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**

## REPLY BRIEF FOR PETITIONER


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## RULE 29.6 STATEMENT

As noted in Petitioner's Brief on the Merits, OBB Personenverkehr AG ("OBB") is an instrumentality of a foreign state, the Republic of Austria. OBB's stock is wholly held by OBB Holding Group, a joint-stock company organized under Austrian law and created by the Republic of Austria pursuant to the Austrian Federal Railways Act. The sole shareholder of OBB Holding Group is the Austrian Federal Ministry of Transport, Innovation and Technology, an organ of the Republic of Austria.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

## INDEX TO ABBREVIATIONS

**Persons and Entities:**

NML Capital Ltd. ..... NML

Petitioner OBB Personenverkehr AG..... OBB

Rail Pass Experts ..... RPE

Respondent Carol Sachs..... Respondent

**Briefs:**

Brief for Petitioner ..... Pet.

Brief for Respondent..... Resp.

Amicus Curiae Br. of the International Rail Transport Committee in Support of OBB Personenverkehr and Reversal ..... CIT

Brief of the Governments of the Kingdom of the Netherlands and the Swiss Confederation as *Amici Curiae* in Support of the Petitioner ..... NL/CH

Brief for the United States as Amicus Curiae Supporting Reversal ..... U.S.

Brief of NML Capital, Ltd. as *Amicus Curiae* in Support of Respondent..... NML

## ARGUMENT

### I. INTRODUCTION

Respondent's and her amicus NML's arguments ignore this Court's holdings in *Nelson* and *Bancec*, and the plain language of the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602 *et seq.* ("FSIA").

They argue that the commercial activity exception's "based upon" requirement is satisfied if any element of a cause of action has a factual connection to the United States. Resp. 37-51; NML 29-33. However, in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), this Court held that the first clause of the commercial activity exception focuses on the "basis," "foundation" or "gravamen" of the action, instead of on any one element of a cause of action. *Id.* at 356-57. Under *Nelson*, Respondent's claim is "based upon" the accident that occurred in Austria, not the on-line sale of her Eurail Pass by U.S. travel agent RPE, which was never alleged to be wrongful. *Accord* U.S. 9, 27-28, 32 (supporting reversal).

Respondent's argument that the commercial activity should, under the "based upon" analysis, be broadly construed as OBB's operation of a "railway enterprise," Resp. 11, goes nowhere. Respondent did not sue OBB because it operates a railway enterprise. Her claim of wrongdoing is based on a particular act: the accident at the train station in Austria.

In support of the Ninth Circuit's holding that RPE's ticket sale could be attributed to OBB,

Respondent argues that Congress could not possibly have meant what it said when it mandated that the definition of "foreign state" in §1603(a) applies to the *entire* FSIA (excepting only §1608, irrelevant here). But there is no basis for this Court to depart from the plain text of §1603 and follow the Ninth Circuit's distinction – found nowhere in the commercial activity exception – between agents for purposes of "invocation" and "attribution," Resp. 18-20; NML 15-16. Sections 1603(a) and (b) define a foreign state to include corporate entities in addition to the foreign sovereign. Thus, these sections already attribute the acts of those corporate entities to the foreign state, and that attribution applies in determining what constitutes "commercial activity by such state" under §1605(a)(2). NML's distinction between "agency" and "agent" also fails, Resp. 20; NML 15-16, because neither §§1603(a) or (b), nor the first clause of the commercial activity exception, attribute the acts of "common law agents" to the foreign state. Where Congress intended to make a distinction in the FSIA between "agencies" and "agents," it did so expressly in the terrorism exception. §1605A.

Alternatively, if this Court departs from the FSIA's text, it must do so consistently with *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629-30 (1983) ("*Bancec*"). Respondent and NML incorrectly state that *Bancec* focuses only on "alter egos." Resp. 7, 10, 22-23; NML 19-20. *Bancec* also held that an "agent-principal relation" arises under the FSIA where there is

sufficient "control" by the principal over the agent under federal common law principles. 462 U.S. at 629-30. "Control" is a fundamental component of the "agent-principal relationship" under *Bancec*. Yet it was absent from the test for attribution applied by the Ninth Circuit and there is zero evidence in the record that OBB controlled RPE. It is undisputed that RPE would *not* be an agent of OBB under §1603(b) or *Bancec*.

