No. 13-1067

In the Supreme Court of the United States

OBB PERSONENVERKEHR AG, PETITIONER

v.

CAROL P. SACHS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

1. Whether common-law agency principles may be used to determine whether the acts of a separate entity are attributable to a foreign state for purposes of the commercial-activity exception of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, which gives U.S. courts jurisdiction over claims that are "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2).

2. Whether respondent's claims are "based upon" commercial activity carried on in the United States.

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INTEREST OF THE UNITED STATES

This case concerns the commercial-activity exception of the Foreign Sovereign Immunities Act of 1976 (FSIA or the Act), 28 U.S.C. 1330, 1602 *et seq.*, which gives U.S. courts jurisdiction over an action against a foreign sovereign "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2). At the Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at the petition stage of this case.

STATEMENT

1. The FSIA establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488

(1983). Section 1604 provides that a foreign state is "immune from the jurisdiction of the courts of the United States" unless the suit falls within one of the Act's exceptions to immunity. 28 U.S.C. 1604; see 28 U.S.C. 1330. The "commercial activity" exception, which is at issue in this case, provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2); see 28 U.S.C. 1603(d) and (e).[1]

Section 1603(a) defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined by subsection (b)." 28 U.S.C. 1603(a). Subsection (b) then defines an "agency or instrumentality of a foreign state" as "any entity" that is (1) a "separate legal person"; (2) "an organ of" or majority-owned by "a foreign state or political subdivision thereof," and (3) "neither a citizen of a State of the United States * * * nor created under the laws of any third country." 28 U.S.C. 1603(b).

2. a. Petitioner OBB Personenverkehr AG (OBB) operates passenger rail service in Austria. It is wholly owned by OBB Holding Group, a joint-stock company created by the Republic of Austria and wholly owned by the Austrian Federal Ministry of Transport, Innovation, and Technology. Petitioner is a member of the Eurail Group, an association responsible for marketing and selling Eurail passes, which authorize

[1] The Act also includes several other exceptions to immunity, including a tort exception. See, *e.g.*, 28 U.S.C. 1605(a)(5).

passenger transit on the railways of member countries. Pet. App. 5.

Respondent is a California resident who purchased a Eurail pass over the Internet from Rail Pass Experts (RPE), a travel agent in Massachusetts. Pet. App. 5, 44. In April 2007, respondent presented her Eurail pass to petitioner in Innsbruck, Austria, to purchase a couchette reservation on a train traveling from Innsbruck to Prague. *Id.* at 6. When attempting to board the train, respondent fell and suffered injuries that ultimately required amputation of both her legs above the knee. *Ibid.*

b. Respondent sued petitioner in the District Court for the Northern District of California, asserting claims for negligence, strict liability for design defects and failure to warn of design defects, and breach of implied warranties of merchantability and fitness. Pet. App. 6. The complaint alleges that petitioner moved the train while respondent was attempting to board; provided an unsafe space for boarding because of a gap between the train and platform; failed to warn respondent of that gap; and did not supervise the boarding process. J.A. 14-18.

The district court dismissed the suit for lack of subject-matter jurisdiction under the FSIA. Pet. App. 101-111. The court concluded that the FSIA's commercial-activity exception to immunity did not apply because petitioner itself had not engaged in commercial activity in the United States and RPE's sale of the Eurail pass could not be attributed to petitioner. *Id.* at 108-109.[2]

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[2] Respondent did not contest that petitioner qualified as an agency or instrumentality of Austria. *Id.* at 104 n.1.

3. A panel of the court of appeals affirmed. Pet. App. 67-85. The court then granted rehearing en banc and reversed the district court's dismissal of the action. *Id.* at 1-66. The en banc court held that respondent's claims are "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2), and that petitioner therefore is not immune from suit. Pet. App. 40-41.

a. The court of appeals first held that a foreign state may "carr[y] on" commercial activity in the United States within the meaning of Section 1605(a)(2) if the state acts through an entity whose actions are attributable to the foreign state "[u]nder traditional agency principles," so long as the agent (or subagent) was acting with actual authority. Pet. App. 15. The court concluded that "RPE is a subagent of [petitioner] through Eurail Group," and that because of that agency relationship "RPE's act of selling the Eurail pass to [respondent] within the United States can be imputed to [petitioner] as the principal." *Id.* at 18.

The court of appeals rejected petitioner's argument that before an entity's conduct may be attributed to a foreign state, the entity must satisfy Section 1603(b)'s definition of "agency or instrumentality." Pet. App. 21-30. The court explained that Section 1603(b) "defines what type of entity can be considered a foreign state for purposes of claiming sovereign immunity," but does not address the situations in which an entity's acts can be attributed to the foreign state. *Id.* at 22; see *id.* at 22-23.

b. The court of appeals next concluded that respondent's claims are "based upon" petitioner's commercial activity in the United States. Pet. App. 32-40. The court explained that this Court held in *Saudi*

Arabia v. *Nelson*, 507 U.S. 349 (1993), that "based upon" is "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief." Pet. App. 32-33 (quoting *Nelson*, 507 U.S. at 357). The court further explained that, under Ninth Circuit precedent, a claim is "based upon" commercial activity if "an element" of the claim consists of commercial activity carried on in the United States, or if the commercial activity in the United States is an "essential fact" that the plaintiff must prove in order to establish an element of her claim. *Id.* at 33, 35 (emphasis omitted). The court concluded that California law applies to respondent's claims, *id.* at 34 n.14, and that the sale of the Eurail pass, which occurred in the United States, was an essential fact for purposes of those claims, *id.* at 33-40.

c. Judge O'Scannlain, joined by Chief Judge Kozinski and Judge Rawlinson, dissented. Pet. App. 42-61. The dissenting judges reasoned that an entity's actions may be attributed to a foreign state only if the entity's separate form should be disregarded under *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*), and that respondent had not satisfied that standard. Pet. App. 45-58. They also concluded that respondent's strict-liability claims are not "based upon" the sale of the Eurail pass because those claims do not require proof of a transaction. *Id.* at 58-61.

