No. 13-1067

IN THE

Supreme Court of the United States

OBB PERSONENVERKEHR AG,

Petitioner,

v.

CAROL P. SACHS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

The questions presented in the petition are:

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

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

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BRIEF FOR RESPONDENT

Respondent Carol Sachs respectfully requests that this Court affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

INTRODUCTION

In general, injured customers have recourse against commercial enterprises responsible for their injuries. And so long as their suit arises from a commercial activity that has substantial contact with the United States, American customers may litigate their claims at home, rather than seek redress an ocean away. This case is no different, save that a foreign state happens to operate the commercial enterprise. Under the commercial activity exception of the Foreign Sovereign Immunities Act of 1976, that makes no difference.

STATEMENT OF THE CASE

A. Legal And Factual Background

1. Until the mid-twentieth century, the United States and the rest of the international community adhered to an absolute rule of sovereign immunity. Under this regime, no sovereign state could be haled into another's court against its will. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

Eventually, states came into more frequent contact with foreign citizens as everyday participants in burgeoning global markets. *See generally* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976) ("Tate Letter"). And with more

interactions came more disputes. As a result, the international community increasingly saw "no justification" for allowing a foreign state that "enters the marketplace" to thrust the economic costs of accidents it causes "onto the shoulders of private parties." *Saudi Arabia v. Nelson*, 507 U.S. 349, 366 n.2 (1993) (White, J., concurring in the judgment) (quoting *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong., 2d Sess. 27 (1976) (statement of Monroe Leigh, Legal Adviser, State Department)).

Accordingly, many states adopted the so-called "restrictive" theory of sovereign immunity, which restricts immunity to public (or sovereign) acts and denies it for private (or commercial) acts. Tate Letter. The United States Department of State soon followed suit. *Id.* But while official American policy changed, courts still looked to the State Department on a case-by-case basis to decide whether a foreign state should receive immunity. *Verlinden*, 461 U.S. at 487. Diplomatic pressure often trumped fealty to the restrictive theory. *Id.* Inconsistency reigned.

Two decades later, Congress passed the Foreign Sovereign Immunities Act of 1976 ("the FSIA") to codify the restrictive theory so that courts would make immunity decisions according to clear legal rules. *See* 28 U.S.C. § 1602; *Verlinden*, 461 U.S. at 488. The Act's "comprehensive set of legal standards," *Verlinden*, 461 U.S. at 488, now governs both subject-matter and personal jurisdiction over a foreign sovereign in the United States. *See* 28 U.S.C. § 1330(a)-(b).

The FSIA provides for jurisdiction in federal court for claims against foreign states through a series of exceptions to immunity. *See* 28 U.S.C. §§ 1605, 1607. The "most significant" of these is the commercial activity exception. *Republic of Argentina v. Weltover*, 504 U.S. 607, 611 (1992). It ensures that foreign states do not evade legal accountability "insofar as their commercial activities are concerned." 28 U.S.C. § 1602. And "a foreign state engages in commercial activity . . . where it acts 'in a manner of a private player within' the market." *Nelson*, 507 U.S. at 360 (quoting *Weltover*, 504 U.S. at 614).

The commercial activity exception contains three distinct clauses. Clause One – the clause at issue here – denies sovereign immunity where an action is "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). In other words, foreign states are not immune from suit in actions arising from "either a "regular course of commercial conduct" or a "particular commercial transaction or act" that has "substantial contact" with the United States. *See id.* § 1603(d)-(e) ("Definitions"). Clause Two denies immunity in actions based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." *Id.* § 1605(a)(2). And Clause Three denies immunity for actions based "upon an act outside 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." *Id.*

2. In 2007 – when the events here took place – some 20 million tourists visited Austria, spending over $18 billion. UN World Tourism Org., *Tourism*

Highlights: 2008 Edition 5 (2008).[1] Much of this tourism involved getting from place to place. Visitors traveled between remote resorts in the Alps; medieval landmarks in the countryside (such as Hohenwerfen Castle, as seen in *The Sound of Music*); and historic cities such as Vienna, Salzburg, and Innsbruck. So for petitioner Österreichishe Bundesbanen Personenverkehr ("OBB"), a passenger railway wholly owned by the Austrian government, Pet. App. 5a, tourists traversing the country were (and continue to be) a bountiful target market.

To attract more foreign riders, OBB and several other European railways formed and collectively own the Eurail Group, which markets and sells "Eurail passes." Pet. App. 5a. Long a favorite of American travelers on a budget, these passes offer myriad low-price ticketing packages for travel on OBB throughout Austria. *See* Neth. Bd. of Tourism & Conventions, *More Students Explore Europe By Train*, Globe News Wire (Sep. 28, 2009);[2] *Eurail Passes*, Eurail.[3] The passes are not available to Austrian citizens. *See Eurail Passes*, *supra*. Instead, Eurail markets these passes exclusively to foreigners and even offers free delivery to the United States. *Id.*

In 2007, some 468,000 tourists bought Eurail passes. Felicity Long, *Amid Ridership Increase, Eurail Expands, Unveils New Passes*, Travel Weekly,

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[1] http://www.unwto.org/facts/eng/pdf/highlights/UNWTO_Highlights08_en_HR.pdf (last visited June 25, 2015).

[2] http://globenewswire.com/news-release/2009/09/28/405408/174142/en/More-Students-Explore-Europe-by-Train.html (last visited June 25, 2015).

[3] http://www.eurail.com/eurail-passes (last visited June 25, 2015).

(Feb. 25, 2011).[4] Over half were American. *Eurail Passenger Growth Positive, Setting a New Record*, Eurail Group (April 1, 2008).[5]

In addition to making direct-to-consumer sales online, the Eurail Group contracts with a network of subagents based in the United States to market and sell Eurail passes to Americans. On its website, OBB tells customers as much, stating that the "Eurail Austria Pass can be purchased" through "travel agencies in [sic] overseas." *Eurail Austria Pass*, OBB.[6] The Rail Pass Experts ("RPE"), based in Massachusetts, is one such subagent. RPE markets itself as "the largest single train ticket and rail pass outlet in the U.S." and advertises its status as Eurail's "official agent." *About Us*, RailPass.[7]

3. In 2007, RPE sold respondent Carol Sachs a Eurail pass allowing her to travel on OBB within Austria, as well as to the Czech Republic. Pet. App. 5a. Sachs bought the ticket on RPE's website from her home in California. *Id.* This pass entitled her to board the train and sit in an unassigned seat. *Id.* 6a; Petr. Br. 10. The pass also made clear that "the issuing office is merely the intermediary of the carriers in Europe and assumes no liability resulting from the transport." Pet. App. 5a.

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[4] http://www.travelweekly.com/Europe-Travel/Amid-ridership-increase-Eurail-expands-unveils-new-passes (last visited June, 25, 2015).

[5] http://www.eurailgroup.org/News/Eurail%20passenger%20growth%20positive%20setting%20new%20record.aspx (last visited June 25, 2015).

[6] http://www.oebb.at/en/Travelling_abroad/Eurail_Austria_Pass/index.jsp (last visited June 25, 2015).

[7] http://www.railpass.com/about-us (last visited June 25, 2015).

Sachs left for Austria the next month. Pet. App. 5a-6a. From Innsbruck, she planned to catch an OBB train bound for Prague. Given the long ride, Sachs asked OBB to upgrade her ticket from an unassigned seat to a reserved couchette bed. OBB accepted her request for an additional fee at the station. *Id.*

From there, Sachs walked to the platform to catch her train. Pet. App. 6a. But while attempting to board, the train began to move. She fell onto the tracks. The moving train crushed her legs, forcing doctors to amputate both above the knee. *Id.*

B. Procedural History

1. Sachs sued OBB in the United States District Court for the Northern District of California, asserting five claims: negligence, design defects, failure to warn, and breaches of implied warranty of merchantability and fitness. Pet. App. 6a. She argued that OBB is subject to suit under Clause One of the FSIA's commercial activity exception because OBB, through its subagent RPE, "carried on" commercial activity in the United States, and her lawsuit is based upon that activity. *Id.* 104a-05a; *see* 28 U.S.C. § 1605(a)(2).

OBB moved to dismiss, arguing that it is entitled to sovereign immunity because Clause One does not apply here. Pet. App. 7a, 102a. In the alternative, OBB also argued that Sachs's claims should be dismissed for lack of personal jurisdiction, *forum non conveniens*, and international comity. *Id.*

Without reaching any of OBB's alternative arguments, the district court granted OBB's motion on sovereign immunity grounds. Pet. App. 101a. The district court recognized that foreign states may act

through agents, and it did not dispute that RPE was an agent of OBB under the common-law test. *Id.* 105a-06a. But the district court reasoned that an entity cannot be an agent of a foreign state under Clause One unless the entity is an alter-ego of the foreign state – as defined by *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983) – and RPE is not an alter-ego of OBB. Pet. App. 107a-09a.

