No. 13-1067

In The Supreme Court of the United States

OBB PERSONENVERKEHR AG,

Petitioner,

v.

CAROL P. SACHS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 *et seq*. ("FSIA"), broadly provides sovereign immunity to foreign states and their instrumentalities, subject to limited statutory exceptions. The first clause of the commercial activity exception provides, *inter alia*, that United States courts have subject matter jurisdiction over claims that are "based upon a commercial activity carried on in the United States by the foreign state." *Id*. §1605(a)(2).

The questions presented by this Petition are:

1. Whether, for purposes of determining when an entity is an "agent" of a "foreign state" under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. §1605(a)(2), the express definition of "agency" in the FSIA, the factors set forth in *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), or common law principles of agency, control.

2. Whether, under the first clause of the commercial activity exception of the FSIA, 28 U.S.C. §1605(a)(2), a tort claim for personal injuries suffered in connection with travel outside of the United States is "based upon" the allegedly tortious conduct occurring outside of the United States or the preceding sale of the ticket in the United States for the travel entirely outside the United States.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner-defendant is OBB Personenverkehr AG ("OBB"), an instrumentality of a foreign state, the Republic of Austria. Pursuant to Supreme Court Rule 29.6, OBB states that OBB's stock is wholly held by OBB Holding Group, a joint-stock company organized under Austrian law and created by the Republic of Austria pursuant to the Austrian Federal Railways Act. The sole shareholder of OBB Holding Group is the Austrian Federal Ministry of Transport, Innovation and Technology, an organ of the Republic of Austria.

Respondent-plaintiff Carol P. Sachs ("Sachs"), a California resident, brought an action against OBB, OBB Holding Group, and the Republic of Austria based on personal injuries she incurred at a train station in Innsbruck, Austria. OBB and the Republic of Austria moved to dismiss the complaint for lack of subject matter jurisdiction under the FSIA. Sachs did not oppose the Republic's motion which was granted. The District Court, over Sachs's objection, granted OBB's motion to dismiss. Sachs appealed only the dismissal of OBB. Sachs voluntarily dismissed her claims against OBB Holding Group, whom she had never served with process, in the District Court. Neither the Republic of Austria nor OBB Holding Group was a party to the appeal to the Ninth Circuit; neither is a party in this Court.

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BRIEF FOR PETITIONER

Petitioner OBB respectfully submits that the judgment of the Court of Appeals should be reversed.

OPINIONS BELOW

The District Court's opinion is unreported. App. 101. The Ninth Circuit's panel opinion is reported at 695 F.3d 1021, and is reproduced at App. 67. The order for rehearing *en banc* is reported at 705 F.3d 1112. The *en banc* opinion is reported at 737 F.3d 584, and is reproduced at App. 1. The Ninth Circuit's order staying the mandate pending this Court's final disposition is unreported. App. 100.

JURISDICTION

The Ninth Circuit filed the panel opinion on September 26, 2012. App. 67. The Ninth Circuit granted Sachs's petition for rehearing *en banc* on January 25, 2013. The *en banc* court filed its opinion on December 6, 2013. App. 1. A petition for a writ of certiorari was filed on March 5, 2014. This Court granted the petition on January 23, 2015, and has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602 *et seq.*, and, specifically, the first clause of the commercial activity exception to foreign sovereign immunity, which provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; . . .

§1605(a)(2).

The key terms in the first clause of the commercial activity exception are defined in the FSIA:

> §1603. Definitions
>
> For purposes of this chapter—
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having

> substantial contact with the United States.

§§1603(a)-(e). These provisions, and other relevant provisions of the FSIA, are set forth in the appendices to the Petition for a Writ of Certiorari and this brief. App. 112-120 (Appendix to Petition); A-1 – A-7 (Appendix to this brief).

STATEMENT OF THE CASE

I. FOREIGN SOVEREIGN IMMUNITY UNDER THE FSIA

Petitioner OBB contends that United States courts lack subject matter jurisdiction over this action because OBB has foreign sovereign immunity under the FSIA, and the FSIA's commercial activity exception to immunity does not apply.

"The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). Prior to the FSIA's enactment, "sovereign immunity decisions were [being] made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2250, 2255 (2014) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983)) (alteration in *NML Capital*).

"Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA in 1976." *Samantar*, 560 U.S. at 313. Congress declared in the FSIA that "[c]laims of foreign states to immunity should henceforth be decided by courts . . . in conformity with the principles *set forth in this [Act].*" *NML Capital*, 134 S.Ct. at 2256 (quoting §1602) (alteration in *NML Capital*).

Accordingly, the FSIA is "a *comprehensive* statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (quoting *Verlinden*, 461 U.S. at 488) (emphasis added); *accord NML Capital*, 134 S.Ct. at 2255.[1]

The FSIA's passage had "two well recognized and related purposes . . . : adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment." *Permanent Mission of India to the United States v. City of New York*, 551 U.S. 193, 199 (2007); §1602 (Congress's "declaration of purpose" states its intent to codify the restrictive theory of sovereign immunity under international law). Under the restrictive theory,

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[1] *See also* H.R. Rep. 94-1487, 94th Cong., 2d Sess. 12 (1976) (The FSIA "is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities.").

"immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Samantar*, 560 U.S. at 312 (quoting *Verlinden*, 461 U.S. at 487).

"After the enactment of the FSIA, the Act – and *not the pre-existing common law* – indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Id.* (emphasis added); *accord NML Capital*, 134 S.Ct. at 2255.

This Court has repeatedly held that "the text and structure of the FSIA demonstrate Congress' intention that the FSIA provides *the sole basis* for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis added); *accord, e.g., Permanent Mission*, 551 U.S. at 197.

"Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993);[2] *accord Samantar*, 560 U.S. at 313-14 ("if a defendant is a 'foreign state' within the meaning of the Act, then the defendant is immune from

[2] Under the FSIA, "personal jurisdiction, like subject-matter jurisdiction, exists only when one of the exceptions to foreign sovereign immunity in §§1605-1607 applies." *Amerada Hess Shipping*, 488 U.S. at 435 n.3; *see also* §1330.

jurisdiction unless one of the exceptions in the Act applies") (citing §§1604, 1605-1607).

The "most significant of the FSIA's exceptions" is the commercial activity exception contained in §1605(a)(2). *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). That exception (and specifically its first clause which is at issue here and highlighted below) provides that a foreign state is not immune from suit in any case:

> *in which the action is based upon a commercial activity carried on in the United States by the foreign state*; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

§1605(a)(2) (emphasis added).

The commercial activity exception is carefully tailored. Each of the five terms defined in the FSIA's "Definitions" section is found in the twenty-word first clause of that exception. *Compare* §§1603(a)-(e), *with* §1605(a)(2) (first clause); *see also supra* pp. 2-4 & A-2-A-3 (reciting FSIA's definitions of "foreign state," "agency or instrumentality of a foreign state," "United States," "commercial activity," and "commercial activity carried on in the United States by a foreign state").

As interpreted by this Court, "[f]or there to be jurisdiction" under the first clause of the commercial activity exception, the plaintiff's "action must be 'based upon' some 'commercial activity' by [the foreign state] that had 'substantial contact' with the United States within the meaning of the Act." *Nelson*, 507 U.S. at 356.

II. OBB, WHICH OPERATES THE STATE-OWNED RAILWAY, IS A "FOREIGN STATE" UNDER THE FSIA ENTITLED TO INVOKE FOREIGN SOVEREIGN IMMUNITY

As an undisputed "organ" and "agency or instrumentality" of the Republic of Austria, and thus a "foreign state," OBB properly invoked foreign sovereign immunity under the FSIA. *See* App. 13; *see also* App. 104 n.1 ("Plaintiff does not contest that OBB is in fact an organ of the Republic of Austria.").

OBB operates passenger rail service solely within Austria. Joint Appendix ("JA") at 26 ¶5. It is, by statute, a public railway company, with its responsibilities and functions dictated by the Austrian Federal Railways Act.[3] *Id.* OBB does not do business in the

[3] OBB has no private shareholders, but is wholly owned by OBB Holding AG ("OBB Holding"), a joint-stock company organized under Austrian law and created by the Republic of Austria under §2 of the Austrian Federal Railways Act BBG. The sole shareholder of OBB Holding is the Austrian Federal Ministry of Transport, Innovation and Technology. JA at 25-26 ¶¶2-3. As discussed above, *supra* ii, OBB Holding and the

(Continued on following page)

United States. OBB does not have offices, employees or bank accounts in the United States, nor does it have a license to do business in the United States. JA at 33 ¶23. OBB is not regulated in the United States and is not subject to United States law. *Id.*[4]

III. SACHS WAS ALLEGEDLY INJURED WHEN BOARDING A MOVING OBB TRAIN IN AUSTRIA.

On April 27, 2007, at a train station in Innsbruck, Austria, Sachs, a California resident, attempted to board a moving train operated by OBB. App. 101 (citing Dist. Ct. Docket, Doc. 43 at 10, 58 at 1-2); *see* JA at 84-85 ¶¶a, d-e, 32 ¶¶21-22. Sachs allegedly fell into the tracks and suffered severe injuries resulting in the amputation of her legs. App. 101; *see* JA at 85 ¶e.

Sachs purchased her couchette bed reservation for the train she tried to board two days earlier, from

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Republic of Austria were named defendants, but were dismissed and are no longer parties to this action.

