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 OF NML CAPITAL, LTD. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

NML Capital, Ltd. ("NML") is a fund that invests in sovereign debt through the secondary debt market in the United States.[1] NML and its affiliates have litigated before numerous U.S. federal and state courts (as well as foreign courts) in their efforts to enforce creditors' rights under debt instruments issued by sovereign debtors, including the Republic of Peru, the Republic of Congo, and the Republic of Argentina, among others. They have been involved in many of the leading decisions on the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1332(a), 1391(f) & 1601-1611. Those decisions include *Republic of Argentina* v. *NML Capital, Ltd.*, in which this Court held—in favor of NML—that the FSIA does not "limi[t] discovery in aid of execution of a foreign-sovereign judgment debtor's assets." 134 S. Ct. 2250, 2256 (2014). NML thus has extensive practical experience with the problems facing parties to commercial transactions with foreign states, like Ms. Sachs in this case. *See Republic of Argentina* v. *Weltover*, 504 U.S. 607, 617 (1992) ("Argentina's issuance of [bonds] was a 'commercial activity' under the FSIA.").

NML's most recent and extensive litigation involves bonds issued by the Republic of Argentina. In

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[1] All parties have consented to the filing of this brief. The written consents have been lodged with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, NML states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NML and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

2001, Argentina committed the then-largest sovereign debt default in history. Pursuant to the terms of the defaulted bonds, Argentina had expressly consented to jurisdiction in New York and had explicitly waived any claim of sovereign immunity with respect to lawsuits involving the bonds. Shortly after the default, bondholders (including NML) began to file actions against Argentina in the United States District Court for the Southern District of New York, and that court has entered judgments against Argentina totaling billions of dollars.

Argentina does not dispute that the judgments were validly entered. Yet it has never paid any judgment rendered in favor of NML, and it has never admitted that any of its assets are subject to execution to satisfy those judgments. To the contrary, the Argentine legislature enacted a law in early 2005 that essentially prohibits Argentina from satisfying the U.S. judgments. The ensuing litigation, in which at least 150 actions were filed, has resulted in the entry of at least 100 judgments in the Southern District of New York, at least 38 decisions by the United States Court of Appeals for the Second Circuit, at least 10 petitions for writs of certiorari to this Court, and related proceedings in other courts throughout the United States and around the world. NML has been a party to at least 68 of the actions and at least 21 of the appeals, and has filed or opposed at least 9 of the petitions for writs of certiorari.

In its efforts to enforce its rights as a bond creditor and a judgment creditor, NML has litigated, and continues to litigate, many of the issues presented by this case, including the permissible grounds for imputing conduct between a foreign state and its agents, agencies, instrumentalities, and political

subdivisions; the implications of this Court's decision in *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"); and the proper interpretation of the FSIA's exceptions to foreign sovereign immunity in actions "based upon a commercial activity carried on in the United States by [a] foreign state." 28 U.S.C. §§ 1605(a)(2) (jurisdiction), 1610(a)(2) (attachment or execution).[2] These issues are of exceptional importance to sovereign debt enforcement litigation and to the broader market for sovereign debt issuances. The Ninth Circuit correctly resolved the questions now presented before this Court, and its holding should accordingly be affirmed.

SUMMARY OF THE ARGUMENT

I. Under the FSIA, when a foreign state undertakes commercial activities in the United States, it can be sued in U.S. court and held liable under the same substantive standards applicable to any other person or entity. The FSIA's plain text and history confirm this rule, and it has repeatedly been recognized and applied by this Court.

II. That well-settled rule, in turn, resolves both questions presented in this case.

A. Foreign states that conduct business through private agents are responsible for those agents' con-

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[2] The question presented in this case concerns a foreign state's jurisdictional immunity from suit under Section 1605(a)(2); the same statutory language, however, also appears in Section 1610(a)(2)'s non-jurisdictional exceptions to immunity from attachment and execution. For ease of reference, this brief will refer to Section 1605(a)(2) and the threshold jurisdictional issue.

duct under the same common-law agency principles that govern private individuals and entities. When the agent acts on the principal's behalf, the principal acts too; and thus, when a foreign state's agent carries on commercial activity in the United States on behalf of a foreign state, the foreign state also carries on that activity. Indeed, because a foreign state can act—and conduct business in the United States—only through its agents, a state's commercial activity in the United States necessarily includes its agents' commercial activity on its behalf. The question whether a foreign state "carried on" "commercial activity" sufficient to establish jurisdiction under the FSIA's commercial-activity exception, 28 U.S.C. § 1605(a)(2), is thus governed by the same common-law principles that determine when a non-sovereign party is bound by the acts of its agent.

B. Ordinary principles of personal jurisdiction applicable to private parties also dictate the test for determining whether an action is "based upon" a foreign state's commercial activity within the meaning of the commercial-activity exception. Through the "based upon" standard, the FSIA does the work of a long-arm statute, ensuring that, when a foreign state engages in commercial activity—and thus sheds its sovereign immunity—it can be sued in the United States when there is a sufficient nexus between the United States and the plaintiff's claims. The standard is modeled on, and should be interpreted consistently with, the rule that courts have specific personal jurisdiction over a defendant in an action "arising out of" that defendant's acts in the relevant forum. Under each of the three dominant formulations of the "arising out of" standard, a court may exercise personal jurisdiction to hear a claim against a private defendant if that defendant's acts in the forum

are necessary to prove an element of the plaintiff's claim. The commercial-activity exception extends this same standard to foreign states, as the exception's text and this Court's decision in *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), confirm. This "one-element" test is also easier to administer than the alternatives proposed by OBB and the United States.

ARGUMENT

I. UNDER THE FSIA, FOREIGN STATES ENGAGED IN COMMERCIAL ACTIVITY IN THE UNITED STATES ARE TREATED IN THE SAME MANNER AS PRIVATE PARTIES.

