No. 13-1067

In The Supreme Court of the United States

OBB PERSONENVERKEHR AG,

Petitioner,

v.

CAROL P. SACHS,

Respondent.

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

SUPPLEMENTAL BRIEF OF PETITIONER IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JUAN C. BASOMBRIO
Counsel of Record
DORSEY & WHITNEY LLP
600 Anton Boulevard
Suite 2000
Costa Mesa, California 92626
Telephone: (714) 800-1400
E-Mail: basombrio.juan@dorsey.com

STEVEN J. WELLS
TIMOTHY J. DROSKE
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600
E-Mail: wells.steve@dorsey.com
E-Mail: droske.tim@dorsey.com

Counsel for Petitioner
OBB Personenverkehr AG

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

RESPONSE TO BRIEF OF UNITED STATES

INTRODUCTION

The United States agrees with OBB Personenverkehr AG ("OBB") that the *en banc* Ninth Circuit erred in its application of the commercial activity exception in the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 *et seq.* ("FSIA"), whereby a foreign state is not immune from suit when "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). The United States noted the Ninth Circuit's "overly permissive formulation of the 'based upon' standard" established by this Court in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), which conflicts with the Second Circuit. *See* U.S. Br. 6-7, 15, 18-19.

Moreover, the United States would accept, for purposes of "attribution," a new definition of "agency" based on "traditional agency law principles" that ignores the FSIA's statutory definition and the principles announced in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). Yet, even the United States admits that it is "unclear" whether the Ninth Circuit was correct in holding the domestic travel agent, Rail Pass Experts ("RPE"), to be OBB's agent, because there was no evidence or even allegation that OBB controlled RPE, a hallmark of agency. *See* U.S. Br. 8, 9, 13. The Ninth Circuit created a "based upon" standard unmoored from this Court's reasoning in *Nelson* that radically expands the commercial activity

exception. OBB and the United States, while advocating different formulations for what is activity "by the foreign state," agree that a standard of agency devoid of the element of "control," like that of the Ninth Circuit's, is wrong.

Nonetheless, the United States argues that "this case is not an appropriate vehicle" for certiorari. U.S. Br. 6, 20-23. But its proffered reasons (directed at the "based upon" inquiry) lack merit. The United States' argument that this is a "case-specific . . . inquiry" with a "lack of development below" ignores that, for purposes of this analysis, the critical facts are undisputed: the ticket was sold domestically and the injury occurred in Austria. Review is required because the Ninth Circuit has vastly expanded the commercial activity exception to apply in all instances where tickets for foreign travel are sold by a domestic travel agent even if it had no connection to the foreign state-owned carrier. *See* App. 41.

This case has substantial commercial and foreign policy implications. The United States ignores the concerns of the Netherlands that this decision creates a "substantial risk of jurisdictional and diplomatic conflict." Government of the Kingdom of the Netherlands Amicus Br. ("Netherlands Br.") 1-2. With tens of thousands of Americans purchasing Eurail Passes each year, this holding will "fundamentally alter the way Eurail passes are marketed and sold, to the detriment of American travelers." International Rail Transport Committee Amicus Br. ("CIT Br.") 2, 14. The Ninth Circuit has done what this Court chastised

it for in *Daimler AG*: fashioning an "agency" definition that "stacks the deck" against foreign entities and "always yield a pro-jurisdiction answer" despite "the risks of international comity" and "considerations of international rapport." *Daimler AG v. Bauman*, 571 U.S. ___, 134 S. Ct. 746, 759, 763 (2014).

ARGUMENT

I. THE UNITED STATES HAS RECOGNIZED THAT THE NINTH CIRCUIT'S "BASED UPON" STANDARD CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT PRECEDENT. THIS COMPELS THIS COURT'S REVIEW.

