No. 13-1067

In the Supreme Court of the United States

OBB PERSONENVERKEHR AG, PETITIONER

v.

CAROL P. SACHS

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, provides that foreign states and their instrumentalities are generally immune from suit in U.S. courts, subject to limited statutory exceptions. The commercial activity exception, 28 U.S.C. 1605(a)(2), gives U.S. courts jurisdiction over claims that are "based upon a commercial activity carried on in the United States by the foreign state." The questions presented are:

1. Whether the court of appeals correctly held that common-law agency principles may be used to determine whether the acts of a separate entity are attributable to a foreign state for purposes of Section 1605(a)(2).

2. Whether the court of appeals correctly held that respondent's claims are "based upon" commercial activity carried on in the United States.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA or the Act), 28 U.S.C. 1330, 1602 *et seq.*, establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Section 1604 provides that a foreign state is "immune from the jurisdiction of the courts of the United States" unless the suit falls within one of the narrow exceptions to im-

munity set forth in the Act. 28 U.S.C. 1604; see 28 U.S.C. 1330. The "commercial activity" exception, which is at issue in this case, provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2).

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

2. a. Petitioner OBB Personenverkehr AG (OBB), which operates passenger rail service within Austria, is an entity wholly owned by OBB Holding Group, a joint-stock company created by the Republic of Austria and wholly owned by the Austrian Federal Ministry of Transport, Innovation, and Technology. Petitioner is a member of the Eurail Group, an association responsible for marketing and selling Eurail passes, which authorize passenger transit on the railways of member countries. Pet. App. 5.

Respondent is a California resident who purchased a Eurail pass over the Internet from Rail Pass Experts (RPE), a travel agent in Massachusetts. Pet.

App. 5, 44. In April 2007, respondent presented her Eurail pass to petitioner in Innsbruck, Austria, for travel to Prague. *Id.* at 6. When attempting to board the train, respondent suffered injuries that ultimately required amputation of both her legs above the knee. *Ibid.*

b. Respondent sued petitioner in the United States District Court for the Northern District of California, asserting claims for negligence, strict liability for design defects and for failure to warn of design defects, and breach of implied warranties of merchantability and fitness. Pet. App. 6.

The district court dismissed the suit for lack of subject matter jurisdiction under the FSIA. Pet. App. 101-111. The court concluded that the FSIA's commercial activity exception to immunity did not apply because petitioner itself had not engaged in commercial activity in the United States, and RPE's sale of the Eurail pass could not be attributed to petitioner. *Id.* at 108-109. The court did not address the other grounds on which petitioner argued the suit should be dismissed, including *forum non conveniens*, lack of personal jurisdiction, and international comity. See *id.* at 102.

3. A panel of the court of appeals affirmed. Pet. App. 67-85. The panel held that RPE's sale of the rail pass could not be attributed to petitioner because respondent had not established that RPE's "separate juridical status" should be disregarded under the alter-ego test set forth in *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*). Pet. App. 76; see *id.* at 73-78.

4. The court of appeals granted rehearing en banc and reversed the district court's dismissal of the ac-

tion. Pet. App. 1-66. The court of appeals held that respondent's claims are "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(2), and therefore petitioner is not immune from suit. Pet. App. 40-41.

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

The court of appeals rejected petitioner's argument that before an entity's conduct may be attributed to a foreign state, the entity must satisfy Section 1603(b)'s definition of "agency or instrumentality." Pet. App. 21-30. The court explained that Section 1603(b) "defines what type of entity can be considered a foreign state for purposes of claiming sovereign immunity," but does not address the situations in which an entity's acts can be attributed to the foreign state. *Id.* at 22; see *id.* at 22-23. The court also rejected petitioner's argument that an entity's acts may be attributed to a foreign state only if the entity's separate juridical status should be disregarded under *Bancec*. See *id.* at 20-21. The court reasoned that *Bancec* did not establish the exclusive means by which an entity's actions could be attributed to a foreign state, and that *Bancec*'s alter-ego inquiry was not relevant in the

context of entirely distinct entities like petitioner and RPE. See *ibid.*

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

c. Judge O'Scannlain, joined by Chief Judge Kozinski and Judge Rawlinson, dissented. Pet. App. 42-61. The dissenting judges argued that an entity's actions may be attributed to a foreign state only if the entity's separate form should be disregarded under *Bancec*, and that respondent had not satisfied that standard. *Id.* at 45-58. They also argued that respondent's strict liability claims are not "based upon"

the rail pass sale because they did not require proof of a transaction. *Id.* at 58-61.

