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

REPLY BRIEF OF PETITIONER

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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.

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REPLY TO BRIEF IN OPPOSITION

The Ninth Circuit's *en banc* opinion radically expands U.S. jurisdiction over foreign state-owned common carriers, and Respondent's Opposition only underscores the importance of this Court's review of the questions presented by this Petition. If allowed to stand, the *en banc* opinion would permit a foreign state-owned carrier to be dragged into U.S. court for any injury to a passenger occurring in the foreign state on the sole basis that the subject ticket was purchased within the United States or from a U.S.-based travel agency – even if the ticket was for travel entirely outside the United States and no matter how attenuated or non-existent the relationship between the ticket seller and foreign carrier. As explained in the Petition, this holding is in conflict with the statutory text and purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* ("FSIA"), as well as this Court's holding in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

Moreover, the *en banc* opinion is inconsistent with this Court's recent holdings in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011), and *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011). Those decisions reined in U.S. jurisdiction over foreign corporations; indeed, under those decisions, Petitioner would *not* be subject to jurisdiction if it were privately owned. The *en banc* opinion, in contrast, expands jurisdiction over foreign states, and, if allowed to stand, will mean that jurisdiction over

foreign *states* will be broader than that over foreign *private entities*. Such a holding is in tension with this Court's jurisprudence, and is contrary to the limited nature of the commercial activity exception to sovereign immunity that Congress enacted in the FSIA, thus requiring this Court's immediate attention.

Review of the *en banc* opinion is also important because of the negative reaction it is likely to engender from foreign states, as explained by the separate *amicus* briefs submitted by the Kingdom of the Netherlands and International Rail Transport Committee ("CIT"). The *en banc* opinion creates a danger of adverse foreign policy consequences such as retaliatory jurisdiction, and "create[s] a substantial risk of jurisdictional and diplomatic conflict." Netherlands *Amicus* Brief at 2. As this Court stated in *Daimler*, the Ninth Circuit's expansive views of general jurisdiction have "impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." *Daimler*, 134 S.Ct. at 763. Further, the *en banc* opinion also will have a negative impact on U.S. citizens traveling abroad, because, as CIT highlighted, foreign railways will respond by "alter[ing] their business and ticketing practices in ways that will undoubtedly inconvenience American travelers." CIT *Amicus* Brief at 16.

Accordingly, review by this Court is necessary in order to resolve these important jurisdictional issues affecting foreign state-owned carriers and U.S.-based customers of their services. The broad accessibility of

foreign services in the internet further underscores the timeliness of this Petition.

I. RESPONDENT'S OPPOSITION HIGHLIGHTS THE NEED FOR THIS COURT TO GRANT CERTIORARI AS TO WHAT CONSTITUTES "COMMERCIAL ACTIVITY CARRIED ON IN THE UNITED STATES BY THE FOREIGN STATE."

Respondent's Opposition distorts the first question presented to this Court, the splits in the Circuits and the departure from the FSIA created by the *en banc* opinion. While Congress enacted the FSIA to promote uniformity in the treatment of foreign sovereign immunity, uniformity is undermined by the *en banc* opinion's application of common law principles – which vary from state to state – to determine when a person or entity is acting as an agent of a foreign state. The *en banc* opinion also destroys uniformity by creating a circuit split as to what commercial activity "*by a foreign state*" means under the FSIA. Moreover, the cases cited by the *en banc* opinion and Respondent did not address the "by a foreign state" component of the commercial activity exception, and did not expand the scope of the exception as the *en banc* opinion has done. Finally, Respondent's reliance on a passing footnote in the *en banc* opinion concerning "ratification" does not negate the need for this Court's review. To the contrary, if ratification were the test, it would swallow the rule of immunity under the FSIA, creating jurisdiction over the foreign sovereign whenever the ticket sale occurred in the United States.

A. The *En Banc* Opinion's Reliance on Common Law Agency Principles Conflicts with the Statutory Language and Decisions of this Court and Other Circuits.

Respondent does not dispute that the *en banc* opinion's application of common law agency principles to the requirement that the "commercial activity [be] carried on in the United States *by the foreign state*" conflicts with the statutory definitions of "foreign state" and "agency or instrumentality of a foreign state" in the FSIA. In fact, Respondent openly argues that "foreign state" means something *other* than the statutory definition in the FSIA. Opposition at 4-8. But none of the cases from this Court and other circuits cited by Respondent support that proposition because they did not address the question of what it means to be an agent of the foreign state under the FSIA's commercial activity exception.

For example, Respondent relies upon *Saudi Arabia v. Nelson*, but "[t]here [was] no dispute [t]here that Saudi Arabia, the hospital, and Royspec all qualify as 'foreign state[s]' within the meaning of the Act." *Nelson*, 507 U.S. at 356. And, Respondent concedes the same with respect to *Transatlantic Shiffahrstskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 386 (2d Cir. 2000). Opposition at 6. Likewise, *Barkanic v. Gen. Admin. of Civil Aviation of the Peoples Rep. of China*, 822 F.2d 11 (2d Cir. 1987), as noted by Judge O'Scannlain in his dissent,

did not "analyze when acts of agents can be attributed to a foreign state." Pet. App. at 57.