In the end, Respondent offers arguments based not on this Court's holdings or statutory text, but on the flawed premise that subject matter jurisdiction over claims against a "foreign state" should be indistinguishable from and co-extensive with personal jurisdiction over foreign private corporations. Resp. 2. However, under the FSIA, and unlike private parties, "foreign state[s] shall be immune from the jurisdiction of the courts of the United States" unless an exception applies. §1604.

Here, the commercial activity exception does not apply. Accordingly, the Ninth Circuit's *en banc* decision should be reversed.

## II. UNDER *NELSON*, RESPONDENT'S ACTION IS "BASED UPON" THE ACCIDENT IN AUSTRIA

*Stare decisis* compels that *Nelson*, which interpreted the "based upon" requirement under the first clause of the commercial activity exception, be followed. *Nelson*, 507 U.S. at 356-58; *Kimble v. Marvel*

*Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015) ("*stare decisis* carries enhanced force when a decision . . . interprets a statute"). *Nelson* requires reversal because Respondent's claim is based upon the accident that occurred in Austria, not the preceding sale of a ticket in the United States. Respondent's and NML's "one-element" test would implicitly overrule *Nelson*.

### A. This Action Is Based Upon an "Act" or "Activity" in Austria

#### 1. This Action Is Not Based Upon "OBB's Railway Enterprise"

Respondent argues that the first clause's requirement that the action be "based upon commercial activity" directs a court to focus generally on "OBB's railway enterprise," as opposed to any particular "act." Resp. 24.

Before the Ninth Circuit, Respondent never argued that her claim was based upon "OBB's railway enterprise." She argued that her "claims are 'based upon' the purchase of the ticket which occurred in the United States." Appellant's Opening Brief, 2011 WL 2180427 at *10 (May 25, 2011); Appellant's Reply Brief, 2011 WL 3287994 at * 8 (July 19, 2011) (Respondent argued that "her claim was based on the purchase/sale of the ticket."). Thus, Respondent's "railway enterprise" argument must be rejected because it was not made below. *Chaidez v. U.S.*, 133 S.Ct. 1103, 1113 n. 16 (2013).

Even if this Court considered Respondent's new "railway enterprise" argument, its premise that the focus should not be on a particular act is wrong. "'[C]ommercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act," §1603(d). Here, this action is not based upon OBB's railway enterprise, but on the particular accident in Austria. Thousands of other passengers that same day utilized OBB's "commercial railway business," Resp. 27, but none of them have any claim because they were not involved in an accident.

Respondent argues that "[u]nder the 'substantial contact' requirement, the commercial activity must occur 'in whole or in part in the United States,'" and "OBB's railway business has 'substantial contact' with the United States" by "marketing and selling Eurail passes" here. Resp. 29-30 (citation omitted). But Respondent's claim must still be "based upon" the commercial activity that occurs in part in the United States. *Nelson* held that the "action must be 'based upon' *some* 'commercial activity' by petitioners that had 'substantial contact' with the United States within the meaning of the Act." 507 U.S. at 356 (emphasis added). Respondent is not suing because she purchased her ticket here. And, unrelated OBB ticket sales are irrelevant also for that reason.

Respondent also attempts to argue that RPE's sale of the Eurail Pass triggers the first clause of the commercial activity exception. She argues that courts should first construe "activity" of the foreign state as

broadly as possible[1] ("OBB's overall commercial railway enterprise") and then match any one element of any cause of action to that activity. Resp. 24. However, *Nelson* held that courts must "*begin* [*their*] *analysis* by identifying the *particular conduct* on which the Nelsons' action is 'based' "; that is, the gravamen. 507 U.S. at 356-57 (emphasis added). Respondent's proposed order and scope of inquiry are, under *Nelson*, wrong. The proper focus is on the "particular conduct" the action is "based upon," not on every conceivable activity (a ticket sale) in which the "entire commercial enterprise" might be involved. Resp. 23-25.