2. A divided panel of the Ninth Circuit agreed with the district court's judgment but could not settle on a rationale for affirming it. Adopting the district court's reasoning, Judge Tallman agreed that the ticket sale could not be attributed to OBB. Pet. App. 77a. Judge Bea, by contrast, "assume[ed] *arguendo* that an agency relationship exists" between OBB and RPE. *Id.* 85a. He concluded, however, that Sachs's suit was not "based upon" the commercial activity OBB carried on in the United States because the allegedly negligent acts and omissions at issue here "took place in Austria." *Id.* 86a-87a.

Judge Gould voted to reverse the district court. Pet. App. 90a. He reasoned that (a) common-law agency principles, not *Bancec*'s alter-ego test, control whether a foreign state carries on commercial activity under Clause One, (b) Sachs's lawsuit is "based upon" OBB's commercial activity, and (c) that activity has "substantial contact" with the United States," thereby satisfying Clause One's final requirement. *Id.* 92a, 95a-96a, 98a-99a. He also noted that the only two other courts of appeals to consider similar cases had likewise concluded that "where a foreign common carrier, operated by a sovereign entity, purposefully sells tickets for use of

the carrier's services overseas through a domestic sales agent, the ticket sale is commercial activity which may be imputed to the foreign common carrier and is sufficient to invoke the commercial activity exception." *Id.* 92a-94a (citing *Kirkham v. Societe Air Fr.*, 429 F.3d 288 (D.C. Cir. 2005); *Barkanic v. General Admin. of Civil Aviation of China*, 822 F.2d 11 (2d Cir. 1987)).

3. On rehearing en banc, the court of appeals reversed by an 8-3 vote, adopting Judge Gould's reasoning and the views of the Second and D.C. Circuits. Pet. App. 1a, 41a-42a.

The en banc court first held that common-law agency principles control whether a foreign state "carrie[s] on" commercial activity in the United States for purposes of the FSIA. Pet. App. 15a. Put another way, when a foreign state "engage[s] in commerce in the United States indirectly by acting through its agents or subagents," Clause One denies sovereign immunity. *Id.* And applying those common-law principles, the court explained that when "a common carrier authorizes a travel intermediary to 'issue tickets on its behalf and to collect and hold customer payment, the intermediary acts as the [carrier's] agent.'" *Id.* 18a (alteration in original) (quoting Restatement (Third) of Agency § 3.14 cmt. c (2006)).

Second, the court of appeals held that Sachs's action was "based upon" commercial activity because "an element" of each of her claims arose from OBB's sale of Sachs' ticket. Pet. App. 33a-36a (emphasis omitted) (quoting *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000)). With respect to her negligence claim, the ticket sale formed a "common-

carrier/passenger relationship" between Sachs and OBB, giving rise under the applicable substantive law (California law, *id.* 34a n.14) to OBB's "duty of utmost care." *Id.* 34a. Similarly, the court of appeals reasoned that a "transaction between a seller and a consumer" was "a necessary prerequisite to proving" her other state-law claims for design defects, failure to warn, and breaches of implied warranties. *Id.* 38a-39a (citing Restatement (Second) of Torts § 402A (1965)).

Third, the court of appeals held that OBB's railway enterprise had "substantial contact" with the United States because it involved the regular "marketing, selling, and arranging of foreign travel in the United States." Pet. App. 32a.

Judge O'Scannlain dissented, arguing that "the standard announced in *Bancec*" should control whether an entity is an agent of a foreign state. Pet. App. 51a-53a.

In a separate dissent, then-Chief Judge Kozinski agreed with Judge O'Scannlain that RPE's ticket sale should not be attributed to OBB. Pet. App. 61a. He also maintained that all of Sachs's claims failed Clause One's "based upon" requirement because "[t]he injury and any negligence occurred in Austria." *Id.* 62a, 65a.

4. In this Court, OBB challenges the first two holdings of the court of appeals. It asks this Court to decide (i) whether common-law agency principles determine whether a foreign state carries on commercial activity and (ii) if so, whether Sachs's action is "based upon" OBB's commercial activity. Pet. i. OBB does not challenge the Ninth Circuit's "substantial contact" holding. *Id.*

SUMMARY OF ARGUMENT

Neither of OBB's arguments undercut the court of appeals' holding that Clause One of the FSIA's commercial activity exception denies sovereign immunity in this case.

I. Common-law agency principles control whether a foreign state "carried on" commercial activity in the United States. Foreign states, just like private corporations, can act only through agents. And the FSIA is designed to treat foreign states the same as private actors when they enter the commercial marketplace. That means attributing the acts of common-law agents to foreign states, just as to ordinary businesses.

OBB's alternative proposals misconstrue the FSIA and would produce intolerable results. OBB argues that the FSIA's definition of "foreign state" should control the attribution question here. But that definition determines which entities are eligible for sovereign immunity, not which entities may act as an agent of a foreign state. OBB also contends that the "alter ego" test from *Nat'l City Bank v. Banco para el Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983), should control. But this argument ignores the fact that *Bancec* governs attribution arising from relations between foreign states and their corporate subsidiaries, not from entirely distinct entities performing specific tasks on behalf of foreign states. Were the law otherwise, foreign states conducting business in the United States could evade jurisdiction simply by acting through third-party agents, destroying the symmetry that the FSIA seeks to create between private actors engaged in

commercial entities and foreign states engaged in such activities.

II. Sachs's action is "based upon" a commercial activity – namely, OBB's railway enterprise – that has substantial contact with the United States. The term "activity" in Clause One – in contrast to the term "act" used in Clauses Two and Three – directs courts to conduct the "based upon" inquiry against the overall course of the defendant's business, not any particular acts. That being so, it does not matter here whether the phrase "based upon" refers to the "gravamen" or at least one element of an action. Sachs's action is based *entirely* upon OBB's commercial activity of running a commercial railway. Her action is thus the inverse of *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), where none of the elements of the plaintiffs' action arose from commercial activity; instead, they all derived from sovereign conduct.

Insofar as OBB suggests that the statute's "based upon" requirement requires not only a sufficient nexus to commercial (as opposed to sovereign) activity but also a geographic tie to an act occurring in this country, OBB is mistaken. Clause One's "substantial contact" requirement does that work. And OBB does not challenge the court of appeals' holding that OBB's commercial railway business has substantial contact with the United States.

Even if OBB and the United States were correct that the phrase "based upon" requires a geographic tie to an act occurring in this country, Sachs would still prevail. The phrase "based upon" covers everything from matters based partly on an act to matters based entirely upon an act. Faced with this

indeterminacy, the easily administrable "one element" test would be far superior to the nebulous "gravamen" test. This Court has long stressed that tests to implement jurisdictional statutes should be as simple as possible, avoiding vague, multifactor tests whenever possible. The gravamen test would introduce profound uncertainty into the FSIA, with no significant offsetting benefit.

OBB's argument that Sachs's claims fail the one-element test is not properly before this Court because OBB never advanced this argument in its petition for certiorari. In any event, OBB's argument is unavailing. This Court defers to lower courts on matters of state law, and nothing about the Ninth Circuit's application of California law warrants departure from that presumption of correctness.

ARGUMENT

I. Common-Law Agency Principles Control Whether A Foreign State "Carries On" Commercial Activity In The United States.

Every court of appeals to address the issue – eight in total – has held that the acts of common-law agents should be attributed to a foreign state for assessing jurisdiction under the FSIA's commercial activity exception.[8] The United States concurs, as

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[8] *See Mar. Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1005 (D.C. Cir. 1982); *First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda-Permanent Mission*, 877 F.2d 189, 193-94 (2d Cir. 1989); *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-400 (4th Cir. 2004); *Dale v. Colagiovanni*, 443 F.3d 425, 428-29 (5th Cir. 2006); *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 687-88 (8th Cir. 2002); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 996 (10th Cir. 2007); *Nelson*

has every Justice of this Court to consider the question. *See* U.S. Br. 9-19; *Saudi Arabia v. Nelson*, 507 U.S. 349, 372-73 (1993) (Kennedy, J., joined by Blackmun and Stevens, JJ., concurring in part and dissenting in part). That consensus is correct.

A. Common-Law Agency Principles Implement The Text And Purposes Of The FSIA.

1. *Text.* Clause One of the commercial activity exception provides that foreign states are subject to jurisdiction in United States courts when the plaintiff's action is based upon commercial activity "carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). The statutory phrase "carried on" necessarily incorporates general common-law agency principles. Like a corporation, a foreign state can act "only through its agents." *Daimler AG v. Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (quoting 1 William Fletcher, *Cyclopedia of the Law of Corporations* § 30 (Supp. 2012-2013)); *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (personal jurisdiction depends on the "activities of the corporation's agent[s] within the state"). And "[f]oreign states, like private actors, often engage in commercial activities by employing entities under their control to enter into and execute transactions." U.S Br. 10-11. Congress, therefore, would have expected that courts would use traditional agency principles to determine whether a foreign state "carried on" commercial activity.

