The Foreign Sovereign Immunities Act (FSIA) generally confers immunity from suit for foreign nations in United States courts, but there is an exception for suits "based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). On January 23, the Supreme Court granted certiorari in *OBB Personenverkehr AG v. Sachs*, 13-1067, to answer two questions about the scope of the commercial-activity exception: When may the actions of an agent be imputed to a foreign state, and what does it mean for a claim to be "based upon" commercial activity in the United States?

The plaintiff, an American tourist from California, purchased a Eurorail pass from Rail Pass Experts, a web-based travel agency located in Massachusetts. While traveling in Austria, she fell off a train platform and was severely injured. She sued the railway—which is wholly owned by the government of Austria—in federal district court in California.

The district court dismissed the case for lack of subject-matter jurisdiction. All parties agreed that the Austrian railway, OBB, qualified as a "foreign state" under the FSIA. The district court held that the actions of the internet travel agency within the United States could not be imputed to OBB, however, because the relationship between the two entities was "too attenuated." The travel agency had been authorized to sell Eurorail passes by the Eurorail Group, of which OBB was a member. But there was no evidence that OBB had any "day-to day involvement" with Rail Pass Experts, nor was there any allegation of a principal-agent relationship.

A panel of the Ninth Circuit affirmed the district court's judgment, but on rehearing en banc the Ninth Circuit reversed. The en banc court purported to apply common-law agency principles in concluding that Austria was conducting commercial activity in the United States through Rail Pass Experts. The court also concluded that the suit was "based upon" that commercial activity because one element of one of the plaintiff's claims required proof that the plaintiff had purchased a ticket.

Judge O'Scannlain dissented, joined by Chief Judge Kozinski. Judge O'Scannlain took the view that the FSIA had displaced common-law agency principles. He then pointed to other provisions of the FSIA that define a "foreign state" as including a "political subdivision of a foreign state or an agency or an instrumentality of a foreign state" and specify that citizens "of a State of the United States" are not "agencies or instrumentalities" of a foreign state. 28 U.S.C. § 1603(a)(1)-(2). Under the dissent's view, a foreign state may not be held liable for the actions of its agents unless the agents *also* qualify as foreign states under the FSIA. Because Rail Pass Experts is neither a foreign state in its own right nor an alter ego of OBB, and because recognizing Rail Pass Experts' separateness from OBB would not work a fraud or injustice, OBB could not be held liable under the commercial-activity exception based on the actions of Rail Pass Experts.

Writing separately, Chief Judge Kozinski also disputed the majority's conclusion that the claim was "based upon" commercial activity taking place in the United States. In Judge Kozinski's view, the plaintiff's purchase of a ticket in the United States did not have a "sufficient nexus" to her injuries on an Austrian train platform. In a nod to the law-school-casebook favorite about a woman injured on a New York train platform, Judge Kozinski said that litigating the case in California "makes as much sense as forcing Mrs. Palsgraf to litigate her case in Vienna."

The petition for certiorari largely followed the dissenting opinions, arguing that the Ninth Circuit's "based upon" rule was too broad and that common-law agency principles were not dispositive of the attribution question. The Supreme Court granted certiorari on both issues raised by the dissents.

At the Supreme Court's invitation, the Solicitor General filed a brief stating the position of the United States respecting certiorari. Although the government took the view that the Ninth Circuit's understanding of the phrase "based upon" was too expansive, the government nonetheless opposed certiorari on the basis that the case posed a poor vehicle for resolving the question.

Unless the briefing schedule is altered by the Court at the parties' request, amicus briefs in support of the petitioner (or neither party) will be due on March 16, 2015, and amicus briefs in support of the respondent will be due on April 15, 2015. Any questions about this case should be directed to Andy Pincus (+1 202 263 3220) or Paul Hughes (+1 202 263 3147) in our Washington office.