[4] Sachs pleaded that "[a]t all times relevant, OBB PERSONENVERKEHR AG advertised via the world wide web that American citizens can purchase their tickets directly from the OBB PERSONENVERKEHR AG website," JA at 14 ¶2, and her attorney offered to the District Court a train ticket (not a Eurail Pass) he purchased online from OBB in 2010, three years after Sachs's accident, JA at 79-83. But there was no allegation that these advertisements were viewed by Sachs prior to this suit being filed, and Sachs did not purchase her Eurail Pass from the OBB website. *See* JA at 84-85 ¶¶b-c.

OBB, while she was in Innsbruck. JA at 32 ¶21, 40. This couchette bed reservation was an upgrade that guaranteed her a couchette bed on the train. *Id.* Sachs had previously purchased a Eurail Pass that provided her with four days of travel between Austria and the Czech Republic within a two month window of time. JA at 30-31 ¶18, 31-32 ¶20, 34-35. The Eurail Pass alone would have only allowed Sachs to board the train and use an unoccupied regular seat. JA at 32 ¶21.

Sachs purchased the Eurail Pass from a third-party website, *not* from OBB's website. JA at 84-85 ¶¶b-c. Sachs's receipt shows that she purchased the Eurail Pass from The Rail Pass Experts ("Rail Pass Experts" or "RPE"), a company located in Massachusetts. JA at 34. Sachs's Eurail Pass did not include any reference to RPE, but only contained the Order ID number "RC 122351" listed on Sachs's receipt. JA at 34-35.

IV. RPE AND THE EURAIL GROUP

It is undisputed that the RPE is not an authorized agent of OBB, nor does it have any legal relationship with OBB. JA at 30-31 ¶18. Indeed, there is no evidence that "OBB was even aware of the Rail Pass Experts's existence" prior to this suit. App. 108.

For purposes of this suit, OBB recognized that "The Rail Pass Experts may be, presumably, a subagent of a general sales agent accredited by The Eurail Group and, therefore, able to sell Eurail passes (likely

at higher rates than those available from Eurail directly)." JA at 31 ¶18. The Eurail Group markets and sells rail passes, which it does in part through accredited general sales agents. JA at 31 ¶¶18-19.

The Eurail Group, for its part, is a separate legal entity, organized under the laws of Luxemburg, and headquartered there as well, with its own management and employees. JA at 31 ¶19. OBB is a member of the Eurail Group, together with approximately 30 other similar railway transportation providers in other European nations, all of which are members of an assembly which is convened for certain reasons. *Id.*; *see* App. 69, 108.

Importantly, "there are no factual allegations or evidence that OBB exerted 'day-to-day' control over either Eurail Group or Rail Pass Experts." App. 108.

V. THE PROCEEDINGS BELOW

Had Sachs sued OBB in Austria, she would have been entitled to due process in Austrian courts, under Austrian law, and with access to Austrian counsel regardless of her economic condition. JA at 53-63 ¶¶29-53, 71 ¶69.

Instead, she filed suit in the Northern District of California in April 2008. *See* JA at 1, 13. Sachs's Complaint alleged five causes of action against OBB, OBB Holding, and the Republic of Austria, each of which pertained to the train accident in Austria:

(1) Negligence for purportedly moving the train, providing an unsafe place to board, failure to warn of the gap in the boarding platform, failure to provide supervision at the Innsbruck station, and failure to stop the train and lock the railcar doors.

(2) Strict Liability – Design Defect for defects in the railcars and boarding platform.

(3) Strict Liability – Design Defect – Failure to Warn for the lack of warnings on the railcars and boarding platform.

(4) Breach of Implied Warranty of Merchantability for impliedly warranting that the railcars and boarding platform were reasonably safe when they were not.

(5) Breach of Implied Warranty of Fitness for impliedly warranting that the railcars and boarding platform were fit for their intended purposes when they were not.

JA at 14-18 ¶¶1-20.

OBB and the Republic of Austria moved to dismiss the Complaint under the FSIA and other grounds. *See* JA at 2 No. 43; *see also* Dist. Ct. Docket 43-48; 51-54. Sachs did not oppose the Republic of Austria's motion to dismiss, Dist. Ct. Docket 60, and voluntarily dismissed her claims against OBB Holding, Dist. Ct. Docket 79, but argued that OBB was subject to suit under the first clause of the commercial activity exception because her suit was "based

upon a commercial activity carried on in the United States by the foreign state," App. 104 & n.2. Sachs's purchase of the Eurail Pass from RPE in 2007 was "the only relevant commercial activity within the United States" she claimed. App. 104-05. Sachs argued that "because the purchase of the pass occurred in the United States, and her injury claim is based upon that commercial activity, the commercial activity exception applies and the court therefore has subject matter jurisdiction." App. 105.

The District Court rejected that argument and granted OBB's motion to dismiss, finding "the connection between OBB and the Rail Pass Experts *too attenuated* to establish subject matter jurisdiction," where "plaintiff fails to establish that the commercial activity here was in fact undertaken by a 'foreign state'" as required. App. 109 (emphasis added). The District Court rejected Sachs's invocation of California agency law as the basis for finding RPE's sale to be activity carried on "by the foreign state," and instead relied upon the standard set forth by this Court in *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), as applied by the Ninth Circuit in *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009) and the D.C. Circuit in *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843 (D.C. Cir. 2000). App. 105-07. The District Court noted that this standard establishes, in suits against a foreign state, that a principal-agent relationship arises where "a corporate entity is so extensively controlled by its owner" that it

rises to the level of "day-to-day control." App. 106-07. The District Court held that the commercial activity exception did not apply, because there was no evidence to satisfy the required degree of control. App. 106-09. Having found that it must dismiss on this basis, the District Court did not address the "based upon" requirement under the commercial activity exception, nor the other grounds for dismissal.

The Ninth Circuit Court of Appeals panel affirmed. Judge Tallman, in the decision of the Court, also applied *Bancec*, and held that there was no allegation of control sufficient to consider the Eurail Group's, much less RPE's actions, those of OBB. App. 68, 73-78. Judge Tallman observed that there could be no imputation to OBB where "Sachs does not allege day-to-day, routine involvement of OBB in Eurail Group, much less Rail Pass Experts," and no fraud or injustice would result. App. 76-78 (internal quotation omitted). Judge Bea concurred in the judgment, finding that the commercial activity exception was inapplicable under the alternative ground that the claims in the Complaint were not "based upon" commercial activity in the United States, but in Austria. App. 85-89. Judge Gould dissented. On the question of whether RPE's sale constituted activity "carried on by the foreign state," he rejected *Bancec*'s standard, and advocated a broad new rule: "[W]here a foreign common carrier, operated by a sovereign entity, purposefully sells tickets for use of the carrier's services overseas through a domestic sales agent, the ticket sale is commercial activity which may be

imputed to the foreign common carrier and is sufficient to invoke the commercial activity exception to sovereign immunity under §1605(a)(2) of the FSIA." App. 92-94. Judge Gould also found the "based upon" standard satisfied, reasoning that OBB's tort duty for all the claims "arose from the sale of the ticket for passage on OBB trains, the commercial activity identified by Sachs," and "which occurred in the United States." App. 96-98 (emphasis omitted).

Judge Gould was the only member of the original panel to sit on the *en banc* Court, where his prior positions in dissent became the *en banc* majority's in the opinion he authored. *See* App. 1. The opinion first held that "[a] foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States through a travel agent regardless of whether the travel agent is a direct agent or subagent of the common carrier." App. 4. The opinion first addressed the requirement that the activity be "carried on . . . by the foreign state." App. 14. Based on the premise that "neither the statute nor the legislative history defines how the commercial activity within the United States must be 'carried on' but both suggest that the 'carried on by' requirement be interpreted in light of broad agency principles," the majority stated that "[u]nder traditional agency principles, the foreign state may engage in commerce in the United States indirectly by acting through its agents or subagents." App. 15. (internal quotations omitted). Relying on decisions from the Second and D.C. Circuits dealing with travel, but where agency

was not contested, *see* App. 16 n.5, the majority erroneously concluded that "[u]nder traditional theories of agency, RPE's act of selling the Eurail pass to Sachs within the United States can be imputed to OBB as the principal," App. 18-19.

The majority improperly rejected *Bancec*, holding that "the day-to-day control inquiry under *Bancec* makes no sense here where the question is 'whether a particular type of agency relationship is sufficient under the commercial activity exception.'" App. 21 (quoting *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006)). The majority also rejected OBB's contention that the plain language of the FSIA governs the inquiry. The majority held that the definition of "foreign state" in §1603(b) was inapplicable because "whether an entity meets the definition of an 'agency or instrumentality of a foreign state' to claim immunity is a completely different question from whether the acts of an agent can be imputed to a foreign state for the purpose of applying the commercial activity exception." App. 22-23 (internal quotations omitted). The majority replaced the plain text in the FSIA's definition with what it characterized as a "common sense" approach: "common sense also tells us that an agent that carries on commercial activity for a foreign state in the United States does not need to be an agency or an instrumentality of a foreign state under §1603(b)," relying on the premise that "[f]oreign sovereigns invariably must act through agents, and if they engage in commercial activity in the United States it will necessarily be through an

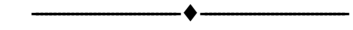
agent, whether that agent is its own employee or a separate company in an agency or subagency relationship." App. 23. The majority concluded that "[w]e cannot believe that . . . Congress intended" to "negate the possibility of commercial activity by a state-owned railway or airline within the United States through a travel agent." App. 25.

The majority also found the other elements of the commercial activity exception satisfied. The majority found that "[w]here a ticket for travel on a foreign common carrier is bought and paid for in the United States . . . the substantial contact requirement is met." App. 32. The majority also found the "based upon" requirement satisfied, reasoning that "buying the Eurail pass from RPE was the start of Sachs's tragic misadventure," and that "the sale of the Eurail pass is an essential fact that Sachs must prove to establish her passenger-carrier relationship with OBB," which is "necessary to the 'duty of care' element" of Sachs's claims. App. 35-36; *see generally* App. 34-40.