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v. Saudi Arabia, 923 F.2d 1528, 1533 (11th Cir. 1991), *rev'd on other grounds*, 507 U.S. 349 (1993). OBB's assertion (Petr. Br. 52) that the Fifth and D.C. Circuits have held to the contrary is incorrect. *See* U.S. Br. 13 & n.3.

Indeed, "where a common-law principle is well established . . . the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citations omitted). The principle that juridical entities act through traditional agents is well established. *See, e.g.*, *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011) ("[W]e consult general principles of law, agency law, which form the background against which federal tort laws are enacted."). And nothing in the text of the FSIA evinces an intent to dispense with that common-law principle.

OBB protests, however, the FSIA itself – "and not the pre-existing common law" – exclusively "governs the determination of whether a foreign state is entitled to sovereign immunity." Petr. Br. 25-26 (citing *Samantar v. Yousuf*, 560 U.S. 305, 312 (2010)). But this rule simply means that a plaintiff must invoke a *statutory* exception to defeat sovereign immunity; a common-law theory will not do. *See id.*; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-39 (1989). Once a plaintiff invokes a statutory exception (as Sachs has done here, with respect to the commercial activity exception), this Court has made clear that common-law principles inform the meaning of the FSIA exception at issue. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 473-78 (2003) (relying on "elementary principles of corporate law" to construe the FSIA); *Nat'l City Bank v. Banco para el Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611, 621-23, 628-30 (1983) (looking to general sources summarizing common-law principles to determine

whether Cuba's national bank was the "alter ego" of the state for purposes of the FSIA).

2. *Purpose*. Applying common-law agency principles to resolve attribution disputes furthers the FSIA's purposes. The FSIA is designed to treat foreign states like private actors when such states operate as "every day participants" in the marketplace. H.R. Rep. No. 94-1487, at 7 (1976); *see also Nelson*, 507 U.S. at 360 (explaining that a foreign state is not immune "where it acts 'in a manner of a private player within' the market" (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992))). Many commercial industries "make frequent use of nonemployee agents to communicate with customers and enter into contracts that bind the customer and a vendor." Restatement (Third) of Agency § 1.01 cmt. c (2006); *see also* U.S. Br. 10. When foreign states use these kinds of agents in this manner, attributing the agents' actions to the states ensures that all commercial actors in this country are treated alike.

Any other rule would produce intolerable results. If conduct of third-party agents could not be attributed to foreign states, then "foreign states engaging in commercial activity in the United States [could always] shield themselves from any exposure to litigation in U.S. courts by the expedient of acting through" U.S.-based common-law agents. U.S. Br. 16. Put another way, a savvy foreign state could foreclose any jurisdiction over its commercial activities in this country simply by conducting all business here through contractors not "owned by [the foreign state]," Petr. Br. 43. This would eviscerate the FSIA's goal of providing American citizens with

"normal legal redress" against foreign states who engage in ordinary commercial transactions. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong., 2d Sess. 24 (1976) (statement of Monroe Leigh, Legal Adviser, State Department)); *see also* Pet. App. 25a-27a (noting that OBB's argument "would mean that scores of state-owned railroads and airlines worldwide" could evade jurisdiction in this country).

OBB offers no answer to this observation. *See* Petr. Br. 60. Instead, OBB merely notes that the FSIA values "uniformity" and complains that common-law agency principles can vary from state to state. *Id.* 59. But this complaint misses the mark. When construing other federal statutes, this Court has consistently held that "the general common law of agency, rather than the law of any particular State" controls. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754-55 (1998) (citation omitted) (Title VII); *see also Meyer v. Holley*, 537 U.S. 280, 285-86 (2003) (using "traditional" agency principles to construe Fair Housing Act). And when construing other provisions of the FSIA, this Court has looked to general sources summarizing common-law principles. *See Dole Food*, 538 U.S. at 474-75 (looking to "basic tenet[s] of American corporate law" to assess ownership issue); *Bancec*, 462 U.S. at 621-23, 628-30 (looking to Restatements and other "general" sources to assess corporate "alter ego" issue). This Court can and should follow the same approach here, consulting "basic tenets of agency law to resolve Section 1605(a)(2) 'carried on' questions." U.S. Br. 18.

B. Neither Of OBB's Alternative Proposals For Identifying Principal-Agent Relationships Withstands Scrutiny.

OBB does not seriously contest that RPE's relationship with it satisfied the common-law test for a principal-agent relationship.[9] OBB maintains, however, that using common-law principles to resolve attribution questions under the FSIA runs afoul of either (1) the FSIA's definition of the term "foreign state"; or (2) this Court's decision in *Bancec*. Neither contention has merit.

1. The FSIA defines the term "foreign state" to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The Act defines the phrase "agency or instrumentality of a foreign state," in turn, to cover only entities that are organs of foreign states or are owned by such states. *See* 28

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[9] This Court should ignore OBB's vague suggestion that RPE may not have been OBB's common-law agent. *see* Petr. Br. 55-56. "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." U.S. Sup. Ct. R. 14.1(a); *see also West v. Gibson*, 527 U.S. 212, 223 (1999) (declining to consider "matters fall[ing] outside the scope of the question presented"). And the first question presented asks this Court to resolve only whether the common-law agency test applies, not whether that test is satisfied here. *See* Pet. i.

At any rate, travel agents and other intermediaries that sell tickets on behalf of common carriers are agents of those carriers under basic principles of agency law. *See* Restatement (Third) of Agency, 3.14 cmt. c (2006). And even if they were not, OBB ratified RPE's authority, thus rendering RPE an agent, when OBB honored Sachs's Eurail pass and allowed her to pay only a difference in fare to upgrade her ticket. *See* Pet. App. 6, 19a n.6.

U.S.C. § 1603(b). From these definitions, OBB argues that any U.S.-based entity that does not constitute an "agency or instrumentality" under the FSIA cannot constitute an agent whose actions may be attributed to a foreign state.

This argument misreads the FSIA and makes no sense.

a. The FSIA's definition of "foreign state" concerns which kinds of entities are the embodiment of the state for purposes of being able to claim sovereign immunity. *See* H.R. Rep. No. 94-1487, at 15 (1976) (noting that "agency and instrumentality" definitions under Section 1603(b) determine which entities would be "entitled to sovereign immunity in any case before a Federal or State court"). If, for example, Sachs were suing RPE for her injuries, and in response RPE argued that it was part of the Austrian government and thus immune under the FSIA, a court would consult the definition of "agency or instrumentality" in Section 1603(b) to evaluate that argument. *See* Restatement (Second) of the Foreign Relations Law of the United States § 66 (1965).

Here, by contrast, the question is whether the actions of RPE can be attributed to OBB – undisputedly "an agency or instrumentality" of the Republic of Austria, Pet. App. 13a – for purposes of satisfying the commercial activity exception's requirement that a foreign state "carr[y] on" a commercial activity in the United States. That attribution question turns not on whether the defendant is an embodiment of a foreign state, but rather on whether a principal-agent relationship exists. *See supra* at 13-14.

That the attribution issue here turns on the statutory phrase "carried on," not the definition of the term "foreign state," answers Judge O'Scannlain's dissenting contention that the term "foreign state" must mean the same thing "throughout the [FSIA]." Pet. App. 47a-49a. The term "foreign state" does mean the same thing (namely, a state itself or an "agency or instrumentality") throughout the statute. But the question here is whether a foreign state has "carried on" commercial activity in the United States. Common-law agency principles determine that question.[10]

The same confusion lies beneath OBB's reliance (Petr. Br. 47) upon the "international law" principles recited in Section 66 of the Restatement (Second) of Foreign Relations Law. An entity must be an "agency or instrumentality" of a foreign state to claim sovereign immunity, but an entity need not be an "agency" of a foreign state to be an "agent" of such a state – that is, for its conduct to be attributed to the state. *See* Restatement (Second) of Foreign Relations Law § 169 (Am. Law Inst. 1965) (acts of an "individual agent" may be attributed to the foreign state).

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[10] That the operative statutory phrase here is "carried on," not "foreign state," likewise disposes of Judge O'Scannlain's assertion (Pet. App. 49a-51a) that the court of appeals' holding renders the word "agent" superfluous in 28 U.S.C. § 1605A(c). That provision creates a cause of action against "[a] foreign state" or "any official, employee, or agent of that foreign state" that is a state sponsor of terrorism. Under the Ninth Circuit's holding, the term "foreign state" in the provision includes agencies or instrumentalities, and the term "agent" means common-law agents. Under OBB's view, however, the term "agent" is superfluous because the term "foreign state" controls the question whether an entity is an agent.

b. Ordinary usage reinforces that the question whether an entity is an "agency" (and therefore a "foreign state") under Section 1603(b) is completely different from whether it is an "agent" for purposes of the FSIA's "carried on" requirement. An "agency" is an arm of a government, *see, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2491 (2014), while an "agent" is a person or entity acting on behalf of another. To be sure, the two terms share a common root. But it is hardly uncommon for two words with the same root to have significantly different meanings. *See FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011) (explaining in statutory construction case that the word "person" means something quite different from "personal," and providing other similar examples).