Chief Judge Kozinski, in a separate dissent, concluded that none of respondent's claims are "based upon" commercial activity carried on in the United States because they all arose "from events that transpired entirely in Austria." Pet. App. 62; see *id.* at 65 (stating that suit against respondent in the United

States "makes as much sense as forcing Mrs. Palsgraf to litigate her case in Vienna"). In his view, the majority's "broad interpretation of the 'based upon' requirement" was inconsistent with this Court's decision in *Nelson* and would permit plaintiffs "to manufacture jurisdiction through artful pleading." *Id.* at 62-63.

SUMMARY OF ARGUMENT

The commercial-activity exception of the FSIA provides, in relevant part, that a foreign state shall not be immune from the jurisdiction of U.S. courts "in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2). This case presents two questions arising from that provision: first, whether a foreign state can "carr[y] on" commercial activity in the United States by means of agents who act on behalf of the state; and second, whether a claim is "based upon" commercial activity in the United States if a single element of the claim (or fact necessary to establishing that element) consists of such activity. The court of appeals correctly answered the first question in the affirmative, but erred with respect to the second question by concluding that the claims at issue in this case satisfy the "based upon" requirement.

A. The court of appeals correctly held that a foreign state may be found to have "carried on" commercial activities in the United States when it has employed an entity to act as its agent in conducting those activities. Like a private party, a foreign state that employs an agent to accomplish commercial ends in the United States has reached into this country to act as a participant in the marketplace. The control that a principal has over an agent means that such a

state is effectively taking actions in the United States commercial market itself—that is, "carr[ying] on" commercial activity. Applying traditional agency-law principles to give content to the phrase "carried on" thus furthers Congress's purpose in the FSIA of ensuring that foreign states are subject to suit when they act in a commercial manner. Were the rule otherwise, a state could conduct all manner of commercial activities in the United States through its agents, and thereby obtain significant benefits, while maintaining immunity from suit in this country if those activities caused injury.

Petitioner's contrary arguments lack merit. Petitioner mistakenly asserts that 28 U.S.C. 1603(b), which defines an "agency or instrumentality of a foreign state," describes the only set of entities whose acts can be attributed to a foreign state for purposes of assessing whether the foreign state has "carried on" commercial activity in the United States under Section 1605(a)(2). Section 1603(b) "defines what type of entity can be considered a foreign state for purposes of claiming sovereign immunity" in its own right, Pet. App. 22, but does not speak to when and how a non-immune entity's acts can be attributed to the foreign state. Petitioner also incorrectly contends that such attribution is proper only if an entity's separate juridical status should be disregarded under this Court's decision in *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*). In explaining that an entity "extensively controlled" by a foreign state may be the state's alter ego and therefore an agent of the state for all purposes, *id.* at 629, *Bancec* identified one way in which an entity's actions could be attributed to a

foreign state. The decision does not, however, address how to determine whether a foreign state has "carried on" commercial activity through agents only for a particular purpose.

B. The court of appeals held that an action is "based upon" commercial activity in the United States if "*an element* of [the plaintiff's] claim consists in conduct that occurred in commercial activity carried on in the United States," or if such activity is an "essential fact" to proving any element of the claim. Pet. App. 33 (citations omitted); *id.* at 35. It then concluded that each of respondent's claims is "based upon" the sale of the rail pass in the United States. See *id.* at 34-40. Those rulings are erroneous.

The text and purpose of Section 1605(a)(2) dictate that the "based upon" determination turns on identifying the gravamen—that is, the gist or essence—of a claim, an approach consistent with *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993). The phrase "based upon" refers to what is fundamental to a claim, amounting to its most important part—and a single element of a claim consisting of commercial activity in the United States, which may be at the periphery of the wrong allegedly suffered, does not necessarily qualify under that definition. Reading "based upon" to include a gravamen requirement ensures that foreign states are not subjected to suit in the United States on the basis of their sovereign (rather than commercial) acts. It also prevents U.S. courts from assuming jurisdiction over cases in which all or virtually all of the acts or omissions that are the subject of the parties' dispute took place abroad—a considerable expansion of the FSIA's limited exceptions to foreign-sovereign immunity.

In this case, the sale of the Eurail pass to respondent is a part of the chain of causation that led her to be present on the railway platform where she sustained injuries, but it is not the gravamen of her claims of negligence, strict liability, and breach of implied warranty. Rather, those claims all center around distinct tortious acts and resulting injuries that allegedly occurred outside the United States. Thus, just as in *Nelson*, it is those alleged bad acts, "and not the * * * commercial activities that preceded their commission," that "form the basis for the [plaintiff's] suit" for purposes of the FSIA. 507 U.S. at 358.

ARGUMENT

A. The Court Of Appeals Correctly Held That A Foreign State May Carry On Commercial Activity In The United States Through An Agent Acting On Its Behalf

1. The FSIA's commercial-activity exception provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2); see 28 U.S.C. 1603(e) (defining latter phrase as commercial activity "carried on by such state and having substantial contact with the United States"). The exception is designed to ensure that when a foreign state acts as an "every day participant[]" in the marketplace—in other words, when the state engages in commercial ventures of the sort that private parties undertake—plaintiffs may seek judicial resolution of any resulting "ordinary legal disputes." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-7 (1976) (*House Report*); *id.* at 17 (examples of disputes that would fall within exception include "business

torts occurring in the United States"); see generally *Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607, 614-615 (1992).