Judge O'Scannlain, joined by then-Chief Judge Kozinski and Judge Rawlinson, dissented. App. 42. He observed that under the plain language of the FSIA, the "commercial-activity exception's use of 'foreign state,'" as informed by this Court's reasoning in *Samantar*, "indicates that the term does not embrace all authorized agents." App. 49-51. The dissent applied *Bancec*, and concluded there was no basis for imputing RPE's, much less the Eurail Group's, actions to OBB. App. 55-57.

Judge Kozinski also wrote a separate dissent on the alternative ground that the majority's "based upon" standard conflicted with this Court's decision in *Nelson*, under which it would not have mattered "if Austria were itself selling train tickets from a kiosk in Times Square," because here, "plaintiff's claim arises from events that transpired entirely in Austria." App. 61-62. Judge Kozinski reasoned that "plaintiff hasn't shown a sufficient nexus between her purchase and the injury," and that "the expansive sweep of the majority's approach" implicated the very "perils of an overly permissive reading of the FSIA's 'based upon' requirement" that were recognized by this Court in *Nelson*. App. 65-66.

The Petition to this Court followed.



SUMMARY OF THE ARGUMENT

The first clause of the FSIA's commercial activity exception provides a narrow exception to foreign sovereign immunity where "the action is based upon a commercial activity carried on in the United States by the foreign state." §1605(a)(2).

The exception is inapplicable to a suit, like this one, involving travel entirely outside the United States and alleging tort claims for personal injuries suffered outside the United States against a foreign state-owned railway, where the only commercial activity within the United States was the plaintiff's purchase of the travel ticket online through a United

States travel agency over which the foreign railway exercised no control and to which the foreign railway gave no direction.

In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), this Court interpreted this provision and held that "[f]or there to be jurisdiction . . . the [plaintiff's] action must be 'based upon' some 'commercial activity' by petitioners ['foreign state'] that had 'substantial contact' within the United States within the meaning of the Act." *Id.* at 356.

Indeed, when Sachs's lawsuit is assessed through the framework dictated by *Nelson*, the *en banc* majority's error, and the commercial activity exception's inapplicability, is manifest. This action is "based upon" the personal injuries resulting from OBB's purported tortious conduct at the train station in Innsbruck, Austria, and not the sale of the Eurail Pass by RPE to Sachs in the United States. Further, the sale of the Eurail Pass by RPE (at most a subagent of the Eurail Group, not OBB) is not commercial activity *by the foreign state* (OBB) under the FSIA.

First, the "based upon" requirement is not satisfied. This Court in *Nelson* held that a court must "begin [its] analysis by identifying the *particular conduct* on which the [plaintiff's] action is *'based'* for purposes of the Act." *Nelson*, 507 U.S. at 356-57 (emphasis added). This Court was precise: "activities [that] led to the conduct that eventually injured the [plaintiff] . . . are *not* the basis for the [plaintiff's]

suit." *Id.* at 358. Rather, it is "[t]hose torts, and not the arguably commercial activities that preceded their commission, [that] form the basis for the [plaintiff's] suit." *Id.* Here, all of Sachs's claims allege personal injuries arising from her fall under the train at OBB's Innsbruck, Austria train station. *See* JA at 14-18 ¶¶1-20. It is those events that occurred in Austria, and not the arguably commercial activities that preceded their commission (*i.e.*, the Internet sale of the train ticket by RPE), that forms the basis for Sachs's lawsuit.

The Ninth Circuit, in ruling that the suit was "based upon" the ticket sale, fell into the same trap this Court warned against in *Nelson*. The "based upon" requirement cannot be satisfied merely because *one element* of the plaintiff's cause of action may be linked to the United States. In *Nelson,* this Court eschewed such element-by-element analysis, warning that it would invite "semantic ploy[s]" by plaintiffs, who "could recast virtually any claim of intentional tort" to include causes of action for failure to warn that would have an element linked to the United States, so as to circumvent the "based upon" requirement. *Nelson*, 507 U.S. at 363. Yet this is the precise approach taken by the Ninth Circuit. It examined the elements of each cause of action in order to find a purported nexus to the United States, holding that the duty element was triggered by the ticket sale by RPE, and that such sale alone satisfied the "based upon" requirement. *See* App. 32-40. This holding is contrary to *Nelson*, invites artful pleading,

and creates a problematic (in its foreign policy implications) and broad new rule: any sale of a ticket on a foreign-owned carrier by any travel agent in the United States can subject a foreign state to suit premised entirely on an injury suffered during travel or other activities occurring entirely outside the United States.

Second, the "by the foreign state" requirement is also not satisfied. The commercial activity exception does not apply to this action because the only commercial activity alleged to have been carried on in the United States was not commercial activity "by the foreign state" (OBB) under the FSIA.

This Court has held that the text of the FSIA is the starting and ending point of the analysis. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000); *see CSX Transp., Inc. v. Ga. State Bd. of Equalization*, 552 U.S. 9, 20 (2007). The plain text of the statute makes clear that the commercial activity exception only applies to "commercial activity . . . *by the foreign state*." §1605(a)(2) (emphasis added).

"[F]oreign state" is specifically defined in §1603, which provides in relevant part:

> For purposes of this chapter—(a) A *"foreign state"*, *except as used in section 1608 of this title*, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b). (b) An "agency or instrumentality of a foreign state" means any entity—(1) which is

> a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

§§1603(a) and (b) (emphasis added).

The term "foreign state" thus includes the foreign sovereign itself and a "political subdivision" or "agency or instrumentality of a foreign state," which in turn includes separate juridical entities, corporate or otherwise, that are either an "organ" of, or majority owned by, the foreign state. §§1603(a) and (b).

Congress unambiguously stated that this definition of "foreign state" applies to *all provisions* of the FSIA, except §1608 (the service of process provisions).[5] "*A 'foreign state', except as used in section 1608 of this title*, includes. . . . " §1603(a) (emphasis added). Thus, Congress stated, in no uncertain terms, that the definition of "foreign state" applies to §1605, the commercial activity exception, and governs the use of the term "foreign state" in that exception. This means that the phrase "by the foreign state" in §1605(a)(2) can be interpreted only to include conduct of those

[5] Foreign states and its agencies or instrumentalities are served in different ways under the FSIA, *see* §§1608(a)-(b).

entities defined in §1603 to constitute the foreign state. The statutory definition does not permit attribution to the foreign state of acts of third-parties that do not fit within the definition.

It is uncontested that OBB falls within the statutory definition of a "foreign state," while the Eurail Group and RPE do not. Accordingly, the alleged commercial activity of RPE (sale of the ticket) is not commercial activity "by the *foreign state*" (OBB). "[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Hartford Underwriters Ins.*, 530 U.S. at 7 (internal quotations omitted).

Although this Court need not look beyond the plain language of the statute, the result is reinforced by principles "common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies" espoused in the FSIA. *Bancec*, 462 U.S. at 622-23.

In *Bancec*, this Court held that for purposes of attribution of liability (which holding, as cited below, the Circuits have extended to the immunity determination), an agent-principal relationship arises "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created." *Bancec*, 462 U.S. at 629. This degree of "control" identified by *Bancec* is central to the creation of a principal-agent relationship under the FSIA. Even the United States concedes that it is

only "by virtue of the state's *direction and control* over the agent, [that] the state is effectively taking actions in the United States commercial market itself." U.S. Br. 9. Applying this "control" requirement, RPE's ticket sale cannot be imputed to OBB because of the absence of any evidence of control by OBB, as the District Court correctly found. App. 108. Thus, under the principles established in *Bancec,* the commercial activity of RPE is not attributable to OBB.

The *en banc* majority expressly disregarded *Bancec*. Relying instead on domestic common law of agency principles surrounding "ambiguous" agency relationships, *see* App. 18, the *en banc* court announced a sweeping new rule, holding that the actions of any United States-based travel agent – even one which OBB did not retain or contract with, direct, control or even know about – can be attributed to OBB for purposes of the commercial activity exception, *see* App. 4. The court made no attempt to analyze the relationship between OBB and RPE, or OBB and the Eurail Group, relying simply on the fact that RPE characterized itself as a "travel agent" and had sold the Eurail Pass to Sachs. The court's approach improperly allows the vagaries of state common law of agency to dictate when foreign sovereigns are immune from suit. That is contrary to Congress's intent that the FSIA establish a uniform federal standard.

For these independent reasons, the Court of Appeals must be reversed.

ARGUMENT

I. THE FSIA COMPREHENSIVELY GOVERNS THE LIMITED EXCEPTIONS TO FOREIGN SOVEREIGN IMMUNITY, INCLUDING THE COMMERCIAL ACTIVITY EXCEPTION

It is firmly established that "[t]he Foreign Sovereign Immunities Act 'provides the *sole* basis for obtaining jurisdiction over a foreign state in the courts of this country.'" *Nelson*, 507 U.S. at 355 (quoting *Amerada Hess Shipping*, 488 U.S. at 443) (emphasis added). "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Id.*; *Permanent Mission*, 551 U.S. at 197 (same); §1604 ("a foreign state shall be immune from jurisdiction of the courts of the United States . . . except as provided in sections 1605 to 1607. . . .").