A. The Ninth Circuit's "Based Upon" Standard Conflicts with Precedents from this Court and the Second Circuit.

The United States concurs with former-Chief Judge Kozinski and OBB that the Ninth Circuit's holding, governing whether claims against a foreign state are "based upon" the state's commercial activity in the United States, "conflict[s] with Supreme Court precedent" in *Nelson*. App. 62; U.S. Br. 14-19. The Ninth Circuit "applied an overly permissive formulation of the 'based upon' requirement." U.S. Br. 14. But it erred not merely by misapplying *Nelson* to the facts (although the United States found that too, was "unduly permissive," U.S. Br. 16). The Ninth Circuit held that the "based upon" requirement under *Nelson* is satisfied 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 an element of the claim." U.S. Br. 15 (quoting Pet. App. 33, 35). The effect is to greatly expand when foreign states will be subject to suit under the subject exception. The Ninth Circuit's test also conflicts with the Second Circuit's "significant nexus" standard counseling review. *See* Pet. 34; *cf.* U.S. Br. 18-19. But more importantly, the Ninth Circuit's test is "problematic," U.S. Br. 15, and conflicts with *Nelson*, which did not employ such a formulaic test, but held that "the commercial activity must be the 'gravamen' – the essence or gist – of the plaintiff's claim, not simply a link in the chain of events that led to an overseas injury." U.S. Br. 15 (citing *Nelson*, 507 U.S. at 357). The Ninth Circuit's test encourages plaintiffs to do what *Nelson* condemned – engage in "semantic ploy[s]" and artful pleading to circumvent immunity. *Nelson*, 507 U.S. at 363. "To give jurisdictional significance to this feint of language would effectively thwart the [FSIA's] manifest purpose to codify the restrictive theory of foreign sovereign immunity." *Id.*

The Ninth Circuit's conflict with *Nelson* compels review, *see* Sup. Ct. R. 10, a ground left unaddressed by the United States, which only posited that "this case does not present an appropriate vehicle to resolve any conflict among the courts of appeals," *see* U.S. Br. 20. The Ninth Circuit's erroneous ruling will improperly drag foreign states into court, and adversely impact "international comity" and "international rapport." *See Daimler AG*, 134 S. Ct. at 759, 763.

B. This Case is an Appropriate Vehicle Compelling Review.

The United States' "inappropriate vehicle" arguments fall flat. The United States argues that the inquiry "requires an understanding of both the elements of the claims and of how the commercial activity relates to those elements." U.S. Br. 20. Such state-law details, however, have no bearing on the test announced in *Nelson*, which the United States recognizes as dispositive. In *Nelson*, this Court's analysis did not turn on elements of the causes of action:

> [T]he Nelsons have alleged that petitioners recruited Scott Nelson for work at the hospital, signed an employment contract with him, and subsequently employed him. While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit. . . . The Nelsons have not, after all, alleged breach of contract, but personal injuries caused by petitioner's intentional wrongs and by petitioner's negligent failure to warn Scott Nelson that they might commit those wrongs. Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit.

507 U.S. at 358.

It is undisputed that RPE sold the ticket domestically and the alleged tortious conduct occurred in Austria. Under *Nelson*, those torts, and not the preceding commercial activity in the United States,

form the basis for the claims. The record was fully developed factually for purposes of ruling on OBB's Fed. R. Civ. P. 12(b)(1) motion.

The United States' view is contrary to the position that it took in its amicus brief in *Nelson*, supporting certiorari. The United States argued in *Nelson* that the facts (not elements of the causes of action) established that the claims were based upon torts that occurred in Saudi Arabia, and advised that "[t]he court of appeals' contrary conclusion has the effect of subjecting a foreign state to the jurisdiction of a United States court concerning a matter that the FSIA places outside the authority of those courts." *See* Brief for the United States as Amicus Curiae, *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (No. 91-522) 1992 WL 12012040 at *18-19.

The United States' other arguments are meritless. That the case may be dismissed on grounds not considered by the District Court, U.S. Br. 21, is no cure because the FSIA conveys immunity from the burdens of litigation. *Rubin v. Islamic Rep. of Iran,* 637 F.3d 783, 794 (7th Cir. 2011). The United States also agrees that dicta in the Ninth Circuit's opinion weakens the likelihood of prevailing on forum non conveniens and comity arguments. U.S. Br. 21.