Private parties often engage in commercial activities with the assistance of agents acting on their behalf. Because an agent is subject to the direction and control of the principal, the agent is able to "act for or in place of" the principal on matters within the scope of the agency as if the principal itself were engaging in the act. *Black's Law Dictionary* 72 (9th ed. 2009) (*Black's*) (second meaning of "agent"); see *General Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 392-393 (1982) (quoting 1 Restatement (Second) of Agency § 1(1) (1958)).

As a result, common-law agency principles are routinely applied in private commercial disputes. For purposes of both jurisdiction and liability, agency principles may provide a basis for attributing conduct to a principal who directed the activity at issue. See *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (explaining that acts of an agent may be imputed to the principal for purposes of exercising specific jurisdiction); see also 1 Restatement (Third) of Agency § 1.01 cmt. c (2006). Such attribution is particularly common when the principal is a corporation: because "the corporate personality * * * is a fiction," such an entity "can act only through its agents." *Daimler AG*, 134 S. Ct. at 759 n.13 (citations omitted); see, *e.g.*, *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-317 (1945).

Congress would have expected traditional agency-law principles to play a similar role in determining when a foreign state has undertaken commercial activities that subject it to suit. Foreign states, like private

actors, often engage in commercial activities by employing entities under their control to enter into and execute transactions. See *Maritime Int'l Nominees Establishment* v. *Republic of Guinea*, 693 F.2d 1094, 1105 (D.C. Cir. 1982) (discussing "the realities of modern commercial undertakings"), cert. denied, 464 U.S. 815 (1983). Indeed, like corporations, foreign states can act only through agents of one sort or another. See Pet. App. 23. When a foreign state uses agents to accomplish its commercial ends, the state is acting as an "every day participant[]" in the marketplace. *House Report* 7. And by virtue of the state's control over the agent, the state is effectively taking actions in the United States commercial market itself—that is, "carr[ying] on" commercial activity. 28 U.S.C. 1605(a)(2); see *The Random House Dictionary of the English Language* 319 (2d ed. 1987) (defining "carry on" as "to manage; conduct").

Applying agency-law principles to determine when a foreign state has "carried on" commercial activity thus furthers Congress's purpose of ensuring that foreign states are subject to suit when they act in a commercial manner. See *Maritime Int'l*, 693 F.2d at 1105; see also *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 372-373 (1993) (Kennedy, J., concurring in part and dissenting in part) (attributing to Kingdom of Saudi Arabia actions of private entity that "acted as the [Kingdom's] exclusive agent for recruiting employees" in the United States); U.S. Amicus Br. at 14 n.8, *Nelson*, *supra* (No. 91-522). If the acts of an agent were not attributed to a foreign state when assessing whether the requirements of Section 1605(a)(2) are met, then a state could conduct extensive commercial activities in the United States through its agents, and

could reap significant benefits from those activities, without ever subjecting itself to suit in this country.

The *House Report*'s discussion of a different (but overlapping) prong of the commercial-activity exception, which denies immunity for "act[s] performed in the United States in connection with a commercial activity of the foreign state elsewhere," 28 U.S.C. 1605(a)(2), reinforces the conclusion that Congress expected that foreign states could be subject to suit as a result of their agents' acts. The *House Report* (at 19) explains that "a representation in the United States by an agent of a foreign state" could constitute an "act performed" by a foreign state.

Exercising jurisdiction over a foreign state that has "carried on" commercial activity through an agent is also consistent with international practice. Cf. 28 U.S.C. 1602 (referring to immunity "[u]nder international law"); *Bancec*, 462 U.S. at 623. The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts provide that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." G.A. Res. 56/83, Pt. 1, ch. II, art. 8, U.N. Doc. A/RES/56/83, at 3 (Jan. 28, 2002). The United States expressed support for an earlier, materially similar draft article. State Responsibility: Comments and observations received from Governments, U.N. Doc. A/CN.4/488, at 41 (Mar. 25, 1998).

Thus, the use of common-law agency principles to make the "carried on" determination gives content to the FSIA's plain text in a manner that is consistent

with "articulated congressional policies" and "internationally recognized" legal doctrine. *Bancec*, 462 U.S. at 623, 630, 633-634; see *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 473-478 (2003) (relying on "elementary principles of corporate law" to construe 28 U.S.C. 1603(b)(2), which refers to ownership of majority of "shares or other ownership interest"); see generally *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991). All of the courts of appeals to have addressed the issue have agreed with that conclusion.[3]

2. Petitioner's arguments against applying traditional agency principles lack merit.

a. Petitioner primarily argues (Br. 38-46, 50) that an entity's acts may be considered acts of the foreign state only if the entity falls within the statutory definition of an "agency or instrumentality of a foreign state" in 28 U.S.C. 1603(b). That argument misses the mark. Section 1603(b) does not speak to the question of how an entity that *is* a "foreign state" under that definition can "carr[y] on" commercial activities in the United States for purposes of Section 1605(a)(2).

That conclusion is apparent from the statutory text. Section 1603(a) provides that a "foreign state" includes the state itself, its political subdivisions, and any "agency or instrumentality" of the state "as defined in subsection (b)." 28 U.S.C. 1603(a). Section 1604 then provides that a "foreign state" is presumptively "immune from the jurisdiction of the [U.S.] courts," 28 U.S.C. 1604, and Section 1605 provides

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[3] See, *e.g.*, *BP Chems. Ltd.* v. *Jiangsu Sopo Corp.*, 285 F.3d 677, 682-686 (8th Cir.), cert. denied, 537 U.S. 942 (2002); *Transamerica Leasing, Inc.* v. *La Republica de Venezuela*, 200 F.3d 843, 849-850 (D.C. Cir. 2000); *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 534-536 (5th Cir.), cert. denied, 506 U.S. 956 (1992).

that a "foreign state shall not be immune from the jurisdiction of the courts of the United States" in specified circumstances, 28 U.S.C. 1605. Section 1603(b), by defining agencies and instrumentalities to include "separate legal person[s]" that are organs of the state (or majority-controlled by the state) and are not citizens of the United States, extends those immunity provisions to such entities in their own right. See, *e.g.*, *House Report* 15 (stating that "agency or instrumentality" definition determines which entities are presumptively "entitled to sovereign immunity").

