THE CRIPPLING OF THE ANTI-TERRORISM ACT UNDER CURRENT GENERAL PERSONAL JURISDICTION

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ABSTRACT

This Note will focus on how two United States Supreme Court cases concerning jurisdiction—Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) and Daimler AG v. Bauman, 134 S. Ct. 746 (2014)—have affected the Second Circuit's recent decision in Waldman v. Palestine Liberation Organization, 835 F.3d 317 (2d Cir. 2016). Specifically, by limiting the jurisdiction of U.S. state and federal courts, Goodyear and Daimler have significantly hindered the ability of terrorist attack victims, such as the plaintiffs in Waldman, to sue foreign entities that would otherwise be liable under the Anti-Terrorism Act (18 U.S.C. §§ 2331–2339 (2012)) ("ATA"). The narrowing of federal jurisdiction under Goodyear and Daimler, as applied in Waldman and similar cases, has effectively crippled the ATA and precludes victims from recovering the reparations the statute was designed to afford.

There are, however, significant holes in the Second Circuit's reasoning in Waldman. This Note identifies and examines those flaws, and argues that regardless of whether the outcome of Waldman alone is desirable, its flawed reasoning cripples an important statute and creates broader detrimental ramifications. This Note also explores the few ways in which the ATA may conceivably be reconciled with existing jurisdiction doctrine, once again allowing the victims of foreign terrorist attacks to seek civil remedies. These solutions include disentangling the separate Due Process jurisdictional tests; carving out an exception for the ATA under the language in

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Daimler; applying different jurisdictional analyses based on the nature of the foreign entity at issue; and adopting a due process analysis fitted to the unique aspects of civil actions against sponsors of foreign terrorism.

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I. INTRODUCTION

On January 22, 2002, a gunman opened fire in a marketplace in Jerusalem, "indiscriminately" spraying bullets at the crowd "with the aim of causing the death of as many people as possible," ultimately killing two and injuring forty-five.[1] Two of the forty-five injured were American citizens.[2]

Five days later, a suicide bomber detonated explosives on a crowded road, the force of the explosion blowing out the windows of the surrounding buildings.[3] This attack severely injured four more American citizens, two of whom were children.[4] Two months later, another American child—this time, a seven-year-old boy—was grievously wounded along with another American citizen in a second suicide bombing.[5]

1. *See* Waldman v. Palestine Liberation Org., 835 F.3d 317, 324 (2d Cir. 2016).
2. *See id.* at 322 n.2, 324.
3. *Id.* at 324. *See also Woman Bomber Attacks Jerusalem*, BBC NEWS (Jan. 28, 2002, 3:29 AM), http://news.bbc.co.uk/2/hi/middle_east/1784941.stm.
4. *Waldman*, 835 F.3d at 324.
5. *Id.*

These attacks were part of a larger wave of Israeli-Palestinian violence (the "al Aqsa Intifada") that lasted for several years, resulting in thousands of Israeli and Palestinian,[6] as well as over fifty foreign, casualties.[7] The American casualties described above, as well as the victims and estates of other Americans killed in similar attacks, later sought relief against the Palestinian Liberation Organization ("PLO") and Palestinian Authority ("PA")—the non-sovereign foreign entities whom the Plaintiffs allege were responsible for these attacks.[8] In 2004, the Plaintiffs brought their initial suit in the Unites States District Court for the Southern District of New York, which, in 2008, denied the Defendants' motions to dismiss for lack of subject matter jurisdiction and personal jurisdiction.[9] But after eight more years of litigation, during which the district court denied Defendants' renewed motions to dismiss and motions for summary judgment,[10] the United States Court of Appeals for the Second Circuit ruled in *Waldman* that the district court lacked general and specific personal jurisdiction over the defendants.[11] The Second Circuit vacated the district court's prior holding, precluding any civil relief for the victims of the attacks.[12]

The loss of life on all sides of this conflict is unquestionably tragic. Nevertheless, the emotional and controversial nature of this conflict, and the far-reaching political and national intricacies of each party's arguments, exceed the scope of this Note. In addition, this Note declines to evaluate whether the end result of *Waldman* is the best political or social outcome. Rather, in a narrower vein, this Note will discuss the questionable aspects of *Waldman*'s legal reasoning, and will explore its legal and procedural consequences, as well as consider several public policy arguments against the current jurisdictional regime.

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6. *See Second Intifada*, ENCYCLOPEDIA OF THE MIDDLE EAST, http://www.mideastweb.org/Middle-East-Encyclopedia/second_intifada.htm (last visited June 3, 2018).

7. *See Intifada Toll 2000-2005*, BBC NEWS (Feb. 8, 2005, 12:46 PM), http://news.bbc.co.uk/2/hi/middle_east/3694350.stm.

8. *See Waldman*, 835 F.3d at 322, 324.

9. Sokolow v. Palestine Liberation Org., 583 F. Supp. 2d 451, 460 (S.D.N.Y. 2008).

10. Defendants' renewed motion to dismiss was denied. Sokolow v. Palestine Liberation Org., No. 04 CV 00397 (GBD), 2011 WL 1345086, at *7 (S.D.N.Y. Mar. 30, 2011). In 2014, in light of the Supreme Court's ruling in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the Defendants moved for summary judgment and were denied by the District Court. Sokolow v. Palestine Liberation Org., No. 04 Civ. 397(GBD), 2014 WL 6811395, at *1–2 (S.D.N.Y. Dec. 1, 2014).

11. *See Waldman*, 835 F.3d at 344.

12. *See id.*

This current jurisdictional regime arises primarily from two aforementioned cases: *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[13] and *Daimler AG v. Bauman*.[14] By limiting the jurisdiction of both state and U.S. federal courts, *Goodyear* and *Daimler* have significantly narrowed the ability for victims of terrorist attacks, such as the plaintiffs in *Waldman*, to sue foreign entities that would otherwise be liable under the Anti-Terrorism Act (18 U.S.C. §§ 2331–2339 (2012)) ("ATA").[15] Before *Goodyear* and *Daimler*, the U.S. District Court for the Southern District of New York had found that it could constitutionally exercise jurisdiction over non-sovereign foreign entities responsible for terrorist attacks that harmed American citizens.[16] Even after *Goodyear* and *Daimler* had narrowed federal jurisdiction, the U.S. District Court for the Southern District of New York held that "[u]nder . . . *Daimler* . . . the [Defendants'] continuous and systematic business and commercial contacts within the United States are sufficient to support the exercise of general jurisdiction,"[17] splitting with the D.C. District Court on the issue.[18] In *Waldman*, however, the U.S. Court of Appeals for the Second Circuit vacated and remanded the case, ruling that the Southern District of New York erred in holding that it had both general and specific jurisdiction over the PLO and PA.[19] In this way, the narrowing of federal jurisdiction under *Goodyear* and *Daimler* has effectively crippled the ATA, and precludes victims from recovering the reparations the statute was designed to afford. The case has triggered a reexamination of the *Goodyear* and *Daimler* jurisdictional regime, in light of both the emotional subject and the unique nature of the ATA. Furthermore, *Waldman* highlights the tension between our fierce desire to support our fellow citizens who are the victims of gruesome terror attacks, and the need for strict adherence to fair legal procedure.

This Note consists of five parts. Building from this Introduction, Part II of this Note will describe how the Supreme Court's *Goodyear* and *Daimler* decisions have limited federal and state jurisdiction under

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

14. Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

15. *See, e.g.*, *Waldman*, 835 F.3d at 336, 344.

16. *See* Sokolow v. Palestine Liberation Org., No. 04 CV 00397 (GBD), 2011 WL 1345086, at *7 (S.D.N.Y. Mar. 30, 2011).

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

18. *Compare* Livnat v. Palestinian Auth., 82 F. Supp. 3d 19, 32–37 (D.D.C. 2015) (holding that the court lacked personal jurisdiction over the defendant under *Daimler*), *with Sokolow*, 2014 WL 6811395, at *2.

19. *See Waldman*, 835 F.3d at 344.

the ATA and foreign entities such as the PA and PLO. Part III will delineate *Waldman* as the result of the ATA's distortion under the current jurisdictional regime. Part IV will analyze the *Waldman* decision in the context of similar cases, weigh the benefits and disadvantages of adhering to narrow jurisdiction over statutes such as the ATA, and propose solutions to reconciling the ATA with existing law. Finally, Part V will conclude that courts should adopt a different jurisdictional analysis when considering civil terrorism cases under the ATA.

II. BACKGROUND

A. Goodyear *and* Daimler

The ATA currently suffocates under the modern federal jurisdictional regime because of the time period in which the statute was born. At the time of the ATA's enactment, the Supreme Court (in *International Shoe Co. v. Washington*[20]) had already divided personal jurisdiction into the two categories of general and specific personal jurisdiction.[21] The Court, however, had refrained from further developing the limits of general personal jurisdiction, and the doctrine soon stagnated as lower courts applied it broadly and inconsistently, often frustratingly so.[22]

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20. 326 U.S. 310 (1945).

21. *See* 1 MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE § 6.01 (2016) (citing Helicopteros Nacionales de Colombia, S.A., v. Hall, 466 U.S. 408, 414 n.8 (1984)). Courts exercise specific personal jurisdiction when the underlying controversy is affiliated with or takes place in the forum, whereas general personal jurisdiction depends on whether the defendant is "essentially at home" in the forum—thus, general jurisdiction may arise where the facts of the case have nothing to do with the forum. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

22. *See, e.g.*, James R. Pielemeier, Goodyear Dunlop*: A Welcome Refinement of the Language of General Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 969, 980–84 (2012) (outlining the vague and fractured development of general personal jurisdiction in various circuits before the advent of *Goodyear*); Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J. 1619, 1620 (2001) (examining cases where "a defendant is sued on multiple counts that all arise out of the same factual event and some of the counts satisfy . . . specific personal jurisdiction but other counts do not meet . . . the requirements," to illustrate the pitfalls of personal jurisdiction at the time); Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT'L L. & POL'Y 209, 210 (2014) (noting that the Court avoided ruling on personal jurisdiction issues between 1990 and 2010). For an overview of the history of general and specific personal jurisdiction, and a discussion of certain doctrinal nuances, see generally Mark M. Maloney, *Specific Personal Jurisdiction*

Thus, having been enacted in 1992,[23] the ATA is a creature that evolved in an environment of vague and broadly applied general personal jurisdiction.[24] Accordingly, the "minimum contacts" analysis under *International Shoe* was the pertinent standard at the time of its passing,[25] and generally allowed for a moderately flexible application of the ATA. Under this standard, a plaintiff made a prima facie showing of personal jurisdiction in ATA litigation if (1) service of process was properly effected as to the defendant; and (2) the defendant's contacts met the requirements of Due Process—i.e., the defendant had sufficient minimum contacts with the United States as a whole and that assertion of personal jurisdiction was reasonable (i.e., the *International Shoe* analysis).[26]

The personal jurisdiction regime, however, shifted dramatically beginning in 2011 in the form of two cases. The first was *Goodyear Dunlop Tires Operations*.[27] In this case, the Supreme Court held that a state court could exert general personal jurisdiction over foreign corporations only where the corporations' "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[28] In other words, if a controversy before a court had not occurred in that court's particular forum (i.e., triggering specific personal jurisdiction), the court could only adjudicate the matter if the foreign party's business was so active in the forum that it

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and the "Arise from or Relate to" Requirement . . . What Does It Mean?, 50 WASH. & LEE L. REV. 1265 (1993).

