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PROTECTING THE ANTITERRORISM TOOLS OF AMERICAN CITIZENS: LIMITING THE APPLICATION OF *DAIMLER'S* “AT- HOME” TEST

ALEXIS CASAMASSIMA[†]

INTRODUCTION

One morning, a father leaves for work, a mother prepares for a holiday meal, a brother shovels snow from the sidewalk, a teenager anticipates a reunion with a sister, daughters wave goodbye to their parents. It is pretty much a typical American day in a typical American life.

But then something happens that forever changes this life. Life will never be the same again. A terrorist, for reasons nobody understands, for reasons beyond the concept of humanity, blows a plane out of the air or hijacks a ship or shoots a father, murders a wife, husband, sister, or brother.¹

“Terrorism is the premeditated use or threat [of] violence by individuals or subnational groups to obtain a political or social objective through the intimidation of a large audience, beyond that of the immediate victims.”² Throughout the past three

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¹ *Anti-Terrorism Act of 1990: Hearing on S. 2465 Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary*, 101st Cong. 1 (1990) [hereinafter *Hearings*] (statement of Sen. Charles E. Grassley).

² Todd Sandler, *The Analytical Study of Terrorism: Taking Stock*, 51 J. PEACE RES. 257 (2014). It is difficult to uniformly define the term “terrorism” because its meaning varies in different countries. This is the precise reason why the United Nations has struggled and has never actually defined the term. *U.N. 101: There Is No UN Definition of Terrorism*, HUMAN RIGHTS VOICES, http://www.humanrightsvoices.org/eyeontheun/un_101/facts/?p=61 (last visited Mar. 6, 2017).

decades, terrorism radically evolved in terms of who is carrying out the attacks, why, and how.³ The 2015 Global Terrorism Index reported the total number of deaths from terrorism to be the greatest in history and found that terrorism is impacting more countries than ever before.⁴ Despite these shocking numbers, deaths related to domestic terrorism have not sharply increased as compared to international terrorism.⁵

Twenty-five years ago, United States Congress recognized two distinct principles regarding terrorism. First, Congress recognized the imperative role money plays: “[Funding] is the oxygen of terrorism.”⁶ Without funding, terrorists cannot build an organizational structure to carry out attacks.⁷ Second, Congress acknowledged the lack of tools American citizens have available in fighting international terrorism through financial recovery for injuries caused by terrorist groups.

In pursuit of these goals, Congress granted Americans, acting in their individual capacity, the right to bring civil actions against those responsible for terrorist acts through the Anti-Terrorism Act of 1992 (“ATA”).⁸ In enacting this law, Congress provided a new mode to deprive terrorists of money while bringing justice to Americans harmed by international terrorism.

³ The forms of terrorism we witness today, we could not have envisioned thirty years ago. The National Security Research Division has studied this evolution and analyzed modern terrorism trends: (1) terrorism has become bloodier; (2) terrorists have developed new financial resources; (3) terrorists have evolved new models of organization; and (4) terrorists have exploited new communication technologies. Brian Michael Jenkins, *The New Age of Terrorism*, in *The McGraw-Hill Homeland Security Handbook* 117–18 (2006).

⁴ INST. FOR ECON. & PEACE, *GLOBAL TERRORISM INDEX 2015: MEASURING AND UNDERSTANDING THE IMPACT OF TERRORISM* 9 (2015) (“The total number of deaths from terrorism in 2014 reached 32,685, constituting an 80 per cent increase from 18,111 the previous year.”).

⁵ *Id.* (“Attacks in Western countries accounted for a small percentage incidents, representing 4.4 per cent of terrorist incidents and 2.6 per cent of deaths over the last 15 years.”).

⁶ Ambassador Francis X. Taylor, Remarks to Executives Club of Chicago Leadership Symposium, Impact of Global Terrorism (Mar. 14, 2002), <http://2001-2009.state.gov/s/ct/rls/rm/8839.htm>.

⁷ Gerald P. O’Driscoll et al., *Stopping Terrorism: Follow the Money*, HERITAGE FOUND.: HOMELAND SEC. (Sept. 25, 2001), <http://www.heritage.org/research/reports/2001/09/stopping-terrorism-follow-the-money> (“Terrorism is a business the fruits of which are nurtured by . . . financial flows. Cut off these flows, and the terrorist’s activities will be stunted no matter how fanatical the devotion of their followers.”).

⁸ The ATA was originally enacted in 1990, but due to a procedural error, the Act was repealed and later reenacted in 1992. See 18 U.S.C. § 2333(a) (2012); *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 68 n.19 (2d Cir. 2012).

Throughout the last two decades, Americans have pursued damages under the Act and brought numerous types of terrorist actors to justice, including third-party actors like corporations, financial institutions, and quasi-government entities. In these actions, courts have allowed American plaintiffs to hold third parties liable when there was a showing of material support.⁹

Nonetheless, as a result of a recent United States Supreme Court precedential case, the practice of bringing foreign sponsors of terrorism into U.S. jurisdictions has been called into question. In 2015, plaintiffs in the United States District Court for the Southern District of New York (“S.D.N.Y.”) won a \$655.5 million verdict against the Palestine Liberation Organization under the ATA’s civil provision.¹⁰ Plaintiff’s victory was achieved in light of the Supreme Court’s recent decision, *Daimler AG v. Bauman*, where the Court imposed a new, stricter standard on federal courts attempting to exercise general jurisdiction over foreign individuals and corporate defendants.¹¹ The S.D.N.Y. found that *Daimler* did not preclude personal jurisdiction in exceptional cases involving acts of terror.¹² However, this decision was recently overturned by the United States Court of Appeals for the Second Circuit.¹³ The Second Circuit adopted a position endorsed by several cases coming out of the District Court for the District of Columbia (“D.D.C.”), which have all ruled that federal courts can no longer exercise jurisdiction over foreign sponsors of terrorism as a result of *Daimler*.¹⁴

This Note argues that courts should not apply the *Daimler* general jurisdiction standard to defendants in ATA civil proceedings, because (1) it was not intended to insulate certain

⁹ But see Alison Bitterly, Note, *Can Banks Be Liable for Aiding and Abetting Terrorism?: A Closer Look into the Split on Secondary Liability Under the Antiterrorism Act*, 83 FORDHAM L. REV. 3389, 3391 (2015) (noting that the circuits are in disagreement over whether secondary liability should extend to third parties indirectly involved with the carrying out of terrorist attacks).

¹⁰ *Sokolow v. Palestine Liberation Org. (Sokolow IV)*, No. 04 CIVIL 00397 (GBD), 2015 WL 10852003, at *3 (S.D.N.Y. Oct. 1, 2015), *vacated*, *Waldman v. Palestine Liberation Org.*, 835 F.3d 317 (2d Cir. 2016); *see also* 18 U.S.C. § 2333(a) (2012) (allowing for treble damages).

¹¹ *Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014).

¹² *Sokolow v. Palestine Liberation Org. (Sokolow III)*, No. 04 Civ. 397(GBD), 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014).

¹³ *Waldman*, 835 F.3d 317.

¹⁴ *Estate of Klieman v. Palestinian Auth. (Klieman II)*, 82 F. Supp. 3d 237, 246 (D.D.C. 2015); *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 31 (D.D.C. 2015); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 49 (D.D.C. 2015).

foreign terrorist sponsors from these actions and (2) applying *Daimler* would seriously undermine the purpose of the ATA's civil provision.¹⁵ Part I surveys the jurisdictional requirements that must be satisfied to bring foreign defendants into federal court. Part II discusses the position of various courts on the issue of whether foreign defendants in ATA civil actions can be subject to the federal jurisdiction on the basis of *Daimler's* standards. Part III urges the Supreme Court to exempt ATA civil actions from *Daimler's* standard to ensure that Americans can continue bringing such suits against sponsors of terrorism. Finally, Part IV explains why *Daimler* cannot apply to foreign defendants in ATA civil actions without creating virtual immunity for certain classes of terrorist sponsors and undermining the purposes of the ATA.

I. ACQUIRING FEDERAL JURISDICTION OVER FOREIGN DEFENDANTS WHO ALLEGEDLY SPONSOR TERRORISM

Foreign defendants can only be brought into federal court when the court can properly exercise jurisdiction over them.¹⁶ To exercise jurisdiction over a foreign defendant, the plaintiff has the burden of establishing both personal jurisdiction over the defendant and subject-matter jurisdiction over the cause of action.¹⁷ Personal jurisdiction is limited by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.¹⁸ The breadth of personal jurisdiction allowed by the Due Process Clause has been a long-standing issue in federal jurisprudence, but the United States Supreme Court recently attempted to resolve this uncertainty by creating a definitive test.¹⁹ In contrast, through its constitutional grant of power, Congress can create subject-matter jurisdiction by passing federal legislation to provide Article III courts the authority to

¹⁵ In articulating this argument, this Note focuses on the application of *Daimler's* ruling to the Palestinian Liberation Organization, a foreign quasi-government, unincorporated entity.

