NO. 21-_____

In the Supreme Court of the United States

FRANCE.COM, INC., A CALIFORNIA CORPORATION,

Petitioner,

v.

THE FRENCH REPUBLIC; ATOUT FRANCE; THE MINISTRY FOR EUROPE AND FOREIGN AFFAIRS; FRANCE.COM, A DOMAIN NAME,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit and other lower federal courts have misapplied this Court's decision in *OBB Personenverkeher v. Sachs*, 577 U.S. 27, 34-35 (2015), as allowing courts to determine the gravamen of Foreign Sovereign Immunities Act "commercial activity" exception suits without analyzing distinct claims presented.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

France.com, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

LIST OF PROCEEDINGS

United States District Court (E.D. Va.):

France.com, Inc. v. The French Republic, No. 1:18-cv-460-LO-IDD (May 31, 2019) (order on motion to dismiss)

France.com, Inc. v. The French Republic, No. 1:18-cv-460-LO-IDD (Dec. 6, 2019) (order on motion to dismiss)

United States Court of Appeals (4th Cir.)

France.com, Inc. v. French Republic, No. 19-1659 (August 27, 2019) (defendants' appeal of order denying motions to dismiss for lack of jurisdiction)

France.com, Inc. v. French Republic, No. 20-1016 (March 25, 2021), petition for reh'g denied, April 19, 2021 (defendants' appeal of order denying motion to dismiss)

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The opinion of the U.S. Court of Appeals, reported as *France.com, Inc. v. French Republic*, 992 F.3d 248 (4th Cir. 2021), *reh'g denied*, 2021 U.S. App. LEXIS 11321 (4th Cir. April 19, 2021) is included below at App.1a. The order of the U.S. District Court, found at 2020 U.S. Dist. LEXIS 247877 (E.D. Va Dec. 6, 2019), is included below at App.17a.

JURISDICTION

The Court of Appeals entered judgment on March 25, 2021. (App.1a). That published decision is located at 992 F.3d 248 (4th Cir. 2021), *reh'g denied*, 2021 U.S. App. LEXIS 11321 (4th Cir. April 19, 2021). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1605(a)(2-3)
Foreign Services Immunities Act of 1976 ("FSIA" or "The Act"), Exceptions, in Relevant Part

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—. . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . . .

STATEMENT OF THE CASE

A. Procedural History

Petitioner France.com filed a five-count suit in the District Court for the Eastern District of Virginia alleging that Defendants—The French Republic; Atout France; The Ministry for Europe and Foreign Affairs; and <france.com>, a domain name (collectively referred to herein as "The French Republic")[1]—engaged in expropriation when they pressured a U.S. domain-name registrar to allow the transfer of the <france.com> internet domain to the French Republic and then used that domain <france.com> in a manner which infringed on Petitioner's registered trademark rights in FRANCE.COM.

Defendants moved to dismiss Plaintiff's suit for failure to state a claim and for lack of jurisdiction, asserting the Foreign Sovereign Immunities Act ("FSIA") shielded The French Republic from suit.

The District Court denied Defendants' jurisdictional motion—finding questions of whether FSIA exceptions applied were best raised after discovery. The Court granted Defendants' 12(b)(6) Motion, granting Plaintiff leave to amend. Defendants appealed the denial of the jurisdictional Motion to Dismiss, but that appeal was dismissed as there was no final order

[1] Two additional Defendants, Jean-Yves Le Drian; The French Republic's Minister for Europe and Foreign Affairs, and Verisign, Inc. were dismissed from the suit prior to litigation in the Court of Appeals—Le Drian through a suggestion of Immunity from the United States and subsequent Court order, and Verisign, Inc. upon Plaintiff's Motion.

issued by the District Court. Plaintiff filed an amended Complaint and Defendants again moved to dismiss on jurisdictional grounds. The District Court denied the motion, citing again the need for discovery to resolve jurisdictional questions.

Defendants again appealed, a motion to dismiss was denied, and the Court of Appeals reversed, finding the lawsuit was not 'based upon' commercial activity, but rather was based upon a factual predicate. In so doing, the Court of Appeals did not examine or discuss Petitioner's distinct individual claims asserted but rather identified one 'based upon' event or gravamen the court applied to the entire suit.

The Court of Appeals instructed that the suit be remanded to the District Court where all claims, even those never discussed or examined by the Court of Appeals, be dismissed with prejudice. The Court denied France.com's petition for rehearing *en banc*. App.22a-23a, 24a-40a.

B. Factual Background

Jean-Noel Frydman grew up in France and immigrated to the United States at age nineteen. He zealously pursued the 'American dream,' formed a small business and became a citizen.