23. *See* 18 U.S.C. § 2333 (2012). A subsection (d) was added in September of 2016. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 4, 130 Stat. 854 (2016) (to be codified at 18 U.S.C. § 2333(d)).

24. *See* Pielemeier, *supra* note 22, at 980–84 (noting the inconsistency of courts' applications of general personal jurisdiction before *Goodyear*).

25. *See id.* at 979–80 (stating that the "test" at the time was "whether the defendant had 'the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*'" (citing *Helicopteros*, 466 U.S. at 415–16)). *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), and *Helicopteros* were, until *Goodyear*, the only two post-*International Shoe* cases in which the Court decided issues on general personal jurisdiction. Pielemeier, *supra* note 22, at 977–78. *Perkins* still plays an enigmatic part in today's general personal jurisdiction doctrine because it is the only case cited as an extreme example that would constitute an exception to *Daimler*'s ruling. *See infra* Part IV.B.

26. *See, e.g.*, Sokolow v. Palestine Liberation Org., No. 04 CV 00397 (GBD), 2011 WL 1345086, at *2 (S.D.N.Y. Mar. 30, 2011); *In re* Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 556–58 (S.D.N.Y. 2005); Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172, 179 (D.D.C. 2004).

27. 564 U.S. 915 (2011).

28. *Id.* at 919.

was "at home" in the forum anyway.[29] Although the phrase "essentially at home in the forum State" was borrowed from *International Shoe*, prior rulings on general personal jurisdiction had not stressed this language, and the case was seen as an overdue clarification of general personal jurisdiction doctrine.[30] Others, however, argue that the Supreme Court in *Goodyear* had merely indicated a favorable attitude towards narrowing the doctrine but had done nothing further to actually refine the doctrine.[31] In any event, the case is regarded as one step towards raising the threshold of general personal jurisdiction.[32]

The next major step came in the form of *Daimler AG v. Bauman*.[33] There, Justice Ginsburg noted that while the Supreme Court "has increasingly trained on the 'relationship among the defendant, the forum, and the litigation,' *i.e.*, specific jurisdiction, general jurisdiction has come to occupy a less dominant place in the contemporary scheme."[34] Accordingly, the Court, "[i]nstructed by *Goodyear*," concluded that the U.S. District Court for the Northern District of California could not exercise general personal jurisdiction over a German company for its actions in Argentina, where its subsidiary could not be considered "'at home' in California."[35] The Court specifically rejected a theory of agency, calling it "an outcome that would sweep beyond even" the broad use of general jurisdiction "rejected in *Goodyear*."[36] In this way, *Daimler* could be characterized as elaborating on *Goodyear*'s initial tightening of

29. *Id.* at 919–20 (noting that because the "episode-in-suit" had occurred in France, North Carolina courts lacked specific personal jurisdiction).

30. *See* Pielemeier, *supra* note 22, at 969, 977–78 (discussing how the language was "*drawn from* . . . International Shoe" but had not been stressed in previous cases, such as *Perkins* and *Helicopteros*, and arguing that "this refinement of the language of general personal jurisdiction is a welcome addition").

31. *See* Brooke A. Weedon, Note, *New Limits on General Personal Jurisdiction: Examining the Retroactive Application of* Daimler *in Long-Pending Cases*, 72 WASH. & LEE L. REV. 1549, 1558–59, 1559 n.63 (2015) (citing Camilla Cohen, Comment, Goodyear Dunlop*'s Failed Attempt to Refine the Scope of General Personal Jurisdiction*, 65 FLA. L. REV. 1405, 1406–07 (2013) (noting that "*Goodyear* could just as easily be narrowly confined to its facts" rather than being seen as a clarification of the doctrine)).

32. *See* 16 MOORE'S FEDERAL PRACTICE: CIVIL § 108.41[3] (Matthew Bender 3d ed., 2017).

33. 134 S. Ct. 746 (2014).

34. *Id.* at 758 (citation omitted).

35. *Id.* at 751, 759–60.

36. *Id.* at 759–60.

general personal jurisdiction,[37] as well as applying the test to a federal district court in addition to state courts.[38]

Thus, in the span of a few years, the Supreme Court in *Daimler* and *Goodyear* had clarified and narrowed jurisdictional doctrine after decades of broader application.[39] As the Supreme Court closed the federal door on foreign corporations, however, lower courts have applied *Daimler* and *Goodyear* to limit the ability of American citizens to sue non-sovereign foreign entities.[40] But to understand how *Daimler* and *Goodyear* apply to these entities, it is necessary to understand the ATA, the types of entities that most of the world considers the PLO and PA to be, and a brief overview of how the ATA has applied to these entities in the past.

B. The ATA, PLO, and PA

The statute commonly known as the U.S. Anti-Terrorism Act is codified at 18 U.S.C. 2331, et seq.[41] The provisions of this statute address a wide range of issues pertaining to both domestic and international terrorism, including prohibitions on "[b]ombing of places of public use,"[42] using radiological or nuclear weapons,[43] and engaging in financial transactions with foreign countries known to support terrorism.[44] The provision at issue in *Waldman* was enacted by Congress in 1992, and provides a means for victims of terrorist attacks to pursue civil remedies.[45] It allows American citizens to sue

37. *See* 16 MOORE'S FEDERAL PRACTICE: CIVIL § 108.41[2B]; Weedon, *supra* note 31, at 1563 (characterizing *Daimler* as "building off of *Goodyear*" while providing "its own distinct test").

38. *See Daimler*, 134 S. Ct. at 751–52.

39. For examples of prior broad applications of general personal jurisdiction, see Morgan v. Coushatta Tribe, 214 F.R.D. 202, 206 (E.D. Tex. 2001); FCNB Spiegel, Inc. v. Dimmick, 619 N.Y.S.2d 935, 937 (N.Y. Civ. Ct. 1994). *See also* sources cited *supra* note 22.

40. *See, e.g.*, Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 228 F. Supp. 2d 40, 49 (D.R.I. 2002).

41. 18 U.S.C. §§ 2331–2339 (2012).

42. *Id.* § 2332f.

43. *Id.* §§ 2332h, 2339.

44. *Id.* § 2332d.

45. *See id.* § 2333. Significantly, subsection (d) was added on Sept. 28, 2016. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 4(a), 130 Stat. 854 (2016) (to be codified at 18 U.S.C. § 2333(d)). The new subsection allows for plaintiffs to assert liability against "a person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed" a foreign act of terrorism injuring a U.S. citizen. *Id.* It is likely that the new subsection was responding to the fact that individuals who lead the organizations liable for the attacks, but who did not commit the attacks themselves, have often not been held liable under the ATA in recent decisions. *See, e.g.*,

perpetrators of international terrorism in federal courts for damages sustained in connection with the international terrorist attacks.[46] In addition, various courts have held that the ATA allows plaintiffs to sue financial supporters of non-sovereign terrorist organizations, provided that the defendant knows that the organization is engaged in terrorist activity.[47] Furthermore, the ATA provides federal courts with subject matter jurisdiction, as it is a federal question.[48]

The PLO and the PA, on the other hand, are often subject to ATA litigation partly because of the vague nature of their status as governments. The PLO and the PA are both considered non-sovereign, government-like entities without official statehood—the United Nations considers the PLO a "non-Member Observer State" roughly equivalent

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Waldman v. Palestine Liberation Org., 835 F.3d 317, 322 n.1 (2d Cir. 2016) (noting that judgment was not entered against the individual defendants); Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172, 179–80 (D.D.C. 2004) (granting the individual defendants' motions to dismiss but denying the PA's motion to dismiss). Thus, the leaders of entities supporting terrorism had been doubly protected by both proximate cause issues and our strict jurisdictional regime. Although the effectiveness of this new subsection has yet to be tested, it is significant for two reasons: (1) it evinces Congress's continued intent to reach entities supporting terrorism under the ATA; and (2) it hints that Congress may yet attempt to reconcile the statute with our strict jurisdictional regime by amending the statute itself.

46. *See* Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 4(a), 130 Stat. 854 (2016). The ATA was actually passed in response to two specific acts of terror—the hijacking of a cruise ship, and the bombing of a Pan Am flight. *See* Lanier Saperstein & Geoffrey Sant, *The Anti-Terrorism Act: Bad Acts Make Bad Law*, N.Y.L.J., Sept. 5, 2012, at 1, http://files.dorsey.com/files/upload/NYLJ_saperstein_sant_anti_terrorism.pdf. The ATA was passed to allow the victims to file suit for terrorist attacks committed in foreign countries. *Id.* However, acknowledging the difficulty of bringing suit against international terrorist organizations without any assets in the United States, the Deputy Legal Advisor of the Department of State testified that the statute "would be limited to the 'few terrorist organizations' that 'have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment.'" *Id.* (citing *S. 2465: A Bill to Provide a New Civil Cause of Action in Federal Court for Terrorist Acts Abroad Against United States Nationals: Hearing on S. 2465 Before the Subcomm. on Courts & Admin. Practice of the S. Judiciary Comm.*, 101st Cong. 2 (1990) (statement of Alan J. Kreczko, Deputy Legal Adviser) [hereinafter *S. 2465 Hearing*], https://www.state.gov/documents/organization/28458.pdf).

47. *See, e.g.*, Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 693 (7th Cir. 2008) (finding that a defendant may be liable for giving money to an organization committing terroristic acts if the defendant "either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not"). It has proven difficult, however, to overcome the proximate cause requirement. *See, e.g.*, Gill v Arab Bank, PLC, 891 F. Supp. 2d 335, 335 (E.D.N.Y. 2012). This may explain Congress's recent addition of subsection (d) to the ATA. *See supra* note 45.

48. *See* Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 153 F. Supp. 2d 76, 85–86 (D.R.I. 2001).

to the status of the Holy See;[49] the United States does not recognize Palestine as a state;[50] and it "does not meet the definition of a 'state,' under United States and international law."[51] Thus, Palestine's lack of official statehood opens up litigation under the ATA because the PLO and PA are not protected by the Federal Sovereign Immunities Act ("FSIA"),[52] which prevents foreign sovereign states from being hauled into U.S. courts (with very limited exceptions).[53] Furthermore, each organization differs slightly both in their respective creations, as well as in each entity's functions concerning Palestine's interests, land control, and population living under its authority. The PLO was established in 1964,[54] and the PA was established by the Oslo Accords[55] in 1993 as a non-sovereign government, occupying territory in parts of the West Bank and the Gaza Strip.[56] The PLO manages Palestine's foreign affairs, while the PA's authority is limited to the land it controls.[57] The PA acts as the governing authority over its physical land and the population subscribing to its authority.[58] Conversely, as the diplomatic arm of Palestine, the PLO maintains international embassies including

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49. Press Release, General Assembly Plenary, General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations, U.N. Press Release GA/11317 (Nov. 29, 2012).

50. Sokolow v. Palestine Liberation Org., 583 F. Supp. 2d 451, 457 (S.D.N.Y. 2008).

51. *Id.*; *see also The Oslo Accords and the Arab-Israeli Peace Process*, U.S. DEP'T OF ST. OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1993-2000/oslo (last visited June 3, 2018) [hereinafter *The Oslo Accords*].