¹⁶ See FED. R. CIV. P. 12(b)(1)–(2).

¹⁷ See *id.*; Jason A. Yonan, Note, *An End to Judicial Overreaching in Nationwide Service of Process Cases: Statutory Authorization To Bring Supplemental Personal Jurisdiction Within Federal Courts' Powers*, 2002 U. ILL. L. REV. 557, 559 (2002).

¹⁸ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011).

¹⁹ *Daimler AG v. Bauman*, 134 S. Ct. 746, 756–57 (2014).

hear specific issues.²⁰ For example, by enacting the ATA, Congress authorized the courts to hear matters arising out of acts of international terrorism.²¹

A. *Evolution of Personal Jurisdiction in the United States*

United States Supreme Court precedent for the requirements of personal jurisdiction to satisfy due process has evolved for nearly two centuries. Personal jurisdiction was first articulated in *Pennoyer v. Neff*²² in which the Court took a strict territorial approach. Under this approach, the Court interpreted due process to allow a defendant to be subject to state court authority only if (1) he was served notice within the state, or (2) through a proceeding against in-state property the defendant owned.²³ However, this standard became frustrated with an evolving American society.²⁴ Advances in technology made it easier for defendants to be transient between states and, thus, made it increasingly difficult for plaintiffs to locate and serve defendants within state lines.²⁵

The Court in *International Shoe Co. v. Washington* recognized and resolved the issue of taking a strict territorial approach to personal jurisdiction by broadening its interpretation of due process.²⁶ In determining the scope of the Due Process Clause, the Court declared that personal jurisdiction could be satisfied by either specific or general jurisdiction.²⁷ Specific jurisdiction arose when the defendant's conduct in the state gave rise to the cause of action.²⁸ General jurisdiction, however, allowed for nonresident defendants to be haled into court for conduct occurring outside the state. For causes of actions arising outside the state, a foreign defendant could be subject to

²⁰ U.S. CONST. art. I, § 8, cl. 9; *Id.* art. III, § 1.

²¹ 18 U.S.C. § 2333(a) (2012).

²² *Pennoyer v. Neff*, 95 U.S. 714 (1877).

²³ *Id.* at 724.

²⁴ *Burnham v. Superior Court*, 495 U.S. 604, 617 (1990) (“In the late 19th and early 20th centuries, changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, led to an ‘inevitable relaxation of the strict limits on state jurisdiction’ over nonresident individuals and corporations.” (quoting *Hanson v. Denckla*, 357 U.S. 235, 260 (1958) (Black, J., dissenting))).

²⁵ *See id.*

²⁶ *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²⁷ *Id.* at 316.

²⁸ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

jurisdiction if (1) the defendant had minimum contacts within the forum and (2) subjecting the defendant to that forum's jurisdiction would not offend "traditional notions of fair play and substantial justice."²⁹

To determine whether a defendant had minimum contacts to satisfy general jurisdiction, the analysis focused on (1) whether the defendant's activities in that state were systematic and continuous, and (2) whether those contacts availed the defendant to the benefits and protection of the laws of that state.³⁰ For example, the Court in *International Shoe* observed that the defendant corporation had sufficient minimum contacts in Washington.³¹ Although the corporation did not have an office in Washington, various company packages travelled in intrastate commerce, and the salesmen were permanent Washington State residents, regularly solicited orders within the state, and rented space in hotels to display company product.³² The Court held this surpassed the threshold of required contacts needed to constitutionally hale the defendant corporation into the forum. The Court also stressed that availing oneself to the benefits of the state created certain obligations, including answering to injured plaintiffs.³³

After *International Shoe*, state governments acted to ensure that personal jurisdiction did not just end at the state border by enacting long-arm statutes.³⁴ Long-arm statutes codified *International Shoe's* holding and its two-part test.³⁵ Subsequently, Congress followed the states by enacting the federal long-arm statute.³⁶

However, the scope of general jurisdiction has since been narrowed by two Supreme Court cases. In *Goodyear*, the Court eliminated a jurisdictional theory that would allow foreign corporate defendants to be brought into United States courts solely on the premise that their commercial product located in

²⁹ *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Myer*, 311 U.S. 457, 463 (1940)).

³⁰ *Id.* at 319.

³¹ *Id.* at 320.

³² *Id.* at 313–14.

³³ *Id.* at 319.

³⁴ Dane Reed Ullian, Note, *Retroactive Application of State Long-Arm Statutes*, 65 FLA. L. REV., 1653, 1659 (2013).

³⁵ *E.g.*, N.Y. C.P.L.R. § 302(a) (McKinney 2016).

³⁶ Fed. R. Civ. P. 4(k)(2).

the forum created jurisdiction for a cause of action that occurred wholly outside the forum.³⁷ It was in this decision that the Court first articulated the “at-home” standard.³⁸

In *Daimler AG v. Bauman*, the Court reaffirmed and applied the at-home standard. The *Daimler* litigation was instituted by foreign Argentinian plaintiffs alleging violations of U.S. human-right laws for conduct occurring entirely in Argentina.³⁹ Plaintiffs sought to hold Daimler AG, a German corporation, vicariously liable for the alleged conduct of its subsidiary, MB Argentina.⁴⁰ MB Argentina purportedly collaborated with Argentinian forces to harm plaintiffs and their relatives during Argentina’s military dictatorship period, known as the “Dirty War.”⁴¹ Although the litigation was premised on U.S. law, both parties were foreign, and the cause of action occurred abroad. Naturally, this raised the question of whether or not the United States District Court for the Northern District of California could properly exercise long-arm jurisdiction over the foreign defendant.⁴²

At the district court level, plaintiffs asserted two theories of jurisdiction. First, they alleged that Daimler itself had sufficient contacts with California under *International Shoe’s* minimum contacts test.⁴³ In the alternative, they argued jurisdiction could be premised under an agency theory.⁴⁴ Ultimately, the court concluded that jurisdiction could not be exercised under either theory.⁴⁵ On appeal, the United States Court of Appeals for the

³⁷ See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 930 (2011). Under this theory, known as the stream of commerce theory, a defendant that puts a product into the marketplace creates ties with every forum in which his product winds up. *Id.* at 926. The plaintiffs were trying to broaden the scope of general jurisdiction by subjecting Goodyear Tire’s foreign subsidiaries in France, Luxemburg, and Germany to litigation in any jurisdiction touched by the company’s distribution chain. *Id.* at 918.

³⁸ *Id.* at 929.

³⁹ *Daimler AG v. Bauman*, 134 S. Ct. 746, 750–51 (2014).

⁴⁰ *Id.* at 752.

⁴¹ *Id.* at 751.

⁴² *Bauman v. DaimlerChrysler AG (DaimlerChrysler I)*, No. C-04-00194 RMW, 2005 WL 3157472, at *4 (N.D. Cal. Nov. 22, 2005).

⁴³ *Id.* at *5.

⁴⁴ *Id.* at *10. Under this theory, plaintiffs asserted the contacts of Daimler’s U.S. subsidiary, MBUSA, could be imputed upon Daimler because MBUSA can be classified as Daimler’s agent. *Id.*

⁴⁵ Before coming to a final decision, the court did allow for limited jurisdictional discovery on the agency theory only. *Id.* at *19. However, following discovery, the court dismissed the action for lack of personal jurisdiction. *Bauman v.*

Ninth Circuit reversed the district court's finding and found that it was reasonable to premise jurisdiction under the agency theory.⁴⁶ Thereafter, Daimler petitioned for writ of certiorari, and, in April of 2013, the Supreme Court granted it.⁴⁷

The issue on appeal was "whether, consistent with the Due Process Clause of the Fourteenth Amendment, Daimler [wa]s amenable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad."⁴⁸ Although the Court acknowledged that the agency theory can be grounds for general jurisdiction in some cases, it found that the Ninth Circuit applied the principles too loosely and, in doing so, impermissibly expanded the reach of general jurisdiction.⁴⁹ Instead, the Court focused its analysis on Daimler's own contacts with California, absent the MBUSA connection.

The Court surveyed general jurisdiction jurisprudence and held that jurisdiction could not be extended constitutionally over Daimler.⁵⁰ In acknowledging that *International Shoe* opened the court's doors to widespread litigation against nonresident and foreign defendants, the Court emphasized that general jurisdiction still imposed a high burden.⁵¹ In interpreting this burden, the Court declared a new standard. No longer would it be reasonable to exercise jurisdiction over foreign defendants on the basis of minimum contacts.