As the Government agrees, the "particular conduct" on which Respondent's action is based is the accident at the train station in Austria, not the sale of a Eurail Pass or general operations that include ticket sales. The "arguably commercial activities that preceded the[ ] [torts'] commission" (in *Nelson* the recruitment and signing of a contract with Nelson and here RPE's ticket sale), 507 U.S. at 358, only "led to the conduct that eventually injured the Nelsons [or the Respondent], they are not the basis for the Nelsons' [or the Respondent's] suit." *Id.* Nelson signed a contract in the United States and Respondent purchased a ticket in the U.S., but neither contractual act is the basis of their claims. And, Respondent's

[1] However, FSIA exceptions are narrowly drawn. *See, e.g.*, *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012).

baseball analogy, Resp. 25, does not get her to first base under *Nelson*, because RPE's ticket sale "alone entitle[s] [the Respondent] to nothing under [her] theory of the case." 507 U.S. at 358.

### 2. Nothing in the Second and Third Clauses of the Commercial Activity Exception Change the Result Required by *Nelson*

To the extent there is a meaningful distinction in the "based upon" inquiry as applied to the first clause, as opposed to clauses two and three, this Court already addressed it in *Nelson*, 507 U.S. at 358. It is not, as Respondent maintains, a distinction between an "act" and "activity," allowing for a *broader* nexus between the suit's allegations and any aspect of the foreign state's "overall commercial . . . enterprise" under the first clause. Resp. 24-28. The important textual distinction lies with the second and third clauses' application to an act "*in connection with* a commercial activity of the foreign state elsewhere." §1605(a)(2) (emphasis added). As *Nelson* explained, "Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such activity. The only reasonable reading of the former term calls for something *more than a mere connection with, or relation to, commercial activity.*" 507 U.S. at 358 (emphasis added). Under *Nelson*, the first clause demands a *tighter* nexus than the second and third clauses, contrary to Respondent's argument

that the first clause broadly requires only a connection with some aspect of the "overall commercial . . . enterprise."[2]

### B. The "One-Element" Test Is Contrary to *Nelson* and the Text of the FSIA

Respondent's argument for a "one-element" test is based on her assertions that the term "based upon" is ambiguous, Resp. 40, and does not mean "foundation" or "most important element," but "can refer to *any* necessary factor, not just the primary or most important one." Resp. 39. (emphasis in the original); *see also* NML 29-31. That argument was rejected in *Nelson*, which held that "[a]lthough the Act contains no definition of the phrase 'based upon,' and the relatively sparse legislative history offers no assistance, guidance is hardly necessary." 507 U.S. at 357.

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[2] Respondent's strained attempt to rely on the first clause (the only clause she invokes) is like trying to fit a square peg into a round hole, because the FSIA is not designed to redress tort injuries overseas. She does not invoke the third clause because "[e]very court that has considered a claim for personal injury sustained in foreign territory has held that subsequent physical suffering and consequential damages are insufficient to constitute a 'direct effect in the United States' for purposes of abrogating sovereign immunity." *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 418 (5th Cir. 1987). And, the second clause would not apply because it "is generally understood to apply to non-commercial acts in the United States that relate to commercial acts abroad," and the RPE's ticket sale is not a "non-commercial" act. *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 157 (2d Cir. 2007) (citation and quotations omitted).

"In denoting conduct that forms the 'basis,' or 'foundation,' for a claim, . . . the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.*; *accord* U.S. 19-20. The Court focused on the "basis," "foundation" or "gravamen" of a cause of action ("gravamen test"). 507 U.S. at 357 (citation and quotations omitted). It did not analyze the elements of the sixteen different causes of action in *Nelson* because, under the gravamen test, such an analysis was irrelevant. *Nelson* forecloses the "one-element" test.

*Nelson*'s focus on the gravamen of the action correctly applies the language of the "based upon" requirement. It directs courts to focus, in a tort case, on the act that constitutes wrongdoing. In *Nelson*, those were the acts that injured Mr. Nelson, not other contract-related commercial activities that "led to the conduct that eventually injured" the plaintiff. 507 U.S. at 358. Even NML agrees that this was at the heart of *Nelson*'s "based upon" analysis. NML 31. Respondent's suggestion that *Nelson* left the door open to a "one-element" test is wrong. Resp. 39. *Nelson* rejected such an approach as crediting "a semantic ploy" that invites artful pleading to circumvent sovereign immunity. *Id.* at 363.