52. *See, e.g.*, Estate of Klieman v. Palestinian Auth., 424 F. Supp. 2d 153, 159–60 (D.D.C. 2006).

53. *See* 28 U.S.C. §§ 1604–1607 (2012). FSIA states that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" except for narrow exceptions in other sections of the statute. *Id. § 1604.*

54. *See Palestinian Liberation Organization (PLO)*, ENCYCLOPÆDIA BRITANNICA (Aug. 25, 2009), https://www.britannica.com/topic/Palestine-Liberation-Organization. As opposed to the PA's birth by agreement, the PLO was formed in 1964 as a centralized leadership of various Palestinian resistance movements who lived in Palestine before the creation of Israel in 1948. *See id.*

55. *See The Oslo Accords*, *supra* note 51. Formally entitled the "Declaration of Principles on Interim Self-Government Arrangements," the Accords were an agreement between then-Israeli Prime Minister Yitzhak Rabin and the PLO. *Id.* The agreement eventually collapsed between 1995 and 1996, after the assassination of Rabin and a series of floundering peace talks. *Id.* However, the PA as a non-sovereign entity survived the collapse of the agreement that created it. *Id.*

56. Waldman v. Palestine Liberation Org., 835 F.3d 317, 322 (2d Cir. 2016); *The Oslo Accords*, *supra* note 51.

57. *Waldman*, 835 F.3d at 323.

58. *Id.* The PA carries out a multitude of state-like functions, such as employing "tens of thousands" of security personnel and funding public infrastructure, judicial system, schools, health care, and government employee salaries, among other activities. *Id.*

two offices in the United States: one to the United States in Washington, D.C., and one to the United Nations in New York City.[59] As the voice of Palestine, the Washington, D.C. office has a "substantial commercial presence," using telephone numbers, purchasing office supplies, maintaining a residence for its representative, and engaging in various other transactions.[60] However, neither the PLO nor the PA are considered "states" under United States and international law,[61] mainly due to their lack of defined territory, non-permanent population, and inability to engage in genuine formal transactions with other foreign states.[62]

Accordingly, courts had consistently held in the pre-*Daimler/Goodyear* era that federal courts could exercise general personal jurisdiction over the PLO and PA in ATA litigation with factual scenarios similar to those in *Waldman*.[63] For example, in *Biton v. Palestinian Interim Self-Government Authority*, the D.C. District Court granted defendants' Fed. R. Civ. P Rule 12(b)(2) motion to dismiss only as to the individual defendants, but denied the PA's motion to dismiss because the organization's activities in the United States met the jurisdictional standard—which, at the time, was essentially the *International Shoe* minimum contacts test.[64] Another example is *Morris v. Khadr*, in which two U.S. soldiers showed that the court had general personal jurisdiction under the ATA over a member of al Qaeda.[65] Additionally, in *Estates of Ungar* ex rel. *Strachman v. Palestinian Authority*, the court found that it had general personal jurisdiction over the PA where several of its members fired a weapon at a car containing a family of U.S. citizens.[66]

After *Daimler* and *Goodyear*, however, courts began applying the Supreme Court's narrowed jurisdictional analysis to ATA litigation. For example, in 2006, before *Daimler* and *Goodyear*, the D.C. District Court in *Estate of Klieman v. Palestinian Authority* found that it had general

59. *Id.*

60. *See* Sokolow v. Palestine Liberation Org., No. 04 CV 00397 (GBD), 2011 WL 1345086, at *4 (S.D.N.Y. Mar. 30, 2011).

61. *See Waldman*, 835 F.3d at 323.

62. *See id.*

63. *See, e.g.*, Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172, 175–76 (D.D.C. 2004); Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 153 F. Supp. 2d 76, 82, 85–86 (D.R.I. 2001).

64. *See* 310 F. Supp. 2d at 179–80. *See also Estates of Ungar*, 153 F. Supp. 2d at 88 (finding that "plaintiffs' [sic] have made a prima facie showing that defendants PA and PLO have minimum contacts with the United States as a whole").

65. Morris v. Khadr, 415 F. Supp. 2d 1323, 1327, 1330–31 (D. Utah 2006).

66. 153 F. Supp. 2d at 82–83, 100.

personal jurisdiction over the defendants, using a minimum contacts test.[67] In 2015, however—after the advent of *Daimler* and *Goodyear*—the same court ruled that "[d]ue to the intervening change in the law, this Court concludes that it cannot exercise general personal jurisdiction over the PA and the PLO."[68] Contrarily, the Second Circuit, in the 2014 *Sokolow v. Palestine Liberation* case, upheld its 2011 holding by asserting that even "[u]nder a post-*Daimler* . . . analysis, this Court has personal jurisdiction . . . over the PA and PLO."[69]

Thus, immediately before the Second Circuit's decision in *Waldman*, the D.C. District Court and the Southern District of New York were split as to whether *Daimler* precluded the courts from exercising general personal jurisdiction over the PLO and PA.[70]

C. Waldman*'s Procedural Posture*

The *Waldman* case, and the Southern District of New York's split with the D.C. District Court, traces its origins back to 2004, when the *Waldman* plaintiffs sued in the Southern District of New York.[71] The Plaintiffs alleged violations of the ATA for seven terror attacks.[72] In

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67. *See* Estate of Klieman v. Palestinian Auth., 82 F. Supp. 3d 237, 239 (D.D.C. 2015) ("In 2006, the Court determined that it could exercise general personal jurisdiction over the PA and PLO based on their 'continuous and systematic' contacts with the United States.").

68. *See id.* at 240.

69. *See* Sokolow v. Palestine Liberation Org., No. 04 Civ. 397(GBD), 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014). The Southern District of New York used the "*Daimler* exception," a potential solution for the ATA discussed *infra* Part IV.B.

70. *See* Ariel Winawer, Comment, *Too Far from Home: Why* Daimler*'s "At Home" Standard Does Not Apply to Personal Jurisdiction Challenges in Anti-Terrorism Act Cases*, 66 EMORY L. J. 161, 179–80 (2016).

71. *See* Waldman v. Palestine Liberation Org., 835 F.3d 317, 324–25 (2d Cir. 2016).

72. *See id.* Of these seven attacks, the district court jury found defendants liable for six. *Id.* These attacks include one of the attacks described in this Note's introduction, as well as a suicide bombing by a bus stop, one bombing committed by HAMAS at Hebrew University, and one bombing on a crowded bus by a PA police officer. *See id.* The attacks were carried out by affiliates of the defendants in the Palestinian uprising against Israel that has become known as the "Al-Aqsa Intifada," or Second Intifada. *See id.*; *Second Intifada*, *supra* note 6. The "affiliates" who carried out the attacks are the al-Aqsa Martyrs Brigade and HAMAS. *Waldman*, 835 F.3d at 324–25. The Plaintiffs accused late PLO Chairman Yasser Arafat and his agents of paying the attackers, and families of attackers who died, to carry out acts of terrorism. *See* Jonathan Stempel, *U.S. Court Voids $655 Million Verdict Against PLO Over Israel Attacks*, REUTERS (Aug. 31, 2016, 9:59 AM), http://www.reuters.com/article/us-israel-palestinians-decision-idUSKCN1161UU. While the PLO and PA have "condemned the attacks and blamed them on rogue employees who acted on their own," the jury nevertheless found the Defendants responsible for their affiliates' actions. *Id.*

2008, the Southern District of New York denied the Defendants' motions for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim (but denied the latter two without prejudice to renew).[73] The court denied the motions consistently with the existing ATA case law at the time, citing *Estate of Klieman*, *Estates of Ungar*, and *Biton*.[74]

After engaging in jurisdictional discovery, the defendants refiled their motion to dismiss for lack of personal jurisdiction.[75] To determine whether its exercise of personal jurisdiction complied with Constitutional due process, the district court first reiterated the pre-*Daimler* standard of establishing a prima facie showing of personal jurisdiction "[i]n the context of ATA litigation"—(1) that "service of process was properly effected," and (2) that "the defendant has sufficient minimum contacts with the United States as a whole to satisfy a traditional due process analysis."[76] Subsequently, to determine the second prong of that test, the court engaged in a two-part analysis.[77] First, it considered whether the PLO and PA had sufficient minimum contacts with the forum.[78] In doing so, the court distinguished between specific and general personal jurisdiction: "Whereas specific jurisdiction applies where a defendant's contacts are related to the litigation, general jurisdiction applies where they are unrelated, and . . . requires that each defendant's contacts with the forum are continuous and

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73. *See* Sokolow v. Palestine Liberation Org., 583 F. Supp. 2d. 451, 460 (S.D.N.Y. 2008).

74. *See id.*

75. *See* Sokolow v. Palestine Liberation Org., No. 04 CV 00397 (GBD), 2011 WL 1345086, at *4–7 (S.D.N.Y. Mar. 30, 2011).

76. *Id.* at *2. The district court cited four cases from which it derived this ATA-specific prima facie standard for personal jurisdiction. The first case it cited was Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 153 F. Supp. 2d 76, 87, 95 (D.R.I. 2001). In *Ungar*, the court first outlined this standard by relying on Federal Rule of Civil Procedure 4(k)(1)(D), which states that service of a summons establishes jurisdiction when authorized by a statute; and 18 U.S.C. § 2334(a), which authorizes service of process for ATA litigation "in any district where the defendant resides, is found, or has an agent." Thus, because this statute authorizes service of process, proper service of a summons establishes jurisdiction under Fed. R. Civ. Pro. 4(k)(1)(D). *Ungar*, 153 F. Supp. 2d at 88, 91. The three other cases cited by the district court follow *Ungar*'s test. *See* In re Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 556–58 (S.D.N.Y. 2005); In re Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765, 806–07 (S.D.N.Y. 2005); Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172, 179 (D.D.C. 2004).

77. *Sokolow*, 2011 WL 1345086, at *2–3.

78. See *id.* at *3–6, where the court determined the minimum contacts issue by utilizing both traditional jurisdiction analysis and the application of jurisdictional exceptions.

systematic."[79] The court examined the PA and PLO's presence in the United States, including their offices in New York and the District of Columbia and their "public relations activities," and concluded that their contacts were sufficiently "continuous and systematic" for the court to exercise personal jurisdiction, regardless of the fact that these contacts were unrelated to the terroristic acts.[80]

Second, the district court determined "whether the assertion of personal jurisdiction comports with 'traditional notions of fair play and substantial justice.'"[81] The court stated that the "reasonableness" inquiry is required where the minimum contacts are unrelated to the conduct at issue.[82] By citing broad public policy considerations, the district court decided that it would be fair to exercise personal jurisdiction here because "[t]here is a strong inherent interest of the United States and Plaintiffs in litigating ATA claims in the United States," and that the defendants "failed to identify an alternative forum where Plaintiffs' claims could be brought, and where the foreign court could grant a substantially similar remedy."[83] Accordingly, the court denied the PLO and PA's motion to dismiss for lack of personal jurisdiction.[84]

Later that same year, however, the Supreme Court published its *Goodyear* decision, taking the first step towards limiting general personal jurisdiction.[85] It was *Daimler*, however, that officially triggered the PLO and PA to file motions for reconsideration in light of *Daimler*'s drastic narrowing of the jurisdictional regime.[86] Accordingly, after *Daimler*, the PLO and PA moved again "for dismissal and

79. *Id.* at *3.