Indeed, in all of its possible definitions for "agency," Black's Law Dictionary never provides that an entity to which authority is delegated may be called an "agency." *See* Black's Law Dictionary 74 (10th ed. 2014). Rather, such an entity is described by the term "agent." *See* Black's Law Dictionary 75 (10th ed. 2014) (defining "agent" as "[s]omeone who is authorized to act for or in place of another; a representative"). And that is the only term that matters here.

c. Treating the statutory definitions of "foreign state" and "agency" as controlling the attribution question here would create still other problems. The FSIA's definition of "agency" *excludes* any entity that is "a citizen of a State of the United States as defined in [28 U.S.C. § 1332(c) & (d)], []or created under the laws of any third country." 28 U.S.C. § 1603(b)(3). A commercial entity is a citizen of a U.S. State under Section 1332(c)(1) (the diversity jurisdiction statute)

when it is incorporated or has its nerve center there. *See Hertz Corp. v. Friend*, 559 U.S. 77, 80-81 (2010). That means that if OBB is correct that the FSIA's definition of "agency" controls when an entity's acts may be imputed to a foreign state for purposes of satisfying the commercial activity exception, the *more* tightly connected an entity is to the United States, the *less* likely it would be to be an agent for imputation purposes. If a foreign state engages in commercial activity in the United States by means of a foreign-based instrumentality, it would be subject to U.S. jurisdiction. But if it establishes a subsidiary in the United States to conduct its business, it would not. That would turn the FSIA on its head.

More generally, OBB cannot be right that foreign states that engage in commerce may escape U.S. jurisdiction when involved in principal-agent relationships that would render private businesses accountable. As the State Department has explained: "When the foreign state enters the marketplace or when it acts as a private party, there is *no justification* in modern international law for allowing the foreign state to avoid the economic costs of . . . the accidents which it may cause. . . . The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong., 2d Sess. 27 (1976) (statement of Monroe Leigh, Legal Adviser, State Department) (emphasis added). It is thus implausible that the FSIA allows foreign states to avoid commercial obligations that private parties may not, when the

purpose of the statute's commercial activity exception is to treat foreign states engaged in commercial activity the same as private businesses.

2. Petitioner's fallback argument – that *Bancec* should control all attribution questions involving the FSIA's "carried on" requirement – fares no better. In *Bancec*, the Court held that an instrumentality's actions can be imputed to the foreign state when the instrumentality is "so extensively controlled" by the state that the two entities are really one. 462 U.S. at 629. In that circumstance, the instrumentality is an "alter ego" of the foreign state, thus rendering it fair to hold the foreign state liable for the instrumentality's actions.

Bancec is mildly "instructive" here because it involved a question of imputation under the FSIA, Petr. Br. 52, and this Court looked to common-law principles to resolve that question, *see* 462 U.S. at 621-23, 628-30. But as the court of appeals recognized here, *Bancec* does not directly apply because that case dealt with piercing the veil of a foreign state's "corporate affiliates," not determining whether actions of "entirely distinct" entities can be attributed to foreign states for jurisdictional purposes. Pet. App. 20a-21a; *see also* U.S. Br. 17-18. The latter situation involves different considerations and turns on a less stringent test. *See Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (inquiry as to third parties is "analytically distinct" from *Bancec*); Restatement (Third) of Agency, Introduction, at 4 (Am. Law Inst. 2006) (distinguishing among different types of principal-agent relationships).

Dissenting below, Judge O'Scannlain argued that if actions of corporate affiliates are not imputed to foreign states unless the affiliates are extensively controlled by the states, it makes no sense for the actions of entirely distinct entities to be attributable to foreign states under less stringent conditions of the common-law. Pet. App. 53a-54a. But this dichotomy makes perfect sense. An alter-ego situation creates a principal-agent relationship "for *all* purposes." U.S. Br. 17. It also exposes the principal to substantive liability for all of the agent's actions. A "traditional agent," by contrast, exposes its principal to jurisdiction only for those "*particular*" actions that it is specifically authorized by the principal to perform. *Id.*; *see also* Br. for the United States as Amicus Curiae Supporting Petr. at 30, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965); Restatement (Third) of Agency, Introduction, at 4 (Am. Law Inst. 2006). It thus is completely natural that the test for the former would be more demanding than the latter.

II. Sachs's Suit Is "Based Upon" Commercial Activity Carried On In The United States.

Clause One of the FSIA's commercial activity exception denies sovereign immunity for any lawsuit "based upon a commercial activity" that has "substantial contact with the United States." 28 U.S.C. §§ 1603(e), 1605(a)(2); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 356 (1993) (Under Clause One, the "action must be 'based upon' some 'commercial activity' by [the foreign state] that had 'substantial contact' with the United States."). OBB does not challenge the Ninth Circuit's holdings that its railway enterprise is a commercial activity having

substantial contact with the United States, Pet. App. 31a-32a. *See* Pet. i. But OBB contends that Sachs's lawsuit is not "based upon" that activity, *see* Petr. Br. i, because the acts constituting "the gravamen of the complaint" occurred outside the United States, *id.* at 29.

OBB is mistaken. Sachs's action easily satisfies the "based upon" requirement in Clause One because it is based *entirely* upon a commercial "activity" that has substantial contact with the United States – namely, OBB's railway enterprise. But even if OBB were correct that Sachs must show that her action is "based upon" a particular "act" occurring in this country, she would meet that requirement because the phrase "based upon" would be best understood to require that the act supply one element of the action.

A. Sachs's Injuries Arise Entirely From A Commercial "Activity" – Operating A Railway Business – That Has Substantial Contact With The United States.

1. *Text.* Regardless of the precise meaning of "based upon," the term "activity" in Clause One directs courts to focus on OBB's overall commercial railway enterprise, not just on any specific commercial "act." Clause One therefore applies here because OBB's railway enterprise is the basis for *all* of the allegations comprising Sachs's action.

a. In contrast to Clauses Two and Three, which require a plaintiff's action to be "based upon . . . *an act*" having a requisite connection to the United States, Clause One requires a plaintiff's action to be "based upon *a commercial activity*" having such a connection. 28 U.S.C. § 1605(a)(2) (emphasis added).

And the FSIA makes clear that the word "activity" is more inclusive than "act." The statute defines "commercial activity" as not just "a particular transaction or act" but also "a regular course of commercial conduct." *Id.* § 1603(d). This reference to a "course of conduct" requires courts to consider not just any discrete act, but the totality of the commercial conduct involved. Thus, a lawsuit satisfies Clause One's "based upon" requirement if it is founded on a regular course of commercial conduct having substantial contact with the United States.

The ordinary meaning of both "activity" and "commercial activity" reinforce this understanding. "Activity" means the "*collective acts* of one person or of two or more people engaged in a common enterprise." *Black's Law Dictionary* 41 (10th ed. 2014) (emphasis added); *see also The Oxford English Dictionary* (3d ed. 2010) (defining "activity" as "an occupation, a pursuit"). For instance, playing baseball is an activity. Throwing a pitch, taking a swing, and running to first base are discrete "acts" that comprise that "activity." In turn, *Black's Law Dictionary* defines "commercial activity" as an "activity, such as operating a business, conducted to make a profit." *Id.* at 41. Operating a bakery, then, is a commercial activity comprised of acts like taking an order for a cake and baking that cake.

Clause One's reference to activity "carried on" by the foreign state confirms that the term "activity" encompasses a broader range of conduct than a single "act." "Carry on" means "practi[c]e continually or habitually," "conduct," or "manage." *The Oxford English Dictionary* (3d ed. 2010) (defining "to carry on"); *see also id.* (defining to "carry" as "[t]o conduct

(a business). . . . Now usually *to carry on*."). "Carried on" thus denotes a course of conduct, not a specific deed. An "activity," in short, is "carried on," 28 U.S.C. § 1605(a)(2) cl. 1, while an "act" is "performed," *id.* cl. 2.

No other understanding of the word "activity" would synthesize Clause One with its neighboring two clauses. This Court has repeatedly recognized that a "textual difference between simultaneously enacted provisions that address the same subject makes no sense unless Congress meant different things by its different usage." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 357 (2005); *accord Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003). Had Congress wanted to require that suits under Clause One also be based upon a particular "act" occurring in the United States, it would not have used that word only in Clauses Two and Three.