Under the Court's new general jurisdiction standard, a plaintiff must prove three elements: (1) the foreign defendant must have systematic and continuous contacts in the forum; (2) those contacts must render the defendant at home in that forum; and (3) exercising jurisdiction over the defendant must be

DaimlerChrysler AG (*DaimlerChrysler II*), No. C-04-00194 RMW, 2007 WL 486389, at *6 (N.D. Cal. Feb. 12, 2007), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp. (*DaimlerChrysler III*), 644 F.3d 909, 931 (9th Cir. 2011).

⁴⁶ *DaimlerChrysler III*, 644 F.3d at 931 ("To the ordinary American, and certainly to us, it would seem odd, indeed, if the manufacturer of Mercedes-Benz, which are sold in California in vast numbers by its American subsidiary, for use on the state's streets and highways, could not be required to appear in the federal courts of that state.")

⁴⁷ *DaimlerChrysler AG v. Bauman (DaimlerChrysler IV)*, 133 S. Ct. 1995 (2013).

⁴⁸ *Daimler AG v. Bauman*, 134 S. Ct. 746, 753 (2014).

⁴⁹ *Id.* at 759. Under the Ninth Circuit's reasoning, any foreign company could essentially be subject to U.S. jurisdiction in any state where it had a subsidiary. *Id.* at 759–60.

⁵⁰ *Id.* at 753–58.

⁵¹ *See id.* at 755; *see also* *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

reasonable to comport with due-process standards.⁵² To determine whether a defendant is at home in the forum, the Court provided guidelines directed at individuals and corporations.⁵³ A corporation will always be deemed at home in its place of incorporation and principal place of business.⁵⁴ The Court noted this analysis was not absolute and a corporation could still potentially be subject to general jurisdiction outside of those two identifiable forums.⁵⁵ However, no guidelines were provided to determine these exceptional cases of when general jurisdiction would arise outside the forum in which the corporation was incorporated or had its principal place of business.⁵⁶

In applying this framework to the facts, the Court concluded that general jurisdiction could not be exercised over Daimler. Daimler is not at home in California because it is neither incorporated nor has its principal place of business there.⁵⁷ Additionally, the Court noted that even if MBUSA's contacts were imputed to Daimler, it would still be insufficient to render Daimler at home in California.⁵⁸ The Court reasoned that the underlying principle of general jurisdiction is to give defendants certainty as to where they may be amenable to lawsuits, therefore bringing Daimler into a California court would violate this principle.⁵⁹ The Court stressed that narrowing the analysis to a corporation's place of incorporation and principal place of business makes it easier for both plaintiffs and defendants to ascertain suitable forums for litigation.⁶⁰

⁵² See *Daimler*, 134 S. Ct. at 761 (adding to *International Shoe* inquiry by interpreting *Goodyear* to additionally require contacts that render the defendant at home within the state).

⁵³ *Id.* at 760.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See *id.*

⁵⁷ *Id.* at 761. Because Daimler did not satisfy either of these paradigm forums, the Court acknowledged that Daimler was essentially immune to U.S. litigation on this matter.

⁵⁸ *Id.* at 761–62.

⁵⁹ *Id.*

⁶⁰ *Id.* at 760.

B. Anti-Terrorism Act of 1992: § 2333(a) Civil Cases

To bring an action in federal court, there must be a cause of action that the court has subject-matter jurisdiction over. Congress has the ability to broaden federal court's subject-matter jurisdiction to include causes of action that previously did not exist. For example, in October of 1985, the Klinghoffer family was vacationing on the Italian cruise ship, Achille Lauro.⁶¹ While out at sea, the cruise ship was seized.⁶² Leon Klinghoffer, a father who was restricted to a wheelchair, was shot and thrown into the Mediterranean by terrorists as his family was forced to watch.⁶³ His surviving family brought a civil suit against the cruise line in S.D.N.Y. in which the Palestine Liberation Organization ("PLO") was impleaded.⁶⁴ It was alleged that members of the PLO carried out the seizure and subsequent terrorist attacks on the ship.

The federal district court needed to decide if it could properly exercise jurisdiction over the PLO,⁶⁵ a foreign unincorporated association for the Palestinian people. The court found that the PLO had sufficient contacts in New York to satisfy personal jurisdiction.⁶⁶ It premised subject-matter jurisdiction on admiralty law, because the cause of action arose in international waters.⁶⁷ This was the first time a foreign terrorist organization was haled into a U.S. courtroom.⁶⁸

Although this case was viewed as a triumph over terrorism,⁶⁹ the limitations of the jurisdictional ruling became evident.⁷⁰

⁶¹ *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 739 F. Supp. 854, 856 (1990).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 857.

⁶⁵ See *infra* Section II.A (explaining the PLO).

⁶⁶ *Klinghoffer*, 739 F. Supp. at 861–63 (applying general jurisdiction principles articulated in *International Shoe*).

⁶⁷ *Id.* at 859.

⁶⁸ *Hearings, supra* note 1, at 12 (statement of Alan J. Kreczko).

⁶⁹ The case never proceeded to trial because the PLO and Klinghoffer family agreed to an out-of-court settlement for an undisclosed sum. Benjamin Weiser, *A Settlement with P.L.O. Over Terror on a Cruise*, N.Y. TIMES (Aug. 12, 1997), <http://www.nytimes.com/1997/08/12/world/a-settlement-with-plo-over-terror-on-a-cruise.html>.

⁷⁰ *Hearings, supra* note 1, at 61 (statement of The Leon and Marilyn Klinghoffer Memorial Foundation) ("If the killing had taken place upon an aircraft or on another nation's soil, the court may well have rejected our attempt to recover from the PLO for the harms inflicted upon my family.").

Antiterrorism law at the time only provided for criminal penalties over international terrorism acts involving U.S. citizens.⁷¹ No statute specifically granted civil jurisdiction over terrorist activity abroad. The *Klinghoffer* were able to satisfy the jurisdictional requirements, not because the case involved terrorism, but because the case was at sea. United States Senator Grassley recognized this problem and responded by introducing Senate Bill 2465.⁷² The bill was structured to expand the *Klinghoffer* ruling by granting federal district courts the power to hear a civil cause of action involving an American citizen injured by an international act of terrorism.⁷³

The contents of Senate Bill 2465 was eventually passed into law⁷⁴ pursuant to Congress's power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."⁷⁵ The enactment was known as the Anti-Terrorism Act ("ATA"). Section 2333(a) of the ATA grants:

Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.⁷⁶

The statute was constructed vaguely. The language of the statute states that a private citizen can bring a civil action against someone who commits "an act of international terrorism."⁷⁷ However, it does not explicitly specify if these actions can only be brought against the perpetrator of the attack or someone indirectly involved, for example a sponsor. To provide some jurisdictional guidelines, Wendy Collins Perdue, a Georgetown University Law Center civil procedure professor, answered related questions at the bill's Subcommittee Hearing.⁷⁸

⁷¹ See 18 U.S.C. § 2332 (2012).

⁷² Senate Bill 2465 was originally introduced in the 101st Congress, but it was Senate Bill 1569 that was ultimately passed into law in the following Congress. S. Res. 1569, 102d Cong. (1992) (enacted).

⁷³ *Hearings, supra* note 1, at 12 (statement of Alan J. Kreczko).

⁷⁴ Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506.

⁷⁵ U.S. CONST. art. I, § 8, cl. 10.

⁷⁶ 18 U.S.C § 2333(a) (2012).

⁷⁷ *Id.*

⁷⁸ *Hearings, supra* note 1, at 121 (statement of Professor Wendy Collins Perdue).

Professor Perdue acknowledged the possibility that jurisdiction could extend beyond the actual perpetrator. She stated that jurisdiction could likely be exercised over an entity or corporation involved with a terrorist attack by satisfying the minimum contacts test as laid out in *International Shoe*.⁷⁹ Notably, she stated that plaintiffs would only realistically be able to recover from an entity with assets, as opposed to the individual terrorist that carried out the attack.⁸⁰ She admitted the language was unclear, but again, reaffirmed that if victims were to be provided “any meaningful remedy, liability must extend beyond the few individuals who actually execute the terrorist act.”⁸¹

Ultimately, whether the ATA extended beyond the mere perpetrator to a third party was a question to be decided by the courts.⁸² Section 2333(a) was first interpreted in *Boim v. Quranic Literacy Institute*.⁸³ In *Boim*, the court addressed whether jurisdiction could properly be exercised over two organizations that allegedly provided material support to the terrorists that murdered a seventeen-year-old American boy waiting at a bus stop in Israel.⁸⁴ In answering that question, the court analyzed the potential class of defendants within the jurisdictional scope of § 2333(a).