Nothing in Section 1603(b) suggests, however, that it addresses the distinct issue of whether the conduct of an entity that is not an agency or instrumentality of a foreign state may nonetheless be attributed to a foreign-state defendant for purposes of determining whether the state has "carried on" commercial activity in the United States under Section 1605(a)(2). The operative question is not what qualifies as a "foreign state"; no one would argue that RPE, the entity that sold the Eurail pass in this case, would somehow be entitled to foreign sovereign immunity were it sued in connection with that sale. Rather, the question is what it means for a foreign state to "carr[y] on" commercial activities, and whether the acts of someone acting on behalf of the foreign state should be deemed to be the state's own acts in assessing whether the state has reached into this country as a commercial participant. As to that question, Section 1603(b)—which does not purport to define the universe of entities that may serve as an "agent" of a foreign state, rather than an "agency" in the sense of being a governmental body in its own right, see Pet. Br. 48—is

simply beside the point. See Pet. App. 24.[4] Petitioner in fact never attempts to define "carried on"; indeed, in quoting or paraphrasing the language of Section 1605(a)(2), petitioner often omits that phrase altogether. See, *e.g.*, Pet. Br. 38-39.

Perhaps recognizing that the FSIA does not contain any provision that would "displace common-law agency principles * * * for purposes of assessing commercial activity," Pet. App. 24, petitioner relies (Br. 46-50) on the Restatement (Second) of Foreign Relations Law § 169 (1965) to contend that at the time the FSIA was enacted, international law would have attributed to a foreign state the acts of individual agents but not the acts of non-governmental entities serving as agents. That reliance is misplaced. The cited Restatement provision does not preclude the attribution of the acts of such entities to a foreign state, and there is no basis in international law for drawing fine distinctions in this context between acts of individual agents and acts of agents that have a corporate form. Moreover, by its own terms, the cited Restatement provision does not "relate to [a foreign state's] responsibility arising out of conduct occurring" outside the territory or jurisdiction of the state itself. *Id.* § 164 cmt. a; see *id.* § 169.

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[4] For the same reason, this Court's decision in *Samantar* v. *Yousuf*, 560 U.S. 305 (2010), cited in Pet. Br. 43-46, is not instructive here. *Samantar* interpreted the definition of "agency or instrumentality" to exclude individual foreign officials and held that the FSIA does not govern the question of their immunity. See 560 U.S. at 314-322. That decision did not address when a foreign state may have "carried on" activities through the actions of individuals or entities acting on the state's behalf.

The lack of support for petitioner's reading of Sections 1603(b) and 1605(a)(2) is not surprising, because that reading would create untenable results. Most notably, it would allow foreign states engaging in commercial activity in the United States to shield themselves from any exposure to litigation in U.S. courts by the expedient of acting through U.S. entities, which, by definition, are not "agenc[ies] or instrumentalit[ies]" of a foreign state. 28 U.S.C. 1603(b); see Pet. App. 23-27. Such an outcome would be inconsistent with the FSIA's purpose of ensuring that U.S. persons have recourse against a foreign state that engages in commercial activity in the United States.[5]

b. Petitioner argues in the alternative (Br. 50-55) that this Court's decision in *Bancec* should guide the inquiry into whether an entity's actions should be attributed to a foreign state. In *Bancec*, the Court observed that under principles common to both federal and international law, where a corporation is "so extensively controlled by its owner that a relationship of principal and agent is created," or where respecting the separate status of that corporation would otherwise "work fraud or injustice," that separate status

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[5] In addition, petitioner's interpretation apparently would automatically attribute to a foreign state itself commercial activities undertaken by a juridically separate agency or instrumentality that meets the Section 1603(b) definition. See Pet. Br. 46-49. That result would disregard this Court's admonition in *Bancec* "that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626-627; see pp. 17-18, *infra*. The commercial activities of juridically separate agencies and instrumentalities generally should not be attributed to the state absent an agency or alter-ego showing. See *Bancec*, 462 U.S. at 628-633.

will be disregarded. 462 U.S. at 629-630. The Court applied similar equitable principles to conclude that an instrumentality of Cuba was responsible for Cuba's debts, because giving effect to that instrumentality's separate status to bar an offset would work an injustice. See *id.* at 613, 633-634.

Although the Court did not elaborate further on the principal-agent basis for disregarding corporate separateness, *Bancec* supports the conclusion that a principal-agency relationship is a proper basis for attribution here. Presumably the consequence of holding that a state instrumentality is "so extensively controlled" as to be an alter ego of the state under *Bancec* is that the instrumentality is treated as the state's agent for *all* purposes. 462 U.S. at 629; see *Transamerica Leasing, Inc.* v. *La Republica de Venezuela*, 200 F.3d 843, 848-849 (D.C. Cir. 2000). In that event, if the state's alter ego carries on commercial activities in the United States, the state itself would be considered to have carried them on as well.