Indeed, this Court has already treated the terms "act" and "activity" as meaning different things under the FSIA and other jurisdictional statutes. In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the Court held that a decree rescheduling maturity dates on government bonds was an "act" under Clause Three with a direct effect in the United States. *Id.* at 618-19. But when addressing the Clause's additional requirement that the relevant act be connected to "commercial activity," the Court looked more broadly to the government bond program as a whole. *Id.* at 612. This Court likewise has repeatedly held that the word "activity" for purposes of determining maritime jurisdiction "is defined not

by the particular circumstances of the incident, but by the general conduct from which the incident arose." *Sisson v. Ruby*, 497 U.S. 358, 365 (1990) (citing cases). "In *Executive Jet* [*Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972)], for example, the relevant activity was not a plane sinking in Lake Erie, but air travel generally." *Sisson*, 497 U.S. at 365.

Applying the phrase "commercial activity" to this case is straightforward. The phrase refers to OBB's commercial railway business that gave rise to Sachs's suit. In fact, the legislative history of the FSIA contemplates lawsuits just like this one, explaining that "commercial activity" "includ[es] a broad spectrum of endeavor," including, for instance, "the carrying on of a commercial enterprise such as . . . an airline." H.R. Rep. No. 94-1487, at 16 (1976). Like running an airline, running a railway is a commercial activity. And selling a train ticket and operating a train are part and parcel of that commercial activity.

b. OBB and the Government ignore the word "activity," jumping instead straight to the question of what "based upon" means. *See* Petr. Br. 28; U.S. Br. 19. But once one properly focuses on the overall commercial activity involved, the precise meaning of "based upon" is irrelevant here. Sachs's suit satisfies Clause One regardless of whether "based upon" refers to the "gravamen" of the suit or at least one element of it, because *all* of the elements of her suit arise from OBB's railway business.

This case is thus the inverse of *Nelson*. In that case, *none* of the elements of the plaintiffs' action were based upon commercial activity. *See* 507 U.S. at 358 n.4. The plaintiffs alleged that Saudi police

wrongfully imprisoned and tortured an American employee of a Saudi government-run hospital. *Id.* at 352-53. Even though "arguably commercial activities" – namely, running a hospital – "led to the conduct that eventually injured" the employee, the complaint rested only on the exercise of police power, an activity "peculiarly sovereign in nature." *Id.* at 358. The action was therefore based "entirely upon" sovereign, not commercial, activity. *Id.* at 358 n.4.

There are, of course, closer cases in which some elements of a claim arise from commercial activity but others arise from sovereign conduct – and that is where the precise definition of "based upon" has bite. The Fifth Circuit developed its gravamen test to deal with that situation – that is, to determine whether the challenged conduct "was commercial rather than sovereign." *Walter Fuller Aircraft Servs. v. Republic of the Philippines*, 965 F.2d 1375, 1386 (5th Cir. 1992) (applying *Callejo v. Bancomer*, 764 F.2d 1101, 1109 (5th Cir. 1985)).

But even if the gravamen test were the correct way to assess that question, it would not matter here. Sachs's suit has nothing to do with any sovereign activity. It is based *entirely* upon a commercial activity: OBB's railway business.

c. The Solicitor General notes (and OBB seems to assume) that Clause One also "calls for a tie to the United States" and maintains that the phrase "based upon" must keep that tie from being too "attenuate[d]." U.S. Br. 24; *see also id.* (the phrase "based upon" "ensures a meaningful linkage between the United States and an action"); Pet. App. 66a (Kozinski, C.J., dissenting) (assuming that the "based upon" requirement demands a "sufficient nexus"

between this country and the plaintiff's action). The Solicitor General is correct that Clause One calls for a geographic foothold in the United States. But as this Court indicated in *Nelson*, the "substantial contact" requirement 28 U.S.C. § 1603(e) – rather than the phrase "based upon" – does that work. *See Nelson*, 507 U.S. at 356 (treating "based upon" requirement as distinct from question whether the activity at issue had "substantial contact with the United States"); *Callejo*, 765 F.2d at 1108-12 (analyzing two issues separately); *Globe Nuclear Servs. & Supply Ltd. (GNSS) v. AO Techsnabexport*, 376 F.3d 282, 286-88, 291-92 (4th Cir. 2004) (Luttig, J.) (same).

Under the "substantial contact" requirement, the commercial activity must occur "in whole or in part in the United States." H.R. Rep. No. 94-1487, at 12 (1976). That is, while particular conduct giving rise to the lawsuit may "occur[] outside of the United States," a meaningful aspect of the commercial activity as a whole must take place inside this country. 15-104 *Moore's Federal Practice - Civil* § 104.12 (LexisNexis 2015). Accordingly, there is no need to shoehorn a geographic nexus requirement into the phrase "based upon." Not only would this import content into the phrase that finds no grounding in its words, but the statute's "substantial contact" requirement would become superfluous. This consequence would be inconsistent with this Court's longstanding obligation to "give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Here, the court of appeals held that OBB's railway business has "'substantial contact' with the

United States." *See* Pet. App. 31a-32a (quoting 28 U.S.C. § 1603(e)). The court of appeals explained that OBB (though its agents) reaches out to U.S. customers and attracts thousands of them each year to ride its trains in Austria by marketing and selling Eurail passes, *id.* – a product not available to Austrian residents.

OBB has not challenged that holding; indeed, OBB's petition for a writ of certiorari never once mentions the phrase "substantial contact." So this Court must assume that the requirement is met here.

2. *Structure*. The structure of Section 1605(a)(2) confirms that Clause One does not require a lawsuit to be based upon a particular wrongful act in the United States, so long as it is based upon business activity that is regularly conducted in part in this country. Only Clause Two's text requires an "act" on U.S. soil. *Id.*

This contrast between Clauses One and Two makes sense. Unlike Clause Two, where the commercial activity involved can occur entirely outside the United States, Clause One requires that the commercial activity have substantial contact with the United States. Therefore, Clause One already requires a tighter connection than the other clauses between commercial activity and the United States – and a tighter connection between the lawsuit and the commercial activity. *Nelson*, 507 U.S. at 357-58; U.S. Br. 22-23. The lawsuit need not also involve a particular act in the United States.

Recognizing the difference between Clauses One and Two also gives each an independent meaning. Clause Two applies when a particular act – even if noncommercial – occurs in the United States but is

connected to a commercial course of conduct abroad (for instance, roughing up a business executive in the United States in connection with a contentious contract negotiation abroad). Clause One, on the other hand, applies when a state conducts commercial activity having substantial contact with the United States and causes an injury *in the course of that activity*.

Importing Clause Two's discrete-U.S.-act requirement into Clause One, as OBB and the Government would have it, would also lead to absurd results. For instance, consider a slight variation on the facts of *Weltover*. In that case, a decree rescheduling debts occurred in Argentina ("an act outside the territory of the United States") in connection with a bond program abroad ("a commercial activity of the foreign state elsewhere"). 504 U.S. at 609-12; 28 U.S.C. § 1605(a)(2). That act denied funds to New York bank accounts ("a direct effect in the United States"). *Weltover*, 504 U.S. at 618-19; 28 U.S.C. § 1605(a)(2). Clause Three therefore conferred jurisdiction. *Weltover*, 504 U.S. at 620. Keeping all else the same, but moving the bond program (the commercial activity) to the United States, however, would trigger Clause One, not Clause Three, because the latter applies only where the commercial activity takes place outside the United States.

But OBB's reading would preclude jurisdiction under Clause One because the defendant's particular wrongful act occurred abroad. Thus, under OBB's reading, a *closer* nexus to the United States would destroy jurisdiction.

3. *Purpose*. Looking under Clause One to the overall course of commercial conduct giving rise to a lawsuit accords with the purpose of the FSIA. The statute's commercial activity exception is designed to treat foreign states like private actors for jurisdictional purposes when states "participat[e] in the marketplace in the manner of a private citizen or corporation." *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992); *accord Nelson*, 507 U.S. at 360. In fact, the FSIA's jurisdictional prerequisites are "patterned after" the District of Columbia long-arm statute. *See* H.R. Rep. No. 94-1487, at 13 (1976).