Chief Judge Kozinski, in a separate dissent, concluded that none of respondent's claims were "based upon" commercial activity carried on in the United States. Pet. App. 65; see *id.* at 61-66.

DISCUSSION

Petitioner challenges the court of appeals' conclusions that (1) common-law agency principles may be used to attribute an entity's actions to a foreign state for purposes of the commercial activity exception; and (2) respondent's claims are "based upon" commercial activity—*i.e.*, the sale of the Eurail pass—in the United States. Further review is not warranted with respect to either question.

The court of appeals correctly held that the commercial activity exception encompasses situations in which a foreign state carries on commerce through the acts of an independent agent in the United States. That ruling does not conflict with any decisions of this Court or other courts of appeals.

The court of appeals' holding that respondent's claims are "based upon" commercial activity in the United States also does not warrant review. Although the court used an overly permissive formulation of the "based upon" standard, this case is not an appropriate vehicle in which to address the meaning of that standard. The court's and the parties' analysis of questions that are antecedent to the "based upon" inquiry—namely, whether California law governs respondent's claims, and, even if it does, how the sale of the Eurail pass relates to each claim under California law—was cursory and incomplete. The resulting lack of clarity about the precise nature of

respondent's claims would make it difficult to provide guidance on the content of the "based upon" requirement by applying it to the claims in this case. In addition, the district court on remand may dismiss the case on other grounds, and cases presenting similar claims are unlikely to recur with any frequency, in light of the prevalence of forum-selection clauses in form ticket contracts for travel.

I. THE COURT OF APPEALS' HOLDING THAT A FOREIGN STATE MAY CARRY ON COMMERCIAL ACTIVITY IN THE UNITED STATES THROUGH THE ACTS OF AN AGENT ACTING ON ITS BEHALF DOES NOT WARRANT REVIEW

The court of appeals correctly held that a foreign state may be found to have "carried on" commercial activities in the United States when it has employed an entity to act as its agent in conducting those activities. Pet. App. 14-17. That holding does not conflict with any decision of this Court or another court of appeals.

A. 1. The FSIA's commercial activity exception provides in relevant part that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. 1605(a)(2); see 28 U.S.C. 1603(e) (defining the latter phrase as commercial activity "carried on by such state and having substantial contact with the United States"). The FSIA does not further explain what it means for commercial activity to be "carried on" by a foreign state. Applying traditional agency-law principles to give content to that phrase best furthers Congress's intent in enacting the exception.

The commercial activity exception is designed to ensure that when a foreign state acts as an "every day participant[]" in the marketplace—in other words, when the state engages in commercial ventures of the sort that private parties undertake—plaintiffs may seek judicial resolution of any resulting "ordinary legal disputes." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-7 (1976) (*House Report*); *id.* at 17 (examples of disputes that would fall within the exception include "business torts occurring in the United States"). Private parties often engage in commercial activities with the assistance of agents whose conduct they direct and control. As a result, common-law agency principles are routinely applied in private commercial disputes: for purposes of both jurisdiction and liability, agency principles may provide a basis for attributing the conduct of one party to a principal who directed the activity at issue. See Restatement (Third) of Agency § 1.01 cmt. c (2006); *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 759 n.13 (2014) (acts of agent may be imputed to principal for purposes of exercising specific jurisdiction).