But *Bancec* does not purport to define the exclusive circumstances in which the actions of an entity should be attributed to a foreign state, or to displace common-law agency principles when an independent entity acts on behalf of a foreign state for a *particular* purpose without the state "extensively controll[ing]" all of that entity's actions. There is no reason to think that the alter-ego showing necessary to make a controlled entity liable for the debts of the controlling state is the same showing necessary to conclude that the state has "carried on" the commercial activities in which it has provided for an agent to engage. See *Dale* v. *Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (*Bancec* inquiry "analytically distinct" from whether

state employed agent); see also Pet. App. 20-21, 28 n.12. *Bancec* therefore does not undermine the conclusion that a state has "carried on" commercial activity in the United States if it retains an agent to transact specific business here on its behalf and enjoys any benefits that flow from the agent's activities—even if the state and the agent have not merged their legal identities. See, *e.g.*, 1 Restatement (Third) Agency § 1.01 cmt. c (explaining that mere fact of "agency relationship" does not "merge[] an agent's distinct identity with the principal's").

c. Finally, petitioner suggests (Br. 55, 59) that use of common-law agency principles will lead to a lack of uniformity. We agree that a uniform rule is necessary here because of the foreign-policy implications of courts' interpretation of the FSIA in this area. See, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). But the proper rule of decision is a federal one that yields a uniform result: relying on "the general common law of agency, rather than on the law of any particular State," gives meaning to the phrase "carried on" in Section 1605(a)(2) and therefore is part of the task of "statutory interpretation." *Burlington Indus.* v. *Ellerth*, 524 U.S. 742, 754-755 (1988); see, *e.g.*, *Meyer* v. *Holley*, 537 U.S. 280, 285-286 (2003) (using "traditional" agency rules in interpreting Fair Housing Act and citing similar cases interpreting other statutes). Thus, just as the Court in *Dole Food* pointed to "basic tenet[s]" of corporate law to interpret an FSIA provision, 538 U.S. at 474, courts can and do rely on basic tenets of agency law to resolve Section 1605(a)(2) "carried on" questions. See Pet. App. 18 (stating reliance on "traditional theories"); note 3, *supra*. But even if state law on agency

were applicable (in its own right, or borrowed as federal law), federal law would supply limiting principles—for instance, to prevent a finding of an agency relationship on such a minimal basis that the foreign state could not be said to have "carried on" the activities in which the "agent" engaged. Cf. *Bancec*, 462 U.S. at 622-623.[6]

B. The Court Of Appeals Erred In Holding That Respondent's Claims Are "Based Upon" Commercial Activity In The United States

1. a. To establish jurisdiction over a foreign state under the relevant clause of Section 1605(a)(2), a plaintiff must show that "the action is based upon" the state's commercial activity carried on in the United States. In *Nelson*, this Court held that the phrase "based upon" connotes "conduct that forms the 'basis,' or 'foundation,' for a claim." 507 U.S. at 357. The Court explained that the phrase "is read most naturally to mean those elements of a claim that, if proven,

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[6] The questions presented challenge only the court of appeals' (correct) decision to employ common-law agency principles; they do not assert that the court erred in applying those principles to the facts of this case. See Pet. i, 14-15. Petitioner's brief (*e.g.*, Br. 55) now adverts to those latter issues, but only under the rubric of the mistaken argument that the *Bancec* standard for "extensive[] control[]" should govern. It is, in fact, unclear whether the court below was correct in concluding that RPE acted as petitioner's agent. Pet. App. 18-20, 26; see U.S. Cert. Amicus Br. 13; cf. *Harby* v. *Saadeh*, 816 F.2d 436, 438-439 (9th Cir. 1987). The evidence in the record on the relationships among petitioner, Eurail Group, and RPE is fairly sparse, and the en banc majority did not discuss those relationships in any detail. The Court should make clear that an endorsement of the use of common-law agency principles does not constitute an endorsement of the specific way the court of appeals applied those principles here.

would entitle a plaintiff to relief under his theory of the case," and it cited with approval a decision describing the inquiry as focusing on "the gravamen of the complaint." *Ibid.* (quoting *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985)). The Court also cautioned that it "d[id] not mean to suggest that the first clause of [Section] 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state" carried on in the United States. *Id.* at 358 n.4.

The plaintiffs in *Nelson* were a husband and wife who sued Saudi Arabia and its state-owned hospital for intentional and negligent torts committed against the husband in Saudi Arabia, allegedly in retaliation for his reporting safety hazards at the hospital where he worked after being recruited and hired in the United States by the defendants. See 507 U.S. at 352-354. The Court held that the plaintiffs' suit was "based upon" the tortious acts committed in Saudi Arabia and not upon recruiting and hiring "activities that preceded the[] [torts'] commission." *Id.* at 358. It was not enough, the Court explained, that the recruiting and hiring activities were "connect[ed] with" or "led to the conduct that eventually injured the [plaintiffs]." *Ibid.* As the Court stated, the suit could not be "based upon" the defendants' earlier activities because "those facts alone entitle the [plaintiffs] to nothing." *Ibid.*

b. *Nelson* did not decide how to treat a claim that consists of both elements premised on commercial activity described in Section 1605(a)(2) and elements that fall outside that category. 507 U.S. at 358 n.4. Nevertheless, *Nelson*'s discussion of the meaning of "based upon" indicates the correct approach: one that looks to the "gravamen of the complaint." *Id.* at 357

(citation omitted). That calls for an inquiry into whether commercial activity carried on in the United States is the gist or essence of a claim, and not simply an analysis of whether an essential fact or single element of the claim turns on the existence of such activity. See U.S. Amicus Br. at 15 & n.10, *Nelson* (No. 91-522) (court should identify "fundamental ingredient" of the cause of action); *Black's* 770 (defining "gravamen" as "substantial point or essence of a claim, grievance, or complaint").

The "gravamen" approach is well supported by the text and purpose of Section 1605(a)(2). As relevant here, the phrase to "base upon" means "to use as a base or basis for," and the noun "base" means "the fundamental part of something: basic principle." *Webster's Third New International Dictionary of the English Language* 180 (1976) (definition 2 of verb "base"; definition 3a of noun "base"); see *Webster's New Twentieth Century Dictionary of the English Language* 154 (2d ed. 1969) (definition 2 of noun "base": "the foundation or most important element"); 1 *The Oxford English Dictionary* 977 (2d ed. 1989) (*OED*) (definition 2.a. of noun "base": "*fig[urative]* [f]undamental principle, foundation, groundwork"; sense II of noun "base": "[t]he main or most important element or ingredient, looked upon as its fundamental part"); *Webster's New International Dictionary of the English Language* 225 (2d ed. 1958) (definition 4.a of "base": "[t]he main or chief ingredient of anything, viewed as its fundamental element or constituent"). *Nelson* relied on just such definitions to conclude that "based upon" in Section 1605(a)(2) refers to the "foundation" for a claim. 507 U.S. at 357 (citations omitted).