The FSIA treats foreign states in the same manner as private entities when those states engage in commercial activity in the United States.

A. The statute "codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden BV* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). Under that theory, foreign states are immune from jurisdiction in "suits involving the foreign sovereign's public acts," but immunity "does not extend to cases arising out of a foreign state's strictly commercial acts." *Id.* at 487.

"A foreign state engaging in 'commercial' activities 'do[es] not exercise powers peculiar to sovereigns,'" and therefore is not entitled to special treatment. *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (quoting *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 704 (1976) (plurality op.)). Instead, when a foreign state "participat[es] in the marketplace in the manner of a private citizen or corporation," it is treated like such private actors. *Ibid*. The theory thus extends to foreign states the "familiar concept" that, "'[w]hen a

state enters the market place seeking customers,'" "'it divests itself . . . of its sovereign character, and takes [on] that of a private citizen.'" *Alfred Dunhill*, 425 U.S. at 695-96 (plurality op.) (quoting *New York* v. *United States*, 326 U.S. 572, 579 (1946), and *Bank of United States* v. *Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907 (1824)).

B. The FSIA codifies the restrictive theory through two provisions. *First*, the FSIA's commercial-activity exception provides that a foreign state is not entitled to immunity, and can be sued in the United States, when that state engages in "commercial activity" with a sufficient nexus to the United States. 28 U.S.C. § 1605(a)(2). Jurisdiction is thus proper in any "action . . . based upon," among other things, "a commercial activity carried on in the United States by the foreign state." *Ibid.* *Second*, the FSIA's "liability" provision states that, when a foreign state is "not entitled to immunity," the state "shall be liable *in the same manner and to the same extent as a private individual under like circumstances*." *Id.* at § 1606 (emphasis added).

Together, Sections 1605(a)(2) and 1606 ensure that, when a foreign state engages in commercial activity in the United States, it is treated in the same manner as a private entity for liability and damages purposes. As this Court has recognized, the "language" of Section 1606 "and [the] 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." *Bancec*, 462 U.S. at 620. Instead, the FSIA "operates as a pass-through, granting federal courts jurisdiction over *otherwise ordinary actions* brought against foreign states." *Bank of N.Y.* v. *Yugoimport*, 745 F.3d 599,

609 n.8 (2d Cir. 2014) (emphasis added); *see also Oveissi* v. *Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009) (FSIA "operates as a pass-through to state-law principles" (citation omitted)).

Applying these provisions, this Court has consistently held that foreign states must be treated like private entities when they participate in the marketplace. In *Weltover*, for example, this Court held that foreign states that issue "garden variety debt instruments" payable in the United States are liable in U.S. court in the same manner as garden-variety debtors. 504 U.S. at 615. And, in *Bancec*, the Court held that a foreign state "instrumentality" that is "run as a distinct economic enterprise" is entitled to the same "presumption" of "separate legal status" as a private corporation—a presumption that can be overcome in the same circumstances that justify disregarding the separate "legal status of *private* corporations." 462 U.S. at 624-30 (emphasis in original). As this Court has explained, "[t]he fact that [a corporation's] shareholder is a foreign state does not change the analysis" of whether the corporation is separate from its parent. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003); *see also Bancec*, 462 U.S. at 630 ("similar equitable principles" must be applied to public and private corporations alike); *id.* at 626 ("[W]hat the Court [has] stated with respect to private corporations . . . is true also for governmental corporations.").[3]

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[3] The Court has applied the same rule in the context of immunity from attachment and execution. In *Republic of Argentina* v. *NML Capital, Ltd.*, the Court held that the FSIA does not "specif[y] a different rule" for post-judgment discovery

C. Holding foreign states to the same standards as private entities when they engage in commerce or other private activities makes perfect sense. As the State Department recognized when it first adopted the restrictive theory, "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." Letter of Jack B. Tate, Acting Legal Adviser, State Department, to Philip B. Perlman, Attorney General, 26 Dep't of State Bull. 984, 985 (1952). Businesses and individuals that purchase goods and services from foreign states reasonably rely on the availability of the same judicial remedies that would be available against private parties. The FSIA thus makes available "normal legal redress against foreign states who engage in ordinary commercial activity or otherwise act as a private party." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary*, 94th Cong. 24 (1976) (testimony of Monroe Leigh, Legal Adviser, State Department)).

The availability of normal legal redress is of particular concern to entities like NML that operate in capital markets or engage in other high-stakes commercial transactions with foreign states. Judicial enforcement of the legal rights of parties to financial transactions is "essential to the integrity of the capital markets." *NML Capital, Ltd.* v. *Republic of Ar-*

"when the judgment debtor is a foreign state." 134 S. Ct. at 2255.

gentina, 727 F.3d 230, 248 (2d Cir. 2013). "Experience shows that debt markets work best when the rights of creditors are protected most effectively." Andrei Shleifer, *Will the Sovereign Debt Market Survive?*, 93 Am. Econ. Rev. 85, 85 (2003). To protect domestic creditors—and credit markets—"[t]he United States has an interest in ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of U.S. courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with *recognized principles* of contract law." *Allied Bank Int'l* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516, 521-22 (2d. Cir. 1984) (emphasis added). Applying ordinary legal principles to foreign states engaged in commerce thus provides "certainty and predictability of result while generally protecting the justified expectations" of interested parties. *Bancec*, 462 U.S. at 621.

Treating foreign state enterprises like private entities benefits those state enterprises as well, because it "facilitate[s] . . . transactions with third parties." *Bancec*, 462 U.S. at 626. While granting special treatment to foreign states "might benefit [them] in the short run, the long term effect would be to cause significant harm" to foreign states, including "developing nations," that seek to participate in U.S. markets. *Elliott Assocs. L.P.* v. *Banco de la Nacion*, 194 F.3d 363, 380 (2d Cir. 1999). If private parties in the United States cannot rely on the availability of normal legal redress against foreign states engaging in commercial activity, they may decline to conduct business with those states—particularly in U.S. capital markets or other high-stakes commercial contexts. *Ibid*. Or they may demand higher prices as

sellers, or lower prices as buyers, to compensate for uncertainty about their rights—making it more difficult for state-run enterprises to compete on equal footing with their private competitors. *Ibid*.