Providing jurisdiction over actions arising from for-profit enterprises that have substantial contact with the United States parallels the circumstances under which courts in Washington, D.C., may exercise personal jurisdiction over private businesses. The D.C. long-arm statute (now, as when the FSIA was enacted) confers jurisdiction over "a person, who acts directly or by an agent, as to a claim for relief arising from the person's *transacting any business*" in the forum. D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 132(a), title I, 84 Stat. 549 (current version at D.C. Code § 13-423 (2015)) (emphasis added). And the Due Process Clause permits the exercise of specific personal jurisdiction when a suit is "arising out of or related to the [defendant's] *activities* within the" forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 409 (1984) (emphasis added); *accord id.* at 414 & n.8. Either "activity [that] is 'continuous or systematic'" *or* "certain 'single or occasional acts'" can establish sufficient contacts with the forum. *Goodyear Dunlop Tires Operations, S.A.*

v. Brown, 131 S. Ct. 2846, 2853 (2011) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).[11]

4. *Consequences*. Understanding Clause One to require only that a plaintiff's action be based upon commercial activity that has substantial contact with the United States – not upon a particular act that occurred in the United States – also achieves sensible outcomes.

a. As the Government has observed, "United States residents benefit from the availability of convenient domestic fora to obtain redress for injuries caused by foreign entities." U.S. Br. 28;

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[11] Even if, as the court of appeals suggested, Clause One's "substantial contact" provision somehow requires a closer nexus between activity and the forum than the "minimum contacts" test does, Pet. App. 31, it bears repeating that OBB has not challenged the court of appeals' "substantial contact" holding. And while OBB raised a due process objection to jurisdiction in the district court, the district court never ruled on that objection, *see* Pet. App. 101a-11a, and OBB does not press any such argument here.

At any rate, OBB's steady stream of sales to Americans, through U.S. agents, of a product customized for the overseas market, constitutes the sort of purposeful availment of the U.S. market that establishes jurisdiction in a U.S. court. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (plurality opinion) (explaining that personal jurisdiction is appropriate where actions are "purposefully directed" at a forum); *id.* at 2792 (Breyer, J., concurring in the judgment) (explaining that a "regular course of sales" in a forum establishes minimum contacts (citation and internal quotation marks omitted)); *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty.*, 480 U.S. 102, 112 (1987) (plurality opinion) (explaining that "designing the product for the market in the forum State, advertising in the forum State, . . . or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" all confirm purposeful availment).

Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (No. 10-76). This is particularly true where, as here, the plaintiff has suffered a physical injury making it extremely difficult – if not impossible – to travel abroad.

Moreover, it is reasonable for United States citizens to assume that when a foreign entity reaches into this country and offers a service – especially, as here, a service not available to that entity's local customers – that they will be able to vindicate their rights in U.S. courts. This assumption comports with the State Department's position when Congress was considering enacting the FSIA. As the State Department's representative explained, when foreign states conduct "ordinary commercial activity" in this country, the restrictive theory of sovereign immunity prevents American citizens from being "deprived of normal legal redress against foreign states." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong., 2d Sess. 24 (1976) (statement of Monroe Leigh, Legal Adviser, State Department).

OBB's reading of Clause One, on the other hand, would create untenable results. Not only could a closer nexus to the United States destroy jurisdiction – as illustrated in the *Weltover* variation discussed above, *see supra* at 31 – but contracts negotiated in the United States would often be unenforceable here. Consider a variation on the facts of *Nelson.* A foreign state-owned corporation regularly negotiates and signs employment contracts entirely in the United States, agreeing to hire American citizens to work as

engineers overseeing oil and gas production. But after one recruit arrives on foreign soil, the employer requires him to perform manual labor on oil rigs.[12]

In such a scenario, OBB's reading of Clause One would presumably render the Clause inoperable because the particular wrongful act giving rise to the action – changing the employee's job duties – occurred abroad. Clause Two would not apply for the same reason, and Clause Three would not apply because there would be no direct effect in the United States.

But a proper reading of Clause One would grant jurisdiction because the action is based upon the operation of an oil and gas business that recruits American employees, a commercial activity having substantial contact with the United States. And this is the correct result. Indeed, *Nelson* itself suggested that had the Nelsons "alleged breach of contract," a U.S. court may have had jurisdiction to hear those claims. 507 U.S. at 354, 358; *see also id.* at 370 (White, J., concurring in the judgment) (noting that the "signing of the employment contract in Miami . . . may very well qualify as commercial activity in the United States").

b. Maintaining Clause One's focus on the commercial "activity" involved also leaves foreign states with ample means of protecting their own interests in litigating at home. Where it would be unfair to hale a foreign state into U.S. courts, states can invoke the doctrine of *forum non conveniens*.

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[12] Litigation against foreign states often arises in the context of contracts concerning development and extraction of natural resources. *See, e.g.*, *SerVaas Inc. v. Republic of Iraq*, 2011 WL 454501 (2d Cir. 2011).

That doctrine permits a court to "resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a . . . statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). *Forum non conveniens* thus enables courts to "retain flexibility" in these types of cases to prevent unfair outcomes. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981).

Furthermore, foreign sovereigns doing business in the United States can contract with their customers to avoid litigating in undesirable fora. As the Government has observed, common carriers often include forum selection clauses in form ticket contracts; indeed, Eurail passes like the one Sachs purchased now include such a clause, requiring lawsuits to be brought in the state of the defendant carrier's residence. U.S. Cert. Br. 21-23; *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (upholding such a forum selection clause). So if an entity such as OBB wishes to avoid litigating in a U.S. court, it has ample ability to do so.[13]

[13] Beyond forum-selection clauses, a number of treaties govern jurisdiction for common carriers. *E.g.*, Montreal Convention, May 28, 1999, 2242 U.N.T.S. 309 (airlines). This further underscores the rarity of situations in which state-owned common carries will be haled into U.S. courts against their will. *See* U.S. Cert. Br. 22 (arguing that it is "unlikely that suits similar to this one will arise with any frequency").

B. Even If Clause One Requires A Plaintiff's Action To Be Based Upon A Discrete "Act" On American Soil, That Act Need Be Only One Element Of Respondent's Action.

Even if this Court accepted OBB's invitation to disregard Clause One's text and to require that a plaintiff's action be based upon a discrete act occurring on U.S. soil, this case would still come out the same way. The phrase "based upon" is susceptible to multiple meanings, and this Court in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), had no need to choose among them. But every court of appeals to assume that the phrase requires a nexus between the plaintiff's lawsuit and an act occurring in this country has held that this requirement is satisfied when the act constitutes one element of the plaintiff's action. *See Kirkham v. Societe Air Fr.*, 429 F.3d 288, 292 (D.C. Cir. 2005); *Barkanic v. General Admin. of Civil Aviation of China*, 822 F.2d 11, 13 (2d Cir. 1987); *Santos v. Compagnie Nationale Air Fr.*, 934 F.2d 890, 893 (7th Cir. 1991); *BP Chems. Ltd.* v. *Jiangsu Sopo Corp.*, 285 F.3d 677, 682 (8th Cir.), *cert. denied*, 537 U.S. 942, 687 (2002); *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000); Pet. App. 33a (this case).[14] If this Court holds that the phrase "based upon" requires a geographical nexus, it should follow this consensus.

1. Addressing the phrase "based upon" in *Nelson*, this Court noted that the phrase refers to "those

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[14] As noted above, the Fifth Circuit uses its "gravamen" test to determine whether a lawsuit is based upon commercial as opposed to sovereign activity, not to perform any geographic nexus assessment. *See supra* at 28; *Callejo*, 764 F.2d at 1109.

elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357. And this Court made clear that the "based upon" requirement does not demand that "each and every element of a claim" arise from commercial activity. *Id.* at 358 n.4. But because *none* of the elements of the plaintiffs' action arose from commercial activity, the Court did not specify how many elements are necessary for an action to be "based upon" certain conduct. *See id.*

OBB nonetheless asserts that *Nelson* "held that the based-upon inquiry should focus on the gravamen of the complaint." Petr. Br. 29. As support for this assertion, OBB quotes a parenthetical summary in *Nelson* of the Fifth Circuit's decision in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985). The Government quotes the same language from the same parenthetical, followed simply by "citation omitted," and asserts that this language "indicates" this Court's endorsement of the gravamen test. U.S. Br. 20-21.

But even setting aside the fact that *Callejo* used the gravamen test to distinguish commercial from sovereign acts, not to perform any geographical nexus inquiry, this Court's reference to *Callejo* hardly embraced the "gravamen" test. *Callejo* was not the only case this Court cited as support for its instruction to look to "th[e] elements of a claim." 507 U.S. at 357. In the same string cite, this Court also cited a Seventh Circuit case, *Santos v. Compagnie Nationale Air France*, 934 F.2d 890. And that case held that "[i]f *one* of those elements consists of commercial activity within the United States or other conduct specified in the Act, this country's courts

have jurisdiction." *Id.* at 893 (emphasis added). What is more, the Seventh Circuit explained in *Santos* that Clause One is satisfied when "a foreign government . . . or its agents sell a plane ticket or otherwise make travel arrangements in the United States (creating a duty of care in providing safe passage) . . . even if the [passenger] was travelling only between foreign points at the time of the accident." *Id.* at 894 (citing *Barkanic*, 822 F.2d at 13).

To be clear: Sachs does not contend that *Nelson*'s reference to *Santos* adopted the "one element" test. But neither can OBB or the Government maintain that *Nelson*'s reference to *Callejo* adopted the gravamen test. The meaning of "based upon" remains an open question.