The United States finally argues that the circumstances here "arise only infrequently, and they will likely become rarer in the future." U.S. Br. 21. This ignores the sweeping scope of the Ninth Circuit's ruling, which subjects a foreign government-owned carrier to jurisdiction in U.S courts every time an

American books international travel from a domestic travel agent. Thousands of Americans annually purchase Eurail Passes domestically, CIT Br. 2, and this holding reaches all forms of international travel whenever a ticket is purchased domestically.[1] The United States ignores the "substantial risk of jurisdictional and diplomatic conflict" that this decision has thus engendered. *See* Netherlands Br. 1-2. The United States' argument that forum selection clauses will reduce the number of such suits is baseless. *Nelson* is Exhibit 1, where the Court observed that, "[p]resumably because the employment contract provided that Saudi courts would have exclusive jurisdiction over claims for breach of contract, the Nelsons raised no such matters." *Nelson*, 507 U.S. at 354. If the United States' prediction that such suits "will likely become rarer in the future" comes true, it will be as a result of counter-measures by foreign governments in response to this decision. As warned in the International Rail Transport Committee's amicus brief, this decision "is likely to fundamentally alter the way Eurail Passes are marketed and sold, to the detriment of American travelers." CIT Br. 14.

[1] The Ninth Circuit's holding extends beyond travel cases to the sale of tickets for countless activities overseas. In light of the increasing amount of commercial activity on the Internet, and the fact that this case involves an Internet sale, this case presents a compelling vehicle to review these important and timely legal issues.

II. REVIEW IS ALSO WARRANTED FOR THE NINTH CIRCUIT'S HOLDING THAT TICKET SALES BY DOMESTIC TRAVEL AGENTS ARE ACTIONS "BY THE FOREIGN STATE" BECAUSE IT IGNORES THE PLAIN TEXT OF THE FSIA AND *BANCEC*.

Review is also warranted for the Ninth Circuit's holding regarding when there is "commercial activity carried on in the United States by the foreign state." The United States opines that "[t]he court of appeals correctly held that a foreign state may be found to have 'carried on' commercial activity in the United States when it has employed an entity to act as its agent in conducting those activities." U.S. Br. 7. But the dispute is over the definition and standard to be applied in making this agency determination.

The United States argues that "traditional agency law principles" of "direction and control" should dictate the agency inquiry. *See* U.S. Br. 8-9. Yet, the Ninth Circuit's decision was not based on "direction and control" because there was no evidence or even claim of direction or control by OBB over RPE. Rather, the Ninth Circuit announced a sweeping rule: the mere sale of a ticket on a foreign state carrier by a domestic travel agent subjects the carrier to suit in the United States. *See* App. 41.

A. The "Agency" Inquiry Starts and Stops with the Plain Text of the FSIA.

When interpreting the FSIA, as with any statute, courts "begin with the text of the statute," *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007), and "when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms," *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000) (internal quotations omitted).

The Ninth Circuit and the United States failed to apply the FSIA's plain text in determining when there is "a commercial activity carried on in the United States *by the foreign state*." 28 U.S.C. §1605(a)(2) (emphasis added). The United States' argument that courts must go outside the FSIA's text to general agency law is based on the false premise that the phrase "'carried on' by a foreign state" is not defined in the statute. U.S. Br. 7. However, Section 1603(e) defines that "[a] 'commercial activity carried on in the United States by a foreign state' means commercial activity *carried on by such state* and having substantial contact with the United States." 28 U.S.C. §1603(e) (emphasis added). Congress did not extend the scope of this phrase to common law agents. Instead, it stated that it applies to commercial activity "by such state."

Nor is there any need to go beyond the text to determine "the sorts of entities whose conduct may be *attributed* to a foreign state defendant for purposes of determining whether the foreign state has 'carried on'

commercial activity in the United States." U.S. Br. 10. The FSIA's definition states that "[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)." 28 U.S.C. §1603(a). The United States ignores Congress' mandate that the definition of "foreign state" shall apply to all provisions except Section 1608 concerning service of process, and thus necessarily applies to the commercial activity exception in Section 1605(a)(2). *See Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970) (Congress set forth the only exceptions to the statute). The United States also overlooks that "attribution" is addressed by the extension of the term "foreign state" to include "agency" in Section 1603(a), which is in turn defined as including a "separate legal . . . corporat[ion]," "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and is not a United States citizen or created under any third country laws, in Section 1603(b).