This Court has been unequivocal as to the "*comprehensive*" scope of the FSIA, given that Congress emphasized that "[c]laims of foreign states to immunity should henceforth be decided by courts . . . in conformity with the principles *set forth in this [Act]*." *NML Capital*, 134 S.Ct. at 2255-56 (quoting §1602 and compiling quotations from *Altmann*, 541 U.S. at 699; *Verlinden*, 461 U.S. at 493; *Samantar*, 560 U.S. at 313) (alteration added in *NML Capital*). The comprehensive scope of the FSIA is a byproduct of "the regime it replaced." *Id.* at 2255. "[A]fter the enactment of the FSIA, the Act – and not the pre-existing

common law – indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Id.* at 2256 (quoting *Samantar*, 560 U.S. at 313). Against this backdrop, "any sort of immunity defense made by a foreign sovereign in an American court *must stand on the Act's text. Or it must fall*." *Id.* (emphasis added).

Sachs invokes only the first clause of the FSIA's commercial activity exception for subjecting OBB, a "foreign state," to jurisdiction in the courts of the United States. App. 104 & n.2. But the plain text of that exception dooms Sachs's argument. *See CSX Transp.,* 552 U.S. at 20 ("When we find the terms of a statute unambiguous, judicial inquiry is complete. . . ." (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)) (alteration in original.).

The first clause of the exception provides that a foreign state is not immune from jurisdiction in a suit "in which the action is based upon a commercial activity carried on in the United States by the foreign state." §1605(a)(2).

On its face, the exception is inapplicable because Sachs's suit for personal injuries suffered overseas in Austria is not "based upon" any commercial activity in the United States but, instead, is based upon the alleged condition of a train and rail platform in Austria.

This Court has addressed the text, meaning, and application of the first clause of the commercial activity exception on one prior occasion, in *Nelson,*

supra. This Court held that "[f]or there to be jurisdiction . . . the [plaintiff's] action must be 'based upon' some 'commercial activity' by petitioners that had 'substantial contact' within the United States within the meaning of the Act." *Nelson*, 507 U.S. at 356.

Following *Nelson*'s framework, it is clear that the "particular conduct" this action is based upon, *see id.*, are the alleged events causing Sachs's injury at the train station, which occurred entirely in Austria, and not the preceding purchase of the Eurail Pass in the United States. The alleged tortious conduct of OBB occurred entirely in Austria, and has no "substantial contact" to the United States within the meaning of the FSIA.

In addition, the sale of the Eurail Pass by RPE, is not commercial activity "by the foreign state" (*i.e.*, OBB) within the meaning of the FSIA. It is undisputed that RPE does not satisfy the definition of a foreign state's "agency" under §1603. In that provision, Congress specifically declared that the definition applies to all other sections of the FSIA (with the sole exception of §1608), including §1605 which contains the commercial activity exception.

In the alternative, if this Court were to venture beyond the statutory definition, *Bancec* governs this determination, and the acts of RPE cannot be attributed to OBB because the necessary element of "control" by OBB over RPE is absent, so that the acts of the latter cannot constitute commercial activity "by the foreign state" under §1605(a)(2).

II. SACHS'S CLAIMS ARE "BASED UPON" HER INJURIES AT THE TRAIN STATION IN AUSTRIA – NOT THE SALE OF THE EURAIL PASS BY RPE IN THE UNITED STATES

A. Under *Nelson,* the "Gravamen" of Sachs's Complaint – and Thus the Allegations Her Claims Are "Based Upon" for Purposes of the Commercial Activity Exception – is the Alleged Tortious Conduct of OBB in Austria

As this Court explained in *Nelson*, "[w]e begin our analysis by identifying the *particular conduct* on which the [plaintiff's] action is '*based'* for purposes of the Act." *Nelson*, 507 U.S. at 356-57 (emphasis added).[6]

This Court recognized that "the Act contains no definition of the phrase 'based upon,' and the relatively sparse legislative history offers no assistance" (notwithstanding Congress's definition of nearly every other phrase in the first clause of the commercial activity exception, *see* §1603), but found that any such "guidance is hardly necessary." *Id.* at 357. Citing to dictionary definitions, this Court concluded that "the phrase is read most naturally to mean those elements

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[6] In *Nelson*, "[t]here [was] no dispute . . . that [petitioners] Saudi Arabia, the hospital, and Royspec all qualify as 'foreign state[s]' within the meaning of the Act." *Nelson*, 507 U.S. at 356 (citing §§1603(a), (b) and that the "term 'foreign state' includes 'an agency or instrumentality of a foreign state.' ").

of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* In doing so, the Court recognized Circuit Court authority that the "focus should be on the 'gravamen of the complaint,'" and "'the elements that prove the claim, no more and no less.'" *Id.* (quoting *Callegio v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (first quote) and *Santos v. Compagnie Nationale Air France*, 834 F.2d 890, 893 (7th Cir. 1991) (second quote)).

Thus, in the context of claims for personal injuries, this Court held that the inquiry should focus on the gravamen of the complaint, *i.e.*, the alleged tortious conduct that injured the plaintiff. It is "[t]hose torts, and not the arguably commercial activities that preceded their commission, [that] form the basis for the [plaintiff's] suit." *Id.* at 358.

A closer examination of *Nelson* informs the proper approach. The plaintiff had been recruited in the United States by HCA, an "independent corporation existing under the laws of the Cayman Islands[that] recruits Americans for employment at the [King Faisal Specialist Hospital in Riyadh] under an agreement signed with Saudi Arabia," to do engineering work at the hospital in Saudi Arabia. *Id.* at 351-52. Nelson signed an employment contract in the United States, went to the hospital, and after working there, was arrested at the hospital by Saudi police, and purportedly beaten and tortured before being released over a month later. *Id.* at 352-53. This Court summarized Nelson's 16 causes of action against Saudi Arabia, the hospital, and Royspec (all

three of which were "foreign states" under the FSIA, *see supra* n.6) as falling into three categories – intentional torts, negligently failing to warn Nelson of the dangers in his employment, and inflicting derivative injury from petitioners' actions. *Id.* at 353-54.

This Court, in its "based upon" analysis, recognized that "the Nelsons have alleged that petitioners recruited Scott Nelson for work at the hospital, signed an employment contract with him, and subsequently employed him." *Id.* at 358. But the Court *rejected* the contention that these actions were what the suit was "based upon":

> *While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit*. Even taking each of the Nelsons' allegations about Scott Nelson's recruitment and employment as true, *those facts alone entitle the Nelsons to nothing* under their theory of the case. *The Nelsons have not, after all, alleged breach of contract,*[7] *but personal injuries* caused by petitioners' negligent failure to warn Scott Nelson that they might commit those wrongs. *Those torts, and not the arguably commercial*

[7] The Court noted that forum shopping was the presumed basis for the complaint's exclusive grounding in tort claims, rather than breach of contract. *See Nelson*, 507 U.S. at 354 ("Presumably because the employment contract provided that Saudi courts would have exclusive jurisdiction over claims for breach of contract, the Nelsons raised no such matters." (internal citation omitted)).

> *activities that preceded their commission, form the basis for the Nelsons' suit*.

Id. at 358 (emphasis added; internal citation omitted). Thus, the creation of the employment relationship or other contractual acts giving rise to a duty of care (which were the sole activities that occurred in the United States) were immaterial to the Court's "based upon" analysis in *Nelson*.

Indeed, the Court specifically rejected, and warned of the dangers in, any careful parsing of the elements of each particular cause of action. The Court recognized that, "[i]n addition to the intentionally tortious conduct, the Nelsons claim a separate basis for recovery in petitioners' failure to warn Scott Nelson of the hidden dangers associated with his employment" "at the time petitioners recruited Scott Nelson" in the United States. *Id.* at 363. But that, said this Court, was not what the Nelsons' claims were "based upon" for purposes of the commercial activity exception:

> But this is merely a semantic ploy. For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity.

Id. All of the claims were held to be "based upon" the defendants' alleged activities and the plaintiff's personal injuries, all of which occurred in Saudi Arabia.

Following this Court's reasoning in *Nelson* compels the same result here. The sale of the Eurail Pass in the United States, while arguably *leading* to the conduct that eventually injured Sachs, is not the basis for her suit. It is, thus, of no consequence that "buying the Eurail pass from RPE was the start of Sachs's tragic misadventure." App. 35. Sachs's injuries occurred entirely as the result of activities and conditions at the train platform in Austria. It makes no difference whether the Eurail Pass was sold in the United States, and "those facts alone entitle [Sachs] to nothing under [her] theory of the case." *See Nelson*, 507 U.S. at 358. Nor is it of any "jurisdictional significance," *see id.* at 363, whether the Complaint casts the causes of action as claims of negligence, strict liability, or breach of implied warranty. Sachs alleges personal injuries caused by OBB's purported negligence and defects in the railcars and platform in Austria. This Court was unequivocal that it is "[t]hose *torts*, and not the arguably commercial activities that preceded their commission" that form the basis for Sachs's suit. *See id*. at 358 (emphasis added).

B. The Ninth Circuit's Approach Distorts *Nelson* By Ignoring the Gravamen of the Complaint

The Ninth Circuit fundamentally erred in its analysis by ignoring the "gravamen" of the Complaint and construing the "based upon" requirement as demanding only that "*an element* of [her] claim consists in conduct that occurred in commercial activity carried on in the United States."[8] App. 33 (quoting *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000) (emphasis in *Sun*; alteration in *en banc*). But this Court, in *Nelson*, did not engage in any element-by-element analysis of the 16 different causes of action pleaded by Nelson. Nor was it even settled in *Nelson* what law would apply to the claims. *See* 507 U.S. at 374 (Kennedy, J., concurring in part and dissenting in part, observing that "the governing state law . . . has not yet been determined"). The Ninth Circuit's separate element-by-element review of each claim, App. 33-36, 38-40, by its very nature, was a search into the *details* of each claim, rather than identifying the

[8] Other Circuits have fallen into the same trap in their construction of the "based upon" requirement. *See e.g., Kirkham v. Societe Air France*, 429 F.3d 288 (D.C. Cir. 2005) (inquiring "whether the ticket sale is *one* of 'those elements of a claim that, if proven, would entitle [Kirkham] to relief under [her] theory of the case' " (quoting *Nelson*, 507 U.S. at 357) (emphasis added; alteration in *Kirkham*)); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998) ("the act or activity must form the basis *of at least some element* of the cause of action" (emphasis added)).