80. *Id.* at *3–7.

81. *Id.* at *6 (citing Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 568 (2d Cir. 1996). Specifically, the court determined "whether it is reasonable under the circumstances of the particular case." *Id.* at *6 (citing *Metro. Life Ins. Co.*, 84 F.3d at 568).

82. *Id.* at *3, *6–7.

83. *See id.* at *7.

84. *Id.*

85. *See generally* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

86. *See* Winawer, *supra* note 70, at 178–79. For example, in *Klieman*, the PA and PLO filed a motion for reconsideration "in light of the Supreme Court's recent decision in *Daimler*." Estate of Klieman v. Palestinian Auth., 82 F. Supp. 3d 237, 241 (D.D.C. 2015). Interestingly, however, the D.C. District Court denied the PLO and PA's motions for reconsideration in *Gilmore v. Palestinian Interim Self-Government Authority*, stating that the defendants had waived their argument by not making it in 2012, after *Goodyear*. Gilmore v. Palestinian Interim Self-Gov't Auth., 8 F. Supp. 3d 9, 14–16 (D.D.C. 2014); Winawer, *supra* note 70, at 178 n.135.

summary judgment based on lack of personal jurisdiction" in *Sokolow*.[87] As opposed to the D.C. District Court,[88] however, the Southern District of New York found that even "[u]nder . . . *Daimler* . . . the PA and PLO's continuous and systematic business and commercial contacts within the United States are sufficient to support the exercise of general jurisdiction."[89] A subsequent jury trial that took place in January and February of 2015 before the Southern District of New York resulted in a multimillion-dollar judgment against the PLO and PA.[90] Pursuant to the ATA's trebled-damages provision,[91] the total award amounted to $655.5 million.[92] The Defendants appealed to the Second Circuit.[93]

III. *WALDMAN V. PLO*

At the outset, the Second Circuit Court of Appeals agreed that neither the PLO nor the PA is a sovereign state "under United States or international law," but noted that the PA nevertheless "is the governing authority in Palestine and . . . funds conventional government services" such as infrastructure, a judicial system, health care, education, and pays more than 155,000 government employee salaries.[94] As discussed *infra* Section IV.C, beginning with this assertion that the PLO and PA are "non-governments that govern" is significant because it shows, arguably, that the Second Circuit is trying to have its cake and eat it, too. In other words, asserting that the PLO and PA "govern" over their territories supports the Second Circuit's finding that they cannot be "at home" in the United States, while asserting that the PLO and PA are

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

88. *See, e.g.*, *Estate of Klieman*, 82 F. Supp. 3d at 241; Livnat v. Palestinian Auth., 82 F. Supp. 3d 19, 30 (D.D.C. 2015), *aff'd*, Livnat v. Palestinian Auth., 851 F.3d 45 (D.C. Cir. 2017), *petition for cert. filed*, No. 17-508 (U.S. Sept. 28, 2017); Safra v. Palestinian Auth., 82 F. Supp. 3d 37, 47–48 (D.D.C. 2015), *aff'd* sub nom. Livnat v. Palestinian Auth., 851 F.3d 45 (D.C. Cir. 2017), *petition for cert. filed*, No. 17-508 (U.S. Sept. 28, 2017).

89. *See Sokolow*, 2014 WL 6811395, at *2.

90. *See* Sokolow v. Palestine Liberation Org., No. 04 Civ. 00397 (GBD), 2015 WL 10852003 (S.D.N.Y. Oct. 1, 2015).

91. *See* 18 U.S.C. § 2333(a) (2012) ("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.").

92. *See Sokolow*, 2015 WL 10852003, at *3.

93. *See* Waldman v. Palestine Liberation Org., 835 F.3d 317, 322 (2d Cir. 2016).

94. *Id.* at 323.

not "sovereign" governments means that they are entitled to due process protection, as opposed to sovereign states.[95]

After restating the harrowing facts of the case, the Second Circuit then addressed the case's history, noting that the Southern District of New York exercised its personal jurisdiction by describing this action as the type of "exceptional case" described in *Daimler* and *Gucci America, Inc. v. Weixing Li*.[96] The Second Circut also cited three D.C. District cases issued "[d]uring and immediately after trial" that dismissed suits similar to the issue in *Sokolow*.[97]

The Second Circuit then addressed three threshold issues raised by the Plaintiffs. These three threshold issues are significant because they hint at cracks in the Second Circuit's reasoning, which begins to crumble in front of both public policy and procedural arguments, discussed *infra*, Part IV. First, the Second Circuit found that the Defendants did not waive their personal jurisdiction defense after failing to raise it after *Goodyear*, because not until the *Gucci* case did the Second Circuit recognize *Daimler* "as the appropriate test for general jurisdiction *over a corporate entity*."[98] Thus, because the Defendants raised the issue immediately after *Gucci*, the Defendants' defense was timely.[99] Second, the court established that "[b]ecause neither defendant is a state, the defendants have due process rights," subjecting them to a *Goodyear/Daimler* analysis.[100] Finally, the Second Circuit addressed the Plaintiffs' argument that the Fourteenth Amendment due process analysis only applies to state powers, while the less-restrictive Fifth Amendment due process clause should apply to

95. *Id.* at 329 (citing Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 399 (2d Cir. 2009)) ("While sovereign states are not entitled to due process protection, neither the PLO nor the PA is recognized by the United States as a sovereign state . . . . Because neither defendant is a state, the defendants have due process rights." (citations omitted)).

96. *Waldman*, 835 F.3d at 326 (comparing the facts of this case to those of Daimler AG v. Bauman, 134 S. Ct. 746 (2014), and Gucci Am. Inc. v. Weixing Li, 768 F.3d 122 (2d Cir. 2014)).

97. *Id.* at 327 (citing Estate of Klieman v. Palestinian Auth., 82 F. Supp. 3d 237, 245–46 (D.D.C. 2015), *appeal docketed*, No. 15-7034 (D.C. Cir. Apr. 8, 2015); Livnat v. Palestinian Auth., 82 F. Supp. 3d 19, 30 (D.D.C. 2015), *aff'd*, Livnat v. Palestinian Auth., 851 F.3d 45 (D.C. Cir. 2017), *petition for cert. filed*, No. 17-508 (U.S. Sept. 28, 2017); Safra v. Palestinian Auth., 82 F. Supp. 3d 37, 47–48 (D.D.C. 2015), *aff'd* sub nom. Livnat v. Palestinian Auth., 851 F.3d 45 (D.C. Cir. 2017), *petition for cert. filed*, No. 17-508 (U.S. Sept. 28, 2017)).

98. *Id.* at 328 (emphasis added) (citing *Gucci*, 768 F.3d at 135–36).

99. *See id.*

100. *Id.* at 329.

federal courts and, thus, ATA litigation.[101] The Second Circuit reasoned that because "[t]he due process analysis [for purposes of the court's *in personam* jurisdiction] is basically the same under both the Fifth and Fourteenth Amendments," and because the Second Circuit has already applied Fourteenth Amendment due process analyses to civil terrorism cases, the Fourteenth and Fifth Amendments' minimum contacts and fairness analyses are the same here.[102]

Finally, the Second Circuit addressed the major issue—"whether jurisdiction over the defendants may be exercised consistent with the [Fifth and Fourteenth Amendments]."[103] Like the district court, the Second Circuit separately addressed the "minimum contacts" inquiry, and the "reasonableness" inquiry.[104] The Second Circuit, however, described the district court's decision as a "misreading" of *Daimler*.[105] First, the court dismissed the Plaintiffs' argument that *Daimler* only applies to individuals and corporations, because *Gucci* "described the Daimler test as applicable to 'entities.'"[106] Thus, *Daimler* applies to the non-sovereign foreign entities of the PLO and PA, "and there is no reason to invent a different test for general personal jurisdiction depending on whether the defendant is an individual, a corporation, or another entity."[107] Accordingly, the Second Circuit concluded that because the Defendants "govern" in Palestine (i.e., the West Bank and Gaza Strip),[108] they can only be "fairly regarded as at home" in Palestine, and not in the United States.[109] Furthermore, the court reasoned that, under *Goodyear*'s "at home" language as interpreted by *Daimler*, "[an entity] that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States."[110]

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101. *Id.*

102. *Id.* at 330–31 (second alteration in original) (quoting Chew v. Dietrich, 143 F.3d 24, 28 n.4 (2d Cir. 1998)) (citing *In re* Terrorist Attacks on September 11, 2001 (Asat Trust Reg.)), 714 F.3d 659, 673–74 (2d Cir. 2013)).

103. *See id.* at 328, 331.

104. *See id.* at 331.

105. *Id.* at 332.

106. *See id.* (citing Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 134 (2d Cir. 2014)).

107. *Id.*

108. *Id.* at 322 (defining "Palestine" as "parts of the West Bank and the Gaza Strip" under the Defendants' control).

109. *See id.* at 332.

110. *Id.* at 333 (citations omitted) (quoting Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.20 (2014)).

The Second Circuit also found that, contrary to the district court's finding, this case does not constitute an "exception" under *Daimler*.[111] The court reasoned that, while the defendant in *Perkins v. Benguet Consolidated Mining Co.*[112] (the case cited by *Daimler* as the "exception" to the "at home" test)[113] temporarily transferred his foreign business to the United States, the PLO and PA have not done so here.[114] Because the "minimum contacts" prong of the jurisdictional analysis failed, the court did not reach the question of whether exercising jurisdiction would be "reasonable."[115]

Accordingly, under a *Goodyear/Daimler* analysis, the Second Circuit vacated the district court's ruling and remanded the case with instructions to dismiss.[116] A closer look at the decision, however, reveals certain flaws in the court's reasoning. In addition, it is possible to correct these flaws and reconcile the ATA with current general personal jurisdiction laws without drastically changing the current doctrine.

IV. ANALYSIS

While the Second Circuit noted that "[t]he terror machine gun attacks and suicide bombings that triggered this suit and victimized these plaintiffs were unquestionably horrific," it vacated the judgment of the district court to avoid unconstitutionally exercising jurisdiction, "no matter how horrendous the underlying attacks or morally compelling the plaintiffs' claims."[117] The Second Circuit's ruling, however, leaves the future of the ATA uncertain. How can the ATA provide a civil remedy to Americans injured in acts of terrorism if the foreign entities or states cannot be hauled into American courts? Does *Waldman* effectively null this provision of the ATA, or can this statute be reconciled with the high bar necessary to invoke federal jurisdiction?