* * *

For all of these reasons, and consistent with the FSIA's text, history, and purpose, this Court should ensure that foreign states engaged in commercial activity in the United States are subject to the same rules as private parties.

II. TREATING FOREIGN STATES ENGAGED IN U.S. COMMERCIAL ACTIVITY IN THE SAME MANNER AS PRIVATE PARTIES RESOLVES BOTH QUESTIONS PRESENTED IN THIS CASE.

The rule that foreign states are treated like private parties when they conduct business in the United States resolves both questions presented in this case. *First*, foreign states conducting business in the United States are responsible for their agents' conduct in the same manner as private entities. *Second*, an action against a foreign state is "based upon" the state's act or activity within the United States under Section 1605(a)(2) (at a minimum) when that act or activity is necessary to establish an element of the plaintiff's claim, just as that relationship between a defendant, forum, and suit suffices to establish specific personal jurisdiction over a private party.

A. FOREIGN STATES ARE RESPONSIBLE FOR THEIR AGENTS' COMMERCIAL ACTIVITY UNDER THE SAME AGENCY PRINCIPLES THAT APPLY TO PRIVATE PARTIES.

The rule that foreign states are treated like private parties when they conduct business in the United States has equal force when states conduct their

business through agents. Because a foreign state can act only through its agents, a state's commercial activity necessarily includes its agent's commercial acts that are attributable to the state. And under the FSIA, attribution is governed by the same common-law agency principles that apply to private parties.

1. A Foreign State's Commercial Activity Includes The Acts Of Its Agents That Are Attributable To The State.

When a foreign state does business through an agent, the agent's acts are treated as the acts of the principal under the same agency principles applicable to private parties.

a. Agency law establishes "[p]rinciples of [a]ttribution" for "attribut[ing] the legal consequences of one person's action to another person." Restatement (Third) of Agency, Ch. 2, Introductory Note. Where the requirements for attribution are satisfied, "the act of the agent is as binding upon the principal *as if it were done by the principal himself*." *Hoffman* v. *John Hancock Mut. Life Ins. Co.*, 92 U.S. 161, 164 (1875) (emphasis added); *see also*, *e.g.*, *Union Mut. Ins. Co.* v. *Wilkinson*, 80 U.S. 222, 235 (1871) (companies "must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, *as if they proceeded from the principal*." (emphasis added)); *Myrick* v. *Prime Ins. Syndicate, Inc.*, 395 F.3d 485, 491 (4th Cir. 2005) ("An agent conducting business with the authority of the principal binds the principal to the same extent *as if the principal personally made the transaction*." (emphasis added)). Attribution in this manner ensures that a "principal

cannot escape liability" by acting "through the medium of an agent" when the same act, "if done by the principal, would have resulted in liability." 2A Corpus Juris Secundum § 410.

These same principles apply to foreign states engaged in commercial activity. A foreign state that hires an agent to carry out a business transaction "'do[es] not exercise powers peculiar to sovereigns,'" but instead merely "participat[es] in the marketplace in the manner of a private citizen or corporation." *Weltover*, 504 U.S. at 614 (quoting *Alfred Dunhill*, 425 U.S. at 704). Under the FSIA, foreign states are therefore responsible for their agents' conduct "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

To hold a foreign state responsible in the same manner as a private individual is necessarily to hold it responsible for the actions of its agents. "[J]ust as a corporation is an entity that can act only through its agents, '[a] State is a political corporate body [that] can act only through agents.'" *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 79 (1989) (quoting *Poindexter* v. *Greenhow*, 114 U.S. 270, 288 (1885)); *see also Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) ("[T]he sovereign can act only through agents."). Sovereign debtors, for example, act through agents when they issue debt in U.S. capital markets and make payments on that debt. *See*, *e.g.*, *NML Capital, Ltd.* v. *Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012) (discussing debt issued "pursuant to a Fiscal Agency Agreement" between Argentina and a private bank acting as Argentina's fiscal agent); *id.* at 255 (describing Argentina's "agent-banks located in New York that hold

money in trust for . . . bondholders and process payments to them under the terms of those bonds"). It therefore "would be absurd to say" that an act "done by [a state's] authorized agents" "was not done by [the] state." *Briscoe* v. *Bank of Commonwealth of Ky.*, 36 U.S. 257, 318 (1837). Instead, like any entity whose "ability to act derives from its own agents," a foreign state's "conduct consists of conduct by [its] agents . . . that is attributable to it." Restatement (Third) of Agency § 7.03 (2006).

b. Consistent with these basic agency principles, the commercial-activity exception's reference to "commercial activity carried on . . . by the foreign state" (28 U.S.C. § 1605(a)(2)) must include activity carried on through the state's agents and attributable to the state. "[S]tatutory terms are generally interpreted in accordance with their ordinary meaning," *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006), and in ordinary usage a party "carrie[s] on" an activity when it acts through an agent, *see*, *e.g.*, *Henry L. Doherty & Co.* v. *Goodman*, 294 U.S. 623, 625 (1935) ("through agents, [principal] *carried on* the business of selling corporate securities" (emphasis added)); *Louisville & N.R. Co.* v. *Chatters*, 279 U.S. 320, 326 (1929) (principal "*carrie*[*d*] *on* [business] in [a] state, through . . . agents of its own located there" (emphasis added)).