"gravamen" and "basis" for the suit as this Court dictated in *Nelson*.

The Ninth Circuit did precisely what this Court warned against in *Nelson*: It gave "jurisdictional significance" to Plaintiff's artful pleading. The Ninth Circuit hinged jurisdiction on the legal elements of "Sachs's theory of the case, [that] OBB owed her a duty of care because her purchase of the Eurail pass established a common-carrier/passenger relationship." App. 34. But OBB owed Sachs a duty of care independent of her purchase of a Eurail Pass. Under traditional tort law railroads have a duty of reasonable care to passengers *and non-passengers* alike for physical harm caused by the railroad's own negligence and risks of harm.[9]

Similarly problematic is the Ninth Circuit's finding that the "implied warranty" counts provided a vehicle for invoking the commercial activity exception, citing California's Commercial Code for the proposition that "[a] transaction between a seller and a consumer is a necessary prerequisite" to these claims as well. App. 39. That finding not only ignored

[9] The Comment to the Restatement (Third) of Torts §40(b) (2012), cited by the *en banc* majority, App. 34-35, provides that when "the *actor's conduct* might have played a role in creating the risk to the injured party, . . . the source of the duty of reasonable care is §7," §40 cmt. c (emphasis added), which is nothing more than the general tort rule that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm," *id.* at §7. *See also id.* at §40 cmt. g; *contrast with id.* at §40 cmt. f, ill. 3.

the gravamen of the claim, it "g[a]ve jurisdictional significance to this feint of language," *Nelson*, 507 U.S. at 363.

First, California's Commercial Code applies only to the sale of goods, not to the sale of a ticket for services.[10] Yet, while refusing to consider "[w]hether Sachs has properly pleaded these claims," App. 38-39 & n.16, the Ninth Circuit used these claims as a basis for the commercial activity exception.

Second, just as "a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn," *Nelson*, 507 U.S. at 363, so too could a plaintiff convert virtually any personal injury tort claim for injuries suffered outside the United States on a foreign carrier into a contractual claim for breach of implied warranty when the ticket was purchased within the United States. Yet, the Ninth Circuit's analysis contravened *Nelson*'s direction that artful pleading should not control whether United States courts have jurisdiction over foreign states.

The Ninth Circuit's reasoning subjects foreign states to jurisdiction in the United States where a cause of action is legally meritless or carefully crafted to convert a tort claim into something else – simply

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[10] The Ninth Circuit cited to West's Ann. Cal. Com. Code §§2314(1), and 2315, App. 39, when the scope of the Commercial Code "applies to transactions *in goods*." West's Ann. Cal. Com. Code §2102 (emphasis added).

because it contains a single element that is purportedly linked to the foreign state's alleged commercial activity in the United States. Such a standard is contrary to *Nelson* and the purposes of the FSIA.

C. The Other "Travel Agent" Cases Relied Upon by the *En Banc* Majority Likewise Failed to Apply *Nelson*

The *en banc* majority relied on *Barkanic v. Gen. Admin. of Civil Aviation of the People's Rep. of China*, 822 F.2d 11 (2d Cir. 1987) and *Kirkham v. Societe Air France*, 429 F.3d 288 (D.C. Cir. 2005). *See* App. 15-18, 32, 34-35, 38, 57. Those cases are both distinguishable and, in light of *Nelson*, wrongly decided.

In *Barkanic*, 822 F.2d at 13, and *Kirkham*, 429 F.3d at 291-92, the defendant foreign state conceded that the sale of the ticket could be imputed to it or the issue was not disputed. Indeed, the *en banc* majority conceded that the attribution "issue was not explicitly raised in those opinions." App. 15-16 n.5. Here, no such concession was made by OBB.

Further, neither case correctly applied the principles in *Nelson. Barkanic* was decided before *Nelson* and inquired into whether a "*sufficient* nexus" existed between the ticket sale and injury, while post-*Nelson*, the Second Circuit has inquired into a "*significant* nexus" focused on the "gravamen" of the complaint. *Compare Barkanic*, 822 F.2d 11 (emphasis added), *with Kensington Intern. Ltd. v. Itoua*, 505 F.3d 147, 155-56 (2d Cir. 2007) (emphasis to "nexus" omitted).

And the D.C. Circuit in *Kirkham* sidestepped *Nelson*'s requirement that the "based upon" inquiry focus on the "gravamen" or "basis" of the suit, instead requiring only that "the ticket sale is *one of* 'those elements of a claim that, if proven, would entitle [Kirkham] to relief under [her] theory of the case.'" *Kirkham*, 429 F.2d at 295 (quoting *Nelson*, 507 U.S. at 357) (emphasis added; brackets in *Kirkham*).

This Court has clearly established that it is the subject "torts, and not the arguably commercial activities that preceded their commission, [that] form the basis for the [plaintiffs'] suit." *Nelson*, 507 U.S. at 358. The proper standard focuses on the "gravamen" of the action, and not on particular elements of the claims. The gravamen of Sachs's action is the condition of the train and train platform in Austria and the injuries that she claims resulted from those conditions. Her claims are therefore "based upon" the alleged events in Austria, not the United States.[11] Because Sachs cannot satisfy this element of the

[11] The Ninth Circuit, after first "imputing the sale of the pass by RPE to OBB," concluded that the "sale creates 'substantial contact' with the United States." App. 31. This reversed the order of inquiry set forth in *Nelson*, which indicated that the "based upon" analysis came first, and the "substantial contact" issue last. *See* 507 U.S. at 356. Here, there was no "substantial contact" with the United States when the "based upon" inquiry is addressed first and focused upon the "gravamen" of the action. *See id.* at 370 (White, J., concurring) ("the Act does not grant the Nelsons access to our courts," because "petitioners' commercial conduct in Saudi Arabia, though constituting the basis of the Nelsons' suit, lacks a sufficient nexus to the United States").

commercial activity exception, the *en banc* opinion must be reversed.

III. THE NINTH CIRCUIT ALSO ERRED BECAUSE THE SALE OF THE EURAIL PASS WAS NOT COMMERCIAL ACTIVITY "BY THE FOREIGN STATE."

Sachs's invocation of the commercial activity exception independently fails because the sale of the Eurail Pass by RPE was not commercial activity by OBB. The first clause of the exception requires that the commercial activity on which the suit is "based upon" be "'commercial activity' by *petitioners*," *i.e.*, entities that "qualify as 'foreign state[s]' within the meaning of the Act" under §§1603(a) and (b)'s definition of "foreign state" and "agency or instrumentality of a foreign state." *Nelson*, 507 U.S. at 356-57 (emphasis added). Here, the only "commercial activity" alleged – the sale of the Eurail Pass by the RPE – was not commercial activity by OBB.

A. On its Face, the Commercial Activity Exception Applies Only to Activity by the Foreign State Itself or its Agencies or Instrumentalities as Defined in the FSIA.

As noted above, the applicability of the commercial activity exception "must stand on the Act's text. Or it must fall." *NML Capital*, 134 S.Ct. at 2256; *accord CSX Transp.*, 552 U.S. at 20. Where Congress

has plainly stated that the exception applies only to the commercial activity of a "foreign state" – and carefully defined the entities that constitute a "foreign state" – the courts are not free to extend the exception to the activities of other entities.

The plain text of the commercial activity exception is limited to activity "by the foreign state." §1605(a)(2). Congress took precise efforts in its statutory definitions to prevent ambiguity in the commercial activity exception on this point. *Compare* §1603 ("Definitions"), *with* §1605(a)(2) (first clause). "[F]oreign state" is the first term defined in the FSIA, and Congress was explicit that its definition applied "[f]or purposes of this chapter," *i.e.*, "Chapter 97-Jurisdictional Immunities of Foreign States," §§1602-1611, subject solely to one express exception – "except as used in section 1608 of this title" governing service of process. *See* §§1603 & 1603(a).

In other words, because Congress explicitly stated that the term "foreign state['s]" use in §1608 is the sole exception to that definition's application throughout the chapter, this definition of "foreign state" necessarily extends to the use of that term in the commercial activity exception in §1605(a)(2). *See United States v. Smith*, 499 U.S. 160, 167 (1991) ("Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception. . . .").

Indeed, Congress's enumerated exception for §1608 forecloses any additional implied exceptions to

the definition of "foreign state." *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent."); *Law v. Siegel*, 134 S.Ct. 1188, 1196 (2014) ("The [Bankruptcy] Code's meticulous – not to say mind numbingly detailed – enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions."); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Thus, the statutory definition of "foreign state" controls when interpreting what constitutes commercial activity "by the foreign state" under §1605(a)(2). *See Burgess v. United States*, 553 U.S. 124, 129-30 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case." (alteration in original) (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949))).