Respondent's Opposition also fails to address this Court's holdings that the *FSIA* is the "*sole basis* for obtaining jurisdiction over a foreign state in our courts," *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis added), and that the FSIA's definition "*specifically delimits* what counts as an 'agency or instrumentality,'" *Samantar v. Yousuf*, 560 U.S. 305, 314 (2010) (citing Section 1603(b)) (emphasis added). Similarly, the Fifth and Eleventh Circuits have held that the FSIA – not common law – defines who is an "agent" of a foreign state. *See Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480 (5th Cir. 1998) ("The FSIA includes agents or instrumentalities of a foreign state within the definition of 'foreign state.'") (emphasis added); *S & Davis Intern., Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1300 (11th Cir. 2000) (same). Review by this Court is required to resolve the *en banc* opinion's disregard of *Samantar* and departure from the FSIA's statutory definition.

B. The Authorities Cited by Respondent Also Do Not Negate the Existence of a Circuit Split Concerning Application of *Bancec* to the "By the Foreign State" Requirement.

In determining whether an entity is an "agent" of a "foreign state" under the FSIA, other circuits have applied the factors in *First Nat'l City Bank v. Banco*

Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983) ("*Bancec*"). *See Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 533-534 (5th Cir. 1992) ("Although Bancec's description of the basis for disregarding the separate juridical status of foreign agencies occurred in a discussion of substantive liability, *its principles have been applied to FSIA jurisdictional issues*. [Citations.] Hence, where . . . jurisdiction depends on an allegation that the particular defendant was an agent of the sovereign, the plaintiff bears the burden of proving this relationship.") (emphasis added); *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847-848 (D.C. Cir. 2000) (same). The *en banc* opinion's newly minted circuit split is in stark contrast with its prior holding that "*Bancec* provides a workable standard for deciding" the question whether "a particular individual or corporation is an agent of a foreign state." *Doe v. Holy See*, 557 F.3d 1066, 1079 (9th Cir. 2009) (*per curiam*), *cert. denied,* 130 S.Ct. 3497 (2010). As Judge O'Scannlain noted in dissent, "[o]ur opinion in *Holy See* provides the proper standard for attributing the actions of third parties to foreign states." App. at 51. As Judge O'Scannlain further noted, "it is clear that the sort of agency relationship that *Bancec* and *Holy See* required for the imputation of actions to the foreign state (an alter ego relationship, for example) differs significantly from the all-authorized-agents standard adopted by the majority." *Id.*

Respondent's contention that the *en banc* opinion does not create a circuit split because it is purportedly

consistent with *Barkanic, supra*, and *Kirkham v. Societe Air France*, 429 F.3d 288 (D.C. Cir. 2005), is incorrect. *See* Opposition at 1. As Judge O'Scannlain observed, "the parties in *Barkanic* and *Kirkham* did not dispute that the relevant actions constituted activity of the foreign state." Pet. App. 57. There was no holding in those cases as to the meaning of "agent." "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." Pet. App. 57 (quoting *Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436, 1448 (2011)). This Court should resolve the circuit split caused by the *en banc* opinion.

C. Common Law Principles of Ratification Do Not Apply to the FSIA, and Their Application Would Lead to Unwanted Results.

Respondent tries to salvage the *en banc* opinion's holding by arguing that a passing footnote concerning agency "ratification" principles dictates the result in this case. *See* Opposition at i (quoting Pet. App. 19-20 n.6). This footnote was not part of the court's holding and, in any event, the concept of ratification has no application to the FSIA or under these facts.

Ratification is a concept from agency common law. Indeed, the case cited by the *en banc* majority in support of its "ratification" theory, *Rayonier, Inc. v. Polson*, 400 F.2d 909, 915 (9th Cir. 1968), relies upon

the Restatement (Second) of Agency and Washington State common law. But "ratification" has no grounding in the FSIA, and the *en banc* majority's reference to state common law principles only exacerbates its departure from the need for uniformity that resulted in the FSIA's enactment.

Moreover, the *en banc* opinion's application of ratification will, with respect to foreign state-owned carriers, swallow the rule of sovereign immunity under the FSIA. When a carrier honors a ticket, it does not necessarily know where, or from what travel agency, that ticket was purchased. Here, for example, OBB was not even aware that ticket seller RPE existed. Yet under the *en banc* majority's reasoning, any time a foreign state-owned carrier such as OBB honors the ticket of a passenger, it has "ratified" that ticket and given it "effect as if originally authorized," thereby subjecting itself to the jurisdiction of U.S. courts if it turns out that the ticket sale has some connection to the United States. The notion that a foreign sovereign essentially waives sovereign immunity every time it honors a ticket with a U.S connection – whether known or unknown – has no basis in the FSIA or the cases interpreting the FSIA.