First, to determine potential defendants that could be sued under § 2333(a), the court looked to the plain language of the statute to determine Congress’s intent.⁸⁵ The court focused on the word “involve” in the statute’s definition of “international terrorism” to determine which class of defendants the statute

⁷⁹ *Id.*

⁸⁰ *Id.* at 126 (“It is the organizations, businesses and nations who support, encourage and supply terrorists who are likely to have reachable assets.”); see also Geoffrey Sant, *So Banks Are Terrorists Now?: The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533, 547 (2013) (“It may be exceedingly rare for a terrorist group to have attachable assets in the United States, but where such a terrorist group exists, it should be subject to suit.”).

⁸¹ *Hearings*, *supra* note 1, at 127.

⁸² See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) (noting it is the job of the courts to interpret Congressional statutory language).

⁸³ *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1001 (7th Cir. 2002).

⁸⁴ *Id.* at 1002–03.

⁸⁵ *Id.* at 1009.

was meant to include.⁸⁶ However, the plain language of the statute could not provide further insight as to a potential class of defendants.

Next, the court looked to the statute's legislative history and to tort law principles.⁸⁷ In reviewing the Senate Report, the court concluded that the statute was "clearly . . . meant to reach beyond those persons who themselves commit the violent act that directly causes the injury."⁸⁸ Given Congress's intent, the court construed the statute broadly and explained a broad statutory construction was imperative because, similar to tort law, drafters cannot anticipate the wide variety of fact patterns that will fall within the statute's confines.⁸⁹

Again, in *Wultz v. Islamic Republic of Iran*, the court was faced with a § 2333(a) case.⁹⁰ The *Wultz* case arose out of a suicide bombing occurring in a Tel Aviv restaurant that killed a sixteen-year-old American boy, Daniel Wultz.⁹¹ Daniel's family brought the litigation under the ATA alleging that the defendant, the Bank of China, knowingly executed dozens of wire transfers, totaling several million dollars, to the attacker's organization, the Palestinian Islamic Jihad.⁹² Similar to *Boim*, the issue was whether secondary liability could be attributed to the defendant under the ATA's civil action provision for executing the wire transfers that furthered the terrorist attack.⁹³

⁸⁶ *Id.*; 18 U.S.C. § 2331(1)(A) (2012) (defining international terrorism as "activities that . . . involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State").

⁸⁷ *Boim*, 291 F.3d at 1011.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1011–12. Ultimately, on the facts presented before the court, the court held that simply making a financial contribution to a terrorist organization does not subject that actor to § 2333(a) liability. *Id.* at 1028. However, the court did say that funding by an organization would be subject to liability if it fell into the aiding and abetting category. *Id.* Embracing this theory, several plaintiffs have sought damages from a variety of banks, such as Bank of China, Credit Lyonnais SA, HSBC, and Royal Bank of Scotland Group. *See, e.g.,* *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704 (E.D.N.Y. Oct. 5, 2006).

⁹⁰ 755 F. Supp. 2d 1 (D.D.C. 2010).

⁹¹ *Id.* at 18.

⁹² *Id.*

⁹³ *Id.* at 54.

In trying to decipher whether the statutory language of § 2333(a) extended to secondary actors, the court started with the general presumption that plaintiffs in civil actions cannot sue parties that allegedly aid or abet.⁹⁴ However, because Congress expressly created a private right of action by enacting § 2333(a) and used broad statutory language, the court concluded that tort law principles applied to the statute and overrides the presumption.⁹⁵ Hence, the courts in both *Boim* and *Wultz* agreed that liability under § 2333(a) extended beyond the mere perpetrator.

II. *DAIMLER'S APPLICATION IN § 2333(A) CASES*

The United States Supreme Court, in articulating a new general jurisdiction standard, did not account for the difficulty lower courts would face in its application. After the Supreme Court issued its *Daimler* decision, courts immediately adjusted the general jurisdiction analysis. However, application of the test has proved to be challenging. For example, the United States District Courts for the Southern District of New York ("S.D.N.Y.") and District of Columbia ("D.D.C.") have applied *Daimler* to ATA § 2333(a) foreign defendants and have reached contrasting decisions. More recently, the United States Court of Appeals for the Second Circuit reversed the S.D.N.Y. decision and adopted the position set forth in the D.D.C. opinions. However, a review by the Second Circuit or a writ of certiorari may be filed by the plaintiffs in the S.D.N.Y. case.⁹⁶

A. *The PLO and PA: Representatives for a Unified Palestine*

The PLO was formed as a result of the Israeli-Palestinian conflict that has evolved over the past century. The main issue involved in the Israeli-Palestinian conflict is "whether the Palestinian people should be allowed to form their own independent country and government in an area that is currently

⁹⁴ *Id.* at 55 (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994)).

⁹⁵ *Id.*

⁹⁶ Hana Levi Julian, *US 2nd Circuit Appeals Court Reverses Anti-Terror Verdict Against Palestinian Authority, PLO*, JEWISH PRESS: NEWS & VIEWS (Aug. 31, 2016), <http://www.jewishpress.com/news/breaking-news/us-2nd-circuit-appeals-court-reverses-anti-terror-verdict-against-palestinian-authority-plo/2016/08/31>.

part of the nation of Israel.”⁹⁷ The conflicting views of Israelis and Palestinians are exhibited through the various military invasions, instability, and violence that the region has endured for decades.⁹⁸ Peace has never been reached and the conflict continues to persist today.⁹⁹

The PLO was formed to create a “central leadership” body for Palestinians in order to liberate their people and form a Palestinian region.¹⁰⁰ Since its creation in 1964, numerous attacks in Israel have been attributed to the PLO, and the organization has continuously made appearances on and off the United States’s list of foreign terrorist organizations.¹⁰¹ When the organization acquired some rights in the West Bank and Gaza in 1993, the PLO formed the PA to focus its mission in that region.¹⁰²

⁹⁷ *An Overview of Relations Between Israel and Palestine*, EBSCO HOST: POLITICS, <http://connection.ebscohost.com/politics/israel-palestinians/overview-relations-between-israel-and-palestine> (last visited Mar. 6, 2017).

⁹⁸ See *Israeli-Palestinian Conflict*, THOMSON REUTERS FOUND.: NEWS, <http://www.trust.org/spotlight/Israeli-Palestinian-conflict/?tab=briefing> (last updated July 23, 2014).

⁹⁹ See *id.*; see, e.g., Ben Wedeman, *Israeli-Palestinian Violence: What You Need To Know*, CNN (Oct. 15, 2015, 8:32 AM), <http://www.cnn.com/2015/10/14/middleeast/israel-palestinians-violence-explainer>.

¹⁰⁰ *Palestine Liberation Organization (PLO)*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/Palestine-Liberation-Organization> (last updated Aug. 25, 2009). In the *Klinghoffer* case, the court noted the PLO’s description of their organization:

[T]he internationally recognized representative of a sovereign people who are seeking to exercise their rights to self-determination, national independence, and territorial integrity. The PLO is the internationally recognized embodiment of the nationhood and sovereignty of the Palestinian people while they await the restoration of their rights through the establishment of a [comprehensive], just and lasting peace in the Middle East.

Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 739 F. Supp. 854, 857 (1990).

¹⁰¹ Adam Kredo, *Congress Works To Shutter Palestine Liberation Organization D.C. Office*, WASH. FREE BEACON (Feb. 11, 2016, 1:35 PM), <http://freebeacon.com/national-security/congress-works-to-shutter-palestine-liberation-organization-d-c-office/print>; S. Res. 2537, 114th Cong. (2016) (enacted).

¹⁰² *Sokolow v. Palestine Liberation Org. (Sokolow II)*, 60 F. Supp. 3d 509, 513 (S.D.N.Y. 2014).