Notably, the FSIA's definition of "foreign state" in §1603(a) is not limited to the foreign sovereign, but extends to other entities, which "include[ ] a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." §1603(a). An "agency or instrumentality of a

foreign state" is defined as "mean[ing] any *entity*" "which is a separate legal person, corporate or otherwise," including "an organ of a foreign state," such as OBB, as well as corporations whose shares are majority owned "by a foreign state or political subdivision thereof," and in any event are incorporated under that country's laws. §1603(b) (emphasis added). The commercial activity exception's applicability to "commercial activity . . . *by the foreign state*," on its face, and by definition, thus extends beyond activities by the foreign sovereign itself, and includes business activities carried on by the foreign sovereign through certain separate government-owned corporations enumerated in §1603. §1605(a)(2). Congress, in its definitions, made clear *which* entities' activities could be *attributed* as commercial activity "by the foreign state."

Glaringly, Congress nowhere said, either in the general definition of "foreign state," or in the language of the commercial activity exception, that activity "by the foreign state" further extends to actions by entities operating as *common law agents*. Rather, Congress reaffirmed in the FSIA's definitions that "[a] 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on *by such state* and having substantial contact with the United States." §1603(e) (emphasis added). When Congress clarified what the reference to conduct "by the foreign state" meant in the context of the first clause of the commercial activity exception, it reaffirmed that it is the activity carried on

"*by such state*," with no reference to common law "agents," "subagents," or, as held by the Ninth Circuit, "travel agents." §§1603(e) (emphasis added), 1605(a)(2).

Congress could have, but did not, draft the commercial activity exception as applying to "commercial activity . . . by the foreign state *or an agent of such foreign state while acting within the scope of its agency.*" And, this Court has refused to extend who is a "foreign state" beyond the statutory definition. For example, in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), the issue was whether entities that did not fall within the definition of an instrumentality under §1603(b) could invoke immunity under the FSIA. This Court rejected the notion, holding that:

> The Dead Sea Companies, as indirect subsidiaries of the State of Israel, were not instrumentalities of Israel under the FSIA at any time. Those companies cannot come within the statutory language that grants status as an instrumentality of a foreign state to an entity a "majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."

Id. at 474 (quoting §1603(b)(2)). "Section 1603(b)(2) speaks of ownership. The Dead Sea Companies urge us to ignore corporate formalities and *use the colloquial sense of the term.* They ask whether, in common parlance, Israel would be said to own the Dead Sea Companies. We reject this analysis." *Id.* (emphasis added). Under the FSIA, then, a "foreign state" is the

sovereign itself or a specifically defined entity that it *owns*. *Id.*[12]

Here, the definition of "foreign state" or "agency or instrumentality" does not apply to RPE because it is undisputed that RPE was not owned by OBB. *Dole* rejects the extension of the definition of "foreign state" to an entity that, at most, is *indirectly* related to OBB, separated by at least three intermediary entities none of which are majority-owned by OBB or owned by OBB at all. *See* JA at 30-31 ¶¶18-19. Extending the concept of commercial activity "by the *foreign state*" to any instance when tickets are sold through a "travel agent" would improperly do precisely what *Dole* rejected: "ignore corporate formalities and use the colloquial sense of the term." *See* 538 U.S. at 474. This Court has refused to stray from the statutory definition of a "foreign state" to include entities that do not satisfy the definition.

The Court's recent decision in *Samantar* is also on point. There, the defendant – a foreign official sued for human rights violations – argued that the immunity protections granted to a "foreign state" under the FSIA extended to its individual officials as well. *See Samantar*, 560 U.S. at 308-11. The Court

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[12] *Dole* emphasized that "[m]ajority ownership by a foreign state, not control, is the benchmark of instrumentality status," and that "[t]he statutory language will not support a control test that mandates inquiry in every case into the past details of a foreign nation's relation to a corporate entity in which it does not own a majority of the shares." *Dole*, 538 U.S. at 477.

rejected this argument, similarly holding that the definition of a foreign state in §1603 cannot be expanded to include individuals:

> Then, *in §1603(b), the Act specifically delimits what counts as an agency or instrumentality*. Petitioner argues that either "foreign state," §1603(a), or "agency or instrumentality," §1603(b), could be read to include a foreign official. Although we agree that petitioner's interpretation is literally possible, our analysis of the entire statutory text persuades us that petitioner's reading is not the meaning that Congress enacted.

Id. at 314-15 (emphasis added).

Here too, the FSIA specifies what kind of "*entity*" falls within the definition of "foreign state" and its "agencies," and it does *not* include common law agents, just as this Court in *Samantar* held it did not include individuals.

> It is true that an individual official could be an "agency or instrumentality," if that term is given the meaning of any thing or person through which action is accomplished. *But Congress has specifically defined "agency or instrumentality" in the FSIA, and all of the textual clues in that definition cut against such a broad construction*."

Id. at 315 (emphasis added) (internal quotation and citation omitted). This Court held that, under the FSIA, the terms "agency or instrumentality" "mean[ ]" any entity matching the *specific characteristics* set

forth in §1603(b). *Id.* (quoting §1603(b)). Thus, in *Samantar*, this Court again refused to expand the concept of agency or instrumentality in the FSIA beyond the definition in §1603(b). As already discussed, here, Congress could have, and did not, extend the list of *entities* to common law agents, and *Dole* confirms that the entities falling within the scope of the "foreign state" under the FSIA are only those that expressly fall within the statutory definition.

As in *Samantar*, this is further confirmed by an "analysis of the entire statutory text," which, as relevant here, is the commercial activity exception itself. *See id.* By using the term "*by* the foreign state" in the commercial activity exception, *see* §1605(a)(2) (emphasis added), and reiterating that this means activity "carried on *by* such state," *see* §1603(e) (emphasis added), Congress reinforced its invocation of the statutory definition of "agency or instrumentality of a foreign state," *see* §1603(b), and in turn its intent that the exception apply to corporate activities carried on by the foreign state through its government owned corporations. Thus, the exception's application to "commercial activity carried on in the United States by the foreign state," §1605(a)(2); *see also* §1603(e), cannot be read to extend to commercial activity carried on by an entity simply operating as a common law agent or sub-agent of a "foreign state" because such entities do not fit within §1603(b).

Thus, as interpreted by this Court, because "foreign state" is defined and because that definition applies to the commercial activity exception, there is

no basis for a court to venture beyond the plain text to expand the "foreign state," as the Ninth Circuit has done by invoking the common law and disregarding §1603. Nothing in the FSIA suggests that Congress intended courts to expand the definition of the "foreign state" by reference to domestic common law. *Cf. Samantar,* 560 U.S. at 319 ("Reading the FSIA as a whole, there is nothing to suggest we should read 'foreign state' in §1603(a) to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted.").

In sum, it is uncontested that the RPE is *not* an agency, instrumentality or organ of OBB as defined in the FSIA. Under the plain text of the FSIA, then, RPE's commercial activities cannot be attributed to OBB, and cannot constitute acts "by" OBB, for purposes of the sovereign immunity determination.

B. International Law at the Time of the FSIA's Enactment Confirms that the FSIA's Definition of "Foreign State" Extends to Both Immunity and Attribution

The Court need not look beyond the statutory definition of a "foreign state." But if the Court were to do so, international law at the time of the FSIA's enactment confirms that what constitutes commercial activity "by the foreign state" for purposes of the commercial activity exception is limited

to the conduct of entities satisfying the definition enacted in the FSIA.

Because one of the FSIA's purposes was the "codification of international law at the time of the FSIA's enactment," this Court has looked to the Restatement (Second) of Foreign Relations Law of the United States (1965), which is "[t]he most recent restatement of foreign relations law at the time of the FSIA's enactment," in interpreting the statute. *See Permanent Mission*, 551 U.S. at 199-200; *accord Samantar*, 560 U.S. at 312 n.6, 314, 321.

The Restatement addresses who "[t]he immunity of a foreign state . . . extends to," and whose conduct "is attributable to the state." Restatement (Second) Foreign Relations Law §§66, 169. These sections parallel each other.

The immunity section provides:

> The immunity of a foreign state under the rule stated in §65 extends to (a) *the state itself*; (b) its head of state and any person designated by him as a member of his official party; (c) *its government or any governmental agency*; (d) its head of government and any person designated by him as a member of his official party; (e) its foreign minister and any person designated by him as a member of his official party; (f) any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state;

> (g) *a corporation created under its laws and exercising functions comparable to those of an agency of the state.*

Id. at §66 (emphasis added).

Correspondingly, the "General Rule as to Attribution" states:

> Conduct of any *organ or other agency of a state*, or of any official, employee, or other *individual agent* of the state or of such agency, that causes injury to an alien, is attributable to the state within the meaning of §164(1) if it is within the actual or apparent authority, or within the scope of the functions, *of such agency* or *individual agent*.

Id. at §169 (emphasis added).

Thus, with respect to other *entities*, both immunity and attribution of conduct extended to any "agency" of the foreign state, as well as government owned corporations. *See id.* at §66; *see also id.* at §169 cmt. b (subject to certain exceptions, "[t]he term 'agency' as used in this Section includes any commercial enterprise owned by a state"). Moreover, "[t]he term 'agency' as used in this Section means a body having the nature of a government department or ministry. *It does not include every person or entity acting as an agent for a state*." *See id.* at §66 cmt. a (emphasis added).[13]

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[13] *See also* Restatement (Second) Foreign Relations Law §169 cmt. c (referring separately to an "individual agent of the

(Continued on following page)

These principles, as they apply to *entities*, are reflected in the FSIA, where the definition of "foreign state" extends to an "agency" of a foreign state, which in turn includes its "organs" and government-owned corporations. *See Samantar*, 560 U.S. at 314-21 (citing Restatement §66 among others); §§1603(a), (b). And the Restatement confirms, as is apparent from Congress's definition of "foreign state" (including its use in the commercial activity exception) – that this definition, which does *not* include entities acting as common law "agents," is applicable for determinations as to who may claim immunity, as well as whose conduct may be attributed to the foreign state. Thus, the Ninth Circuit's assertion that "[w]hether an entity meets the definition of an 'agency or instrumentality of a foreign state' to claim immunity is a 'completely different question' from whether the acts of an agent can be imputed to a foreign state for the purpose of applying the commercial-activity exception," is wrong. *See* App. 22-23.