Although Section 1605(a)(2) asks what an "action" is "based upon," a claim-by-claim analysis is warranted. See *Nelson*, 507 U.S. at 362-363; see also *Keene Corp.* v. *United States*, 508 U.S. 200, 210 (1993); 28 U.S.C. 1330. Under such an analysis, there may be situations in which the foreign state's commercial conduct in the United States establishes a single element of or fact necessary to a claim, and that element or fact is so "[f]undamental" to the particular claim—amounting to its "most important" part, *OED* 977—that the commercial activity may be said to be the gravamen of the plaintiff's demand for relief. But the plain meaning of "based upon" precludes the conclusion that the requirement is met whenever the commercial activity in question constitutes *any* element or necessary factual predicate of the plaintiff's claim—even one that has little to do with the core wrong the plaintiff has allegedly suffered.

As *Nelson* explained, "[w]hat the natural meaning of the phrase 'based upon' suggests, the context confirms." 507 U.S. at 357. The two clauses of Section 1605(a)(2) that immediately follow the clause at issue in this case refer to acts performed "in connection with a commercial activity of the foreign state." 28 U.S.C. 1605(a)(2). Because "Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such activity," the phrase "based upon" must be read to "call[] for something more than a mere connection with, or relation to, commercial activity." *Nelson*, 507 U.S. at 357-358; see *Transatlantic Shiffahrtskontor GmbH* v. *Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000), cert. denied, 532 U.S. 904 (2001). Looking at

the gravamen of a claim gives "based upon" considerably more force than a requirement of a "mere connection" with the relevant commercial activity. But looking only at a single element or necessary fact to decide whether the relationship between the claim and the commercial activity is sufficiently close is essentially equivalent to requiring only a connection between the two—as the court of appeals here acknowledged. See Pet. App. 12 (under single-element test "commercial activity that occurs within the United States must be connected with the conduct that gives rise to the plaintiff's cause of action"); *id.* at 33.

Finally, the purposes of the FSIA and the commercial-activity exception support a gravamen requirement. See 28 U.S.C. 1604. As this Court has recognized, that exception codifies the "restrictive" theory of sovereign immunity—a theory that makes a foreign state subject to suit for its commercial activities because engaging in those activities "do[es] not exercise powers peculiar to sovereigns," but rather "only those powers that can also be exercised by private citizens." *Weltover*, 504 U.S. at 614 (citation omitted); see *Nelson*, 507 U.S. at 363; 28 U.S.C. 1602. Were jurisdiction proper under the FSIA whenever a single fact necessary to make out a claim was linked to some commercial activity in this country, then the exception in Section 1605(a)(2) would enable suits in U.S. courts challenging activities that are best characterized as "state sovereign acts" rather than "state commercial and private acts." *Weltover*, 504 U.S. at 613. The gravamen requirement, in contrast, ensures that the suit is indeed "based upon" alleged wrongdoing that centers on a commercial activity.

Even in situations in which all of the relevant activities of the foreign state are commercial ones, reading "based upon" to call for an examination of the gravamen of the claim ensures a meaningful linkage between the United States and an action over which U.S. courts may exercise jurisdiction. See 28 U.S.C. 1330, 1605. The commercial-activity exception supplies a territorial basis of jurisdiction. Accordingly, each of the exceptions in Section 1605(a) calls for a tie to the United States, so as to avoid inserting this Nation's courts into disputes that are appropriately resolved elsewhere—an intrusion that may raise delicate questions of foreign relations when a foreign sovereign is the defendant. Cf. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664-1665 (2013); see generally *Republic of Phil.* v. *Pimentel*, 553 U.S. 851, 865 (2008); *National City Bank* v. *Republic of China*, 348 U.S. 356, 362 (1955).[7] Too broad an interpretation of "based upon" would attenuate that tie, avoiding a significant jurisdictional limitation imposed by Congress and creating a serious risk that courts would assume jurisdiction over cases in which all or virtually all of the acts or omissions that are the subject of the parties' dispute took place abroad.[8]

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[7] Indeed, the requirement in Section 1605(a)(2) that a plaintiff's claim be "based upon" the foreign state's commercial conduct in the United States arguably 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" in the specific-jurisdiction context. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984).

[8] Although the legislative history of the Act does not directly address the meaning of "based upon," see *Nelson*, 507 U.S. at 357, that history points in the same direction. The *House Report* explains with respect to the second clause of Section 1605(a)(2),

c. In ruling that the "based upon" requirement is satisfied whenever the relevant commercial activity constitutes a single element of a claim or a necessary fact in establishing that element, the Ninth Circuit made no attempt to examine the text or purpose of the FSIA. See Pet. App. 32-33. Rather, that ruling appears to be derived solely from an over-reading of *Nelson*.