Congress therefore would have expected traditional agency-law principles to play a similar role in determining when a foreign state has undertaken commercial activities that subject it to suit. Foreign states, like private actors, may often engage in commercial activities by employing entities under their direction and control to enter into and execute transactions. See *Maritime Int'l Nominees Establishment* v. *Republic of Guinea*, 693 F.2d 1094, 1105 (D.C. Cir. 1982), cert. denied, 464 U.S. 815 (1983). When a foreign state uses agents to accomplish its commercial ends, the state is acting as an "every day partici-

pant[]" in the marketplace. *House Report* 7. And by virtue of the state's direction and control over the agent, the state is effectively taking actions in the United States commercial market itself. Applying agency-law principles to determine when a foreign state has "carried on" commercial activity therefore furthers Congress's purpose of ensuring that foreign states may be subject to suit when they act in a commercial manner.[1] See *Maritime Int'l*, 693 F.2d at 1105; see also *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 372-373 (1993) (Kennedy, J., concurring in part and dissenting in part) (actions of private entity acting as agent of Kingdom of Saudi Arabia could be attributed to Kingdom); U.S. Amicus Br. at 14 n.8, *Nelson*, *supra* (No. 91-522).

Exercising jurisdiction over a foreign state that has "carried on" commercial activity through an agent is also consistent with international practice. The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, a draft convention describing well-accepted state practice in this respect, provides that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is *in fact acting on the instructions of, or under the direction or control of, that State* in

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

carrying out the conduct." G.A. Res. 56/83, Pt. 1, ch. II, art. 8, U.N. Doc. A/RES/56/83, at 3 (Jan. 28, 2002) (emphasis added). The United States expressed support for an earlier, materially similar draft article. State Responsibility: Comments and observations received from Governments, U.N. Doc. A/CN.4/488, at 41 (Mar. 25, 1998).

2. Petitioner's arguments against applying traditional agency principles are without merit.

a. Petitioner first argues (Pet. 17-19) that an entity's acts may be considered acts of the foreign state only if the entity falls within the statutory definition of an "agency or instrumentality of a foreign state" in 28 U.S.C. 1603(b).

As the court of appeals explained, Section 1603(b) defines entities that qualify as an "agency or instrumentality of a foreign state" for purposes of the FSIA. Pet. App. 22-23. Section 1603(a) provides that a "foreign state" includes the state itself, its political subdivisions, and any "agency or instrumentality" of the state, as defined in Section 1603(b). 28 U.S.C. 1603(a). Section 1604 then provides that a "foreign state" is presumptively "immune from the jurisdiction of the courts." 28 U.S.C. 1604.

Nothing in Section 1603(b)'s text suggests that it addresses 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. Nor does Section 1603(b) indicate that "Congress intended to displace common-law agency principles * * * for purposes of assessing commercial activity." Pet. App. 24. Indeed, commercial activities carried on by a juridically separate agency or instrumentality gener-

ally should not be attributed to the foreign state absent an agency or alter ego showing. See *First National City Bank* v. *Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 628-633 (1983). Petitioner is also incorrect in suggesting (Pet. 18-19) that the court of appeals' holding that petitioner "carried on" commercial activity by virtue of RPE's acts wrongly treats RPE as part of the "foreign state," even though it does not satisfy the definition of "agency or instrumentality." The conclusion that an entity's acts may be attributed to a foreign state by virtue of agency principles is distinct from, and does not imply, the conclusion that the entity is an organ of the foreign state.

Petitioner's reading of the FSIA, moreover, would allow foreign states engaging in commercial activity in the United States to shield themselves from any exposure to litigation in U.S. courts by the expedient of acting through U.S. entities, which, by definition, are not "agenc[ies] or instrumentalit[ies]" of a foreign state. See 28 U.S.C. 1603(b); Pet. App. 23-27. That result would be inconsistent with the FSIA's purpose of ensuring that U.S. persons have recourse against a foreign state that engages in commercial activity in the United States.

b. Petitioner also argues (Pet. 14-15, 25-28) that the alter-ego test this Court set forth in *Bancec*, *supra*, provides the exclusive means of attributing an entity's actions to a foreign state. In *Bancec*, this Court held that, although instrumentalities of a foreign state are presumed to have independent juridical status, a court may hold an instrumentality liable for the actions of the state itself when the instrumentality is "so extensively controlled by its owner that a rela-

tionship of principal and agent is created," or when recognizing the separate status of the entity would "work a fraud or injustice." 462 U.S. at 629; see *id.* at 628-633.