Respondent's and NML's other arguments fare no better. Their dictionary definitions do not change the result. Resp. 39-40; NML 30. The "underlying fact or condition," or that "upon which a structure is built," point to the same thing: the accident in Austria. And

Respondent's citations to other U.S. Code sections (using the terms "based entirely," "based primarily," or "based partly"), Resp. 40, do not help her, because the FSIA uses a different term – "based upon."

Respondent has failed to establish that *Nelson* was "badly reasoned" or that application of *Nelson*, in the twenty-two years since that decision was rendered, has revealed that it is "unworkable."[3] *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). There is no basis to depart from *Nelson*.

### C. The FSIA Does Not Treat Foreign States the Same As Private Parties for All Purposes

In an attempt to avoid both the FSIA's text and *Nelson*, Respondent broadly argues that foreign states must be treated the same as private parties

[3] Although Respondent suggests the "gravamen" test is unworkable, the Second Circuit had no trouble understanding or applying *Nelson. See Kensington Int'l*, 505 F.3d at 156 ("Applying the principles of . . . *Nelson,* we cannot agree with Kensington's position that its action is 'based upon' the alleged acts in the United States merely because those acts satisfy the interstate commerce element of the RICO statute"). The Second Circuit rejected "Kensington['s] conten[tion] that it has satisfied the 'based upon' element because it need only show that *one* of the elements of its cause of action is established by the commercial activity in the United States." *Id.* (emphasis in original). Instead, it held that "the gravamen of Kensington's complaint" lacked the nexus to the United States required to trigger the commercial activity exception. *Id.*

under the FSIA. Resp. 1; *see also* NML 5-10. But the FSIA does not state that foreign states must generally be treated the same as private parties. It provides:

> As to any claim for relief *with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter*, the foreign state *shall be liable* in the same manner and to the same extent as a private individual under like circumstances. . . .

§1606 (emphasis added). Only if a plaintiff can overcome sovereign immunity may the foreign state be held "liable" in the same manner as a private party.

This means that the FSIA "is not intended to affect the substantive law of liability." *Bancec*, 462 U.S. at 620 (quoting H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 12 (1976)). It does not mean that foreign states and private parties are treated alike for *all purposes*. The FSIA contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Republic of Argentina v. NML Capital, Ltd.*, 134 S.Ct. 2250, 2255-56 (2014) (citation and quotations omitted). And, it codified "international law," *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007), not domestic procedural doctrines.

It would be improper to depart from the FSIA's text[4] and apply personal jurisdiction jurisprudence regarding foreign private corporations instead of the "based upon" requirement as articulated in *Nelson*, because Congress explicitly stated when a foreign state may be treated like a private party.

Similarly, Respondent argues that the "arising under" test for exercise of personal jurisdiction over private parties supports the "one-element" test. NML 21-33; *but see* U.S. 24 n.7. How lower courts may interpret the term "arising under" to exercise personal jurisdiction over private parties is irrelevant. The FSIA is the "sole basis" for obtaining subject matter jurisdiction as to foreign states. *Nelson*, 506 U.S. at 355. Under the FSIA, "both statutory subject matter jurisdiction . . . and personal jurisdiction turn on application of the substantive provisions of the Act." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983). The text requires "commercial activity *carried on in the United States* by the foreign state," §1605(a)(2) (emphasis added), not a general "arising under" approach.

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[4] NML prevailed before this Court because "any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA]'s text. Or it must fall." *NML Capital*, 134 S.Ct. at 2256. NML's contrary position now, urging this Court to disregard the FSIA's text and apply rules regarding personal jurisdiction over private parties, highlights that NML's interests are driven by its bond-related litigation with Argentina. NML 2-3.