In the decision below (and the prior Ninth Circuit decisions on which the majority relied), the court of appeals focused on *Nelson*'s statement that "based upon" is "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under [its] theory of the case." 507 U.S. at 357; see Pet. App. 32-33. But *Nelson*'s reference to "element*s*" does not suggest approval of the single-element test the court below adopted—particularly in light of *Nelson*'s reservation of the issue of how to treat a case in which certain elements of a claim are based on qualifying commercial activity and other elements are not. See 507 U.S. at 358 n.4. In addition,

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which deprives a foreign state of immunity if "the action is based * * * upon an act performed in the United States in connection with" the state's commercial activity "elsewhere," 28 U.S.C. 1605(a)(2), that "the acts (or omissions) encompassed * * * are limited to those which in and of themselves are sufficient to form the basis of a cause of action," *House Report* 19. That can only be a reference to the "based upon" language, which applies to all three clauses of Section 1605(a)(2) and therefore should be interpreted to mean the same thing with respect to each. See *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994). The limitation set forth in the *House Report* demonstrates Congress's understanding that a claim cannot be "based upon" an activity if—far from being "sufficient" in itself to create a cause of action—the activity is tangential to the wrongdoing alleged.

as Chief Judge Kozinski explained in his en banc dissent, the suggestion in *Nelson* that "a claim *can* be based upon commercial activity even if proving that activity [will not] establish *every* element of the claim" cannot be transmuted into "an endorsement of the converse proposition—that a claim *is* based upon commercial activity so long as proving that activity will establish at least *one* element of the claim," no matter which one. Pet. App. 63.[9]

The test adopted below not only departs from the text and purpose of the FSIA, but also would entail untoward consequences. Under that erroneous test, the scope of the commercial-activity exception would depend on the artfulness of a plaintiff's pleadings rather than on the nature of the sovereign's acts. If one claim permits qualifying commercial activity to be shoehorned into a single "element" of the claim while another does not, and both claims are based on the same underlying conduct, then the FSIA would—on the Ninth Circuit's view—permit the first claim to proceed while barring the second.

That approach would encourage the kind of gamesmanship that this Court disapproved in *Nelson*, which refused to give "jurisdictional significance" to a "feint of language" whereby "a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn." 507 U.S.

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[9] *Nelson* cited *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991), which stated a single-element test. 507 U.S. at 357; see Pet. App. 33. The statement from *Santos* that *Nelson* quoted did not embody that test, however. And because *Santos* concluded that no element of the claim at issue was based upon U.S. commercial activity, see 934 F.2d at 891, 894, the result would have been the same under the gravamen approach.

at 363; cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 702 (2004) (criticizing "repackag[ing]" of claims to manipulate application of foreign-country exception to waiver of immunity in Federal Tort Claims Act).[10] It would raise the possibility that the immunity analysis in very similar cases—even ones arising from essentially the same set of facts—would have different outcomes, creating uncertainty and a perception of unequal treatment in the "vast external realm." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936). And it would create the risk that the United States would be subject to similar arbitrary rules when foreign courts evaluate whether jurisdiction over a claim against this country is proper. See *Boos* v. *Barry*, 485 U.S. 312, 323 (1988) (highlighting "concept of reciprocity").

2. An examination of the claims asserted in this case makes clear that respondent's claims are not "based upon" commercial activity in the United States.

The complaint alleges that petitioner provided an unsafe boarding area and permitted unsafe boarding procedures in Innsbruck, as a result of which respondent fell and was injured while she was attempting to board a train to Prague. See J.A. 14-18. The

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[10] Courts should be especially wary of such gamesmanship where—as here—a plaintiff's claim could fall within the scope of the tort exception to immunity if the requisite connection to the United States existed. See 28 U.S.C. 1605(a)(5) (covering claim for damages for "personal injury or death, or damage to or loss of property, occurring in the United States and caused by [a] tortious act or omission"); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). Otherwise, plaintiffs could use the commercial-activity exception to circumvent Section 1605(a)(5)'s strict territorial limitation.

complaint asserts claims of negligence; strict liability for defective railcars and platforms and a failure to warn of the defects; and a breach of implied warranties of merchantability and fitness relating to the railcars and the platform. See *ibid.* The only commercial activity in the United States attributed to petitioner was RPE's sale of her Eurail pass. But all of the allegedly tortious conduct occurred in Austria, after respondent purchased the pass and traveled to Europe.

While RPE's sale of the Eurail pass to respondent in the United States enabled respondent to use the pass in Innsbruck, the sale of the pass is not the "gravamen," or foundation, of respondent's suit. Respondent does not allege that the sale of the Eurail pass was itself wrongful, and this is not a breach-of-contract action based on her purchase of it. Rather, respondent alleges that the sale was a link in the chain of events that led her to be injured in Austria by petitioner's allegedly tortious activities in that country. As was true in *Nelson*, those alleged bad acts, "and not the * * * commercial activities that preceded their commission, form the basis for the [plaintiff's] suit." 507 U.S. at 358.

Assuming that California law applies (as the court below concluded, see Pet. App. 34), a detailed examination of the elements of respondent's claims confirms that common-sense conclusion.[11] First, the negligence

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[11] It is doubtful that the court below was correct in concluding that California law governs. Contrary to the court's assertion (Pet App. 34 n.14), the FSIA's provision that a non-immune foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 1606, does not indicate disregard for choice-of-law principles. See, *e.g.*,

claim centers around activity that took place in Austria rather than in the United States: petitioner's alleged failure to take sufficient care with respect to the condition of the platform and the boarding procedures in Innsbruck, and the injury that respondent says resulted from that failure. See J.A. 14-15. The focus of tort claims is ordinarily on the breach of a duty of care and on the resulting injury, rather than on the circumstances giving rise to the duty in the first instance.