2. The phrase "based upon" – like the phrases "arising out of" or "stemming from" – describes the relationship between something and its constituent or precipitating factors. But the phrase does not describe that relationship with any specificity. The Solicitor General cites dictionary entries defining "base" as "the foundation or most important element." U.S. Br. 21 (quoting definition 2 of the term from one dictionary and definition 4.a from another). But "based upon" can refer to *any* necessary factor, not just the primary or most important one. *See Black's Law Dictionary* 192 (rev. 4th ed. 1968) (defining "based upon" as "an initial or starting point for calculation"); *Black's Law Dictionary* 180 (10th ed. 2014) (defining "basis" as "an underlying fact or condition"); *The Random House Dictionary of the English Language* 172 (1973) ("Base, basis, foundation refer to *anything* upon

which a structure is built and upon which it rests." (emphasis added)).

Common usage in the U.S. Code confirms that "based upon" has a range of possible meanings. Something can be "based entirely," "based primarily," or "based partly" upon something else. *See, e.g.*, 5 U.S.C. § 8467(c)(1) (referring to a claim "based in whole or in part upon the physical, sexual, or emotional abuse of a child"); 11 U.S.C. § 502(k)(1) (referring to "a claim filed under this section based in whole on an unsecured consumer debt"); 31 U.S.C. § 3730(d)(1) (referring to an "action" that "the court finds to be based primarily on" certain disclosures). Those statutory refinements of the phrase "based upon" would make no sense if the phrase necessarily meant the most important element. The phrase, when left unadorned, must encompass situations in which only one element is present.[15]

3. When the meaning of a jurisdictional statute such as the FSIA is indeterminate, this Court favors clear, bright-line rules. Therefore, to the extent that the meaning of "based upon" is ambiguous, the one-element test represents a far better method of

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[15] The Solicitor General contends that because Clauses Two and Three require lawsuits to be based upon "act[s] performed *in connection with* a commercial activity," 28 U.S.C. § 1605(a)(2) (emphasis added), the phrase "based upon" must mean "something more than a mere connection with, or relation to, commercial activity," U.S. Br. 22 (quoting *Nelson*, 507 U.S. at 357-58). Maybe so. But the "one element" test requires more than a mere connection or relationship; it requires that the commercial activity at issue supply one of the facts necessary for the success of the plaintiff's action. So the phrase "in connection with" provides no meaningful contrast here.

administering a geographic nexus requirement than does the vague gravamen test.

a. Time and again, this Court has stressed that "jurisdictional rules should be clear." *Lapides v. Bd. of Regents*, 535 U.S. 613, 621 (2002). Consequently, when choosing among possible constructions of a jurisdictional statute, this Court has long "place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010).

This approach to jurisdictional statutes benefits courts and litigants alike. "[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz*, 559 U.S. at 94. This is especially true in the context of subject-matter jurisdiction. Courts have an independent obligation to assure themselves of such jurisdiction even if the parties have not raised the issue. 5B Wright et al., Federal Practice & Procedure Civil § 1350 (3d ed. 2013); *see also* Pet. App. 21a n.7 (noting OBB's failure here to make certain arguments). That being so, a "vague boundary" should be avoided "in the area of subject-matter jurisdiction wherever possible." *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in the judgment).

For litigants too, "[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." *Grupo Dataflux v. Atlas Global Grp. L.P.*, 541 U.S. 567, 582 (2004). This is especially true with respect commercial actors. When "making business and investment decisions," such entities crave

"predictability" and certainty. *Hertz*, 559 U.S. at 94; *see also First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 621 (1983) (explaining "the need for certainty and predictability of result" for foreign states conducting commercial activity). Nebulous standards or multifactor tests cannot deliver such stability.

A few examples illustrate this Court's strong preference for clear rules to implement jurisdictional statutes. In *Hertz*, the Court had to decide, for purposes of the diversity jurisdiction statute, 28 U.S.C. § 1332, whether a business should be deemed to reside in its "nerve center" or where it conducts most of its business activities. 559 U.S. at 93. The former proposal typically requires knowledge only of the corporation's headquarters, while the latter turns on "general multifactor tests." *Id.* at 91. Even though the Court recognized that "seeming anomalies would arise" under the bright-line "nerve center" test, this Court – in a unanimous opinion by Justice Breyer – concluded that it "must accept them . . . in view of the necessity of having a clearer rule." *Id.* at 96. "[O]ccasionally counterintuitive results is the price the legal system must pay to avoid overly complex jurisdictional administration while producing the benefits that accompany a more uniform legal system." *Id.*

Similarly, in *Grupo Dataflux*, this Court stuck to a bright-line rule for determining the citizenship of parties under the diversity-jurisdiction statute. Even though permitting "constant litigation" over diversity would have allowed courts to implement the statute with more precision, this Court held that the time of filing should always control whether diversity exists.

541 U.S. at 580-82. This straightforward rule "minimiz[es] litigation over jurisdiction." *Id.* at 581. Indeed, a time-of-filing rule also prevails in the context of the FSIA when determining corporate ownership. *See Dole Food*, 538 U.S. at 478.

Finally, in *Sisson*, this Court "eschew[ed] [a] fact-specific jurisdictional inquiry" for determining whether maritime jurisdiction exists under 28 U.S.C. § 1331(1). 497 U.S. at 364. Unanimously rejecting the defendant's argument that the question whether the incident has "a potentially disruptive impact on maritime commerce" should "turn on the particular facts of the incident" at issue, this Court held that the statute is satisfied whenever "the general features of the type of incident involved" demonstrate disruptive potential. *Id.* at 362-63. This Court indicated that "simpler jurisdictional formulae" should be rejected only when they "entirely divorce[] the jurisdictional inquiry from the purposes that support the exercise of jurisdiction." *Id.* at 364 n.2.

b. It is common ground between Sachs and the Solicitor General that, if the phrase "based upon" contains a geographical nexus requirement, "a single element of or fact necessary to a claim" can satisfy that requirement. U.S. Br. at 22. (OBB has not yet offered its view.) The question is thus whether this Court should adopt a "gravamen" test to try to further calibrate this requirement according to the specific facts of each individual case. Just as this Court has rejected similar arguments with respect to other jurisdictional statutes, it should reject OBB's and the Solicitor General's argument here.

i. OBB never explains exactly what it means by "gravamen." At one point in its brief, OBB equates

the term with "the alleged tortious conduct that injured the plaintiff." Petr. Br. 29. But this formulation fails to pinpoint any particular conduct within a tort action. And it fails to provide any guidance with respect to myriad other types of lawsuits. The Solicitor General, for his part, defines "gravamen" as the "gist or essence of a claim," U.S. Br. 21, thereby replacing one hazy term with two more.

Neither OBB nor the Solicitor General, therefore, offers any predictable formula for determining when an action is "based upon" commercial conduct that occurred on U.S. soil. Instead of looking merely at the elements of a plaintiff's claims, the gravamen test would require courts to concoct an approach for determining the "gist or essence" of the lawsuit, with no clear guideposts at hand.

Suppose, for example, that there is an accident on a direct flight from JFK to Vienna International Airport on an Austrian state-run airline. The plane crashes on the runway in Vienna, and a plaintiff alleges that the Austrian crew failed to inspect the landing gear before takeoff in New York. Is the gravamen of the action the crash in Vienna or the failure to inspect in New York? *Cf. Executive Jet*, 409 U.S. at 266-67 (noting the "serious difficulties" of determining whether the tort involved in a plane crash occurred where plane first incurred damage or where it crashed). Would the answer be different if the plaintiff also alleged negligence in landing the plane in Vienna? What about a negligent flight plan

designed jointly by the control tower in Austria and the pilots in New York? It is impossible to say.[16]

Worse yet, the gravamen test would require courts to decide the difficult question of whether an element is the "'most important' part" of a lawsuit prior to any litigation on the merits. U.S. Br. 22 (citation omitted). Jurisdictional tests should not require courts "to decide to some extent the merits of the [the plaintiff's lawsuit] to answer the legally and analytically antecedent jurisdictional question." *Sisson*, 497 U.S. at 365. But the gravamen test would involve precisely this sort inquiry. As Judge Tatel recognized for a unanimous panel of the D.C. Circuit, it would be a "problem" to require courts to look beyond the alleged elements of a plaintiff's claim in FSIA cases because that would "tie[] sovereign immunity to the merits of the plaintiff's claim." *See Kirkham*, 429 F.3d at 293.

One need look no further than the facts of this case to see why. To apply a gravamen test here, a court would potentially have to figure out both whether OBB breached its duty of utmost care (owed to Sachs as a ticketed passenger) and whether it breached a duty of ordinary care (owed to any bystander on the platform). *See infra* at 48. If OBB breached the former but not the latter, its sale of a ticket to Sachs would become dispositive and therefore seemingly the "most important" element of her action. But if OBB breached even an ordinary duty of care, then perhaps its mere operation in

[16] The same uncertainty would arise in the employment contract scenario discussed above at 35. How would one locate the gravamen of a complaint where the contract is formed in the United States but breached abroad?