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111. *Id.* at 334–35.
112. 342 U.S. 437 (1952).
113. *See Daimler AG*, 134 S. Ct. at 746 n.8.
114. *Waldman*, 835 F.3d at 335.
115. The Second Circuit Court of Appeals did, however, reach the issue of specific personal jurisdiction, even though the district court did not explicitly rule on the issue. *See id.* In a nutshell, the court found that, because the action from which the litigation arises occurred entirely outside of the United States, and was not specifically aimed at U.S. citizens, it lacked specific personal jurisdiction as well. *See id.* at 343–44 (concluding that "the deaths and injuries suffered by the American plaintiffs in those attacks were 'random [and] fortuitous'").
116. *Id.* at 344.
117. *Id.*

There are, in fact, several ways of redeeming the ATA's civil remedies provision concerning the PLO and PA, and its hamstringing under *Daimler* and *Goodyear* jurisdiction. While the Second Circuit Court of Appeals was quick to discount most of these ideas, the arguments for these ideas are colorable. At the very least, they are no more arbitrary than the Second Circuit's reasoning—and at best, they address the weaknesses of the Second Circuit's decision, while also preserving a statute designed to aid innocent American victims of terror attacks. The first flaw in the *Waldman* decision is its immediate and conclusory conflation of Fourteenth and Fifth Amendment personal jurisdiction analyses.[118] The second is its cursory dismissal of the Plaintiffs' argument that the court should consider this and similar civil terrorism cases as the exception mentioned in *Daimler*.[119] The third is the court's juxtaposed treatment of the Defendants as functional governments for the purpose of applying *Daimler*'s "at home" test, while emphasizing their lack of recognized official "sovereignty" in order to grant them due process rights, and its mistaken reliance on *Gucci* in determining that *Daimler* applies to entities such as these.[120] Additionally, the fourth and final major flaw in the *Waldman* decision is the court's refusal to consider applying a different jurisdictional framework to entities such as the PLO and PA.[121] Furthermore, two other solutions to the tension between the ATA and the current jurisdictional regime include: (1) reexamining the official sovereign statuses of the PLO and PA,[122] and (2) using an entirely different jurisdictional scheme for cases in which non-sovereign foreign entities are being sued under the ATA for supporting foreign terrorism.[123]

A. The Differences between Fourteenth Amendment and Fifth Amendment Due Process

As the Second Circuit noted, the issue in *Daimler* was "whether the Due Process Clause of the *Fourteenth Amendment* preclude[d] the

118. *See Waldman*, 835 F.3d at 329–30; Winawer, *supra* note 70, at 182–85.

119. *See Waldman*, 835 F.3d at 334–35. Since *Waldman* was decided and as of the writing of this Note, the use of the *Daimler* exception (discussed *infra* Part IV.B) as a possible solution and the ATA's jurisdictional problems have also been explored in Stephen J. DiGregoria, *If We Don't Bring Them to Court, the Terrorists Will Have Won: Reinvigorating the Anti-Terrorist Act and General Jurisdiction in a Post-*Daimler *Era*, 82 BROOK. L. REV. 357, 389 (2016).

120. *See Waldman*, 835 F.3d at 329, 332.

121. *See id.* at 332.

122. *See* discussion *infra* Part IV.C.

123. *See* discussion *infra* Part IV.D.

District Court from exercising jurisdiction . . . given the absence of any California connection to the atrocities."[124] The *Waldman* Plaintiffs, as well as the *amici curiae* named "Former Federal Officials," however, argued that the Fourteenth Amendment due process analysis has no place in federal matters, especially in matters concerning the federal government's relationship with foreign entities.[125] They asserted that the Fourteen Amendment's roots stem from jurisdictional conflicts among the fifty states, and should therefore only apply to state courts and conflicts involving states.[126] On the other hand, they argue, the Fifth Amendment concerns the federal government and "contemplates disputes with foreign nations."[127] Thus, the more lenient Fifth Amendment personal jurisdiction test applies when defendants are subject to "the jurisdiction of the courts of the United States but not of any particular State."[128]

In two short paragraphs, the *Waldman* court addressed this argument by essentially shrugging its shoulders and string-citing several Second Circuit cases where the court had already used the Fourteenth Amendment *Daimler* analysis in civil terrorism cases.[129] Additionally, the court's own reasoning consisted of citing a single footnote from a 1998 case involving a yachting accident.[130] That case explained that the only difference between Fourteenth and Fifth Amendment due process analyses is that "under the Fifth Amendment the court can consider the defendant's contacts throughout the United States, while under the Fourteenth Amendment only the contacts with the forum state may be considered."[131]

But why do these analyses differ at all, even in this seemingly minor way? The Second Circuit seems to have neglected the reasoning behind even this minor difference. Examining the roots of Fourteenth Amendment general personal jurisdiction, however, shows how

124. Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014) (emphasis added); *Waldman*, 835 F.3d at 329.

125. *See Waldman*, 835 F.3d at 329–30.

126. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); *Waldman*, 835 F.3d at 329–30.

127. *See* U.S. CONST. amend. V, § 1 ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *Waldman*, 835 F.3d at 330.

128. *See Waldman*, 835 F.3d at 330 (quoting J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011)).

129. *See id.* (citing *In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 93 (2d Cir. 2008); Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300, 315 n.37 (2d Cir. 1981)).

130. *See id.* (citing Chew v. Dietrich, 143 F.3d 24, 28 n.4 (2d Cir. 1998)).

131. *See id.* (citing *Chew*, 143 F.3d at 28 n.4).

grounded the doctrine is in individual state sovereignty, rather than the U.S.'s relations as a whole with foreign entities.[132] In *Max Daetwyler Corp. v. Meyer*, the Third Circuit Court of Appeals acknowledged that *International Shoe*'s minimum contacts test was designed to limit the territorial power of individual *states*:

> To aggregate the national contacts of an alien defendant in order to obtain personal jurisdiction may be neither unfair nor unreasonable when assessed by fifth amendment standards. Although the minimum contacts test established by *International Shoe* is itself a fairness inquiry, the scope of that inquiry necessarily acknowledges that the constitutionality of a state's assertion of in personam jurisdiction reflects territorial limitations on the power of an individual state.[133]

Thus, aggregating a foreign defendant's national contacts in determining personal jurisdiction "may be neither unfair nor unreasonable when assessed by fifth amendment standards."[134]

Accordingly, the Fifth Amendment's personal jurisdiction test differs from that of the Fourteenth Amendment by being less restrictive, because "there is no overarching concern with state sovereignty under the Fifth Amendment" as opposed to the Fourteenth Amendment.[135] Indeed, the federal government's relationship with foreign powers is not burdened by the same balancing act necessary to curb sovereignty between the fifty states—thus, the personal jurisdiction tests concerning the federal government and foreign entities may and should be influenced by important policy considerations, as opposed to that of the states.[136]

As Ariel Winawer argues in her Comment, *Too Far from Home: Why* Daimler*'s "at Home" Standard Does Not Apply to Personal Jurisdiction Challenges in Anti-Terrorism Act Cases*, civil terrorism cases are precisely the type of issue that calls for a Fifth Amendment general personal jurisdiction test.[137] As a statute passed by Congress largely implicating the U.S.'s relationships with foreign entities, and fueled by the strong policy consideration of compensating the innocent victims of overseas terror attacks, it simply makes no sense to apply *Daimler*'s

132. *See* Winawer, *supra* note 70, at 172–73.
133. 762 F.2d 290, 294 (3d Cir. 1985); *see also* Winawer, *supra* note 70, at 172.
134. *Max Daetwyler Corp.*, 762 F.2d at 294.
135. *See* Winawer, *supra* note 70, at 173.
136. *See id.* at 173 n.93.
137. *See id.* at 171–74.

Fourteenth Amendment personal jurisdiction test.[138] It is illogical that a statute designed to reach foreign terroristic entities should be subject to a personal jurisdiction regime requiring those foreign entities to be "at home" in the United States.

Clearly, it was possible for the *Waldman* court—and will be for any future court, for that matter—to make a distinction between the Fourteenth and Fifth Amendment general personal jurisdiction tests and when they should be used. Additionally, the *Waldman* court would not be prevented by the Supreme Court from making this distinction, which has noted the difference but has not addressed the issue.[139] The Second Circuit's conflation of these two separate doctrines, however, is far from the only weakness in the *Waldman* decision.

B. The Daimler *Exception*

In *Daimler,* Justice Ginsburg wrote a small but controversial "backdoor" into a footnote of the opinion.[140] The Court stated that its holding did not "foreclose the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State."[141] Furthermore, the footnote is placed immediately after one of the (quite arguably) most important sentences in *Daimler*, in which Justice Ginsburg emphasized *Goodyear*'s language that a foreign corporation must be "*essentially at home* in the forum State."[142]

The Court, however, provided very little guidance as to what scenario might constitute an "exceptional case," except by citing *Perkins v. Benguet Consolidated Mining Co.*[143] In *Perkins*, the president of a company (with its principle place of business located in the Philippines) conducted his business from his home in Ohio while the Philippines was occupied by the Japanese.[144] The Court found that the Supreme Court of Ohio had jurisdiction over the foreign company, even though the

138. *See id.*

139. *See id.* at 172–73 (citing Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 113 (1987)) (noting that "the Court acknowledged the Fifth Amendment Due Process Clause, but did not opine whether a foreign company's contacts with the United States could be aggregated nationwide for jurisdictional purposes").

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

141. *Id.*

142. *Id.* at 761 (emphasis added) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

143. *See id.* at 761 n.19.

144. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438, 447 (1952).

lawsuit concerned activities entirely separate from the president's actions that he performed while located in the state of Ohio.[145] The Court in *Daimler* does not explicitly state why the *Perkins* defendant's actions were "so substantial and of such a nature" that it should be treated as such an exceptional case.[146] Presumably, however, the Court meant that the company's temporary transferal of its primary office to Ohio made its contacts "continuous and systematic" enough to be considered "at home."[147] Indeed, the Court noted that "Ohio was the corporation's principal, if temporary, place of business."[148]

The Second Circuit rejected the Southern District of New York's finding that the facts of *Waldman*, like those of *Perkins*, satisfied the exception carved out by Justice Ginsburg in *Daimler*.[149] The *Waldman* decision compared the PLO and PA's contacts with those of the defendant in *Perkins*, as well as the defendant's in *Gucci*.[150] In *Gucci*, the Second Circuit held that a bank's four branch offices in a forum did not make the bank "at home" in the forum, where it was headquartered and incorporated elsewhere.[151] The court noted that the Bank of China "has only four branch offices in the United States and only a small portion of its worldwide business is conducted in New York," and found that these facts did not make the Bank "at home in the forum."[152] In

145. *See id.* at 448–49.

146. *See Daimler*, 134 S. Ct. at 761. It is possible (although this is pure speculation) that the Courts in *Daimler* and *Goodyear* merely characterized *Perkins* as an "exception" to avoid appearing as if *Daimler* and *Goodyear* were contradicting long-established precedent. *Goodyear* characterizes *Perkins* as "[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Goodyear*, 564 U.S. at 928 (quoting Donahue v. Far E. Air Transp. Corp., 652 F.2d 1032, 1037 (D.C. Cir. 1981)).

147. *See Perkins*, 342 U.S. at 448–49.

148. *See Daimler*, 134 S. Ct. at 756 (quoting Keeton v. Hustler Magazine, Inc. 465 U.S. 770, 780 n.11 (1984)).

149. *See* Waldman v. Palestine Liberation Org., 835 F.3d 317, 334–35 (2d Cir. 2016). The Southern District of New York first tried to distinguish this case from *Daimler* by noting that the foreign entities here were not corporations like the company in *Daimler*, and thus were "not subject to the traditional analysis of determining a defendant's place of incorporation or principal place of business." Sokolow v. Palestine Liberation Org., No. 04 Civ. 397 (GBD), 2014 WL 6811395, at *2 (S.D.N.Y. Dec. 1, 2014). The Second Circuit responded, however, by stating that "while Daimler involved corporations . . . Daimler's reasoning was based on an analogy to general jurisdiction over individuals, and there is no reason to invent a different test for general personal jurisdiction depending on whether the defendant is an individual, a corporation, or another entity." *Waldman*, 835 F.3d at 332.