B. *S.D.N.Y. District Court Does Not Allow Daimler To Preclude General Jurisdiction*

In 2014, an S.D.N.Y. District Court announced that despite the recent Supreme Court ruling in *Daimler*, private U.S. citizens were allowed to institute a civil action against the PLO and the PA.¹⁰³ The litigation, *Sokolow v. PLO*, focused on a series of terrorist attacks, occurring in and around Jerusalem between 2001 and 2004, that left U.S. citizens either killed or seriously injured.¹⁰⁴ The plaintiffs¹⁰⁵ sought to exercise their right under ATA § 2333(a) to commence a civil proceeding against actors of international terrorism.¹⁰⁶ The PLO and PA were named defendants for alleged involvement in planning, carrying out, and rewarding the perpetrators of the various attacks.¹⁰⁷

Subsequently, the PLO and the PA moved to dismiss the complaint for lack of personal jurisdiction.¹⁰⁸ In determining whether the foreign defendants were amenable to U.S. jurisdiction, the court first articulated the standard: “In the context of ATA litigation, a plaintiff makes a prima facie showing of personal jurisdiction if: (1) service of process was properly effected as to the defendant¹⁰⁹ . . . and (2) the defendant has sufficient minimum contacts with the United States as a whole to satisfy a traditional due process analysis.”¹¹⁰ Hence, the court followed the conventional *International Shoe* inquiry of minimum contacts and availing itself of the forum.¹¹¹

The court’s analysis disclosed that the PLO and PA had surpassed the minimum threshold of contacts required. First, the PLO and PA operated a fully functional office in Washington, D.C.¹¹² Additionally, to run the office, they engaged in multiple commercial contracts with U.S. businesses, including for office supplies and equipment, postage, shipping, news

¹⁰³ *Id.* at 509.

¹⁰⁴ *Id.* at 512.

¹⁰⁵ The plaintiffs were the guardians, family members, and personal representatives of the estates of the citizens killed or injured in the terrorist attacks. *Id.*

¹⁰⁶ *Id.* at 515.

¹⁰⁷ *Id.* at 512–13.

¹⁰⁸ *Sokolow v. Palestine Liberation Org. (Sokolow I)*, No. 04 CV 00397(GBD), 2011 WL 1345086, at *1 (S.D.N.Y. Mar. 30, 2011).

¹⁰⁹ Defendants did not contest service. *Id.* at *2.

¹¹⁰ *Id.*

¹¹¹ *See id.* at *3.

¹¹² *Id.*

services/subscriptions, telecommunications, Internet, IT support, accounting and legal services, and credit cards.¹¹³ Second, PLO and PA employees engaged in a variety of promotional endeavors, including interviews and speeches, that were usually broadcasted on major national U.S. news networks.¹¹⁴ Third, they managed two domestic bank accounts and a Certificate of Deposit account.¹¹⁵ Fourth, the PA entered into a multiyear, multimillion-dollar contract with a U.S. consulting and lobbying firm for the purpose of having their agents represent the PA in political activities to broadcast their mission.¹¹⁶

In determining the reasonableness of subjecting the defendants to U.S. jurisdiction, the defendants did not meet their burden of establishing a due process violation.¹¹⁷ The court noted that the defendants were subject to U.S. jurisdiction on numerous occasions in the past and had rigorously defended these litigations.¹¹⁸ Thus, the court denied the defendant's motion to dismiss, a conclusion consistent with other federal courts that have applied the *International Shoe* framework to the PLO and PA.

However, after the Supreme Court decided *Daimler*, the defendants moved for summary judgment on the grounds that the court no longer could exercise personal jurisdiction over them.¹¹⁹ Defendants argued that under *Daimler* and a Second Circuit case adopting *Daimler*, their U.S. activities were substantially smaller compared to their global activities, meaning they could not be rendered "at home" within the U.S.¹²⁰

The court ruled that *Daimler* did not preclude the lawsuit and maintained that personal jurisdiction could still be properly exercised.¹²¹ First, it highlighted the Court's admittance that the new standard was not absolute; not every defendant falls within the paradigm corporate forums laid out in *Daimler*.¹²² Second,

¹¹³ *Id.* at *4.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at *7.

¹¹⁸ *Id.*

¹¹⁹ *Sokolow III*, No. 04 Civ. 397(GBD), 2014 WL 6811395, at *1 (S.D.N.Y. Dec. 1, 2014).

¹²⁰ *See id.* (citing *Gucci Am., Inc. v. Bank of China*, 768 F.3d 122 (2d Cir. 2014)).

¹²¹ *Id.* at *2.

¹²² *See id.*

the defendants did not produce evidence to establish that they were at home somewhere other than the U.S.¹²³ Therefore, the court reaffirmed its previous finding of personal jurisdiction.¹²⁴

Because the court could properly exercise jurisdiction over the defendants, the case proceeded to a jury trial. Ultimately, the jury found in favor of the plaintiffs and returned a \$218.5 million verdict, which was increased to \$655.5 million in accordance with ATA's treble damages provision.¹²⁵

C. D.D.C. Finds Daimler To Preclude General Jurisdiction

D.D.C. litigation of § 2333(a) cases produced a markedly different *Daimler* analysis compared to the approach in *Sokolow*. The first D.D.C. court to face the issue of whether *Daimler* precluded the PLO and PA in § 2333(a) cases was *Estate of Klieman v. Palestinian Authority*. The case was brought after Esther Klieman, an American schoolteacher, was killed by a Palestinian terrorist who open fired at a public bus in Israel.¹²⁶

Two years after the filing, the PLO and PA moved to dismiss the action for lack of personal jurisdiction.¹²⁷ More specifically, the defendants argued that the plaintiffs did not satisfy their burden of demonstrating that the defendants had minimum contacts within the U.S.¹²⁸ This defense was rejected on the grounds that it was generally accepted among courts that the PLO and PA engaged in sufficient activities in the U.S. so as to satisfy minimum contacts.¹²⁹

Similar to the *Sokolow* case, after the *Daimler* decision, the PLO and the PA moved for reconsideration on the court's personal jurisdiction ruling.¹³⁰ In analyzing the defendants' motion, the court compared the pre- and post-*Daimler* standards.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Sokolow IV*, No. 04 CIVIL 00397 (GBD), 2015 WL 10852003, at *3 (S.D.N.Y. Oct. 1, 2015), *vacated*, Waldman v. Palestine Liberation Org., 835 F.3d 317 (2d Cir. 2016); 18 U.S.C. § 2333(a) (2012).

¹²⁶ Complaint at 23–25, *Estate of Klieman v. Palestinian Auth. (Klieman I)*, 467 F. Supp. 2d 107 (D.D.C. 2006) (No. 1:04-cv-01173).

¹²⁷ *Klieman I*, 467 F. Supp. 2d 107, 110 (D.D.C. 2006).

¹²⁸ *See id.*

¹²⁹ *Id.* at 113 (“Other federal courts in the United States have determined that both the PA and the PLO have sufficient minimum contacts with the United States to permit suit here consistent with the Due Process Clause of the Constitution . . . [and] [t]his Court agrees.”).

¹³⁰ *Klieman II*, 82 F. Supp. 3d 237, 239 (D.D.C. 2015).

The court noted that before *Daimler*, courts exercised personal jurisdiction over a foreign defendant if they (1) had minimum contacts within the forum and (2) could have reasonably foreseen being subject to D.D.C. jurisdiction.¹³¹ The court noted that after *Daimler*, plaintiffs must additionally establish that the defendant's minimum contacts essentially render them at home in the U.S.¹³²

The court acknowledged that the PLO and PA had numerous contacts within the U.S.,¹³³ precisely the same contacts the *Sokolow* court considered. However, unlike the *Sokolow* court, the court focused its analysis on the defendants' activities internationally to determine whether those U.S. contacts could essentially render the defendants at home in the U.S.¹³⁴ The court emphasized that the PLO was based in the West Bank and the PA was based in the West Bank and the Gaza Strip; thus, a majority of their activities occurred in these locations.¹³⁵ Additionally, comparing the defendants' U.S. contacts with their international contacts highlighted that their U.S. operations only represented a small portion of their overall activity.¹³⁶ The court further compared these facts with those of *Daimler* and concluded that the PLO and PA's contacts with the U.S. were fewer than *Daimler's* contacts with California.¹³⁷ Hence, the court concluded that under *Daimler*, the PLO and PA could not be rendered at home in the U.S. and granted summary judgment.¹³⁸

In addition to *Estate of Klieman*, two subsequent ATA civil cases have been brought in the D.D.C. courts: *Livnat v. Palestinian Authority* and *Safra v. Palestinian Authority*.¹³⁹ Both of these cases reached the same conclusion: the PA could not be summoned to a U.S. court, because it is not at home in the U.S. Importantly, the court in *Livnat* addressed the plaintiff's

¹³¹ *Id.* at 242 (articulating the *International Shoe* approach).

¹³² *Id.*

¹³³ *Id.* at 245–46.

¹³⁴ *Id.*

¹³⁵ *Id.* at 245.

¹³⁶ *Id.*

¹³⁷ *Id.* at 242, 245 (“*Daimler's* U.S. subsidiary, its continuous business operations, and commercial sales accounting for 2.4% of *Daimler's* worldwide sales were insufficient to support general jurisdiction.”).