Bancec thus identifies one way in which an entity's actions may be attributed to a foreign state. One consequence of holding that a state instrumentality is an alter ego of the state under *Bancec* is that the instrumentality is treated as the state's agent for *all* purposes. See *Transamerica Leasing, Inc.* v. *La Republica de Venezuela*, 200 F.3d 843, 848-849 (D.C. Cir. 2000). But *Bancec* does not purport to define the exclusive circumstances in which the actions of an entity should be attributed to a foreign state, or to displace common-law agency principles when a foreign state directs the conduct of an independent entity (as opposed to an agency or instrumentality) for a particular purpose. See *Dale* v. *Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (*Bancec* inquiry is "analytically distinct" from the question whether the state has employed an independent agent).

B. Petitioner's contention that the court of appeals' decision conflicts with those of other courts of appeals is without merit. Petitioner relies (Pet. 26) on two decisions that applied the *Bancec* standard to determine whether an instrumentality's acts should be imputed to the foreign state for purposes of the commercial activity exception. See *Transamerica*, 200 F.3d at 847-849; *Arriba Ltd.* v. *Petroleos Mexicanos*, 962 F.2d 528, 533-537 (5th Cir.), cert. denied, 506 U.S. 956 (1992). Neither decision, however, suggested that the *Bancec* standard provides the exclusive means of attributing an entity's actions to the state. To the contrary, both courts also recognized that, even if the

instrumentality's separate juridical status should not be disregarded under *Bancec*, agency principles provided an alternative means of attributing the instrumentality's actions to the state. *Transamerica*, 200 F.3d at 849-850; *Arriba*, 962 F.2d at 534-535.

C. For the reasons stated above, further review of the court of appeals' conclusion that common-law agency principles govern whether RPE's sale of the Eurail pass could be attributed to petitioner is unwarranted.

It is unclear, however, whether the court was correct in concluding that RPE did in fact act as petitioner's agent. Pet. App. 18-19; cf. *Harby* v. *Saadeh*, 816 F.2d 436, 438-439 (9th Cir. 1987) (airline lacked necessary control over travel agent). The court did not discuss RPE's relationship with petitioner in any detail, and it did not state whether it applied state or federal law in determining the existence of an agency relationship. Nor did the court consider whether, even if state law applies, federal law provides limiting principles on the relationships that would support attribution to the foreign state. Cf. *Bancec*, 462 U.S. at 623 (characterizing alter-ego analysis as grounded in "international law and federal common law"). Petitioner has not challenged those aspects of the court's decision before this Court. See Pet. i, 14-15. In any event, the fact-specific question whether RPE acted as petitioner's agent would not merit this Court's review.

II. THE COURT OF APPEALS' HOLDING THAT RESPONDENT'S CLAIMS ARE "BASED UPON" PETITIONER'S COMMERCIAL ACTIVITY IN THE UNITED STATES DOES NOT WARRANT REVIEW

Petitioner also challenges (Pet. 29-35) the court of appeals' conclusion that respondent's claims are "based upon" petitioner's commercial activity in the United States. Although the court applied an overly permissive formulation of the "based upon" requirement, this case would not be a suitable vehicle to provide guidance on the correct application of that requirement.

A. 1. In order to establish jurisdiction over a foreign state under the relevant clause of Section 1605(a)(2), a plaintiff must show that "the action is based upon" the state's commercial activity in the United States. In *Nelson*, this Court held that the phrase "based upon" connotes "conduct that forms the 'basis,' or 'foundation,' for a claim." 507 U.S. at 357. The Court explained that the phrase "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case," and it cited with approval a decision describing the inquiry as focusing on "the gravamen of the complaint." *Ibid.* (quoting *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985)). The Court also cautioned that it "d[id] not mean to suggest that the first clause of [Section] 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state." *Id.* at 358 n.4. The Court concluded that Nelson's claims challenging his torture and imprisonment during his employment in Saudi Arabia were not based upon his recruitment and hiring in the United States. Those commercial

activities, the Court stated, "preceded the[] commission" of the intentional torts Nelson alleged. *Id.* at 358.