150. Waldman, 835 F.3d at 335.

151. *See id.* (citing Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 135 (2d Cir. 2014)).

152. *Gucci Am., Inc.*, 768 F.3d at 135.

Waldman, the Second Circuit compared that defendant's contacts to those of the PLO and PA, and made the rather conclusory statement that "defendants' activities in this case . . . 'plainly do not approach' the required level of contact to qualify as 'exceptional,'" focusing on the fact that the defendant in *Perkins* had "transported [its] principle 'home' to the United States."[153]

Perhaps, however, the *Perkins* defendant's level of activity in Ohio is more similar to the PA and PLO's levels of activity in the United States than the Second Circuit deigns to consider. In *Perkins*, the defendant mining company, displaced to Ohio by the Japanese occupation of the Philippines, engaged in "a continuous and systematic, but limited, part of its general business . . . consisting of directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc."[154] Compare these facts with the PLO and PA, who, through an office in D.C.,

> had a substantial commercial presence in the United States. The Defendants operated a fully and continuously functional office in Washington, D.C. . . . [and] had thirty-five land line telephone and cell phone numbers and two bank accounts from 2002-2004. The Defendants had a CD account as late as January 2003. Defendants also had ongoing commercial contracts and transactions with numerous U.S.-based businesses, including for office supplies and equipment, postage/shipping, new services/subscriptions, telecommunications/internet, IT support, accountant and legal services, and credit cards. Defendants even paid for certain living expenses of [an employee of the PLO].[155]

The district court went on to describe how the PA "retained a consulting and lobbying firm through a multi-year, multi-million dollar contract . . . [who] engaged in numerous political activities on behalf of the PA . . . [and] promoted the PA's interests through television and radio appearances."[156] "[T]he D.C. office engaged in extensive public relations activities throughout the United States, ranging from interviews and speeches to attending and participating in various

153. *See Waldman*, 835 F.3d at 335 (citing *Daimler*, 134 S. Ct. at 761 n.19).

154. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 437, 445 (1952).

155. *See* Sokolow v. Palestine Liberation Org., No. 04 CV 00397 (GBD), 2011 WL 1345086, at *4 (S.D.N.Y. Mar. 30, 2011) (citations omitted).

156. *Id.* (citations omitted).

public events."[157] They often spent over $200,000 every six months for these activities.[158] Additionally, the district court noted that the PLO and PA participated in affairs concerning the United Nation, which may not be considered as a basis of jurisdiction in New York.[159]

Are not the *Waldman* Defendants' extensive contacts at least similar to (if not even more extensive than) the amount of business the *Perkins* defendant conducted in Ohio, which was found to be sufficient? Are not the PLO's contacts at least *more* similar to those in *Perkins* than the *Gucci* bank's mere four branch offices, which were found to be insufficient?[160] The *Daimler* decision seems to imply that *Perkins* is the exception because Ohio was that defendant's only place of business—thus, he *intended* Ohio to be the primary place of business, if only temporarily.[161] Compare the *Perkins* defendant to the PLO, which conducts Palestine's foreign affairs in the U.S., maintains two diplomatic offices in the U.S., and retains long-term, multi-million-dollar contracts with U.S. consulting and lobbying firms to advocate its message.[162] The PLO functions as an embassy to the U.S. and the rest of the world.[163] Thus, one can make a colorable argument that the PLO is "at home" in its offices around the world, since it exists as its own diplomatic entity rather than satellite offices stemming from a sovereign state.[164]

This argument also brings up weaknesses in the actual application of the "at home" language of *Goodyear* as used by *Daimler*. The Court in

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157. *Id.*

158. *See id.*

159. *See id.* at *5 (citing Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, 937 F.2d 44, 51–52 (2d Cir. 1991)). The *Waldman* decision noted the district court's reasoning, but did not address it explicitly. *See* Waldman v. Palestine Liberation Org., 835 F.3d 317, 325 (2d Cir. 2016).

160. *Compare Sokolow*, 2011 WL 1345086, at *4–5 (explaining the types of contacts PLO and PA had in the United States, including, inter alia, a fully and continuously functional office in Washington D.C., thirty-five telephone numbers, two bank accounts, and ongoing commercial contracts with numerous U.S.-based businesses), *with Perkins*, 342 U.S. at 438 (explaining that the defendants engaged in systematic and continuous business in the United States, including, inter alia, directors' meetings, business correspondence, and banking), *and* Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 134–35 (2014) (concluding that the district court may not properly exercise general personal jurisdiction over the bank which had only four branch offices in the United States and only a small portion of its worldwide business in New York).

161. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 756 (2014) (quoting Keeton v. Hustler Magazine, Inc., 465 U. S. 770, 779 n.11, 780 (1984)).

162. *See Waldman*, 835 F.3d at 323.

163. *See id.*

164. *See id.* at 323, 329.

Goodyear articulated the jurisdictional test as whether the "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State,"[165] implying an element of quantity—i.e., all that is needed is a certain *amount* of continuous, systematic affiliations; an amount high enough that would render the entity *essentially* at home.[166] *Daimler* and, to an even more explicit extent, *Gucci* and *Waldman*, seem to have interpreted this language so that the foreign entity must actually "*transport*" its "home" to the forum state, "even temporarily."[167] How else is it possible to reconcile the *amount* of affiliations in *Perkins* compared with the (arguably more extensive) affiliations in *Waldman*? While this distinction may seem to be splitting hairs, its nuances do make a difference. In characterizing the language of "essentially at home" as *literally* at home or *transporting* to the forum in question, the courts in *Gucci* and *Waldman* seem to assume that foreign corporations and entities can only be at home in one forum at a time.[168] *Goodyear* and *Perkins*, however, say no such thing. *Perkins* suggests that the defendants there fell under the Court's jurisdiction because "the business done in Ohio by the respondent mining company was sufficiently substantial and of such a nature as to permit Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from its activities in Ohio."[169]

Gucci and *Waldman*, however, seem to ask for a *transportation* of the entity's home, rather than extensive affiliations that *essentially* render the defendant at home.[170] Because government-like foreign entities that are non-sovereign rarely, if ever, "transport" their principle

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

166. In other words, it is arguable that the use of the word "essentially" implies "in essence," but not "literally" at home in the forum.

167. *See Waldman*, 835 F.3d at 335 (citing Brown v. Lockheed Martin Corp., 814 F.3d 619, 628–30 (2d Cir. 2016)) ("The PLO and PA have not transported their principle 'home' to the United States, even temporarily, as the defendant had in *Perkins*.").

168. *See* Gucci Am. Inc. v. Weixing Li, 768 F.3d 122, 134–35 (2014) ("Aside from 'an exceptional case,' the [*Daimler*] Court explained, a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company's formal place of incorporation or its principal place of business."); *Waldman*, 835 F.3d at 335.

169. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952). Indeed, nothing in *Perkins*'s language indicates that the defendant needed to have *transported* itself to Ohio; rather, it uses language examining the amount and type of affiliations with the forum. *See id.* at 445 (examining "[t]he amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state").

170. *Gucci*, 768 F.3d at 134–35; *Waldman*, 835 F.3d at 335.

authority beyond their territory, the purpose of the ATA itself (to reach foreign agents committing foreign acts of terrorism) is rendered moot.[171] After all, even pre-*Goodyear* and *Daimler* in 1990, Congress and the Department of Justice had not turned a blind eye towards the difficulty of bringing suit under the ATA.[172] Firstly, the ATA (perhaps purposefully) does not provide helpful language in determining *who* to sue for foreign acts of terrorism—rather, the language seems deliberately broad so that civilians may sue any non-sovereign entity or person engaging in foreign acts of terrorism.[173] Additionally, the issue was brought up during congressional hearings on the ATA.[174] There, members of Congress and expert witnesses agreed that the ATA targeted terrorists, while recognizing that few terrorists had assets or were located in the United States.[175] But if the *Waldman* decision stands, even the few potentially liable organizations with U.S. assets seem to be effectively protected from the ATA.[176]

As demonstrated thus far, however, the *Waldman* decision is based upon an arbitrary and incorrect conflation of the Fourteenth and Fifth Amendment jurisdiction analyses, as well as flawed reasoning that the case is unlike the *Perkins* exception.[177] The case relies on yet another faulty misjudgment concerning the nature of the PA and PLO themselves.

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171. In part, because asking whether the entity "transported" its home to the forum begs the question of whether the ATA even makes sense.

172. *See S. 2465 Hearing*, *supra* note 46 (noting that "[f]ew terrorists travel to the United States and few terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment"); *Antiterrorism Act of 1991: Hearing on H.R. 2222 Before the Subcomm. on Intellectual Property & Judicial Administration of the Comm. on the Judiciary H. of Representatives*, 102d Cong. 13 (1992).

173. *See* Anti-Terrorism Act, 18 U.S.C. § 2333(a) (2012) ("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 . . . ."). The ATA goes on to define terrorism as "violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State." Anti-Terrorism Act, 18 U.S.C. § 2331(1)(A) (2012).

174. *See* Saperstein & Sant, *supra* note 46.

175. *See id.*; *S. 2465 Hearing*, *supra* note 46, at 2–3.

176. *See generally* Waldman v. Palestine Liberation Org., 835 F.3d 317, 344 (2d Cir. 2016).

177. *See id.* at 329–30, 334. See DiGregoria, *supra* note 119, at 389, for additional arguments as to why the *Daimler* exception is a possible solution to the ATA's jurisdictional problem.

C. The FSIA, ATA, and "Non-Sovereign Foreign Entities"

The U.S.'s official designation of whether the PLO and PA are sovereign states is particularly relevant as to whether the jurisdictional scheme of *Daimler* and *Goodyear* even apply. The PLO and PA themselves are not formally listed as terrorist organizations in the United States (although the PLO has been designated as a terrorist organization in the past).[178] However, as discussed above, the PLO and PA are considered "non-sovereign entit[ies] with governmental attributes"[179] and have "cash assets or property located in the United States that could be attached and used to fulfill a civil judgment."[180]

The *Waldman* decision consistently refers to the Defendants as non-sovereign entities or non-sovereign governments.[181] The problem with how *Waldman* characterizes the PLO and PA, however, is that the implications of their "non-sovereign" statuses are inconsistent, changing based on the issue to ensure that the PLO and PA fall under the *Daimler* general personal jurisdiction test.[182] First, the *Waldman* court reasoned that because the United States does not recognize the PLO and PA as sovereign states, the PLO and PA have due process rights.[183] Later, in its due process analysis, the court addressed the plaintiff's' argument that *Daimler* applies to only individuals and corporations.[184] The court agreed that the Defendants were foreign entities and not individuals or corporations, but noted that the Second Circuit in *Gucci* "described the Daimler test as applicable to 'entities.'"[185] Therefore, the court concluded that "there is no reason to invent a different test for general personal jurisdiction depending on whether the defendant is an

178. *Foreign Terrorist Organizations*, U.S. DEP'T OF ST., http://www.state.gov/j/ct/rls/other/des/123085.htm (last visited June 3, 2018) [hereinafter *Foreign Terrorist Organizations*]; *see also* 22 U.S.C. § 5201(b) (2012) (stating that "Congress determines that the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States").