Moreover, this ordinary usage directly reflects the background agency principle that an agent's acts are imputed to the principal, *see supra* at 11-12, and indeed the statute is presumed to have incorporated that principle, *see Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law . . . principles."); *see also*, *e.g.*, *Meyer* v. *Hol-*

ley, 537 U.S. 280, 285 (2003) (Congress "legislates against a background of ordinary . . . vicarious liability rules and consequently intends its legislation to incorporate those rules.").[4]

The FSIA's legislative history confirms this interpretation. The FSIA's jurisdictional provisions—including the commercial-activity exception—were "patterned after the long-arm statute Congress enacted for the District of Columbia," H.R. Rep. No. 94-1487, at 13 (1976), which permitted D.C. courts to "exercise personal jurisdiction over a person," as to any "claim for relief arising from the person's . . . transacting any business in the District of Columbia." Pub. L. No. 91-358, § 13-422, 84 Stat. 473, 549 (1970). The requirement that the person "transac[t] any business in the District" could be satisfied when the person "act[ed] directly or *by an agent*." *Ibid*. (emphasis added). The FSIA should be construed analogously. *See Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1176 (2014) (where Congress "modeled" one statute on another, courts should "interpre[t] the two provisions consistently" absent "overwhelming" "textual differences"). A foreign state therefore may carry on commercial activity either "directly or by an agent."

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[4] Because "commercial activity carried on . . . by the foreign state" (28 U.S.C. § 1605(a)(2)) includes activity carried on through that state's agents, it is irrelevant whether—as OBB contends—a foreign state's agent "falls within the definition of 'foreign state.'" Pet'r's Br. 44; *see also id.* at 19, 21-23, 27, 38-46, 47, 49-50, 56-57, 61. It is enough that the *principal* is a foreign state and carries on commercial activity in the United States through its agent.

c. If foreign states could not "carr[y] on" activity within the meaning of the FSIA by acting through their agents—the only way they can act—then the commercial-activity exception would have no force. A construction of the FSIA that did not permit attribution would thus run afoul of the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979). It would also undermine Congress's efforts to "codif[y]" the "restrictive theory of sovereign immunity" by limiting immunity to a foreign state's "public acts." *Verlinden*, 461 U.S. at 487-88. And it would deprive plaintiffs of the "normal legal redress" that Congress intended to confer against foreign states engaged in commercial activity. Testimony of Monroe Leigh, *supra*, 94th Cong. 24. Not only could a foreign state structure its commercial affairs to avoid all responsibility simply by choosing to act through an agent, but it could disclaim even well-settled transactions carried on in its name by its officially designated representatives or officials.

OBB concedes that the commercial-activity exception must therefore incorporate at least *some* principles of attribution. It argues that the statute's definition of "agency or instrumentality" (28 U.S.C. § 1603(b)) determines "*which* entities' activities could be *attributed* as commercial activity 'by the foreign state.'" Pet'r's Br. 40-41. It contends, in other words, that the FSIA imputes to a foreign state the acts of state entities, but not the acts of private agents.

That approach correctly recognizes that a foreign state's "commercial activity carried on in the United States" includes, in appropriate circumstances, conduct carried on through other entities—namely, the

state's agencies and instrumentalities, which are presumptively "separate juridical entities" under *Bancec*. 462 U.S. at 625. But OBB errs in insisting on a different rule for private agents. That distinction lacks any textual support. *See* Resp't's. Br. 17-22; U.S. Br. 13-15. And OBB fails to explain how state agencies and instrumentalities can carry on commercial activity as agents of their parents, if not through those agencies' and instrumentalities' *own* agents. An interpretation of the FSIA that attributes to foreign state entities only the conduct of other state entities thus fares little better than an interpretation that fails to attribute any conduct at all to a foreign state.

To give meaningful effect to the commercial-activity exception and the restrictive theory of sovereign immunity, therefore, courts must recognize that a foreign state's commercial activity includes its agent's commercial acts.

2. COMMON-LAW AGENCY PRINCIPLES DETERMINE WHETHER AN AGENT'S COMMERCIAL ACTIVITY IS ATTRIBUTABLE TO ITS FOREIGN-STATE PRINCIPAL.

The determination of *which agents* act on a foreign state's behalf—and *which acts* may be attributed to the state—is governed by common-law agency principles. To hold foreign states responsible "in the same manner and to the same extent as a private individual," as the FSIA demands, courts must apply to foreign states the same agency principles that would apply to a private party "under like circumstances." 28 U.S.C. § 1606. The FSIA thus operates as a "pass-through" to ordinary agency law. *Yugoimport*, 745 F.3d at 609 n.8.

a. This Court has already held in *Bancec* that questions of "attribution" under the FSIA are governed by "common law," not by any provision of the FSIA. 462 U.S. at 623. Just as the FSIA "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality," it also "was not intended to affect . . . the attribution of liability among instrumentalities of a foreign state." *Bancec*, 462 U.S. at 620. The legislative history of the statute confirms that it was "not intended to affect . . . the attribution of responsibility between or among entities of a foreign state," including "whether an entity sued is liable in whole or in part for the claimed wrong." H.R. Rep. No. 94-1487, at 12. Congress thus conceived of "attribution" as a question of "liab[ility]" to be determined under the same "substantive law of liability" applicable to private entities. *Ibid.*

Under *Bancec*, the applicable common-law principles governing attribution are derived from "federal common law," rather than "the law of the forum State." 462 U.S. at 622 n.11. Applying federal common law is appropriate, this Court explained, given "'the importance of developing a uniform body of law'" concerning the amenability of foreign states to suit in U.S. courts. *Ibid*. (quoting H.R. Rep. No. 94-1487, at 32). Federal law, in turn, reflects "the general common law of agency, rather than . . . the law of any particular State." *Burlington Indus.* v. *Ellerth*, 524 U.S. 742, 754-55 (1998) (quotation marks omitted); *see also* Resp't's Br. 16.