¹³⁸ *Id.* at 250.

¹³⁹ 82 F. Supp. 3d 19 (D.D.C. 2015); 82 F. Supp. 3d 37 (D.D.C. 2015).

argument that *Daimler* does not apply to organizations, such as the PA.¹⁴⁰ The court responded by saying that *Daimler* is not necessarily limited to corporate entities simply because the *Daimler* Court did not explicitly state that the standard applies to entities other than corporations.¹⁴¹ In reading *Daimler* broadly, the court stated the focus should be on how to apply the standard to organizations like the PA and not whether these organizations are subject to *Daimler*.¹⁴²

In determining how to apply the *Daimler* standard to these organizations, the court relied on the analysis performed in another D.D.C. case, *Toumazou v. Turkish Republic of Northern Cyprus*.¹⁴³ In *Toumazou*, the court was tasked with applying *Daimler* to the Turkish Republic of Northern Cyprus (TRNC), a “democratic republic” that governs a portion of Cyprus, but is not recognized by the U.S. as a sovereign government.¹⁴⁴ The TRNC was deemed to be at home in Cyprus, the land it governed, because a majority of its activities were carried out there.¹⁴⁵ The *Livnat* court concluded that because TRNC was deemed at home in Cyprus, the PA must therefore be deemed at home in the West Bank—the PA’s governing land and center of activities.¹⁴⁶ The court explained that drawing this inference was permissible because “[i]t is common sense that the single ascertainable place where a government such a[s] the Palestinian Authority should be amenable to suit for all purposes is the place where it governs.”¹⁴⁷ Additionally, the court listed some of the PA’s activities that lend support to the conclusion that the PA is a government operating abroad: (1) consular services and (2) services like community outreach and cultural events.¹⁴⁸

In all three D.D.C. cases, the courts expressly stated disagreement with the *Sokolow* court’s personal jurisdiction ruling. The D.D.C. courts disagreed with the *Sokolow* court’s finding that the defendants failed to rebut the plaintiff’s evidence by establishing that the PA was at home somewhere else besides

¹⁴⁰ *Livnat*, 82 F. Supp. 3d at 27.

¹⁴¹ *Id.* at 28.

¹⁴² *Id.*

¹⁴³ *Id.* at 30; 71 F. Supp. 3d 7 (2014).

¹⁴⁴ *Livnat*, 82 F. Supp. 3d at 30.

¹⁴⁵ *Toumazou*, 71 F. Supp. 3d at 15.

¹⁴⁶ *Livnat*, 82 F. Supp. 3d at 30.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 30–31.

the U.S.¹⁴⁹ In doing this, the D.D.C. courts stated the *Sokolow* court impermissibly shifted the burden from the plaintiff, who must establish the defendant is at home in the U.S., to the defendants to establish they are at home somewhere else.¹⁵⁰

D. Second Circuit Reverses Sokolow and Adopts D.D.C. Position

On August 31, 2016, the Second Circuit rendered its decision reversing the district court's holding that it had personal jurisdiction over the PLO and PA.¹⁵¹ After the landmark jury decision awarding millions of dollars to the plaintiffs, the defendants sought to overturn it by again arguing lack of personal jurisdiction.¹⁵² The Second Circuit disagreed with the lower court and found that it could not constitutionally exercise personal jurisdiction over the PLO.¹⁵³ First, the court found that *Daimler* applied—even though the PLO and PA are not corporations—because the Supreme Court did not intend to distinguish between corporations and unincorporated associations in performing the at-home analysis.¹⁵⁴ Therefore, the court proceeded to perform the at-home analysis and found that the evidence showed the defendants were at home in Palestine.¹⁵⁵ It dismissed the lower court's conclusion that the defendants' U.S. contacts could render them at home in the U.S. Second, the court refused to interpret the facts of the case as “exceptional” and, therefore, out of *Daimler's* realm, which would have allowed for a different personal jurisdictional analysis.¹⁵⁶

In finding that the district court did not have personal jurisdiction over the defendants, the Second Circuit vacated the district court's judgment and remanded the case with instructions to dismiss the case for lack of personal

¹⁴⁹ *Klieman II*, 82 F. Supp. 3d 237, 246 (D.D.C. 2015).

¹⁵⁰ *Id.*; *Livnat*, 82 F. Supp. 3d at 31; *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 49 (D.D.C. 2015).

¹⁵¹ *Waldman v. Palestine Liberation Org.*, Nos. 15–3135–cv (L); 15–3151–cv (XAP), 2016 WL 4537369, at *20 (2d Cir. 2016).

¹⁵² *Id.* at *7.

¹⁵³ *Id.* at *13.

¹⁵⁴ *Id.* at *10.

¹⁵⁵ *Id.* at *11.

¹⁵⁶ *Id.* at *13.

jurisdiction.¹⁵⁷ The plaintiffs have expressed interest in requesting a review by the full Second Circuit or the possibility of filing an appeal to the Supreme Court.¹⁵⁸

III. THE SUPREME COURT NEEDS TO EXEMPT APPLICATION OF *DAIMLER* IN § 2333(A) CASES

Whether foreign sponsors of terrorism can be haled into U.S. courts should be addressed by the United States Supreme Court. The Supreme Court must carve out an exception to *Daimler* by exempting plaintiffs in § 2333(a) cases from satisfying the “at-home” test when proceeding against foreign sponsors of terrorism. Due process, the touchstone of determining general jurisdiction, demands fundamental fairness and substantial justice. By continuing to bring these foreign sponsors of terrorism into federal court, the Court would be balancing (1) the U.S.’s interest in providing a forum for American victims of terrorism and (2) foreign defendants’ interest in not being forced to defend actions in a jurisdiction with which they have no connection. In following these principles, the Supreme Court would appropriately narrow *Daimler* while satisfying fundamental fairness and substantial justice.¹⁵⁹

By exempting *Daimler* in § 2333(a) cases, plaintiffs would still need to prove that the court has general jurisdiction under *International Shoe* by proving: (1) systematic contacts and (2) reasonableness. The *International Shoe* standard is not only the standard that foreign defendants in § 2333(a) cases have been subjected to for the past two decades, but also the only fundamentally fair option. If these defendants have systematic and continuous contacts in the U.S. and purposefully avail themselves of the benefits of the laws and protections of the U.S., American citizens should be able to exercise their right to hold them accountable for their involvement in international terrorism. Otherwise, § 2333(a) serves very little purpose.

¹⁵⁷ *Id.* at *20.

¹⁵⁸ Julian, *supra* note 96.

¹⁵⁹ See Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish for: Goodyear, Daimler, and the Evisceration of General Jurisdiction*, 64 EMORY L.J. 2001, 2012 (2014).

IV. *DAIMLER* DOES NOT APPLY TO § 2333(A) CASES

Applying *Daimler* in cases where the PLO and PA are named foreign defendants is only one example highlighting the constitutional implications of applying the “at-home” test to foreign defendants allegedly sponsoring terrorism in § 2333(a) cases. The Islamic State of Iraq and the Levant, a U.S. designated foreign terrorist organization that has infiltrated the U.S. media and Internet to gain support and funding from U.S. citizens to carry out overseas attacks, is just another example of a terrorist group that will be immune to civil litigation by virtue of never being truly at home in the U.S. Cases brought under § 2333(a) are symbolic, sensitive, and meant to compensate victims harmed by international acts of terrorism. By applying *Daimler* to § 2333(a) cases, it becomes nearly impossible for American citizens to exercise this right against not only the PLO and PA but a variety of foreign actors that by virtue of their mission or policies will never be at home in the U.S.

A. *Daimler’s “At-home” Test Undermines § 2333(a) and Destabilizes National Security*

Foreign organizations will be virtually immune to § 2333(a) cases if *Daimler* applies, because organizations like the PLO and PA will rarely be reachable under general jurisdiction. Foreign organizations can be brought into U.S. courts under theories of specific or general jurisdiction.¹⁶⁰ To be brought into the U.S. under specific jurisdiction, the cause of action must have arisen from or must be related to the forum.¹⁶¹ Markedly, in *Daimler*, the United States Supreme Court attributed the growth in specific jurisdiction to the limited need for general jurisdiction.¹⁶² However, even though specific jurisdiction is more frequently utilized, it “is not sufficiently broad to eliminate the need for a more generous scope of general jurisdiction.”¹⁶³ This is best illustrated by the fact that § 2333(a) defendants cannot be haled into federal court under specific jurisdiction because § 2333(a)

¹⁶⁰ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923–24 (2011).