2. In this case, the court of appeals stated that a claim is "based upon" commercial activity under *Nelson* 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. Pet. App. 33 (citations omitted); *id.* at 35. That understanding of the "based upon" requirement is problematic. As this Court indicated in *Nelson*, 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. 507 U.S. at 357; accord U.S. Amicus Br. at 10, *Nelson*, *supra* (No. 91-522). Congress's inclusion of the "based upon" language provides a significant limitation on the jurisdiction of courts in cases brought under Section 1605(a)(2) by requiring an appropriate connection between the claims at issue and the foreign state's commercial activities in the United States. There may be situations in which the commercial activity establishes a single element of, or fact necessary to, a claim, and that element is so central to the claim that the commercial activity may be said to be the gravamen of the claim. But a court might apply the single-element formulation in a manner that permits the "based upon" requirement to be satisfied simply because the commercial activity is relevant to an element or factual predicate of the plaintiff's claim that has little to do with the core wrong the plaintiff has allegedly suffered. That could lead the court to assert jurisdiction in a case that does not have a substantial connection to

the foreign state's commercial activity in the United States.

The court of appeals' application of the single-element standard in this case also appears to have been unduly permissive. The court focused on whether the ticket sale in the United States established a fact necessary to an element of each of respondent's claims. Pet. App. 33-40. The court concluded that respondent's claims were "based upon" the sale of the Eurail pass because, under California law, that sale was necessary to (1) establish a heightened duty of care for petitioner as a common carrier for purposes of respondent's negligence claim, and (2) to establish the existence of a transaction between seller and consumer for purposes of respondent's strict-liability and breach-of-implied-warranty claims. *Id.* at 34-40. It is doubtful that the sale of a rail pass in the United States should be considered the gravamen of respondent's claims, as those claims focus on the events in Austria that caused respondent's injury there.

It is difficult to reach a definitive conclusion on this issue, however, because the parties and the court did not analyze the elements of respondent's claims in any detail. As an initial matter, it is not clear that the court was correct in concluding that California, not Austrian, law governs respondent's claims.[2] Neither party appears to have addressed which jurisdiction's law should apply. Pet. C.A. Br. 40-43; Resp. C.A. Re-

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[2] Contrary to the court's assertion, Pet App. 34 n.14, the FSIA's provision that a non-immune foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 1606, does not indicate that the forum state's law should apply regardless of choice-of-law principles.

ply Br. 6-10. The court's cursory choice-of-law analysis, while assertedly based on the Restatement (Second) of Conflict of Laws (1971) (Restatement), did not weigh all relevant factors or explain why California's interest outweighed Austria's, even though respondent was injured in Austria and her claims concern the duties of common carriers in Austria and the adequacy of Austrian transportation facilities and safety measures. See Pet. App. 34 n.14; cf. Restatement §§ 6, 145; *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 70 (D.C. Cir. 2011) (under Restatement, forum where injury occurred presumptively has stronger interest in personal-injury claims), vacated on other grounds, 527 Fed. Appx. 7 (D.C. Cir. 2013).

Even assuming that the court of appeals correctly concluded that California law applies, the court's analysis of the role that the sale of the rail pass plays in each of respondent's claims under California law was incomplete. The court's analysis was conducted without assistance from the parties, who did not discuss the state-law elements of respondent's claims or address how the Eurail pass sale related to those claims, except at the highest level of generality. See Pet. C.A. Br. 40-43 (arguing that none of respondent's claims were based on pass sale because claims concerned subsequent alleged torts); Resp. C.A. Reply Br. 6-9 (stating that pass purchase was necessary to negligence claim, without discussing other claims). Thus, although the court opined that the purchase of the Eurail pass was an "essential fact" for respondent's negligence claim because the purchase "established a common-carrier/passenger relationship" and therefore a heightened duty of care, Pet. App. 34-35, it is not clear that the purchase of a ticket alone is suffi-