OBB contends that "'pre-existing common law'" is irrelevant to FSIA immunity because the FSIA is a "'comprehensive'" statute. Pet'r's Br. 25-26. But the FSIA necessarily incorporates other substantive lia-

bility rules when immunity is intertwined with questions of liability, because the statute does not address—and was "'not intended to affect'"—"'the substantive law of liability.'" *Bancec* 462 U.S. at 620 (quoting H.R. Rep. No. 94-1487, at 12). Whether a claim is "based upon" commercial activity for purposes of jurisdiction under Section 1605(a)(2), for example, depends on the "elements of [the] claim." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 357 (1993). And those elements generally are defined by state law, not by the FSIA. *BP Chems. Ltd.* v. *Jiansu Sopo Corp.*, 285 F.3d 677, 682 (8th Cir. 2002) (applying commercial-activity exception to elements of claim under Missouri law); *Sun* v. *Taiwan*, 201 F.3d 1105, 1110 (9th Cir. 2000) (remanding for district court to apply commercial-activity exception to elements of claim under California law). Similarly, when a plaintiff alleges jurisdiction over a foreign state to seek relief "for personal injury . . . caused by the tortious act or omission of that foreign state," 28 U.S.C. § 1605(a)(5), state tort law—not the FSIA—determines whether the foreign state's act was "tortious." *See*, *e.g.*, *USAA Cas. Ins. Co.* v. *Permanent Mission of the Republic of Namibia*, 681 F.3d 103, 109-11 (2d Cir. 2012) (applying New York law). The question whether a foreign state "carried on" commercial activity, too, is bound up with questions of attribution and liability, *see supra* at 13-16, and thus cannot be decided without looking to substantive agency principles located outside of the FSIA in the common law of agency.

b. Although, under *Bancec*, federal common law governs the attribution of conduct to a foreign state, it does not follow—as OBB proposes—that attribution is limited to the specific common-law principles at issue in *Bancec*. Pet'r's Br. 50-55. *Bancec* did not

involve a foreign state's actions through its agent, and thus did not address the standard for imputing to a foreign state the actions of an agent performed on the foreign state's behalf. Instead, the question in *Bancec* was whether Bancec, a state-owned bank that qualified as an "instrumentality" of the Cuban government, could be "held liable for actions *taken by the sovereign*"—namely, the expropriation of Citibank's assets—in which Bancec played no role, such that Citibank's counterclaims against Cuba could be set off against Bancec's claims against Citibank. 462 U.S. at 621.

This Court held that, under principles derived from ordinary corporate law, *see id.* at 624-30, Cuba's liability to Citibank could not be imputed to Bancec based solely on Cuba's ownership of Bancec, because Bancec was entitled to a "presumption" of "separate legal status." *Id.* at 628. This Court then held that the presumption could be overcome—and the "'corporate form . . . disregarded'"—by showing that Bancec was "so extensively controlled by its owner that a relationship of principal and agent is created," or that recognizing the corporate form would "'work fraud or injustice.'" *Id.* at 629-30.

Both of *Bancec*'s grounds for disregarding the corporate form involve "alter-ego analysis," not agency principles. *Yugoimport*, 745 F.3d at 614. The Court relied on alter-ego principles because other grounds for attribution—such as agency principles—were plainly inapplicable: Bancec could not be held liable for Cuba's expropriation of Citibank's property under agency principles because Cuba was not Bancec's agent.

The standard for alter-ego liability is higher than the standard for agency liability because the conse-

quences are greater: Whereas agency principles attribute to the principal only specific acts within the scope of the agency relationship, *see* Restatement (Third) of Agency § 7.04, an alter-ego's conduct is imputed to another entity "for *all* purposes," U.S. Br. 17. And whereas agency liability flows from agent to principal, *see* Restatement (Third) of Agency § 7.03, alter-ego liability "can also flow in the other direction." *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1284 n.18 (11th Cir. 1999). Even under *Bancec*'s first test, despite the use of "principal/agent terminology," "the corporate agent may be held responsible for its owner's debts to third parties upon a showing that the owner's exercise of control constitutes an abuse of the corporate form sufficient to deprive the agent of its independent juridical identity." *Ibid.* And while this Court has held that an agent's contacts may not be imputed to its parents for purposes of general personal jurisdiction, it left in place the holding of several circuits that "a subsidiary's jurisdictional contacts can be imputed to its parent" if "the former is so dominated by the latter as to be its alter ego." *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 759 (2014).

Bancec's test addresses the requirements for triggering these significant consequences, not the lower standard for imputing a single act from agent to principal. *Bancec* thus leaves in place other common-law principles of attribution, such as agency attribution, that do not require piercing the corporate veil. The Ninth Circuit applied those principles when it held, based on the Restatement (Third) of Agency, that the sale of a ticket to Ms. Sachs through OBB's agent or subagent could be attributed to OBB. Pet. App. 18-19. Because the Ninth Circuit was correct to apply ordinary, common-law agency princi-

ples, its holding on the first question presented should be affirmed.

B. Like Private Parties, Foreign States Are Subject To Jurisdiction In U.S. Courts When Their Commercial Activity In The United States Establishes An Element Of The Plaintiff's Claim.

The rule that foreign states are treated like private parties when they carry on commercial activity in the United States also dictates the proper test for determining whether an action is "based upon" an activity or act for purposes of the FSIA's commercial-activity exception. Through the "based upon" standard, the FSIA operates as an ordinary long-arm statute that extends jurisdiction over a foreign state engaged in commercial activity in the United States, in the same circumstances that would create specific personal jurisdiction over a private party.

A private party may be subjected to specific personal jurisdiction in a given forum where the action "aris[es] out of" that party's acts in that forum. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984). That test is satisfied, at a minimum, where the defendant's acts in the forum establish any element of the plaintiff's claim.