¹⁶¹ *Id.*

¹⁶² *Daimler AG v. Bauman*, 134 S. Ct. 746, 757–58 (2014).

¹⁶³ Arthur & Freer, *supra* note 159, at 2013.

cases specifically deal with international acts.¹⁶⁴ With specific jurisdiction unavailable, plaintiffs can only reach these foreign defendants with general jurisdiction, but organizations like the PLO and the PA will likely never be at home in the U.S. by way of their mission statement; U.S. plaintiffs seeking to sue these defendants will be left with no domestic forum options.¹⁶⁵

Because organizations, such as the PLO and PA, will be virtually immune to civil litigation and free to continue backing terrorism, the deterrent effect of the ATA is diminished. The bill's purpose was not only to merely compensate U.S. citizens. It was meant to deter terrorist groups from (1) maintaining assets in the U.S.; (2) benefitting from U.S. investments; and (3) soliciting funds within the U.S.¹⁶⁶ It was also meant to encourage other countries to pass similar legislation, which would effectively create significant hurdles for terrorist operations.¹⁶⁷ These purposes cannot be fulfilled if U.S. plaintiffs cannot acquire jurisdiction over § 2333(a) foreign defendants.

Not only does this undermine the ATA and the injured plaintiffs' right to a remedy, but also it weakens the nation's counterterrorism efforts.¹⁶⁸ Specifically, the United States in a Statement of Interest submitted in the *Sokolow* case stated:

The ability of victims to recover under the ATA also advances U.S. national security interests. The law reflects our nation's compelling interest in combatting and deterring terrorism at every level, including by eliminating sources of terrorist funding and holding sponsors of terrorism accountable for their actions. Imposing civil liability on those who commit or sponsor acts of

¹⁶⁴ 18 U.S.C. § 2333(a) (2012); *see also supra* Section I.A (defining specific jurisdiction).

¹⁶⁵ *See Daimler AG*, 134 S. Ct. at 773 (Sotomayor, J., concurring) (“[I]t should be obvious . . . the ultimate effect of the majority’s approach . . . Under the majority’s rule, for example, a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States . . . [T]he majority’s approach would preclude the [se types of] plaintiffs . . . from seeking recourse anywhere in the United States even if no other judicial system was available to provide relief.”). The D.D.C. courts conceded to this when it concluded the PLO and PA can only be at home in the place in which they govern. *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 30 (D.D.C. 2015); *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 48 (D.D.C. 2015).

¹⁶⁶ *Hearings, supra* note 1, at 12 (statement of Alan J. Kreczko).

¹⁶⁷ *Id.*

¹⁶⁸ Statement of Interest of the United States of America at 2, *Sokolow v. Palestine Liberation Org.*, No. 04-CV-397 (S.D.N.Y. Aug. 10, 2015).

terrorism is an important means of deterring and defeating terrorist activity. Further, compensation of victims at the expense of those who have committed or supported terrorist acts contributes to U.S. efforts to disrupt the financing of terrorism and to impede the flow of funds or other support to terrorist activity.¹⁶⁹

Without funding, terrorist operations cannot be sustained.¹⁷⁰ Section 2333(a) was designed to diminish terrorism financing by allowing victims to collect damages.¹⁷¹ If *Daimler* applied to § 2333(a) cases, the burden of establishing a foreign sponsor of terrorism at home in the U.S. would make it nearly impossible to assert jurisdiction over foreign defendants and would hinder the nation's counterterrorism efforts and the ATA.

B. *Daimler's "At-Home" Test was Not Written with an Eye Towards § 2333(a) Defendants*

1. Foreign Sponsors of Terrorism Fail To Satisfy *Daimler's* Economic Policymaking Justification

The *Daimler* Court imposed the at-home test to establish a jurisdictional standard through which defendants could easily ascertain the U.S. forums in which they could be subject to litigation. The Court focused on corporations and made clear that it was restricting lawsuits against corporations to their place of incorporation and principal place of business, because those forums are easily ascertainable.¹⁷² The underlying rationale for creating a standard that is easily ascertainable was based on principles of international economic policymaking.¹⁷³ These principles rest on the theory that an "expansive exercise of

¹⁶⁹ *Id.*

¹⁷⁰ Taylor, *supra* note 6.

¹⁷¹ *Hearings*, *supra* note 1, at 12.

¹⁷² *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). Despite the Court striving to create easily ascertainable forums for corporations, corporations after *Daimler* are still unclear as to where they can be reached pursuant to general jurisdiction. See Harold K. Gordon & Sevan Ogulluk, *New York Tests Daimler's Limits with Its Consent-to-Jurisdiction Rule for Foreign Companies Registering To Do Business in the State*, JONES DAY (June 2015), <http://www.jonesday.com/New-York-Tests-iDaimleris-Limits-with-Its-Consent-to-Jurisdiction-Rule-for-Foreign-Companies-Registering-to-Do-Business-in-the-State-06-29-2015>.

¹⁷³ Lauren Carasik, *Supreme Court Ruling Shields Corporations from Accountability*, W. NEW ENG. UNIV. SCH. L. (Feb. 20, 2014, 10:00 AM), <http://digitalcommons.law.wne.edu/media/104>.

jurisdiction would lead to unpredictability about where corporations could be sued, thereby discouraging foreign investment.”¹⁷⁴ Thus, the Court’s reasoning offers greater protection to foreign defendants by limiting their liability in order to maintain economic stability in the U.S.¹⁷⁵

Plainly read, this reasoning is directed towards corporations that promote or fuel the U.S. economy,¹⁷⁶ not organizations similar to the PLO and PA that are not involved in promoting economic activity in America. This is further supported by the position the United States took in its Amicus Curiae Brief submitted in the *Daimler* case:

In some instances, the interests of the United States are served by permitting suits against foreign entities to go forward in domestic courts. But expansive assertions of general jurisdiction over foreign corporations may operate to the detriment of the United States’ diplomatic relations and its foreign trade and economic interests.¹⁷⁷

Terrorism-related cases are an “instance” in which the U.S.’s interests are better served. The primary purpose for the PLO’s and PA’s presence in the U.S. is not economically related but instead focuses on endorsing liberation, establishing a Palestinian region, and raising funds to assist the process.¹⁷⁸

¹⁷⁴ *Id.*

¹⁷⁵ Kaitlin Hanigan, Comment, *A Blunder of Supreme Propositions: General Jurisdiction After Daimler AG v. Bauman*, 48 LOY. L.A. L. REV. 291, 299 (2014) (“[T]he *Daimler* opinion marks a shift away from concerns of fairness and predictability—the very principles underpinning personal jurisdiction—in favor of protecting big business from jurisdictional vulnerability.”); see also Stephanie Denker, Comment, *The Future of General Jurisdiction: The Effects of Daimler AG v. Bauman*, 20 FORDHAM J. CORP. & FIN. L. 145, 166–69 (2014) (“Companies prefer to invest and do business in places where they can predict the jurisdictional consequences of their actions.”).

¹⁷⁶ At the time, there was a real threat of companies scaling back U.S. investments and instead investing in other countries. For example, a group of German entities stated in a brief of Amici Curiae:

Since these *Bauman*-influenced decisions, the German Viega Companies have been expanding investments in other countries, such as ones in Asia, with more predictable legal environments. Absent reversal, the German Viega Companies will consider divesting in the United States, and will recommend to other similarly situated companies to do the same.

Brief for Petitioner, *DaimlerChrysler IV*, 133 S. Ct. 1995 (2013) (No. 11-965), 2013 WL 3421894, at *4.

¹⁷⁷ *Id.* at *1.

¹⁷⁸ See *Sokolow I*, No. 04 CV 00397(GBD), 2011 WL 1345086, at *4 (S.D.N.Y. Mar. 30, 2011).

Certainly, the Supreme Court did not intend to give equal protection to both foreign corporations that invest vast amounts of money in the U.S. and foreign organizations using their American presence to promote a mission that is related to sponsorship of terrorist acts.¹⁷⁹

2. *Daimler* Never Intended To Blanket All Foreign Defendants and Strip U.S. Terrorism Victims of a Remedy

The plain language of the *Daimler* opinion is evidence that the Court did not intend to blanket all foreign defendants under its new at-home standard.¹⁸⁰ If the Court wanted the test to apply to every foreign defendant, the Court would have explicitly stated so or structured its opinion broadly, instead of focusing on corporations and the economic policymaking behind it.¹⁸¹ Notably, “it said nothing about how one might determine where noncorporate associations (including labor unions, partnerships, and limited liability companies) might be ‘at home.’”¹⁸² Even within the context of corporations, the Court admitted a foreign defendant may, in exceptional cases, be subject to personal jurisdiction in a forum other than the two corporate paradigm forums the Court listed, but it did not address when this exception would apply nor did it provide factors courts should look at to determine if a corporation falls within this category.¹⁸³

Foreign sponsors of terrorism are the type of defendant that should merit such an exception to *Daimler*. Organizations like the PLO and the PA are unincorporated associations.¹⁸⁴ These organizations do not have a place of incorporation or principal

¹⁷⁹ See Kredo, *supra* note 101.