Such a "ratification" theory would also likely lead foreign state-owned carriers to alter their ticketing policies in ways that will lead to expense and trouble for U.S. citizens traveling abroad. If OBB had refused to honor Respondent's ticket and forced her to buy a new ticket when she arrived in Austria, OBB would not be subject to U.S. jurisdiction since that would

not be "commercial activity *carried on in the United States* by the foreign state." As CIT identified in its *amicus* brief, European railways are likely to change their business practices in response to the *en banc* opinion in order to avoid exposure to U.S. jurisdiction, and such changes "are likely to make it more inconvenient for Americans to purchase international railway passage." CIT *Amicus* Brief at 3, 16. Review by this Court is necessary, given the serious foreign relations and business considerations at stake.

II. THE *EN BANC* OPINION'S HOLDING THAT A PERSONAL INJURY CLAIM ARISING FROM A FOREIGN TRAIN ACCIDENT IS "BASED UPON" THE SALE OF A TICKET IN THE UNITED STATES CONFLICTS WITH *SAUDI ARABIA V. NELSON* AND IS AN UNPRECEDENTED EXPANSION OF FSIA JURISDICTION OVER FOREIGN SOVEREIGNS.

Concerning the commercial activity exception's "based upon" requirement, Respondent offers no response to Chief Justice Kozinski's dissent that the *en banc* majority's decision "conflict[s] with Supreme Court precedent" in *Saudi Arabia v. Nelson*. This conflict further compels review by this Court.

Nor does Respondent make any effort to reconcile the *en banc* majority's holding with *Nelson*. Instead, Respondent argues that there is no conflict because "the petition overlooks *Nelson's* reference to *Santos v. Compagnie Nationale Air France*, 934 F.2d 890,

892-894 (7th Cir. 1991) and the fact that *Santos* cited *Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11, 13, *cert. den.*, 484 U.S. 964, upon which the Ninth Circuit relied." Opposition 2. But it is what *this Court* said in *Nelson* ("Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit." *See* 507 U.S. at 358) that is the law. Applying *Nelson*, the claims here are "based upon" the alleged torts that occurred in Austria, and not on the ticket sale from a U.S.-based ticket seller months earlier.

Moreover, there is division in the circuit courts as to what the "based upon" standard means post-*Nelson*. The *en banc* majority, for example, "require[es] that only '*an element*' of the claim consist of such [commercial] activity." App. 62. In contrast, the Second Circuit, in *Kensington Intern. Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007), has held that the "based upon" element requires a "degree of closeness between the acts giving rise to the cause of action and those needed to establish jurisdiction that is *considerably greater* than *common law* causation requirements." *Id*. at 156 (emphasis in the original). The Eighth Circuit, employing yet another test, has held that the relevant inquiry is where the commercial activity "primarily" took place. *See Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1382-1384 (8th Cir. 1993). The Eleventh Circuit focuses on "the conduct which forms the basis of [the] complaint." *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1312-1313 (11th Cir. 2009). And, the Fifth Circuit relies on a confusing

combination of tests. *See Callejo v. Bancomer, S.A.,* 764 F.2d 1101 (5th Cir. 1985) ("[T]he focus should be on the elements of the cause of action itself: Is the gravamen of the complaint a sovereign activity by the defendant?"); *Can-Am Intern., LLC v. Republic of Trinidad and Tobago*, 169 Fed. Appx. 396, 405 (5th Cir. 2006) ("The court must therefore focus only on the conduct on which [the] action is based.").

It is important that this Court resolve these divisions and confusion as to the test for the "based upon" requirement particularly given the international impact of the *en banc* opinion. In addition to making no sense,[1] the *en banc* opinion's use of the "elements only" test dramatically expands jurisdiction over foreign state-owned carriers, finding jurisdiction based solely on the sale of a ticket in the United States *by anyone* (because, according to the *en banc* majority, *anyone* becomes an agent of the foreign carrier that honors the ticket), regardless of the location of the accident or absence of contacts between the carrier and the United States.

The need for this Court to accept review is pressing given this Court's concerns regarding courts in general, and the Ninth Circuit in particular,

[1] Respondent's claim is based upon "commercial activity" in Austria – Petitioner's provision of train services – not on the sale of the ticket in the United States. The ticket was not deceptive, overpriced or flawed in some way that gave rise to the claim. The ticket could have been sold anywhere in the world, and the claim would still be based upon the accident in Austria.

overstepping their bounds and subjecting foreign corporations to jurisdiction. *See, e.g., Daimler*, 134 S.Ct. at 759-760 (rejecting Ninth Circuit's common law of agency-based theory of jurisdiction). While the Court has reined in the Ninth Circuit's over-reaching in the area of jurisdiction over foreign *corporations*, the *en banc* opinion, if permitted to stand, would impose a similar "expansive view" of jurisdiction over foreign states, with "little heed to the risks to international comity." *Id.* at 763. This means that jurisdiction over foreign *states* would be broader than over foreign *private entities*, an anomaly contrary to the limited exceptions to sovereign immunity enacted in the FSIA.

CONCLUSION

The Ninth Circuit's expansion of subject matter jurisdiction over foreign state-owned carriers should not remain the law. For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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