That business focused on connecting French expats in the U.S. and grew as the fledgling 'world-wide-web' grew, fostering a Francophile community through promotion of France and support of tourism. *See* Plaintiff's Opposition to Defendants' Motion to Dismiss, ROA Doc. 64 at 3-4. In 1994, Frydman purchased the commercial web domain name <france.com>

from Network Solutions, LLC.[2] *See* Amended Complaint, ROA Doc. 48 at 7. Mr. Frydman assigned his entire interest in the domain name to his company, incorporated as France.com, Inc. Frydman also secured trademark rights in the name France.com (with first use in 1995). *See* Complaint, ROA Doc. 1 at 2-3, ROA Doc. 48 at 8. That trademark became incontestable after five years of continuous and unchallenged use. *See* 15 U.S.C. § 1065. With the domain and the trademarked domain/business name, Frydman operated an award-winning commercial French tourism business until the events giving rise to the lawsuit below.

Across the Atlantic, The French Republic formed 'Atout France' fifteen (15) years after Frydman's France.com began operations. Atout France serves as the official tourism arm of The French Republic—albeit one made up not only of the French Government but also large businesses profiting from French tourism.[3]

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[2] The ".com" top-level domain (TLD), derived from the word "commercial," is intended for the purpose of domains registered and used by commercial organizations. *See* https://archive.icann.org/en/tlds/ (last visited September 14, 2021). Others have explored top level domains precisely in the context of the current dispute. *See* Russell Brandom, The Battle for France.com, https://www.theverge.com/2018/4/30/17302000/france-website-domain-name-lawsuit-french-government (published Apr. 30, 2018) (last visited September 14, 2021).

[3] Atout France initially began in 2009; however, it merged with Maison de la France (the French Government Tourist Office) to form a Groupement d'intérêt économique ("GIE") (referred to in English as an Economic Interest Group ("EIG")). *See* Brief of Appellee at 4, *France.com, Inc. v. French Republic*, 992 F.3d 248 (4th Cir. 2021). A GIE is a unique multi-member structure governed by specific provisions of the French Code. As its name in French or English implies, the main purpose of the structure

As France.com supported the interests of both the government and private actors forming Atout France, the economic group recognized Frydman and his business for their work. *See* Amended Complaint, ROA Doc. 48 at 7-8. Atout France endorsed France.com in trade catalogues, promotions, and marketing material as a legitimate and honored contributor to French tourism. France.com incorporated the official Atout France seal of approval on its website. *Id*. In 2010, Atout France offered Mr. Frydman a position on their Advisory Board where he served for the following four years. *Id*., Doc. 48-4 at 2.

Unbeknownst to Mr. Frydman as he served on that Advisory Board, the Atout France leadership and French Republic had decided not only that they should own Mr. Frydman's domain name and trademarks but

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is to pool and leverage resources so as to have a competitive advantage in the marketplace. *Id*. at 5. A GIE, by law, must engage in the type of activity "similar to that practiced in the companies which constitute it." *Id*. Those members indirectly share in any economic benefit derived by the GIE (or directly if the members of the GIE so decide) and directly share, jointly and severally, in any liabilities of the GIE. The very flexible structure consists of private or public members or some combination thereof. In the case of Atout France, there is a public component as the GIE serves as, and was organized to be, the official tourism arm of the French Government (*Id*.); however, despite the presence of government actors on the Atout France governing board, from its beginning the GIE has had a heavy private-sector component—and two of its largest private founding entities and members are giants in the private tourism field, Air France/KLM (AFLYY) and Accor Hotels (ACRFY). *Id*. at 6. France.com began working with that office as early as 1997 with the publication of the business's first French travel guide. France.com began working with the French Ministry of Foreign Affairs from the very first days of having its <france.com> domain. *See OECD Tourism Trends and Policies* at 157 (OECD 2010).

had put in place an aggressive plan in the French Courts to seize both rather than purchase either. ROA Doc. 48 at 8.

France.com had sued a private entity in France for infringing on France.com's European Union ("EU") trademarks. That suit settled; however, before the case was closed by the French Court, The French Republic intervened and argued that it was entitled to the domain <france.com> and that France.com's EU trademarks should be cancelled on the theory that the Republic held exclusive rights of publicity in the word 'France.' *See* Brief of Appellee at 7, *France.com, Inc. v. French Republic*, 992 F.3d 248 (4th Cir. 2021). The French Republic had never raised such an argument regarding France.com before; it appears they had never raised it about their Board member Air France or any other French business; and, in the United States (where France.com was incorporated and had registered the domain <france.com>), they had expressly disclaimed exclusive rights to the word 'France' when applying for their own trademark.