179. *See Waldman*, 835 F.3d at 329.

180. Saperstein & Sant, *supra* note 46; *see also Waldman*, 835 F.3d at 323 (noting that the PLO has property and assets in the U.S.).

181. *See Waldman*, 835 F.3d at 322, 329, 332.

182. *See id.* at 329, 332.

183. *See id.* at 329 ("Foreign sovereign states do not have due process rights but receive the protection of the Foreign Sovereign Immunities Act.").

184. *See id.* at 329, 332.

185. *See id.* at 332 (quoting Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 134 (2014)) ("The essence of general personal jurisdiction is the ability to entertain 'any and all claims' against an entity based solely on the entity's activities in the forum, rather than on the particulars of the case before the court.").

individual, a corporation, or another entity."[186] Immediately afterward, however, the court asserted that the PA and PLO could only be regarded at home "where they govern."[187] To establish that the PA and PLO should only be considered at home "where they govern," the court then describes all of the ways the PA and PLO behave exactly like sovereign governments—their "governmental ministries, the Palestinian president, the Parliament, and the Palestinian security services."[188]

Essentially, then, the court is saying that, there is no official piece of paper saying that the Defendants are sovereign states, so the court will treat them as non-sovereign states by affording them due process rights—but they *function* exactly like sovereign states, so the court will treat them like sovereign states "at home" in the lands they govern.

Is not the inconsistency of the court's reasoning enough of a reason to treat these entities as either sovereign or non-sovereign states (or at the very least, differently than individuals or corporations)? First, in the same way the Second Circuit relied on *Gucci* to determine that *Daimler* applies to "entities,"[189] one can just as easily argue that *Gucci*'s use of the word "entity" is a "misreading" of *Daimler*.[190] The opinion in *Daimler* does not purport to apply its test to anything beyond individuals and corporations.[191] In fact, in only applying to individuals and corporations, *Daimler* quoted directly from *Goodyear*, stating that

> *Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."[192]

Thus, in light of the purpose of the ATA, *Daimler* should not apply to civil terrorism cases both constitutionally, and because of the language of *Daimler* itself.[193] Accordingly, in light of public policy, the

186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.* ("The district court . . . relies on a misreading of the Supreme Court's decision in *Daimler*.").
191. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 929 (2011)).
192. *See id.*
193. *See* Winawer, *supra* note 70, at 173, 187.

Constitution, and the inapplicability of *Daimler*, there is ample support "to invent a different test for general personal jurisdiction depending on whether the defendant is an individual, a corporation, or another entity," be it through the Fifth Amendment or an entirely different analysis.[194]

The Supreme Court tightened personal jurisdiction requirements in *Goodyear* and *Daimler* "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[195] But the defendants in both of those cases were corporations.[196] In trying to shield corporations, the Supreme Court has inadvertently allowed lower courts[197] to afford immunity in U.S. civil courts to potential supporters of terrorism.[198] The current jurisdiction doctrine precludes even the few cases in which the terrorists were sponsored by entities with assets in the U.S., which the statute was precisely meant to reach.[199]

Rather than changing the current jurisdiction doctrine (discussed *infra* Section IV.D), a more radical yet effective approach to saving the ATA would be to treat "non-sovereign foreign entities" as if they were

194. *Waldman*, 835 F.3d at 332; *see also infra* Section IV.D.

195. *Daimler*, 134 S. Ct. at 754 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923 (2011)).

196. *Daimler*, 134 S. Ct. at 751; *Goodyear*, 564 U.S. at 920 (2011).

197. Indeed, *Daimler* itself purports to apply only to individuals and corporations. *See* 134 S. Ct. at 760. The PLO and PA are not corporations. *See* Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 153 F. Supp. 2d 76, 89–90 (D.R.I. 2001). The Second Circuit's only consideration as to whether this jurisdiction scheme even applies to the PA and PLO in *Waldman* is the cursory, throwaway comment that "there is no reason to invent a different test for general personal jurisdiction depending on whether the defendant is an individual, a corporation, or another entity." *Waldman*, 835 F.3d at 332.

198. While the PA and PLO are not formally listed as terrorist organizations, both HAMAS and the Al-Aqsa Martyrs Brigade are formally listed as terrorist organizations. *See Foreign Terrorist Organizations*, *supra* note 178. HAMAS and the Al-Aqsa Martyrs Brigade receive funding from the PLO and PA, and were responsible for the actual attacks at issue in *Waldman*. *See* Stempel, *supra* note 72. Furthermore, the district court jury found the PLO and PA financially liable for the attacks carried out by HAMAS and the Al-Aqsa Martyrs Brigade. *See Waldman*, 835 F.3d at 336–37.

199. *See* Saperstein & Sant, *supra* note 46. Additionally, regardless of jurisdiction, there is a proximate cause issue between terrorist organizations and the sovereign or non-sovereign state sponsorship of terrorist organizations. *See id.* (noting that "the ATA imposes a proximate cause requirement, namely that the injuries occurred 'by reason of an act of international terrorism,'" and that the funders of the terrorist organizations must have been reasonably aware that their money would be used for acts of terror). *See also* Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 4(d)(2), 130 Stat. 854 (2016) (to be codified at 18 U.S.C. § 2333) (allowing plaintiffs to assert liability against a person who "aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed" a foreign act of terrorism injuring a U.S. citizen); *supra* note 45 and accompanying text.

sovereign entities. As discussed in *Waldman*, sovereign entities do not have due process rights—thus, *Daimler* would be inapplicable, and entities such as the PLO and PA would be removed from its analysis.[200] Sovereign entities, however, are afforded broad civil suit immunity by the Foreign Sovereign Immunities Act ("FSIA").[201] But unlike due process, FSIA has several exceptions.[202] For example, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") amended FSIA by providing that a foreign state that is officially designated as a state sponsor of terrorism waives its sovereign immunity for personal injury or death caused by its officials or agents against U.S. nationals.[203] Furthermore, various district courts have ruled that "the due process analysis applicable to foreign state defendants that are sued pursuant to § 1605(a)(7) differs from the traditional due process analysis."[204] Thus, it is conceivable that treating entities such as the PLO and PA as sovereign states (or expressly labeling them as "sovereign") might actually allow the ATA to reach them through the FSIA's terrorism exception.[205]

Of course, this potential solution is not without its problems. Obviously, U.S. recognition of Palestine as a foreign state could create enormous political and international ramifications that exceed both the scope of this article, and, possibly, the benefits of possibly re-empowering the ATA.[206] Furthermore, treating the actions of HAMAS and the Al-Aqsa the Martyrs Brigade as state-sponsored terrorism does

200. *See Waldman*, 835 F.3d at 329.

201. *See id.*

202. *See* 28 U.S.C. §§ 1605–1607 (2012).

203. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1241 (1996). The Justice Against Sponsors of Terrorism Act ("JASTA") went a step further and amended FSIA and AEDPA, allowing federal courts to exercise personal jurisdiction over foreign states "that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States," regardless of whether those states are designated as state sponsors of terrorism. *See* Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(b), 130 Stat. 854.

204. Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 153 F. Supp. 2d 76, 93 (D.R.I. 2001) (citing Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998); Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F. Supp. 325, 330 (E.D.N.Y. 1998)).

205. *See Estates of Ungar*, 153 F. Supp. 2d at 93.

206. For two recent views on the implications of this possibility, compare Catherine Shakdam, *Why Palestinian Statehood Poses Such a Threat to Israel*, MINTPRESS NEWS (Dec. 29, 2014), http://www.mintpressnews.com/palestinian-statehood-poses-threat-israel/200249/, with Matthew Duss & Michael A. Cohen, *The United States Should Recognize the State of Palestine*, WASH. POST (Mar. 27, 2015), https://www.washingtonpost.com/opinions/the-united-states-should-recognize-the-state-of-palestine/2015/03/27/1815e9b4-d366-11e4-ab77-9646eea6a4c7_story.html?utm_term=.d3b58603cdf4.

not guarantee that the ATA would reach the PLO and PA—although a terrorism exception to the Foreign Sovereign Immunities Act does exist, the statute limits "suits to specifically-designated terrorist states, and even then allowed those claims to proceed only under certain conditions."[207] Additionally, because the designation of the sovereignty of foreign entities does not lie with the judicial branch,[208] it is difficult to imagine that courts would be willing to entangle themselves in these broad and serious implications just to maximize the effect of the ATA.

Nevertheless, as previously established, there is ample support to apply a different jurisdictional test to civil terrorism cases than that in *Daimler*.[209] One of these potential different analyses lies in the interesting niche created by the AEDPA and the FSIA, as discussed below.

D. Changing the Jurisdictional Scheme

In *Waldman*, the Second Circuit acknowledged that "[t]he terror machine gun attacks and suicide bombings that triggered this suit and victimized these plaintiffs were unquestionably horrific."[210] Yet it ruled that it cannot constitutionally exercise jurisdiction "beyond the limits prescribed by the due process clause of the Constitution, no matter how horrendous the underlying attacks or morally compelling the plaintiffs' claims."[211] Is this really the outcome that the Supreme Court in *Daimler* and *Goodyear* intended? In *Daimler*, Argentinian plaintiffs were suing a German car company and its subsidiary in a California court for actions allegedly committed in Argentina.[212] In *Goodyear*, North Carolina plaintiffs were suing an Ohio company and its international subsidiaries in a North Carolina state court, for a tire failure in Paris, France.[213] In *Waldman*, American families filed suit in the Southern District of New York against two foreign entities for killing and wounding their families during terrorist attacks that occurred in Israel, under a statute specifically designed for such an occasion.[214] The facts of the latter case are vastly distinguishable from

207. *See* Saperstein & Sant, *supra* note 46.
208. *See* U.S. CONST. art. II, § 2 (delegating most of the United States' diplomatic power to the executive branch).
209. *See* Waldman v. Palestine Liberation Org., 835 F.3d 317, 326 (2d Cir. 2016).
210. *Id.* at 344.
211. *Id.*
212. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 750–51 (2014).
213. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918 (2011).
214. *See Waldman*, 835 F.3d at 322.

those of the first two. Therefore, as previously demonstrated,[215] perhaps it would not be unreasonable to hold financial supporters of terrorists (whose actions are purposefully designed to kill indiscriminately) under a different, less-stringent statutory scheme than negligent foreign corporations.[216]

The plaintiffs in *Waldman* were not the first to make such an argument. In *Livnat v. Palestinian Authority*, American plaintiffs brought suit against the Palestinian Authority under the ATA for a machine-gun attack on family members at a Jewish holy site in the West Bank city of Nablus.[217] The Palestinian Authority moved to dismiss the action for lack of specific or general personal jurisdiction, "arguing that it has insufficient contacts with the United States to support jurisdiction."[218] In its opinion, the district court distinguished between general and specific personal jurisdiction, acknowledging that general personal jurisdiction exists where a foreign entity is essentially "at home" in the state, and that specific personal jurisdiction exists where a foreign entity's actions and the forum are sufficiently connected.[219]

The plaintiffs in *Livnat* had likewise argued that *Daimler* applied only to corporations rather than entities like the PA.[220] Alternatively, "[p]laintiffs argued that [d]efendant was 'at home' in the U.S. because it operated an office in the U.S., conducted public relations and other activities in the U.S., and received hundreds of millions of dollars in U.S. aid each year."[221]

First, the D.C. District Court held that the Palestinian Authority does have Due Process rights.[222] Then, the district court applied the *Goodyear/Daimler* framework and concluded that it did not have personal jurisdiction over the PA.[223] The district court "respectfully disagree[d] with the recent application of *Daimler* to the Palestinian

215. *See supra* Sections IV.A–B.