### D. Respondent's Sovereign Acts Argument Is a Red Herring

Respondent argues that this case is the "inverse of *Nelson*" because the conduct in *Nelson* was sovereign rather than "commercial," and "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." Resp. 27-28. OBB has never argued that it engaged in "sovereign activity" and *Nelson* is not limited to that issue. *Nelson* controls because it explains the correct order and scope of the inquiry under the first clause. One must first "identify[ ] the particular conduct on which Nelson's action is 'based' for purposes of the Act," and then determine whether that conduct was commercial or sovereign. *Nelson*, 507 U.S. at 356-63.

### E. The Gravamen Test Fosters the FSIA's Purposes

*Nelson*'s approach favors clear and predictable jurisdictional rules; Respondent's "one-element" test does not. The gravamen test is straightforward, here focusing on the alleged "torts, and not the arguably commercial activities that preceded their commission, [that] form the basis for the . . . suit." 507 U.S. at 358. The "one-element" test opens the door to complexity, requiring courts to analyze the elements of each state law claim. As *Nelson* held, such an approach invites gamesmanship. And, since the FSIA does not change "substantive liability," a foreign state seeking predictability would face the onerous task of reviewing

multiple states' laws, if it sought to limit its exposure to jurisdiction in the U.S.

*Nelson* illustrates the simplicity of the gravamen test versus the "one-element" test. The majority's "based upon" analysis required only one paragraph, without wading into the weeds of choice of law determinations and identification of elements for each claim. 507 U.S. at 358. The division between the majority and dissent arose only upon examination of the elements of the negligent failure to warn claims. *Id.* at 363, 371, 375.

The only certainty that the "one-element" test provides is that plaintiffs will be encouraged to artfully plead around a foreign state's immunity. Thus, *Nelson* refused to apply the "based upon" requirement in a manner where "a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn" and be "give[n] jurisdictional significance to this feint of language." 507 U.S. at 363.

Finally, Respondent's and NML's policy arguments fail. They incorrectly treat the impact on private plaintiffs as the primary policy goal, Resp. 33-34; NML 8-9, when the FSIA is focused primarily on extending immunity to foreign states. *See* §1604.

Respondent argues that "it is reasonable that when a foreign entity reaches into this country and offers a service . . . that they will be able to vindicate their rights in U.S. courts." Resp. 32-35. While that may be a consideration under *International Shoe v.*

*Washington*, 326 U.S. 310 (1945)'s personal jurisdiction analysis, it is irrelevant for purposes of determining *subject matter jurisdiction*, which is governed solely by the FSIA with respect to foreign states. In any event, Petitioner provided train travel entirely within Austria.

Respondent's additional argument that foreign states can invoke *forum non conveniens* or contract around jurisdiction, Resp. 35-36, misses the mark. Congress already decided the issue by affording foreign states immunity under the FSIA, and not leaving them to rely on procedural doctrines or contracts.

There is no dispute that if the gravamen test in *Nelson* is applied, this action is "based upon" the accident in Austria. The Government agrees. U.S. 9, 27-28, 32. The "one-element" test was properly rejected by *Nelson* because it would invite artful pleading. This Court should re-affirm *Nelson*'s focus on the gravamen of the action and reverse the Ninth Circuit.

## III. RPE'S SALE CANNOT BE IMPUTED TO OBB UNDER THE FSIA

### A. Under the Plain Text of the FSIA, Activity of RPE Is Not Activity of a "Foreign State"

Under §1603(a), RPE's sale of the Eurail Pass cannot be attributed to OBB for purposes of the immunity determination because RPE does not fit the definition of "foreign state." To avoid that result, the

Ninth Circuit ignored §1603 and imported unspecified common law agency principles regarding "ambiguous relationships" to hold that RPE was OBB's agent.

In support of that result, Respondent offers an argument that the Ninth Circuit never made: "[t]he statutory phrase 'carried on' necessarily incorporates general common-law agency principles." Resp. 13; NML 3-4, 11-14. That argument must be rejected because the text of the FSIA's commercial activity exception, §1605(a)(2), and its statutory definitions, §§1603(a) and (b), are the starting and ending point of the analysis. Specifically, the first clause requires that the claim be based upon "commercial activity carried on in the United States *by the foreign state*." §1605(a)(2) (emphasis added). Congress defined the phrase commercial activity "carried on . . . by the foreign state" in the FSIA, stating that it "means commercial activity carried on *by such state*." §1603(e) (emphasis added). Congress could have, but did not, define the term to mean "carried on by such state *or its common law agents*."