cient to establish such a duty under California law, see *Orr* v. *Pacific Sw. Airlines*, 257 Cal. Rptr. 18, 21-22 (Cal. Ct. App. 1989). The court next concluded that the sale of the pass was a "necessary prerequisite" to respondent's implied-warranty claim. Pet. App. 39. The court did not address, however, whether California law treats a ticket for foreign rail transportation as containing an implied warranty of safety or fitness of railcars and platforms, and if so, whether there would be a sufficient nexus between that claim and the sale of the pass. *Ibid.* The court also assumed that a "sale of a product" is a necessary element of respondent's strict liability claims, *id.* at 38, but as the dissent pointed out, California law may permit respondent to prevail on her claim without showing that any sale took place, *id.* at 60 (citing case involving injuries to user of heavy equipment). Finally, the court did not consider whether, even if the pass sale is an "essential fact" or element of each of respondent's claims under California law, permitting jurisdiction over the claims would run afoul of *Nelson*'s holding that plaintiffs should not be permitted to "recast" claims in a manner that expands the FSIA's commercial activity exception beyond the jurisdictional limits it imposes. 507 U.S. at 363 (rejecting failure-to-warn claim as a "semantic ploy" designed to take advantage of Section 1605(a)(2)).

B. As petitioner observes (Pet. 34), the Second Circuit has used a different formulation than the Ninth Circuit to describe the "based upon" requirement. The Second Circuit has emphasized that a claim "based upon" commercial activity requires a "significant nexus" between the activity and the gravamen of the complaint that exceeds but-for causation.

Kensington Int'l Ltd. v. *Itoua*, 505 F.3d 147, 155 (2007) (emphasis omitted) (holding that plaintiff's claim was not based upon shipments in United States because they were not the core of the alleged conspiracy); see *Transatlantic Shiffahrtskontor GmbH* v. *Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000), cert. denied, 532 U.S. 904 (2001). Other courts, however, have used a single-element formulation similar to that employed by the Ninth Circuit. See *Kirkham* v. *Société Air France*, 429 F.3d 288, 292-293 (D.C. Cir. 2005) (under single-element formulation, claims for injuries suffered in French airport were "based upon" ticket sale in United States); *BP Chems. Ltd.* v. *Jiangsu Sopo Corp.*, 285 F.3d 677, 682 (8th Cir.) ("only one element of a plaintiff's claim must concern commercial activity"), cert. denied, 537 U.S. 942 (2002).

The extent to which those different formulations reflect substantive disagreements as to the content of the "based upon" requirement is unclear, however, because each case concerns distinct claims and varying degrees of connection between the commercial activity and one or more elements of the plaintiff's claims. In the one post-*Nelson* decision involving facts materially similar to those presented here, the D.C. Circuit, like the Ninth Circuit here, concluded that the plaintiff's tort claims were "based upon" the defendant's sale of a ticket in the United States.[3] See *Kirkham*, 429 F.3d at 292-293.[4]

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[3] Petitioner relies on *Daimler AG*, in arguing (Reply Br. 1-2) that if it were privately owned, it would not be subject to jurisdiction in U.S. courts for an injury occurring in Austria. *Daimler* held that a private foreign company alleged to have committed torts abroad was not subject to *general* personal jurisdiction based

C. For several reasons, this case does not present an appropriate vehicle to resolve any conflict among the courts of appeals.

First, whatever formulation is used to elaborate on the "based upon" requirement, determining whether a plaintiff's claims are "based upon" commercial activity requires an understanding of both the elements of the claims and of how the commercial activity relates to those elements. See *Kensington*, 505 F.3d at 156-157; *BP Chems.*, 285 F.3d at 683-684. Here, however, it is unclear that the court was correct to apply California law in the first place, but petitioner has not challenged that antecedent conclusion. See Pet. i. Moreover, respondent has not explained the precise state-law theories on which her claims rest or how the sale of the rail pass relates to the elements of each claim, and petitioner has addressed those issues only at a high level of generality. As a result, the court of appeals' analysis of respondent's claims may reflect a mistaken understanding of the governing law, and of respondent's theories under California law, even if that law applies. See pp. 16-18, *supra*.