The definition of "foreign state" in the FSIA and Restatement – whether for purposes of immunity or attribution – show that both extend to an "agency" of a foreign state, including its government-owned corporations, and does *not* extend to entities acting as common law "agents." Thus, the acts of RPE cannot

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state or of such agency," with the term "individual agent" specifically defined to "include[ ] any official, employee, member of the armed forces, or other individual employed by or authorized to act on behalf of the state or any agency of the state.").

be attributed to OBB for purposes of the commercial activity exception.

C. In the Alternative, the Principles Articulated in *Bancec* Should Guide the Inquiry into Attribution for Purposes of the Commercial Activity Exception.

Even if this Court looked beyond the FSIA's plain terms, the commercial activity exception would *not* extend broadly to any time a ticket is sold "in the United States through a travel agent," nor to the specific facts of this case. *See* App. 4. Instead, any attribution inquiry should be dictated by the precepts of the restrictive theory of international law that Congress sought to codify, cognizant that, "[w]hen it enacted the FSIA, Congress expressly acknowledged 'the importance of developing a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts." *Bancec*, 462 U.S. at 622 n.11 (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32 (1976) (*House Report*)).

This is the approach endorsed by this Court in *Bancec*. That case involved Citibank's counterclaim against Bancec, a Government of Cuba-created bank, and "instrumentality" of the "foreign state" under the FSIA. *Id.* at 613-17. Citibank asserted a right to set off the value of its assets that had been seized by the Cuban government against its debt to Bancec. *Id.* at 614-15. The key question was not whether Bancec had immunity under the FSIA (it was undisputed

that Bancec, as the party that originated the lawsuit, was foreclosed under the FSIA from asserting immunity, *see id.* at 619-20) but whether, for purposes of the counterclaim, "the FSIA prohibits holding a foreign instrumentality owned and controlled by a foreign government responsible for actions taken by that government," *i.e.*, Cuba's nationalization of Citibank's assets. *Id.* at 620.

This Court held that the FSIA did not impose such a prohibition, because "[t]he language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state," including "'whether the proper entity of a foreign state has been sued.'" *Id.* (quoting *House Report* 12). But it concluded that "[n]evertheless, our resolution of that question is guided by the policies articulated by Congress in enacting the FSIA." *Id.* at 621. This Court turned to principles "common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies." *Id.* at 623. Examining those principles, the Court articulated two instances where such attribution would be permitted: (1) "*where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created*"; or (2) when failing to recognize such attribution "would work fraud or injustice." *Id.* at 629 (emphasis added).

Bancec is instructive because it addressed questions of attribution (though in the context of liability rather than sovereign immunity), and is grounded in principles set forth in the FSIA, including codification of international common law and Congress's uniformity interest. Circuit Courts, including the Fifth Circuit and D.C. Circuit, have held that *Bancec* guides the question of what commercial activity may be attributed to the foreign state for purposes of the commercial activity exception. *See Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533, 535-37 (5th Cir. 1992); *Transamerica Leasing*, 200 F.3d at 847-54 (D.C. Circuit).

A similar examination of international common law and federal common law on agency reveals that "control" is a fundamental and critical element needed to create a principal-agent relationship. *Bancec* is illustrative, in finding that extensive control *on its own* can give rise to a principal-agent relationship under international and federal common law principles. *Bancec*, 462 U.S. at 629. Moreover, even outside the alter ego context, the United States in this case has agreed that "direction and control" were necessary elements for attributing the conduct of any agent to the "foreign state" for FSIA purposes under federal common law, U.S. Br. 8-9, as consistent with international practice, U.S. Br. 9-10 (citing The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Pt. 1, ch. II, art. 8, U.N. Doc. A/RES/56/83,

at 3 (Jan. 28, 2002); State Responsibility: Comments and observations received from Governments, U.N. Doc. A/CN.4/488, at 41 (Mar. 25, 1998)).

Applying *Bancec* and the fundamental requirement of "control" embodied under international and federal common law, RPE's actions cannot be attributed to OBB. Fatal to Sachs's claim, as the District Court observed, is that there is *no evidence*, or even allegation, that OBB exercised any degree of direction or control, or element of control, over RPE. This is unsurprising given the attenuated connection. At most, RPE may be presumed to have been a *subagent* of an unidentified *general sales agent* accredited by the *Eurail Group*, not OBB itself. JA at 30-31 ¶18. Also, no evidence was offered that OBB, as just one of 30 members of the Eurail Group, exercised sufficient direction and control to make the *Eurail Group*'s actions attributable to OBB under a principal-agent relationship, much less sufficient direction and control to cover what are at least three degrees of corporate separation between OBB and RPE. Indeed, there was no evidence that OBB even knew RPE existed prior to the filing of this suit.[14]

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[14] The FSIA requires a shifting burden. Defendants first "establish[ ] their prima facie entitlements to sovereign immunity by proving only that they qualif[y] as 'foreign states' under 28 U.S.C. §1603(a)-(b)." *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 305 (9th Cir. 1997), *cert. denied,* 535 U.S. 987 (2002). "Once a foreign state makes a prima facie showing of immunity, the plaintiff seeking to litigate in the United States then has the burden of showing that an exception applies." *Gen. Elec. Capital*

(Continued on following page)

The Ninth Circuit did not hold to the contrary as to the facts. Instead, it rejected the principles in *Bancec* directly, stating that "[t]he day-to-day control inquiry under *Bancec* makes no sense here," and disregarded the notion that *any control at all* was required by a common carrier over a "travel agent" before imputing that sale as commercial activity by the foreign state. App. 4, 21. The only "facts" upon which the Ninth Circuit relied to find that RPE's acts should be attributed to OBB was that RPE was a travel agent that sold the Eurail Pass, as "a subagent of OBB through Eurail Group," because "Eurail Group markets and sells rail passes for transportation on OBB's rail lines, making Eurail Group an agent of OBB." App. 4, 18. That holding is inconsistent with *Bancec*, international law, and federal common law of agency. The Ninth Circuit made no finding that evidence of "direction and control" existed between RPE and the Eurail Group, or between the Eurail Group and OBB, much less between RPE

Corp. v. Grossman, 991 F.2d 1376, 1382 (8th Cir. 1993); *accord, Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir. 2002) ("[I]n a challenge to FSIA subject matter jurisdiction, the defendant must present a *prima facie* case that it is a foreign sovereign. . . . Then, *the plaintiff* has the *burden of going forward* with evidence showing that, under exceptions to the FSIA, immunity should not be granted." (emphasis in original) (internal quotations omitted)). OBB's motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, and Sachs's opposition, were fact-based. *See* Dist. Ct. Docket 43 at 1; *see also* Dist. Ct. Docket 44-45, 58-59.

and OBB. Thus, application of *Bancec*'s principles also compels reversal.

D. The Ninth Circuit's Approach is Inconsistent with the Text and Intent of the FSIA, Yields an Unreasonable Pro-Jurisdiction Answer, and Strains the Reaches of Jurisdiction.

1. The Ninth Circuit's Reliance Upon Purported Domestic Common Law Sub-Agency Principles Conflicts with the Plain Text and the FSIA's Purposes.

Rather than apply the plain text of the statute, or international and federal common law on attribution and agency as dictated by *Bancec*, the *en banc* majority adopted Sachs's position and stated that it was relying on domestic common law of agency principles – principles that vary from state to state and are unmoored from the foundational component of control. Sachs, for her part, has consistently grounded her attribution argument in California agency law, *see* Ninth Cir. Docket 7-2 at 12, and the *en banc* majority likewise predicated its decision that travel agents are "agents" of a common carrier upon a citation to an obscure section of the Restatement entitled "[a]mbiguous relationships," while eschewing the bedrock requirement that an agency relationship requires

control by the principal.[15] *See* App. 18 (citing Restatement (Third) Agency §3.14 cmt. c (2006)); App. 21.

The *en banc* majority's reasoning in rejecting the FSIA's plain text is contrary to basic canons of statutory construction and purposes of the FSIA.

First, and most fundamentally, the Ninth Circuit ignored the FSIA's clear, unequivocal definition of "foreign state," arguing that its extension to "an agency or instrumentality of a foreign state" only "defines what type of entity can be considered a foreign state for purposes of claiming sovereign immunity," a separate question, according to the Ninth Circuit, from "whether the acts of an agent can be imputed to a foreign state for the purpose of applying the commercial activity exception." App. 22-23 (internal quotation omitted).

But the definition of "foreign state" does not vary from section to section within the FSIA. Congress did

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[15] In contrast, acting "*subject to the principal's control*" is fundamental to establishing a principal-agent relationship. Restatement (Third) Agency §1.01 ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and *subject to the principal's control*, and the agent manifests assent or otherwise consents to act." (emphasis added)); Restatement (Second) Agency §1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control*, and consent by the other so to act." (emphasis added)).

not say "foreign state" has one definition as applied to the invocation of immunity, and another as to attribution for purposes of the exception to immunity. Instead, that definition applies *throughout the Act* and in *all its uses*, subject to Congress's sole and express exception when that term is used in §1608 governing service of process. *See* §1603(a). "[F]oreign state" thus does not mean something else when used in the commercial activity exception. *See* §§1603(a), 1605(a)(2).