Under the FSIA's definitions, the term "foreign state, except as used in section 1608," includes "an agency or instrumentality of a foreign state," §1603(a), which is defined to include separate corporations majority-owned by the foreign state, §1603(b). The definitions control whose acts constitute commercial activity "by the foreign state," including as the phrase is used in the commercial activity exception, §1605(a)(2). *Powerex Corp. v. Reliant Energy Servs.,*

*Inc.*, 551 U.S. 224, 232 (2007) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.").

Congress's directive that the definition of "foreign state" be consistently defined with respect to FSIA-based jurisdiction is also found in 28 U.S.C. §1330(a): "[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action *against a foreign state as defined in section 1603(a)* of this title. . . ." (emphasis added).

Respondent argues that, in some contexts, there is a distinction between "agency" and "agent," Resp. 20; NML 15-16, and that distinction should apply to the commercial activity exception because "[l]ike a corporation, a foreign state can act 'only through its agents.'" Resp. 13 (citation omitted); U.S. 10; NML 3-4, 11-14. But she confuses the acts of an employee or government official of the foreign state with the concept of an agent as a separate legal entity, *see* §1603(b). While a foreign state (like a corporation) must perform its acts through *individual* agents (employees or officials), foreign states (like OBB) or corporations do not necessarily act through *other entities* serving as their agents. Thus, the argument that "Congress . . . would have expected that courts would use traditional agency principles to determine whether a foreign state 'carried on' commercial activity," is flawed. Resp. 13; *see also* NML 4.

Further, Congress did not, as the Ninth Circuit held (based on its own conception of "common sense")

and Respondent argues, make a distinction between "invocation" and "attribution" in determining which entities are subject to immunity. Resp. 18-20; NML 15-16. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). The Ninth Circuit's opinions about what it believes Congress intended are irrelevant. This Court "will not ignore a clear jurisdictional statute in reliance upon supposition of what Congress *really* wanted." *Powerex Corp.*, 551 U.S. at 237 (emphasis in the original).

There is no distinction in the commercial activity exception's text between acts of a foreign state for purposes of invoking immunity versus acts attributable to it to defeat immunity. Resp. 18. Rather, Congress already made the "attribution" election in §§1603 and 1605. The definition of a foreign state in §§1603(a) and (b) includes "agencies and instrumentalities" in addition to the foreign sovereign and, thus, attribute acts of third parties to the "foreign state," but not those of "common law agents." The definitions govern whose commercial activity constitutes acts "by the foreign state" under §1605(a)(2). And the definitions apply to the commercial activity

exception, because §1603(a) states that they apply to the entire FSIA except only §1608.[5]

NML's argument that courts must look at agency common law in the commercial activity exception because other exceptions look to the substantive law of liability is wrong. NML 18 (citing tortious activity exception in §1605(a)(5)). NML's examples do not concern defined terms. And NML acknowledges that references to agency common law must be premised on federal law (conceding the *Bancec* argument, *infra*).

Respondent attempts to refute the plain text by references to "ordinary usage," arguing that "the question whether an entity is an 'agency' (and

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[5] This Court should not depart from the FSIA's text, given this Court's reiteration in *NML Capital* that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." 134 S.Ct. at 2256. The cases cited by Respondent, Resp. 12 n.8, are distinguishable or support the Petitioner's *Bancec* argument, *infra*. *See*, *e.g.*, *Mar. Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982) (no attribution of purported agent's conduct due to lack of control and direction); *First Fid. Bank, N.A. v. Gov't of Antigua & Barbuda-Permanent Mission*, 877 F.2d 189, 193-94 (2d Cir. 1989) (individual agent and not corporate entity); *Velasco v. Gov't of Indonesia*, 370 F.3d 392 (4th Cir. 2004) (individual officers); *Dale v. Colagiovanni*, 443 F.3d 425 (5th Cir. 2006) (individual agent); *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002) (parties did not dispute the application of common law); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980 (10th Cir. 2007) (held bank was not agent); *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991) (reversed).