The "based upon" standard in the FSIA is modeled on the "arising out of" standard, and thus is satisfied in like circumstances. U.S. courts have jurisdiction over a claim against a foreign state, therefore, if that foreign state's commercial activity in the United States is necessary to establish any element of the claim. This "one-element test," which the Ninth Circuit applied below, better accords with the

FSIA's text and purpose, and is more easily administered, than the alternative "gravamen" tests proposed by OBB and the government.

For the reasons articulated in Ms. Sachs's brief, this Court need not decide on the proper test for determining whether an action is "based upon" an activity, because under any test, her action "is based *entirely* upon a commercial 'activity' that has substantial contact with the United States—namely, OBB's railway enterprise." Resp't's Br. 24. Should this Court address the proper "based upon" test, however, it should affirm the Ninth Circuit's one-element test.[5]

1. FOREIGN STATES ARE SUBJECT TO JURISDICTION IN U.S. COURTS WHEN THEY ENGAGE IN COMMERCIAL ACTIVITY WITH A SUFFICIENT NEXUS TO THE UNITED STATES TO CREATE PERSONAL JURISDICTION OVER A PRIVATE PARTY.

The commercial-activity exception's "based upon" standard is modeled on, and directly incorporates, the standard for establishing personal jurisdiction over a private party in an action "arising out of" that party's acts in the forum.

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[5] NML takes no position on the Ninth Circuit's application of the one-element test to the elements of Ms. Sachs's claims. That question is not properly before this Court because it was not raised in OBB's petition for certiorari, and because it turns on questions of state law—concerning the elements of Ms. Sachs's claims—that do not merit this Court's review. *See* Resp't's Br. 47-48; *see also* U.S. Cert. Br. 21 (noting the "case-specific nature of th[at] inquiry.").

A court may exercise personal jurisdiction over a private defendant, consistent with the requirements of due process, when that defendant is subject to either the court's general jurisdiction (because the defendant has "continuous and systematic" contacts with the forum) or its specific jurisdiction (because the action "aris[es] out of . . . the defendant's contacts with the forum"). *Helicopteros*, 466 U.S. at 414 n.8. This Court has long recognized that exercising specific jurisdiction over a nonresident defendant to "enforce" "obligations [that] arise out of" its activities within the forum" is consistent with "'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316, 319 (1945). It is therefore "sufficient for purposes of due process that [a] suit [i]s *based on* a contract which had substantial connection with that State." *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (emphasis added).

The Court has not decided whether "a foreign state is a 'person' for purposes of the Due Process Clause," *Weltover*, 504 U.S. at 619, and therefore entitled to these same due-process protections limiting the personal jurisdiction of U.S. courts. The FSIA makes that inquiry unnecessary, however, because it incorporates similar standards into its jurisdictional provisions, including the "based upon" requirement. Section 1330 provides "[p]ersonal jurisdiction over a foreign state" for "every claim for relief" "with respect to which the foreign state is not entitled to immunity" under the FSIA's exceptions to immunity (*i.e.*, Sections 1605-1607), including the commercial-activity exception. "[E]ach of th[ose] immunity provisions," in turn, "requires some connection between the lawsuit and the United States," or requires the

foreign state to consent to jurisdiction. H.R. Rep. No. 94-1487, at 13.

Together, Sections 1330 and 1605 through 1607 "provid[e], in effect, a Federal long-arm statute over foreign states" that "embodie[s]" the "requirements of minimum jurisdictional contacts." H.R. Rep. No. 94-1487, at 13. Sections 1605 through 1607 "prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction over a foreign state," Testimony of Monroe Leigh, *supra*, 94th Cong. 28, while Section 1330 creates personal jurisdiction whenever those contacts exist.

The commercial-activity exception's "based upon" requirement thus serves the same purpose as this Court's "arising out of" standard for specific personal jurisdiction: Once a foreign state sheds its immunity and places itself on the same plane as a private actor by engaging in commercial activity, *see supra* Part I, the "based upon" requirement ensures that the foreign state's commercial activity has a sufficient nexus to the United States to permit U.S. courts to exercise jurisdiction over the state.

Indeed, the FSIA's legislative history confirms that the "based upon" standard was intended to track the "arising out of" standard. In *International Shoe* and *McGee*, this Court used those phrases interchangeably to refer to the requirements for specific jurisdiction over a private party. *Compare Int'l Shoe,* 326 U.S. at 321 ("arising out of"), *with McGee,* 355 U.S. at 223 ("based on"). The FSIA and the commercial-activity exception thus "embod[y]" the "requirements of minimal jurisdictional contacts" outlined in those cases. H.R. Rep. No. 94-1487, at 13 (citing *Int'l Shoe*, 326 U.S. 310, and *McGee*, 355 U.S. at 223).

The D.C. long-arm statute on which the commercial-activity exception was "patterned" (H.R. Rep. No. 94-1487, at 13; *see also supra* at 14) adopted similar language: It permitted courts in the District of Columbia to "exercise personal jurisdiction over a person" as to a claim "*arising from* the person's . . . transacting any business in the District of Columbia." Pub. L. No. 91-358, § 13-422, 84 Stat. 473, 549 (1970) (emphasis added). That legislative history undermines the government's assertion—without support—that the "based upon" standard adopted in the FSIA "requires a closer nexus to the United States than is required to find that a plaintiff's suit 'aris[es] out of or relate[s] to the defendant's contact with the forum.'" U.S. Br. 24 n.7 (alterations in original). Instead, "based upon" should be given the same meaning as the phrase "arising out of," from which it was derived.

2. PRIVATE PARTIES ARE SUBJECT TO JURISDICTION IN THE UNITED STATES WHEN THEIR ACTS IN THE UNITED STATES ARE NECESSARY TO PROVE AN ELEMENT OF THE PLAINTIFF'S CLAIM.

