants are "at home." *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). These are not United States districts "where any plaintiff resides." 18 U.S.C. § 2334. And the practical costs of this course of action would be simply insurmountable. Cf. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (Noting that plaintiffs "would be at a severe disadvantage if they were forced to follow the [defendant] to a distant State in order to hold it legally accountable."). Due process is not satisfied by a merely theoretical right of access to a legal remedy, but rather by "*meaningful* access to the courts." *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (emphasis added).

The lower court's disregard for Plaintiffs' due process right of access to the courts of the United States, to obtain a judicial remedy created for them by Congress, compels reversal.

III. THE DISTRICT COURT'S DECISION IGNORED THE STRONG INTEREST AND SOVEREIGN RIGHT OF THE UNITED STATES TO PROVIDE JUDICIAL REMEDY FOR WRONGFUL INJURY TO ITS RESIDENTS.

A. The Interest of the Federal Forum Is To Be Accorded Even Greater Weight than the Strong State Interest in Providing a Forum for a State Law Cause of Action.

The strong interest of the United States, as the forum jurisdiction here, also warrants reversal. The Supreme Court has repeatedly declared that this factor in determining whether jurisdiction comports with the due process reflects the state's "'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King Corp.*, 471 U.S. at 473 (quoting *McGee*, 355 U.S. at 223). Historically, states have been accorded "great latitude" in imposing tort liability for wrongful injury in the exercise of that power. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

When the claim is governed by state tort law, the Court in *BMS* recognized, the "sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States." 137 S. Ct. at 1780 (quoting *World-Wide Volkswagen*, 444 U.S. at 293). That was the case in *BMS*, where the courts of the State of California sought to assert jurisdiction over a pharmaceutical company incorporated in Delaware and headquartered in New York. Justice Alito wrote for the Court that "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.* at 1781 (quoting *World-Wide*

Volkswagen, 444 U.S. at 294). The Court therefore upheld the specific jurisdiction over BMS by injured California residents, which was not contested, *BMS*, 137 S. Ct. at 1779, but held that assertion of jurisdiction over the company by plaintiffs who were not California residents would violate due process. *Id.* at 1782.

In this case, plaintiffs are not nonresidents, in whose claims the state "may have little legitimate interest." *Id.* at 1780. Each is an "American national" for whom Congress expressly provided this cause of action in the ATA. *See* 18 U.S.C. § 2331(a).

More broadly, the "decisive" factor in limiting the California court's scope of personal jurisdiction, the due process clause of the Fourteenth Amendment "acting as an instrument of interstate federalism," *BMS*, 137 S. Ct. at 1781, is not relevant to this case, which is brought under a federal statutory cause of action and is governed by the Fifth Amendment. As this Court has stated, "in litigation involving federal claims, . . . safeguarding the sovereignty of one state of the United States against a sister state's intrusion is not a relevant concern." *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd.*, 647 F.2d 200, 203 n.4 (D.C. Cir. 1981). *See also* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, 4 Fed. Prac. & Proc. Civ. § 1068.1 (4th ed.) ("The Fourteenth Amendment function of protecting the several states' status as coequal sovereigns seemingly ought to be

of no relevance to the parallel analysis under the Due Process Clause of the Fifth Amendment.”).

B. Congress Has Expressed the Strong National Interest in Affording American Nationals a Federal Forum for Litigating their Claims for Damages Under the ATA.

In enacting the ATA, Congress well understood both that “international terrorism is a serious and deadly problem that threatens the vital interests of the United States,” 18 U.S.C. § 2339B Notes, and that only the federal government is able to protect American citizens abroad. *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 431 (E.D.N.Y. 2009). There “can be no dispute that combating international terrorism is a paramount interest of the United States.” *Id.*

As the House Judiciary Committee has explained, Congress designed the ATA to establish “a new civil cause of action in Federal law for international terrorism that provides extraterritorial jurisdiction over terrorist acts abroad against United States nationals.” H.R. Rep. No. 102-1040, at 1 (1992). Congress intended this cause of action not only to add a remedy for American victims of terrorism to the categories of “civil wrongs compensated by our legal system.” S. Rep. No. 102-342, at 22 (1992). Congress also intended that the provision of compensatory damages “and *the imposition of liability at any point along the causal chain of terrorism,* . . . would interrupt, or at least imperil, the flow of money” to those responsible for such attacks. *Id.* (emphasis added).

To ensure that this purpose would be accomplished, Congress enacted the Justice Against Sponsors of Terrorism Act, S. 2040, 114th Cong. § 4(a) (2016) ["JASTA"], to add that liability under the Act "may be asserted as to any person who aids and abets, by knowingly providing substantial assistance" to those committing acts of international terrorism. 18 U.S.C. § 2333(d)(2). Congress intended JASTA to "'provide civil litigants with the broadest possible basis . . . to seek relief against [those] that have provided material support, *directly or indirectly*, to foreign organizations or persons that engage in terrorist activities against the United States.'" *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 277 (D.C. Cir. 2018) (quoting JASTA, § 2(b), 130 Stat. at 853) (codified at 18 U.S.C. § 2333(b) Notes) (emphasis added). *See also Estate of Parsons v. Palestinian Auth.*, 651 F.3d 118, 149 n.10 (D.C. Cir. 2011) (Brown, J., concurring and dissenting in part) ("The ATA's legislative history confirms that the primary purpose of the [provision for treble damages] is to deter future acts of terrorism.").

Judge Posner has pointedly observed, compensatory awards against those who provide monetary support makes good sense as a counterterrorism measure, as "damages are a less effective remedy against terrorists and their organizations . . . whereas suits against financiers of terrorism can cut the terrorists' lifeline." *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 690-91 (7th Cir. 2008) (en banc).

The lower court's unduly narrow view threatens to undermine this important national security objective and compels reversal of the decision below.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to reverse the district court's decision granting the foreign Defendants' motion to dismiss Plaintiffs' action for lack of personal jurisdiction.

Respectfully submitted,

/s/ Jeffrey R. White
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street NW, Suite 200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

Attorney for Amicus Curiae
American Association for Justice

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,277 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

Date: January 19, 2021

/s/ Jeffrey R. White
JEFFREY R. WHITE

CERTIFICATE OF SERVICE

I, Jeffrey R. White, counsel for amicus curiae and a member of the Bar of this Court, certify that on January 19, 2021, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

/s/ Jeffrey R. White
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