¹⁸⁰ Vivek Krishnamurthy, *Daimler AG v. Bauman: In Latest ATS Decision, the Supreme Court Limits Jurisdiction of U.S. Courts over Multinational Corporations*, FOLEY HOAG LLP (Jan. 18, 2014), <http://www.csrandthelaw.com/2014/01/18/daimler-ag-v-bauman-for-corporations-home-is-now-where-the-lawsuits-must-now-be> (“What is a surprise, however, is that in deciding [*Daimler*], the Court substantially tightened the law of jurisdiction in both U.S. federal and state courts as it applies to large corporations.”).

¹⁸¹ *C.f.* *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (explaining a new general jurisdiction approach using broad language so as to not limit the holding to any particular defendant).

¹⁸² Arthur & Freer, *supra* note 159, at 2005; *see also* *Livnat v. Palestinian Auth.*, 82 F. Supp. 3d 19, 28 (D.D.C. 2015) (“[T]he Supreme Court did not enumerate paradigm all-purpose forums for other types of organizations.”).

¹⁸³ *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 n.19 (2014).

¹⁸⁴ *Klieman I*, 467 F. Supp. 2d 107, 113–14 (D.D.C. 2006).

place of business, because they are not corporations.¹⁸⁵ Therefore, where these organizations are at home is not as straightforward under the Court's guidelines. The underlying principle of the Court's jurisdictional at-home test is, therefore, weakened because these defendants are not provided notice as to where they are amenable to litigation.¹⁸⁶

Public policy supports the premise that foreign sponsors of terrorism should be exempted from *Daimler's* personal jurisdiction analysis. It is against public policy to allow the PLO and PA to operate in the U.S. while concurrently killing and injuring American citizens abroad.¹⁸⁷ There must be some protection for American citizens outside the U.S. border.¹⁸⁸ Allowing U.S. citizens to civilly attack organizations that aid terrorist attacks can provide some protection because, if *Daimler* does not apply, these organizations could potentially face a lawsuit and fatal monetary damages that could impede their terrorism financing and, thus, reduce the frequency of terrorist attacks.¹⁸⁹ The *Daimler* Court was not thinking about terrorism and terrorism-related defendants when it opined the "at-home" test and, hence, the test should not be extended to all foreign defendants.

¹⁸⁵ *Safra v. Palestinian Auth.*, 82 F. Supp. 3d 37, 48 (D.D.C. 2015).

¹⁸⁶ Before *Daimler*, the PLO and PA were on notice that they were subject to American jurisdiction under the *International Shoe* analysis. *E.g.*, *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 795 F. Supp. 112, 114 (S.D.N.Y. 1992); *Knox v. Palestine Liberation Org.*, 248 F.R.D. 420, 427 (S.D.N.Y. 2008); *Klieman I*, 467 F. Supp. 2d at 113; *Estate of Ungar v. Palestinian Auth.*, 325 F. Supp. 2d 15, 59 (D.R.I. 2004); *Biton v. Palestinian Interim Self-Government Auth.*, 310 F. Supp. 2d 172, 179–80 (D.D.C. 2004).

¹⁸⁷ See *Public's Policy Priorities Reflect Changing Conditions at Home and Abroad*, PEW RESEARCH CENTER (Jan. 15, 2015), <http://www.people-press.org/2015/01/15/publics-policy-priorities-reflect-changing-conditions-at-home-and-abroad> (noting that public policy in America has favored defending against terrorism as the top priority consecutively for three years).

¹⁸⁸ See *Worldwide Caution*, U.S. DEPT. OF STATE (Sept. 9, 2016), <http://travel.state.gov/content/passports/en/alertswarnings/worldwide-caution.html> (explaining the continuing threat of terrorism against U.S. citizens and interests around the world).

¹⁸⁹ See *Protecting U.S. Citizens Abroad from Terrorism: Hearing Before the Subcomm. on Int'l Operations and Terrorism of the Comm. on Foreign Relations*, 107th Cong. (2002) (statement of Sen. Boxer, Chairman, Subcomm. of Int'l Operations and Terrorism) ("Congress has a responsibility and a duty to continue our oversight role in reviewing the threat that terrorism poses to U.S. citizens abroad.").

C. *Due Process Demands Fairness, and It Is Not Fair to Subject § 2333(a) Defendants to Daimler’s “At-Home” Test*

Application of the at-home test to the facts in *Daimler* comports more with fundamental fairness than application of the test in § 2333(a) cases. The facts of *Daimler* were an outlier; the case dealt with a foreign plaintiff, a foreign defendant, and a cause of action that arose in a foreign country with which the defendant was not directly involved.¹⁹⁰ If the Court found general jurisdiction to exist, essentially every foreign corporation engaged in some business in the U.S. would be amenable to suit in the U.S. by either domestic or foreign plaintiffs for causes of action that accrued in any part of the world. Certainly, this would violate due process.

However, these circumstances are not present in § 2333(a) cases. First, these defendants have been put on notice since the enactment of § 2333(a) and by subsequent cases that have been brought pursuant to it. Second, these defendants have harmed an American.¹⁹¹ These proceedings will always yield a domestic interest, because Congress only granted private American citizens, including survivors, estates and heirs, the constitutional right to bring § 2333(a) cases.¹⁹² Third, the statute specifically allows for causes of actions that accrue internationally.¹⁹³ Therefore, Congress has put foreign defendants on constructive notice, warning them that they will be subject to U.S. jurisdiction if they engage in terrorism and injure or murder an American.¹⁹⁴ This was a major focus of the statute, because Congress wanted to ensure that foreign defendants could be held accountable for their involvement in foreign terrorist attacks.¹⁹⁵ Subsequent case

¹⁹⁰ Stanley E. Cox, *The Missing “Why” of General Jurisdiction*, 76 U. PITT. L. REV. 153, 169–70 (2014) (“[T]he facts in *Daimler* were another example of the kind of outlier general jurisdiction that puts those defending such a holding on the outlier edges of justifications for the doctrine.”).

¹⁹¹ See 18 U.S.C. § 2333(a) (2012).

¹⁹² *Id.*; *Sokolow I*, No. 04 CV 00397(GBD), 2011 WL 1345086, at *7 (S.D.N.Y. Mar. 30, 2011) (“The reality is that ATA litigation often involves foreign individuals and entities, and thereby, a statutory cause of action for international terrorism exists. There is a strong inherent interest of the United States and Plaintiffs in litigating ATA claims in the United States.”).

¹⁹³ 18 U.S.C. §§ 2333(a), 2331(1)(C).

¹⁹⁴ See § 2333(a).

¹⁹⁵ See *Hearings*, *supra* note 1, at 3 (statement of Sen. Charles E. Grassley).

law has interpreted the statute to apply to secondary foreign sponsors of terrorism, as well.¹⁹⁶ Hence, § 2333(a) cases present a markedly different set of facts than were present in *Daimler*.

CONCLUSION

American citizens should continue to have the opportunity to bring civil actions in federal courts against those that contribute to heinous acts of international terrorism that injure or kill Americans abroad. This was the stated legislative purpose of § 2333(a), to compensate injured Americans and send a message to terrorist organizations that American citizens can and will civilly pursue terrorist assets. Americans can continue exercising this right if the United States Supreme Court's decision in *Daimler* is not applied to these sensitive and narrow group of cases.

The Court in *Daimler* was not thinking about § 2333(a) cases when it constructed its restrictive "at-home" test. Carving out an exception for § 2333(a) defendants will keep *Daimler's* at-home standard good law, while concurrently avoiding unfairness to American victims of terrorism. Instead, plaintiffs should only have to prove general jurisdiction over § 2333(a) defendants pursuant to *International Shoe*. In doing so, the Court will allow American citizens to have their day in court, while still providing foreign organizations notice as to where they may be amenable to suit.

Terrorism has become an unavoidable part of our lives, especially in the modern society where international terrorism is growing at a faster rate than the world has ever seen before. History is the best indicator that terrorism can happen at any moment to anyone. Unfortunately, American citizens have limited individual recourse in fighting terrorism. The courts should not strip tools provided to the American people by Congress to combat it.

¹⁹⁶ See *supra* Section I.B (explaining the *Boim* and *Wultz* cases).