216. *See* Max Daetwyler Corp. v. Meyer, 762 F.2d 290, 294 (3d Cir. 1985) (finding that aggregating a foreign defendant's national contacts in determining personal jurisdiction "may be neither unfair nor unreasonable when assessed by fifth amendment standards").

217. 82 F. Supp. 3d 19, 20–22 (D.D.C. 2015).

218. *Id.* at 24.

219. *See id.* at 24–25.

220. *See id.* at 27; Mark McCrone, *Personal Jurisdiction. District Court Dismisses Terrorism Case Against the Palestinian Authority for Lack of Personal Jurisdiction*, LEXOLOGY (July 30, 2015), http://www.lexology.com/library/detail.aspx?g=9b821452-78ba-4ef8-aedc-13928ed3071b.

221. *Id. See also* Livnat v. Palestinian Auth., 82 F. Supp. 3d 19, 23 (D.D.C. 2015).

222. *Livnat*, 82 F. Supp. 3d at 26.

223. *See id.* at 28–30.

Authority by . . . the Southern District of New York" in *Waldman*'s district court decision, *Sokolow v. Palestine Liberation Org.*[224] Specifically, the D.C. District Court disagreed with the Southern District of New York's ruling despite its acknowledgment that the record was "insufficient to conclude that either defendant [was] 'at home' in [the Southern District of New York]."[225] The D.C. District Court reasoned that it was the plaintiffs, rather than defendants, who were required to "overcome the common sense presumption that a non-sovereign government is at home in the place they govern."[226]

Thus, because the challenges to the application of *Daimler* have been exhausted, it may be necessary to apply a different jurisdictional scheme specifically tailored to civil terrorism cases, either by altering the current scheme entirely or carving out a separate jurisdictional analysis for "non-sovereign" governments such as the PLO and PA.

For example, if limiting the *Daimler/Goodyear* analysis to only individuals and corporations is too extreme, courts could construct an analytical framework specifically for non-sovereign governments sponsoring state terrorism. However, this potential remedy poses an issue of proximate cause. In *Stutts v. De Dietrich Group*, the District Court for the Eastern District of New York "noted that the ATA imposes a proximate cause requirement, namely that the injuries occurred 'by reason of an act of international terrorism.'"[227] In other words, providing money to terrorist organizations was not enough to reach the funders.

Another remedy to fix the recent eroding of the ATA is to amend the entire jurisdictional scheme based on procedural policy considerations even broader than concerns about terrorism. One consideration that plays a "pervasive" role when constructing a jurisdictional scheme is "'whether . . . jurisdictional thinking should embody a bias in favor of the defendant or . . . the plaintiff.'"[228] Even before *Daimler* and *Goodyear*, the traditional jurisdictional scheme over foreign entities favored defendants. This traditional scheme reflected the idea that if a plaintiff wanted to recover from a foreign entity, the plaintiff should file

224. *Id.* at 31.
225. *See id.*
226. *See id.*
227. Saperstein & Sant, *supra* note 46 (quoting Stutts v. De Dietrich Group, No. 03-CV-4058 (ILG), 2006 WL 1867060, at *2–4 (E.D.N.Y. 2006)).
228. *Personal Jurisdiction—General Jurisdiction*—Daimler AG v. Bauman, 128 HARV. L. REV. 311, 316 (2014) (alteration in original) (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1966)).

suit in whatever forum in which the defendant entity could be found rather than compelling the defendant to come to him.[229] However, while *Daimler* and *Goodyear* recognize certain narrow situations in which the plaintiffs may compel a defendant to come to them, recently, there have been arguments for a jurisdictional scheme that is even more plaintiff-friendly.[230] Specifically, this position argues for the "expansion of plaintiff-friendly specific jurisdiction to all 'cases in which the controversy arises out of conduct that is essentially multistate on the part of the defendant, and essentially local on the part of the plaintiff.'"[231] In these cases, jurisdiction would be found over the defendant if "'the defendant's activity foreseeably involved the risk of serious harm to individuals in communities other than his own,' whereas the plaintiff, whose activities were localized, could not have foreseen involvement in an out-of-state suit."[232] Thus, while *specific* personal jurisdiction (concerning the actions tied to the forum) would expand, *general* personal jurisdiction (concerned with the foreign entity's presence in the forum) would shrink or remain narrow.[233] This new scheme would also seem to reduce the tension between Congress's desire to subject international terrorism to the jurisdiction of U.S. courts through the ATA, and the Supreme Court's recent tendency to cut the reach of U.S. courts over foreign entities.[234] Of course, this idea is not without its own risks, such as broadly interpreting what constitutes a "foreseeable risk of serious harm," and thereby re-opening the proverbial floodgates of jurisdiction.[235] .

To avoid such risks, another possible solution to solving the hamstringing of the ATA is for courts to adopt "a due process analysis specifically fitted to the unique circumstances of civil actions against

229. *See id.* at 316–17.

230. *See id.* at 317.

231. *Id.*

232. *Id.* (quoting von Mehren & Trautman, *supra* note 228, at 1167).

233. *See id.* at 317–18. Essentially, the argument is that hauling defendants to a foreign forum based on whether they are "doing business" in that forum is too broad of a standard. *See id.* Therefore, constructing a plaintiff-friendly jurisdictional scheme that favors *actions* (specific personal jurisdiction) while minimizing *location* (general personal jurisdiction) would also be fairer to defendants. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 757–58 (2014).

234. *See* Noah Feldman, *Anti-Terrorism Act Loses Some Teeth*, BLOOMBERG (Sept. 1, 2016, 3:25 PM), https://www.bloomberg.com/view/articles/2016-09-01/anti-terrorism-act-loses-some-teeth.

235. *See Personal Jurisdiction—General Jurisdiction*—Daimler A.G. v. Bauman, *supra* note 228 (quoting von Mehren & Trautman, *supra* note 228, at 1167).

foreign terrorists and their sponsors."[236] This "fitted" due process analysis—which is not without precedent in certain circuits[237]—would rely on AEDPA and FSIA.[238] Using these statutes, the U.S. District Court for the District of Columbia used a "minimum contacts" analysis in *Rein v. Socialist People's Libyan Arab Jamahiriya* to find that

> [a]ny foreign state would know that the United States has substantial interests in protecting its flag carriers and its nationals from terrorist activities and should reasonably expect that if these interests were harmed, it would be subject to a variety of potential responses, including civil actions in United States courts.[239]

The question in *Rein*, however, was whether the District Court for the District of Columbia could assert personal jurisdiction over a *foreign state*'s actions overseas.[240] Conversely, the plaintiffs in *Biton v. Palestinian Interim Self-Government Authority* attempted to use the AEDPA and FSIA construction to argue that *individuals* in PA and PLO leadership positions should be held accountable for their non-sovereign government's terroristic actions overseas.[241] Interestingly, the D.C. District Court in *Biton* noted that this argument had "some merit," using *Burger King Corp. v. Rudzewicz*[242] and *World-Wide Volkswagen Corp. v. Woodson*[243] to entertain the idea that "no foreign terrorist today can fairly assert a lack of 'fair warning' that it could be 'haled into court' in the United States . . . given the [United States's] exhaustive antiterrorism policies. . . ."[244] Nevertheless, the court in *Biton* held that "the differences between the ATA and the FSIA are too great for their common focus on antiterrorism to allow cross-pollination on this issue,"

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236. Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172, 178 (D.C.C. 2004) (citations omitted).

237. *See, e.g.*, Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1, 7 (D.D.C. 2000); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 22 (D.D.C. 1998); Rein v. Socialist People's Libyan Arab Jamahiriya, 995 F. Supp. 325 (E.D.N.Y. 1998), *aff'd in part and appeal dismissed in part*, 162 F.3d 748 (2d Cir. 1998).

238. *See Rein*, 995 F. Supp. 325, 330 (E.D.N.Y. 1998).

239. *Id.*

240. *See id.*

241. *See* 310 F. Supp. 2d. at 178.

242. 471 U.S. 462, 472 (1985).

243. 444 U.S. 286, 297 (1980).

244. *Biton*, 310 F. Supp. 2d. at 178.

and accordingly declined to use this analysis for ATA claims against foreign individuals.[245]

The district court in *Biton*, however, did not consider whether this analysis could be used in place of the ATA against non-sovereign governments such as the PLO and PA, as opposed to individuals.[246] Indeed, it would have been unnecessary—the district court found that it did have personal jurisdiction over the PA in the ATA claim filed against it, using a minimum contacts analysis.[247] However, now that the PA's activities in the United States no longer suffice as "minimum contacts" in the Second Circuit as they once did,[248] it is worth reconsidering whether courts might be able to exercise jurisdiction over "non-sovereign governments" such as the PLO and PA, under the AEDPA and FSIA analysis that has been used against sovereign states.

V. CONCLUSION

While certain remedies exist that may be able to re-empower the ATA, the Second Circuit in *Waldman* has essentially rung the statute's death-knell.[249] The direction that general personal jurisdiction analysis has taken after *Goodyear* and *Daimler* is wholly inconsistent with both the purpose and application of the ATA.[250]

However, there has been no shortage of terrorist attacks. One source calculates that since 1993, approximately 54 American civilians have been killed in attacks committed by extremist groups purportedly affiliated with or receiving funding from the PLO and PA.[251] The actions of a few radical extremists do not invalidate these organizations' peaceful efforts to spread their ideas and accomplish their goals. Nevertheless, the use of *Daimler* and *Goodyear* by the lower courts to hamstring the ATA is inconsistent with Congress's intent to aid victims

245. *Id.*
246. *See id.*
247. *See id.* at 182–83.
248. *See* Waldman v. Palestine Liberation Org., 835 F.3d 317, 343–44 (2d Cir. 2016).
249. *See* Feldman, *supra* note 234, at 2.
250. *See id.* ("The basic idea of the 'at home' doctrine is that parties should be sued where they live, not where it's convenient for the plaintiffs. That's very close to being the opposite of the idea of the Anti-Terrorism Act, which specifies that Americans can sue the perpetrators of international terrorism domestically.").
251. Caroline Taillandier et al., *Terrorism: American Victims of Terrorist Attacks*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/jsource/Terrorism/usvictims.html (noting that the exact number "is difficult to calculate because of incomplete or inaccurate news reports regarding numbers and nationalities of those killed or injured.") (last visited June 3, 2018).

of terror attacks in receiving some type of restitution. As discussed above, a host of arguments justify a different outcome in *Waldman*. The courts should not allow a strict reading of the language in *Goodyear* and *Daimler* to force them to blindly cripple the ATA.[252]

252. On April 2, 2018, the Supreme Court denied a petition for a writ of certiorari to hear the *Waldman* case. Sokolow v. PLO, 138 S. Ct. 1438 (2018).

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