Further, international law at the time of the FSIA's enactment indicates that the definition of "foreign state," as applied to entities, was congruent with respect to both immunity and attribution. Restatement (Second) Foreign Relations Law §§66, 169.

The Ninth Circuit's contention that "[c]ommon sense . . . tells us that an agent that carries on commercial activity for a foreign state in the United States does not need to be an agency or instrumentality of a foreign state under §1603(b)" misses the point. App. 23. Such an approach was rejected in *Samantar*, which declined to expand the definition based on what may be "literally possible," holding that §1603(b) "specifically delimits what counts as an agency." 560 U.S. at 314-15.

Thus, the FSIA definitions address attribution of other entities' conduct in the immunity context, and extended it to an "agency" of a "foreign state," *i.e.*, commercial activity "by such state" – no more and no less. Such entities include separate juridical

"corporate" persons that can, and have in other cases, *see Nelson*, 507 U.S. at 351 (as to Royspec) and *Bancec*, 462 U.S. at 613-16, carried on commercial activity within the United States. Thus, here, where the issue is whether actions taken by a separate juridical entity may be attributed to the foreign state for immunity purposes under the commercial activity exception, the inquiry turns exclusively upon whether that entity is an "agency or instrumentality of a foreign state" as defined by the FSIA. Here, it is undisputed that RPE does not fall within that definition; thus, its acts cannot be attributed to OBB.

Second, the *en banc* majority's "presumption that the [FSIA] maintains common-law principles," and that Congress did not "intend[ ] to displace common-law agency principles under the statute for purposes of assessing commercial activity within the United States," is also wrong. App. 24. As this Court made clear in *Samantar*, that canon of construction only applies with respect to the "field formerly governed by the common law." *Samantar*, 560 U.S. at 320-21 (recognizing canon, but holding it inapplicable where FSIA did not codify "the common law with respect to the immunity of individual officials"). The FSIA, however, was not intended to codify the state common law of *agency*. Rather, its purpose was "codification of *international law* at the time of the FSIA's enactment." *Id*. at 320 (emphasis added) (quoting *Permanent Mission*, 551 U.S. at 199). It is *this* "common law and international practice" that is appropriate to examine "when interpreting the Act." *Id.* As already

addressed, international law, as expressed by the Restatement, *Bancec*, and the International Law Commission, are all consistent in foreclosing attribution of RPE's ticket sale to OBB for immunity purposes.

Third, the Ninth Circuit's invocation of state common law agency principles is contrary to the FSIA's "*comprehensive*" scope. *See NML Capital*, 134 S.Ct. at 2255-56 (emphasis in original). Congress's interest in uniformity was clear in its declaration of purpose. *See* §1602. Further, the legislative history explained that the FSIA "is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." *House Report* 12. Yet the Ninth Circuit frustrates Congress's intent by making the commercial activity exception rise and fall upon state common law agency and sub-agency principles entirely and expressly divorced from the principle of "control" fundamental to international law. This is highlighted here, where jurisdictions vary widely as to whether travel agents are in fact to be legally treated as "agents." Indeed, the Restatement of Agency provision relied upon by the *en banc* majority for holding RPE to be OBB's agent is a comment entitled "Ambiguous Relationships." App. 18 (quoting Restatement (Third) Agency §3.14 cmt. c.). And that provision goes on to highlight variations from court-to-court on whether travel agents are in fact "agents."

Indeed, another decision from the Ninth Circuit never mentioned by the *en banc* majority highlights the error of assuming that an entity calling itself "travel agent" is actually an "agent" even under common law. In *Harby v. Saadeh*, 816 F.2d 436, 439 (9th Cir. 1987), the court held that a travel agent did *not* act as an "agent" for Kuwait Airlines in selling a travel ticket because "[c]ontrol is a crucial element missing from the relationship between Kuwait Airlines and Saadeh," where he was "not supervised or 'controlled' by any one carrier or group of carriers." Under *Harby*, as under international common law, RPE's conduct could not be imputed to OBB. The *en banc* majority's holding that a "travel agent" is always an agent of a common carrier, is unsupportable.

Finally, the Ninth Circuit openly, and improperly, elevated its policy determinations over those expressed by Congress. It defended its conclusion that OBB was subject to suit due to RPE's actions, on the basis that a contrary ruling grounded in the plain text or *Bancec*'s principles "would negate the possibility of commercial activity by a state-owned railway or airline within the United States through a travel agent. We cannot believe that this is what Congress intended." App. 25. This Court, however, has rejected such an approach to interpreting the FSIA. As this Court has explained, any such "riddle is not ours to solve (if it can be solved at all),. . . . '[T]he question . . . is not what Congress would have wanted but what Congress enacted in the FSIA.'" *NML Capital*,

134 S.Ct. at 2258 (third alteration in original) (quoting *Weltover*, 504 U.S. at 618).

Congress enacted a limited exception for commercial activity "by the foreign state," which included actions by the foreign state itself, as well as its "agenc[ies] or instrumentalit[ies]." *See* §§1603(a)-b), 1605(a)(2). The Ninth Circuit erred in reaching beyond those definitions.

2. The Ninth Circuit's Standard Adopts the Very Type of Pro-Jurisdiction Test this Court has Emphatically Rejected

The "agency theory" propounded by the *en banc* majority for subjecting foreign states to suit under the commercial activity exception does precisely what this Court chastised the Ninth Circuit for last term: formulating an "agency theory" for foreign entities that "stacks the deck" so as to "always yield a pro-jurisdiction answer." *Daimler AG v. Bauman*, 134 S.Ct. 746, 759-60 (2014).

Here, too, the Ninth Circuit has created a black letter rule that "[a] foreign-state owned common carrier, such as a railway or airline, engages in commercial activity in the United States when it sells tickets in the United States through a travel agent." App. 4. This *per se* rule eschews consideration of the element of "control" foundational to agency, and applies "regardless of whether the travel agent is a direct agent or subagent of the common carrier," thus

"always yield[ing] a pro-jurisdiction answer." *See* App. 4; *Daimler AG*, 134 S.Ct. at 759.

The Ninth Circuit's decision also significantly diminishes the "based upon" requirement because it ignores the gravamen of the action and, instead, allows plaintiffs to plead, and courts to rely on, any single legal element that may have a connection to the United States, in disregard of *Nelson*.

As this Court has stated, the Ninth Circuit's "expansive view[s]" of jurisdiction "pa[y] little heed to the risks to international comity." *Daimler AG*, 134 S.Ct. at 763.[16] It was recognized in *Daimler* that such an "expansive view" of agency in the context of general jurisdiction over a foreign *corporation* had "impeded negotiations of international agreements" and led to "international friction." *Id.* "Considerations of international rapport," *see id.,* are that much more pronounced here when dealing with the assertion of jurisdiction over the *foreign state* itself, rather than a privately owned foreign corporation. Indeed, "[a] primary purpose of the FSIA is to make it difficult for private litigants to bring foreign governments into

[16] Most Circuits (in contrast to the Ninth Circuit's broad approach) have held that the commercial activity exception, like other FSIA exceptions, must be narrowly construed. *See e.g.*, *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012) ("The FSIA established a broad grant of immunity for foreign sovereigns that can only be abrogated by one of the statute's narrowly drawn exceptions."); *Garb v. Republic of Poland*, 440 F.3d 579, 587 (2d Cir. 2006) (interpreted commercial activity exception "narrowly").

court, thereby avoiding affronting them." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003).

Here, the Ninth Circuit's holding has already generated the attention of the international community, with the Netherlands stating that the Ninth Circuit's holding creates a "substantial risk of jurisdictional and diplomatic conflict," Government of the Kingdom of the Netherlands Amicus Br. 1-2, and the International Rail Transport Committee contending that, if the holding stands, it will "fundamentally alter the way Eurail passes are marketed and sold, to the detriment of American travelers," International Rail Transport Committee Amicus Br. 2, 14.

The Ninth Circuit's holding, if permitted to stand, would create the untenable anomaly that it is easier for a plaintiff to obtain jurisdiction in the courts of the United States over a foreign *state* than a foreign *corporation*. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (no personal jurisdiction over foreign corporation for injuries to U.S. citizens while traveling abroad on foreign corporation's helicopter, despite negotiations for travel occurring in the United States); *see also J. McIntyre Mach. Ltd. v. Nicastro*, 131 S.Ct. 2780, 2786, 2790-91 (2011) (no personal jurisdiction over foreign corporation J. McIntyre because there was no "purposeful availment" where "J. McIntyre itself did not sell its machines to buyers in this country beyond the U.S. distributor, and there is no allegation that the distributor was under J. McIntyre's *control*." (emphasis added)). This would be an affront to the

presumptive immunity of foreign states from suit under the FSIA, *see Nelson*, 507 U.S. at 355, and disregards concerns of international rapport and that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *See Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty.*, 480 U.S. 102, 115 (1987); *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 239 (2007) (Kennedy, J., concurring; Alito, J., joining) ("When Congress acted through the [FSIA] to codify certain protections and immunities for foreign sovereigns and the entities of those sovereigns, it no doubt considered its action to be of importance for maintaining a proper relationship with other nations.").

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the Complaint dismissed on the basis of OBB's foreign sovereign immunity.

Respectfully submitted,

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Relevant Excerpts of the Foreign Sovereign Immunities Act

28 U.S.C. §1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

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28 U.S.C. §1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the

rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

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28 U.S.C. §1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

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28 U.S.C. §1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

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28 U.S.C. §1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

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(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

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28 U.S.C. §1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in

accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.