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." Resp. 20. Respondent's claim, that "in all of its possible definitions for 'agency,' Black's Law Dictionary never states that an entity to which authority is delegated may be called an 'agency,'" *id.*, is contradicted by the very first definition in the Black's version she cites, which states that "agency" means:

> 1. A relationship that arises when one person (a principal) manifests to another (*an agent*) that *the agent* will act on the principal's behalf, subject to the principal's control, and *the agent* manifests assent or otherwise consents to do so.

Black's Law Dictionary 74 (10th ed. 2014) (emphasis added).

Respondent also incorrectly argues that an "agency" in the FSIA context is limited to "an arm of the government." Section 1603(b) defines foreign states to include corporations majority-owned by the foreign state. Resp. 20.

Finally, if Congress had intended attribution in the commercial activity exception to extend beyond the definitions of "agency or instrumentality" to include common law agents, it would have said so. Congress did say so when it added the terrorism exception, §1605A, to the FSIA in 2008, which *explicitly* does what the Ninth Circuit, Respondent and

Government maintain Congress *intended* to do in §1605(a)(2). Section 1605A provides:

> A foreign state shall not be immune . . . in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture . . . if such act . . . is engaged in by an official, employee, *or agent* of such foreign state while acting within the scope of his or her office, employment, or agency.

§1605A(a)(1) (emphasis added). "If, as respondent[ ] seems to say, Congress intended" to extend applicability of the commercial activity exception to conduct carried on by an agent of the foreign state acting within the scope of its authority, one would "presume it would have used the word[ ] ['agent'] in the statutory text." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994). It is compelling that Congress did *not* use the word "agent" in the commercial activity exception, §1605(a)(2), but did use it in the terrorism exception, §1605A(a)(1). Similarly, with respect to liability, Congress used the word "agent" in the terrorism exception, §1605A(c), but did not use it with respect to liability under the rest of the FSIA, §1606.

And contrary to Respondent's claim, the explicit reference to "agent" in the terrorism exception is not superfluous. *See* Resp. 19 n.10. Section 1605A deprives foreign states of immunity for acts of its common law agents *in addition to* acts of entities

satisfying the statutory definition of an "agency or instrumentality." *See* §1605A(a)(1), (c); *see also Conn. Nat'l Bank*, 503 U.S. at 253 ("[C]ourts should disfavor interpretations of statutes that render language superfluous.").[6]

### B. In the Alternative, *Bancec* Controls the Analysis and Requires Reversal

If common law agency principles apply, Respondent and Government recognize that *Bancec* is relevant. Respondent acknowledges that "*Bancec* is mildly 'instructive' here because it involved a question of imputation under the FSIA." Resp. 22.[7] And the Government cites *Bancec* as requiring that common law of agency be applied "in a manner that is consistent with 'articulated congressional policies' and 'internationally recognized' legal doctrine," with "limiting principles . . . to prevent a finding of an agency relationship on such a minimal basis that the foreign state could not be said to have 'carried on' the activities in which the 'agent' engaged." U.S. 14, 19.

*Bancec*, however, does not limit its analysis to alter egos. Resp. 7, 10, 22-23; U.S. 17; NML 19-20.

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[6] Respondent cites *Dole Food v. Patrickson*, Resp. 16, but *Dole* relied on common law corporate principles to *reinforce* a rule "supported by the statutory text," 538 U.S. 468, 477 (2003), not *depart* from the statutory text.

[7] NML states that "under *Bancec*, federal common law governs the attribution of conduct to a foreign state." NML 18.

*Bancec* held that attribution would be permitted *either* (1) where there is an alter ego relation or (2) "where a corporate entity is *so extensively controlled by its owner* that a relationship of principal *and agent* is created." 462 U.S. at 629 (emphasis added). Under *Bancec*, the foundational elements of an agent-principal relation are control and ownership.