A claim "arises out of" a defendant's contact with a forum, at a minimum, when its acts in the forum establish an element of the plaintiff's claim. This Court has not articulated the precise "tie between a cause of action and a defendant's contacts with a forum" necessary to establish specific jurisdiction. *Helicopteros*, 466 U.S. at 415 n.10. But the lower courts have distinguished three dominant approaches. *See*, *e.g.*, *Myers* v. *Casino Queen, Inc.*, 689 F.3d 904, 912 (8th Cir. 2012).

"The most restrictive standard is the 'proximate cause' or 'substantive relevance' test," which "examines whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim." *O'Connor* v. *Sandy Lane Hotel Co.*, 496 F.3d 312, 318-19 (3d Cir. 2007). The "more relaxed" "but for" test requires that "the plaintiff's claim would not have arisen in the absence of the defendant's contacts." *Myers*, 689 F.3d at 912 (quotation marks omitted). And the "substantial connection" or "discernible relationship" test examines "whether the tie between the defendant's contacts and the plaintiff's claim is close enough to make jurisdiction fair and reasonable." *O'Connor*, 496 F.3d at 319 (quotation marks omitted).

Regardless of which test controls, specific jurisdiction exists under each of them when the defendant's activity in the forum establishes a necessary element of the plaintiff's claim.

The "proximate cause" or "substantive relevance" test requires activities that are "relevant to the merits of the plaintiff's claims," *O'Connor*, 496 F.3d at 318-19 (quotation marks omitted), so a court may hear any action in which the defendant's contacts form a "material" "element of proof in the plaintiff's case," *Nowak* v. *Tak How Invs., Ltd.*, 94 F.3d 708, 715 (1st Cir. 1996) (quotation marks omitted). In a contract action, for example, it is sufficient under this test that "'the defendant's contacts with the forum were instrumental in *either the formation* of the contract *or its breach*.'" *O'Connor*, 496 F.3d at 320 (emphases added).

Likewise, under the "but-for" causation test, a defendant's contact with the forum that is *necessary* to the plaintiff's claim is necessarily a fact without

which "the . . . claim would not have arisen." *Myers*, 689 F.3d at 912 (quotation marks omitted).

Finally, under the "substantial connection" test, it is sufficient that the "operative facts of the controversy are . . . related to the defendant's contact with the state." *Third Nat'l Bank in Nashville* v. *WEDGE Grp., Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989) (quotation marks omitted). That "lenient standard," *Bird* v. *Parsons*, 289 F.3d 865, 875 (6th Cir. 2002), merely *relaxes* the requisite degree of connection—below that required under the proximate or but-for causation test—where a defendant has especially substantial contacts with the forum. *O'Connor*, 496 F.3d at 320. Courts applying that test therefore readily find jurisdiction appropriate where the defendant's contact with the forum is necessary to establish an element of the plaintiff's claim. *See*, *e.g.*, *Air Prods. & Controls, Inc.* v. *Safetech Int'l, Inc.*, 503 F.3d 544, 553 (6th Cir. 2007) (test satisfied because "[o]ne element of [plaintiff's] cause of action for fraudulent transfer is that there be a debtor-creditor relationship which . . . was made possible by and would not have existed but for" defendant's business relationship in the forum state); *Tharo Sys., Inc.* v. *Cab Produkttechnik GMBH & Co. KG*, 196 F. App'x 366, 371 (6th Cir. 2006) (where defendant's forum contacts are "substantially connected with" "the operative facts regarding the formation and meaning" of a contract, "it matters not that the actual breach . . . may have occurred" elsewhere).

Thus, even under the "most restrictive" standard, *O'Connor*, 496 F.3d at 318, an act that establishes an element of the plaintiff's claim satisfies the "arising out of" standard. Meeting the one-element test accordingly suffices to establish specific jurisdiction.

OBB's contention that the Ninth Circuit's holding below makes it "easier for a plaintiff to obtain jurisdiction in the courts of the United States over a foreign state than a foreign corporation" (Pet'r's Br. 63 (emphases omitted)) is therefore unfounded. All of the approaches that lower courts apply to test specific jurisdiction over private parties, including foreign corporations, would be satisfied by the one-element test that the Ninth Circuit applied here. And under that test, a private defendant would be subject to specific jurisdiction on the facts of this case: an action alleging that the defendant's sale of goods or services in the forum, through the defendant's agent, gave rise to a duty that the defendant later breached. *See*, *e.g.*, *O'Connor*, 496 F.3d at 323-24 (finding personal jurisdiction over tort claim alleging that defendant breached a duty that arose as a result of its sale of services in the forum state, even though breach occurred outside the forum); *Pro Axess, Inc.* v. *Orlux Distrib., Inc.*, 428 F.3d 1270, 1278-79 (10th Cir. 2005) (contract claim arose out of French company's actions, largely through an agent, to solicit and develop business agreement with, and communicate with, in-forum plaintiff); *Mott* v. *Schelling & Co.*, 966 F.2d 1453 (6th Cir. 1992) (per curiam) (unpublished) (product liability action against Austrian defendant arose out of defendant's sales, through an agent, into the forum); *cf. Daimler AG*, 134 S. Ct. at 759 n.13 (for purposes of specific jurisdiction, "a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there"). The Ninth Circuit's

one-element test is thus fully consistent with the rule applicable to private parties.[6]

3. THE ONE-ELEMENT TEST BETTER ACCORDS WITH THE FSIA'S TEXT AND THIS COURT'S DECISION IN *NELSON*, AND IS MORE EASILY ADMINISTERED, THAN THE "GRAVAMEN" TESTS PROPOSED BY OBB AND THE UNITED STATES.