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solely on the sales activities of a U.S. subsidiary. 134 S. Ct. at 759-760. Because the FSIA's commercial activity exception requires that the plaintiff's claim be "based upon" the foreign state's commercial contacts with the United States, however, the more relevant private-entity analog is specific jurisdiction, which requires that the plaintiff's suit "aris[e] out of or relat[e] to the defendant's contact[] with the forum." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984).

[4] Two other courts reached the same conclusion before *Nelson*. See *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991); *Barkanic* v. *General Admin. of Civil Aviation of China*, 822 F.2d 11, 13 (2d Cir.), cert. denied, 484 U.S. 964 (1987).

This case would therefore be a poor vehicle in which to address the meaning of the "based upon" standard. Given the case-specific nature of the inquiry and the difficulty of clarifying the standard with any one verbal formulation, the ideal vehicle would be one in which the Court could give concrete guidance to lower courts by applying the standard to the claims at issue. The lack of development below and consequent uncertainty about respondent's theories of her claims would make any such application difficult in this case.

Second, the district court may dismiss this case based on alternative grounds it has not yet considered, including forum non conveniens and international comity. See Pet. App. 7. Although the court of appeals' conclusion that California has a "strong interest" in the suit for purposes of its choice-of-law analysis, *id.* at 35 n.14, may be relevant to the forum non conveniens and comity inquiries, the district court should have the opportunity to consider those questions in the first instance. It appears that at least some of the factors relevant to forum non conveniens, such as the location of the evidence and witnesses, would weigh in favor of dismissal. See generally *Carijano* v. *Occidental Petroleum Corp.*, 643 F.3d 1216, 1229-1234 (9th Cir. 2011), cert. denied, 133 S. Ct. 1996 (2013).

Finally, cases raising the "based upon" question in the context presented here—*i.e.*, where a plaintiff brings suit in the United States after purchasing a foreign travel ticket in the United States—arise only infrequently, and they will likely become rarer in the future. As this Court has observed, forum-selection clauses are often included in form ticket contracts for travel in order to limit the forums in which the carrier

can be sued, and such clauses are enforceable when reasonable. See *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 593-594 (1991); *UNC Lear Servs., Inc.* v. *Kingdom of Saudi Arabia*, 581 F.3d 210, 219 (5th Cir. 2009), cert. denied, 559 U.S. 971 (2010). Although it is unclear whether the pass at issue in this case contains a forum-selection clause, carriers may be able to use such clauses to ensure that passenger claims are brought in the carriers' chosen forum.

Indeed, multi-country Eurail passes like the one at issue here now expressly provide that they are governed by the Convention concerning International Carriage by Rail and the Uniform Rules concerning the Contract of International Carriage of Passengers by Rail. See *Eurail Pass Conditions of Use*, http://www.eurailgroup.org/Rail%20Passes/~/media/CoU_2014/Eurail%20Pass%20%20%20COU%202014.ashx (last visited Dec. 4, 2014); Int'l Rail Transp. Comm. Amicus Br. 6-11. Under the Uniform Rules, a plaintiff must file suit in the forum of the defendant carrier's residence. *Convention concerning International Carriage by Rail: Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV)*, Tit. VI, art. 57, at 34 (July 1, 2006), http://www.cit-rail.org/en/rail-transport.law/cotif/. The Uniform Rules provide that carriers "shall be liable" for losses or damages resulting from personal injuries arising from rail travel. *Id.* Tit. IV, ch. I, art. 26, at 19; see *id.* art. 28, at 20.

Because the availability of forum-selection clauses makes it unlikely that suits similar to this one will arise with any frequency, this case is an unsuitable vehicle to provide additional guidance on how the "based upon" inquiry should proceed. In addition, the

ability of state-owned passenger carriers to use forum-selection clauses to ensure that suits are brought in their home forums mitigates to a considerable degree petitioner's concern that the decision below "would permit a foreign state-owned carrier to be dragged into U.S. court" against its will based on "attenuated or non-existent" contacts with the United States. Reply Br. 1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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