Nonetheless, the Ninth Circuit expressly rejected the applicability of *Bancec* and never determined whether OBB exercised the requisite control over RPE. App. 21. As the Government emphasizes, "control" is a bedrock requirement to both federal common law of agency and international law, and a necessary requirement for the Government's textual reading of commercial activity "carried on . . . by the foreign state" extending to an agent's conduct. U.S. 6-7, 10-12, 17, 19. And tellingly, the Ninth Circuit did not hold, nor has any party argued, that OBB exercised sufficient "control" over RPE to give rise to an "agent-principal relation" under *Bancec*. There is no such evidence.

Under *Bancec*, RPE's ticket sale cannot be imputed to OBB for purposes of the immunity determination because RPE is not an "agent" of OBB.

### C. Policy Considerations Favor OBB's Interpretation

Echoing the Ninth Circuit, Respondent and Government argue that application of §1603 or *Bancec* on attribution would lead to "intolerable" or

"untenable" results, and that "OBB offers no answer to this observation." Resp. 15-16; U.S. 16. They fret that a foreign state may shield itself from jurisdiction by acting through "agents" that do not fall within §1603(b) or meet the "control" requirement of *Bancec*. Immunity from jurisdiction, however, is an important purpose of the FSIA. §1604.

The Second Circuit has held:

> [G]iven the Supreme Court's *Bancec* decision, had either the Government or the Russian Federation wanted to shield the latter entity from being the subject of these confirmation proceedings, either could have designated a publicly-owned state corporation or instrumentality as the entity to contract with Noga.

*Compagnie Noga D'Importation et D'Exportation S.A. v. Russian Fed'n*, 361 F.3d 676, 685-86 (2d Cir. 2004). Indeed, *Bancec* held that "government instrumentalities established as juridical entities distinct and independent from the sovereign should normally be treated as such." 462 U.S. at 626-27. Otherwise, "the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated." *Id.* at 626.

The fears expressed by the Ninth Circuit, Respondent and Government are overstated. If travel originated at JFK Airport and a customer was injured there, the foreign state-owned carrier would have

conducted commercial activity "in the United States," and the first clause would apply *regardless of who sold the ticket*. This case presents a different situation, where the travel and accident occurred entirely outside of the United States.

Finally, policy considerations favor Petitioner's interpretation of the statutory language and counsel against the Ninth Circuit's holding. In *Daimler AG v. Bauman*, 134 S.Ct. 746, at 759-60 (2014), this Court rejected a similar Ninth Circuit attempt to invoke common law agency principles as a basis to expand personal jurisdiction over foreign private corporations. Now, the Ninth Circuit resurrects those vague common law agency principles in an attempt to expand jurisdiction over foreign states, making it easier to sue foreign states than it is, after *Daimler*, to sue private corporations. Based on vague common law agency principles, the Ninth Circuit attributes to the foreign state the acts of "entirely distinct entit[ies]," Resp. 10, instead of limiting attribution to the acts of "agencies or instrumentalities" as defined in §1603(b). Because in enacting §1603 "Congress had corporate formalities in mind," *Samantar v. Yousuf*, 560 U.S. 305, 316 (2010) (citation and quotations omitted), the purported agent must be "tightly connected," *see* Resp. 21, to the foreign state, instead of simply being geographically connected "to the United States." Resp. 21, 43. Further, the "one-element" test would allow U.S. courts to hear disputes in actions in which the foreign defendant's acts in the United States bear no relation to the basis of the claims.

That is far more than the Supreme Court has allowed in the private arena, where it has limited general jurisdiction carefully (*e.g.*, in *Daimler*).

Respondent also makes no effort to address the serious risk of damage to foreign relations created by the Ninth Circuit, as noted by amici Kingdom of the Netherlands and Swiss Confederation. NL/CH 15-16, 25. And, the Ninth Circuit's deviation from the plain text of the FSIA and *Bancec* also invites adverse retaliatory decisions that will negatively impact commerce, including the very sale of Eurail passes, *see* CIT 14, 16-17, which Respondent admits are "[l]ong a favorite of American travelers on a budget." Resp. 4.

## CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case dismissed because OBB has foreign sovereign immunity.

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