Austria of its trains would be the most important thing here. This sort of uncertainty – and resulting cart-before-the-horse litigation – should not be tolerated in a subject-matter jurisdiction test.

ii. The one-element test offers a straightforward rule and avoids any need to evaluate the relative importance of every element of the action. Under this test, courts need only identify whether the relevant conduct on U.S. soil constitutes an element of the action. Indeed, circuit courts have successfully applied the one-element test for decades in cases factually similar to this one. *See Kirkham*, 429 F.3d at 292 (airline business); *Sun*, 201 F.3d at 1109 (travel abroad); *Barkanic*, 822 F.2d at 13 (2d Cir. 1987) (airline). And other courts of appeals have successfully applied this test in other settings. *Santos*, 934 F.2d at 893; *BP Chems.*, 285 F.3d at 682.

OBB does not even dispute the superior administrability of the one-element test. Instead, it contends that the gravamen test is necessary to prevent plaintiffs from securing jurisdiction by "artful pleading." Petr. Br. 35 (citing *Nelson*, 507 U.S. at 363). But *Nelson*'s prohibition against "artful pleading" is specific to claims of "intentionally tortious conduct." 507 U.S. at 363. In particular, this Court held that plaintiffs in cases involving the FSIA cannot dress up an intentional tort claim as a defendant's failure "to announce its own tortious propensity before indulging it." 507 U.S. at 363; *see also id.* at 373 (Kennedy, J., concurring in part and dissenting in part) (noting that the majority's "summary treatment" of the failure-to-warn claim "may stem from doubts about the underlying validity" of that cause of action). Permitting such

manipulation would allow plaintiffs to "recast virtually any claim of intentional tort *committed by sovereign act* as a claim of failure to warn," thereby "effectively thwart[ing] the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity." *Id.* at 363 (emphasis added).

No such problem exists here. There is nothing manipulative about the garden-variety tort causes of action that Sachs alleges. Nor is there any sovereign activity that Sachs is challenging – either explicitly or implicitly. So there is no worry that allowing her to frame her lawsuit as she deems appropriate will thwart the purpose of the FSIA.

4. In its petition for a writ of certiorari, OBB did not contest the Ninth Circuit's determination that Sachs's action satisfies the one-element test. OBB nevertheless raises new arguments in its merits brief that challenge that holding. *See* Petr. Br. 34-35. This Court should deem these arguments to be waived, *see, e.g.*, *Taylor v. Freeland & Krontz*, 503 U.S. 638, 646 (1992), particularly because most turn on state instead of federal law and would be unlikely to provide guidance to litigants in any future cases.

At any rate, OBB's arguments are unavailing. OBB first argues that, as a matter of California law, Sachs's negligence claim does not depend on her purchase of the Eurail pass. Petr. Br. 34; *see also* U.S. Br. 30 (arguing same).[17] This Court, however, extends a "presumption of deference [to] the views of a federal court as to the law of a State within its

[17] As the United States notes (Br. 28 n.11), jurisdiction under the FSIA does not necessarily mean that U.S. law applies. But OBB does not challenge the court of appeals' holding that California law applies here.

jurisdiction," typically declining to second-guess whether such state-law assessments are correct. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998). There is no reason to deviate from that general rule here because nothing about California law informs the question how to interpret the FSIA.

Even if this Court did wish to wade into California law, the Ninth Circuit correctly determined that Sachs's ticket purchase is a necessary element of her action. A common carrier owes an individual without a ticket a duty only of "ordinary care and diligence." Cal. Civ. Code § 2096; *accord* Petr. Br. 34. But a common carrier owes ticket purchasers like Sachs a heightened duty of "utmost care and diligence." Cal. Civ. Code § 2100. Sachs alleges that this duty of utmost care was breached. J.A. 15. Consequently, her purchase of the railway pass was a necessary element for her claim of negligence in operating the train.[18]

OBB next argues that Sachs's implied warranty claims fail the one-element test. Petr. Br. 34-35. But this argument depends on yet another legal assumption that it has never briefed or argued – namely, that the commercial activity exception

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[18] Contrary to the Government's suggestion (Br. 30), *Grier v. Ferrant*, 144 P.2d 631 (Cal. Dist. Ct. App. 1944), does not undermine this conclusion. Faced with a dispute involving taxis, *Grier* recognized an exception to the general rule that a holding a ticket or a pass is necessary to establish to a common-carrier duty of care. *Id.* at 310-11. The court reasoned that taxis are different from other common carriers because "taxicab fares cannot be computed and therefore are not collected until the termination of the trip or journey." *Id.* at 311. So for taxicabs, a common-carrier duty can arise before any fare is charged or collected. *Id.*

requires a plaintiff to satisfy the exception's requirements with respect to each and every claim in the complaint. This assumption is seriously debatable.

As the United States acknowledges, U.S. Br. 22, Clause One requires that the plaintiff's "action" – not each "claim" – be based upon a commercial activity carried on in the United States. 28 U.S.C. § 1605(a)(2). The Clause also determines whether the plaintiff's "case" may proceed in federal court. *Id.* § 1605(a). The words "action" and "case" are "synonymous" with "suit" – that is, the plaintiff's overall complaint. *Black's Law Dictionary* 35 (10th ed. 2014) (citation and internal quotation marks omitted). Furthermore, construing Section 1605(a)(2) to refer to the entire lawsuit, not individual claims, would be consistent with the purpose of the FSIA. The Act is designed to shield foreign states from being haled into U.S. court. Once they are already properly there, little would be gained by using the Act as a scalpel for excising individual claims – at least where, as here, those claims do not implicate any sovereign act.

The Solicitor General asserts that "a claim-by-claim analysis is warranted." U.S. Br. 22. But this assertion is not coupled with any argumentation, and none of the authority the Solicitor General cites after his bare assertion actually supports the assertion.[19]

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[19] The Solicitor General cites *Nelson*, *Keene Corp. v. United States*, 508 U.S. 200 (1993), and 28 U.S.C. § 1330. But none deals with whether the word "action," let alone the word "action" in Section 1605(a)(2), requires a "claim-by-claim" analysis. *See Nelson*, 507 U.S. at 362-63 (stating that "the Nelsons' *action* is based upon a sovereign activity immune from subject-matter jurisdiction") (emphasis added); *Keene Corp.*, 508 at 210

Under these circumstances, this Court ought not to venture an answer on a legal issue that petitioner has never raised at any stage of this litigation.

In any event, the Ninth Circuit correctly held that the ticket purchase is also an element of Sachs's implied warranty claims. OBB contends that implied warranty claims can be pressed only with respect to "the sale of goods, not to the sale of a ticket for services." Petr. Br. 35; *accord* U.S. Br. 32. But a "bailor" under California law who charges money for use of a chattel "impliedly warrants . . . that he has exercised reasonable care to ascertain that the chattel is safe and suitable for the purpose for which it is hired." *McNeal v. Greenberg*, 40 Cal. 2d 740, 742 (1953). That is Sachs' theory here – namely, that OBB acted as a bailor when it sold her a Eurail pass and breached its implied warranty of fitness when it supplied her with an unsafe train. J.A. 17-18.[20] It remains to be litigated on remand "[w]hether Sachs has properly pleaded these claims" – that is, whether these claims are substantively sound under state law. Pet. App. 38a n.16. But that is "irrelevant to the jurisdictional inquiry" here. *Kirkham*, 429 F.3d at 293. All that matters is that Sachs' bases her theory

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(defining "claim" where two "comparable claims" were pending in two different courts); 28 U.S.C. § 1330 (conferring personal jurisdiction over foreign entities "as to any claim for relief" where immunity does not apply).

[20] The Ninth Circuit may not exactly have understood Sachs' theory because it cited Cal. Civil Code § 2341, which deals with "goods," Pet. App. 39a, instead of Cal. Civil Code § 1955, which concerns bailments. *See Holmes Packaging Machinery Corp. v. Bingham*, 252 Cal. App. 2d 862, 869 (1985). But OBB never challenged the legitimacy of Sachs' implied warranty claims below.

of recovery on commercial activity occurring in the United States, *id.*, which she does.

The Solicitor General (but not OBB) also argues that Sachs' strict liability claims "bear no relationship to the pass or its purchase" because even a "bystander" can bring such claims under California law. U.S. Br. 30-31. But for any plaintiff to succeed in California, the defendant must have placed the item at issue "on the market." *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 253 (1970). And under Sachs' bailment theory, OBB put temporary use of its trains on the market by selling Eurail passes in the United States – an act that not only enticed Sachs to engage in a commercial transaction with OBB but also to come to Austria. Having reached into this country in this manner, OBB should not now be able to cloak itself in a shield of immunity.

CONCLUSION

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

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