Because the FSIA treats foreign states engaged in commercial activity "in the same manner . . . as a private individual under like circumstances," 28 U.S.C. § 1606, the same one-element test that suffices to establish personal jurisdiction over a private defendant also applies to foreign states under the commercial-activity exception. The one-element test better accords with the FSIA's text, this Court's decision in *Nelson*, and the overwhelming weight of au-

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[6] OBB suggests that *Helicopteros* and *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 131 S. Ct. 2780 (2011), show that a private party in OBB's shoes could avoid specific jurisdiction in like circumstances, but neither case supports that tion. Pet'r's Br. 63. In *Helicopteros*, this Court analyzed only *general jurisdiction*; the parties "concede[d]" that the plaintiff's claims "did not 'arise out of'" the defendant's activities in the forum, and did not "argu[e] any relationship between the cause of action" and the "forum." 466 U.S. at 415-16 & n.10. This Court accordingly "assert[ed] no 'view' with respect to that issue." *Id.* at 415 n.10. And in *Nicastro*, personal jurisdiction was absent because the defendant did not "engage in *any* activities" in the forum, but instead merely placed products into the "'stream-of-commerce,'" leading to their sale in the forum by an "independent company"—not an agent of the defendant. 131 S. Ct. at 2785-86, 2791 (plurality op.) (emphasis added).

thority in the courts of appeals than the alternative approaches that OBB and the government propose. It is also far more easily administered, and thus better serves the FSIA's purpose of "clarify[ing] the governing standards" for foreign sovereign immunity. *Verlinden*, 461 U.S. at 488.

OBB and the government contend that, to satisfy the "based upon" standard under *Nelson*, a foreign state's commercial activity must constitute "the gravamen of [the plaintiff's] claims." U.S. Br. 9; *see also* Pet'r's Br. 29 ("the focus should be on the gravamen of the complaint" (quotation marks omitted)). The government defines the "gravamen" as the "gist or essence of [the] claim," U.S. Br. 21, while OBB specifies that, "in the context of claims for personal injuries," the "gravamen" is "the alleged tortious conduct that injured the plaintiff." Pet'r's Br. 29. Those tests are unsupported, and instead the one-element test is correct.

As an initial matter, as demonstrated in Ms. Sachs's brief, the one-element test is more consistent with dictionary definitions and other statutory uses of the phrase "based upon" than the "gravamen" tests that OBB and the government propose. *See* Resp't's Br. 39-40.

Moreover, as Ms. Sachs has also articulated, *Nelson* did not adopt the gravamen test, and indeed endorsed caselaw applying the one-element test. *Nelson*, 507 U.S. at 357 (citing *Santos* v. *Compagnie Nationale Air Fr.*, 934 F.2d 890, 893 (7th Cir. 1991)); *see also* Resp't's Br. 37-39. OBB and the government contend that *Nelson* adopted or approved the gravamen test when it quoted, in a parenthetical, the Fifth Circuit's statement in *Callejo* v. *Bancomer* that the "focus" of the "based upon" inquiry "should be on the

'gravamen of the complaint.'" *Nelson*, 507 U.S. at 357 (quoting *Callejo*, 764 F.2d 1101, 1109 (5th Cir. 1985)); *see also* Pet'r's Br. 28-29; U.S. Br. 19-21. But that argument misconstrues both *Callejo* and *Nelson*'s citation to it.

Callejo used the phrase "gravamen of the *complaint*"—rather than "gravamen of [the] *claim*," U.S. Br. 9 (emphasis added)—to distinguish allegations establishing "elements of the cause of action itself," from those serving merely as background. 764 F.2d at 1109. The Fifth Circuit thus held that the plaintiff's claim was "based upon" the defendant's breach of contract, rather than upon other allegations about what *caused* the defendant to breach the contract. *Ibid.* This Court reached the same conclusion in *Nelson*: It held that the plaintiff's action was not "based upon" allegations about events that merely "*led to* the conduct that eventually injured the plaintiff." 507 U.S. at 358. *Callejo*'s and *Nelson*'s use of the word "gravamen" thus reflects nothing more than the requirement that courts focus on allegations related to "elements of [the] claim," rather than other allegations in the complaint. *Id.* at 357. The Fifth Circuit has accordingly reaffirmed, after *Nelson*, that the "based upon" standard requires only that the foreign state's "act or activity . . . form the basis of *at least some element of the cause of action*." *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998) (emphasis added). Other courts of appeals have likewise understood *Nelson* to approve the one-element test. *See* Resp't's Br. 37.

The one-element interpretation is also far more easily administered than any "gravamen" approach proposed by OBB or the government. As Ms. Sachs

explains, Resp't's. Br. 40-43, "administrative simplicity is a major virtue in a jurisdictional statute," and "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case," *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

The one-element test offers courts a straightforward method to assess jurisdiction. *See* Resp't's Br. 46. Indeed, it requires courts only to determine what they already must determine in ruling on a motion to dismiss: which factual allegations are necessary to establish the plaintiff's claims. *Cf.*, *e.g.*, *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 561 (2007).

A "gravamen" test, in contrast, would require a "freewheeling judicial inquiry" (*Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1985 (2011) (quotation marks omitted)) into what constitutes the "gist or essence of a claim." U.S. Br. 21. Ms. Sachs explains several of the hazards such an unguided approach presents. *See* Resp't's Br. 43-46. Among other things, the "gravamen" approach would force courts routinely to undertake not just the relatively simple task of identifying the elements of a particular claim under the governing law, but also (somehow) a complicated and subjective inquiry into their relative importance. And that is just to determine whether the court has *jurisdiction* to hear the claim at all.

Predictability and consistency are critical for private parties like NML who deal with foreign states or are affected by those states' commercial activities. Sophisticated parties, in particular, routinely negotiate and enter into high-stakes commercial agreements with foreign states. "Predictability is valuable to corporations making business and investment de-

cisions." *Hertz*, 559 U.S. at 94. Uncertainty whether disputes can be resolved in U.S. courts discourages parties from transacting with foreign states and generates wasteful litigation, "eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Ibid.*

The gravamen test should therefore be rejected. Only the Ninth Circuit's one-element test fulfills the FSIA's text, history, and purpose by subjecting foreign states engaged in commercial activity to the same standard as private parties, and it does so in an easily understood and administered way.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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