Thus, the FSIA identifies which entities qualify as an agent of the foreign state. This Court recognized as much in *Nelson*, citing "28 U.S.C. §§1603(a), (b) (term '"foreign state"' includes '"an agency or instrumentality of a foreign state"')" when acknowledging that "[t]here is no dispute here that Saudi Arabia, the hospital, and Royspec all qualify as 'foreign state[s]' within the meaning of the Act." 507 U.S. at 356. This is confirmed in *Bancec*, where "the Cuban Government's exclusive agent in foreign trade"

satisfied the definition of an "agency or instrumentality" of a "foreign state." 462 U.S. at 613-14, 619-21. No resort to common law of agency is needed because Congress has spoken in Sections 1603(a) & (b), which extend commercial activity "by the foreign state" to include acts by corporate entities under the state's control by virtue of majority ownership.[2]

B. In the Alternative, *Bancec*'s Test of Agency Should Govern.

In the alternative, *Bancec*, rather than loose invocations to the common law of agency, should dictate the scope of "commercial activity carried on in the United States by the foreign state," as other circuits have held. Focusing on the "alter ego" prong of *Bancec*'s agency test, the United States argues that *Bancec* identifies "one way in which an entity's actions may be attributed to a foreign state," but that the test is not "exclusive." *See* U.S. Br. 12. But that ignores the other agency standard enunciated in *Bancec* "where a corporate entity is so extensively controlled by its owner that a relationship of principal

[2] The United States in *Nelson* urged review of the court of appeals' decision as "not anchored in the statutory text" and "ignor[ing] the precise language of this carefully drafted statute." *See* Brief for the United States as Amicus Curiae, *Nelson*, 1992 WL 12012040 at *9, 13. "The FSIA's definitions provide pertinent guidance in determining whether a foreign state has carried on a commercial activity in the United States." *Id*. at *13. Here, the Ninth Circuit's test disregards the definition of agency altogether.

and agent is created." 462 U.S. at 629. The D.C. and Fifth Circuits have recognized *Bancec* as dictating the parameters of the agency inquiry for purposes of the commercial activity exception. *See Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847-50 (D.C. Cir. 2000) (relying on *Bancec*'s "control" requirement in determining whether an agency relationship existed for purposes of the commercial activity exception); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533-37 (5th Cir. 1992).[3] The Ninth Circuit conflicts with these circuits since it refused to apply *Bancec* as the standard. *See* App. 20-21. In the process, it also disregarded the "control" element that the United States has identified as fundamental to the agency inquiry, stating that "[t]he day-to-day control inquiry under *Bancec* makes no sense here. . . ." App. 21. Review is required to resolve this circuit split and clarify the extent to which *Bancec* delimits which common law agency factors, such as control, are relevant for purposes of the commercial activity exception.

[3] The Fifth Circuit in *Dale v. Colagiovanni*, 443 F.3d 425, 429-30 (5th Cir. 2006), cited by the United States, refused to apply *Bancec* when "*apparent authority*" was alleged. *Dale* is inapposite because RPE's actual authority is at issue. App. 15 (Ninth Circuit held that "[a]s long as the agent or subagent acts with actual authority, those acts can be imputed to the foreign state.").

C. This Case is an Appropriate Vehicle Compelling Review Now.

Although the United States argues that "the fact-specific question whether RPE acted as petitioner's agent would not merit this Court's review," U.S. Br. 13, the Ninth Circuit's holding is not fact-specific. It is a bright-line rule holding foreign state-operated commercial carriers liable to suit in the United States when a ticket is sold domestically, without regard for the FSIA's plain text or the requirement of "control" fundamental to *Bancec*. Review is compelled to correct the Ninth Circuit from, again, using common law agency principles to improperly expand federal jurisdiction over foreign entities, this time foreign states. *Daimler AG*, 134 S. Ct. at 759, 763.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JUAN C. BASOMBRIO
Counsel of Record
DORSEY & WHITNEY LLP
600 Anton Boulevard
Suite 2000
Costa Mesa, California 92626
Telephone: (714) 800-1400

STEVEN J. WELLS
TIMOTHY J. DROSKE
DORSEY & WHITNEY LLP
50 South Sixth Street
Suite 1500
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600
E-Mail: wells.steve@dorsey.com
E-Mail: droske.tim@dorsey.com

Counsel for Petitioner
OBB Personenverkehr AG

December 26, 2014