The court below said that the sale of the pass was necessary to establish an element of the claim, reasoning that petitioner owed respondent "a duty of care because her purchase of the Eurail pass established a common-carrier/passenger relationship." Pet. App. 34; see *id.* at 35. Even if that were correct, that would not shift the gravamen of the claim away from petitioner's allegedly negligent acts at a particular train

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Barkanic v. *General Admin. of Civil Aviation of China*, 923 F.2d 957, 959-961 (2d Cir. 1991). The court's cursory choice-of-law analysis did not weigh all relevant factors or explain why California's interest outweighed Austria's, even though respondent was injured in Austria and her claims concern the adequacy of Austrian transportation facilities. See Pet. App. 34 n.14; cf. 1 Restatement (Second) Conflict of Laws §§ 6, 145 (1971); *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 70 (D.C. Cir. 2011), vacated on other grounds, 527 Fed. Appx. 7 (D.C. Cir. 2013). Still, in the court of appeals neither party addressed, for purposes of a "based upon" analysis, which jurisdiction's law should apply, Resp. C.A. Reply Br. 6-10; Pet. C.A. Br. 40-43; *id.* at 51-52 (briefly asserting in *forum non conveniens* argument that Austrian law governs), and petitioner has not challenged the Ninth Circuit's choice of law, see Pet. i; Pet. Br. 28-38. Accordingly, the issue may be deemed waived. Alternatively, if the Court chooses to remand for application of the correct "based upon" standard, the Court could instruct the Ninth Circuit to revisit the choice-of-law issue.

station in Austria and the injury that is claimed to be the consequence of those acts. But it is wrong even as a matter of California law. Respondent need not show that petitioner owed her the duty of heightened care associated with the common carrier/passenger relationship in order to prevail on a negligence claim; a rail carrier owes non-passengers a duty of ordinary care. See *Orr* v. *Pacific Sw. Airlines*, 257 Cal. Rptr. 18, 20-21 (Cal. Ct. App. 1989); *McGettigan* v. *Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516, 520, 522-524 (Cal. Ct. App. 1997). In addition, the pass itself did not create a common carrier/passenger relationship that gives rise to a heightened duty with respect to a tort claim. Under California law, that relationship is created when "one, intending in good faith to become a passenger, goes to the place designated as the site of departure at the appropriate time and the carrier takes some action indicating acceptance of the passenger as a traveler." *Orr*, 257 Cal. Rptr. at 21 (citation omitted); see *Grier* v. *Ferrant*, 144 P.2d 631, 633-634 (Cal. Dist. Ct. App. 1944) ("relationship is created when one offers to become a passenger, and is accepted as a passenger after he has placed himself under the control of the carrier"); see also 11A Cal. Jur. 3d *Carriers* § 143 (2007). Merely holding a ticket or a pass is neither sufficient, see *Orr*, 257 Cal. Rptr. at 21-22; see also *Simon* v. *Walt Disney World Co.*, 8 Cal. Rptr. 3d 459, 464-466 (Cal. Ct. App. 2004), review denied, Mar. 30, 2014, nor necessary, see *Grier*, 144 P.2d at 633; see also J.A. 15, 32, 40; see generally *Aschenbrenner* v. *United States Fid. & Guar. Co.*, 292 U.S. 80, 82-85 (1934).

Second, the strict-liability claims bear no relationship to the pass or its purchase. The complaint alleges

that "the railcars and boarding platform were defective in their design" and should have been accompanied by warnings, J.A. 16-17; the gravamen of those claims is outside the United States, where the allegedly defective items were designed, sold, and used, see *ibid.*, and where any warnings about the items would have been provided. With respect to the defects, the court below confused the issue by apparently considering the sale of the pass to be a necessary element of a strict-liability claim. See Pet. App. 38-39 & n.17. That was wrong as a matter of California law, under which strict liability for defective products exists regardless of whether the injured party is a purchaser, a lessee, or simply a bystander. See, *e.g.*, *Price* v. *Shell Oil Co.*, 466 P.2d 722, 725-726 (Cal. 1970) (disagreeing with Restatement (Second) of Torts § 402A); *Elmore* v. *American Motors Corp.*, 451 P.2d 84, 88 (Cal. 1969). Moreover, to the extent that a sale of the allegedly defective product to *someone* is required in order for strict liability to attach, the sale of the pass would not qualify, since the pass is not the thing that is said to be defective. See J.A. 16. With respect to the need for a warning, respondent has not alleged that the pass should have warned about the conditions on one specific platform in one particular city in Europe. If any warning was needed, it surely was one that should have been given in Innsbruck. See Pet. App. 88 (Bea, J., concurring in panel's judgment).

Last, the breach-of-implied-warranty claims are merely a way of restating the strict-liability claims in an attempt to make them sound in contract and thus link them to the pass. See *Greenman* v. *Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963). Just as in *Nelson*, the Court should not permit respondent to

invoke the commercial-activity exception through a "feint of language." 507 U.S. at 363. Under California law, implied warranties of merchantability and fitness attach to contracts to sell or supply goods, not contracts to provide services, see *Link-Belt Co.* v. *Star Iron & Steel Co.*, 135 Cal. Rptr. 134, 142 (Cal. Ct. App. 1976)—and a ride on a train falls into the latter category. See, *e.g.*, *Garcia* v. *Halsett*, 82 Cal. Rptr. 420, 422 (Cal. Ct. App. 1970) (defining "bailment"). Respondent is not truly complaining about a breach of any promise contained in her pass; she is complaining of distinct tortious actions allegedly taken by petitioner on an Austrian rail platform, and her claim is therefore not "based upon" commercial activity in the United States.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1330 provides:

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.

2. 28 U.S.C. 1602 provides:

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.

3. 28 U.S.C. 1603 provides:

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.

4. 28 U.S.C. 1604 provides:

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.

5. 28 U.S.C. 1605 provides:

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—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the for-

eign state may purport to effect except in accordance with the terms of the waiver;

(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;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or

employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime

lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that

the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110-181, div. A, title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the

court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The Court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

6. 28 U.S.C. 1605A provides:

Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract a-

warded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph

(1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

7. 28 U.S.C. 1606 provides:

Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

8. 28 U.S.C. 1607 provides:

Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

9. 28 U.S.C. 1608 provides:

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.

10. 28 U.S.C. 1609 provides:

Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

11. 28 U.S.C. 1610 provides:

Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution

of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state un-

der the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

12. 28 U.S.C. 1611 provides:

Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the

bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.