Though without authority or legal grounds to determine ownership of U.S. property, the French court ordered that the domain name be transferred to The French Republic within a two-month window or France.com pay a fine of 150 Euros per day of delay. *See* ROA Docs. 62-1, 48.

France.com appealed the lower French court's decision, and on September 22, 2017, the French intermediate appellate court affirmed that ruling. Though the affirmed order directed that France.com transfer the domain name within two months or face a financial penalty, less than two months after the appellate decision, on November 8, 2017—two months before

France.com received service of the decision, and four months before any financial penalty for non-transfer would begin—The French Republic apparently grew impatient with the pace of its own system and went outside of that system, sending a copy of the order to the Florida domain registrar Web.com and directing them to allow the transfer of <france.com> to The French Republic.[4] [5]

France.com received service of the Appellate decision on January 8, 2018.[6] On January 11, 2018, three days later, without notice or explanation to

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[4] The French Court order was not self-executing and only directed France.com to do anything connected to the domain name. The French Republic never attempted to domesticate the order in the United States, and even if it had, it would have only been able to enforce a financial penalty for France.com's failure to transfer the domain, not force a transfer of the domain. Despite the fact that the French Republic went outside of the court contemplated process and managed to have the domain transferred when neither the French Republic nor Web.com were subject to the order, the Court of Appeals held the Order was the gravamen of France.com's later infringement suit.

[5] The mechanics of domain-name transfer are such that the registrar acts in tandem with an entity seeking transfer. Personnel for The French Republic took steps to transfer the domain to themselves and the registrar allowed that transfer to occur. The French Republic, a party to the action in which France.com was ordered to take action before a certain date, in effect took action on their own rather than wait for that order to be followed or the appellate process to play out. As discussed *infra*, the Fourth Circuit holding that this case is about a French Court decision cannot be squared with the fact that France disregarded that very order and the question of whether that order was correct is currently under consideration in French Courts.

[6] France.com filed a timely appeal with the French Supreme Court where the case, three years later, remains on appeal.

France.com, Web.com allowed the transfer of <france.com> to The French Republic.[7] The transfer instantaneously destroyed France.com's web-based business. The French Republic revoked the business's access to its @france.com email extensions and immediately began using <france.com> to redirect visitors, including U.S. visitors, to its own <france.fr> domain.

While The French Republic took extra-judicial measures to accomplish its goals, France.com operated within that system to appeal the domain-transfer ruling. To redress the harm to its business from and after the transfer, France.com filed suit in the United States District Court for the Eastern District of Virginia to address two separate issues: 1) the improper acts taken by The French Republic outside of the French order to gain control of the <france.com> domain, and 2) Lanham-Act claims related to the infringement of the France.com trademark in the United States District Court. The United States District Court was the only venue where France.com could pursue claims related to its federal trademark.

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[7] The French Republic provided a copy of the French court order to the Florida registrar without providing the registrar any context about France.com's appeal rights, jurisdictional issues, France.com's U.S. trademark, or disclosing that the judgment had not been subjected to U.S. Court review. The registrar allowed The French Republic to transfer the domain name to themselves. *See* Brief of Appellee at 8, *France.com, Inc. v. French Republic*, 992 F.3d 248 (4th Cir. 2021).

France.com's five counts and attendant elements were:

1. **CYBERSQUATTING** — "[A plaintiff] must show that [there was]: (1) a bad faith intent to profit from using [a] . . . domain name, and (2) the domain name is identical or confusingly similar to, or dilutive of, the distinctive and famous [trade]mark." *Lamparello v. Falwell*, 420 F.3d 309, 318 (4th Cir. 2005) (internal citations and quotations omitted).

2. **REVERSE DOMAIN NAME HIJACKING ("RDNH")** — "A domain name registrant whose domain name has been suspended, disabled, or transferred [per a registrar's policy prohibiting the registration of domains that infringe on the trademark of another] file[s] a civil action to establish that the registration or use of the domain name by such registrant is not unlawful under this chapter. The court may grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant." *Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona*, 330 F.3d 617, 626 (4th Cir. 2003) *citing* 15 U.S.C. § 1114(2)(D)(v).

3. **EXPROPRIATION** — A plaintiff must establish that "(1) rights in property are in issue; (2) that the property was taken; (3) that the taking was in violation of international law; and (4) that one of the two nexus requirements is satisfied." *Zappia Middle E. Constr.*

Co. v. Emirate of Abu Dhabi, 215 F.3d 247, 251 (2d Cir. 2000)

4. **TRADEMARK INFRINGEMENT** — "To establish trademark infringement under the Lanham Act, a plaintiff must prove: (1) that it owns a valid mark; (2) that the defendant used the mark in commerce and without plaintiff's authorization; (3) that the defendant used the mark (or an imitation of it) in connection with the sale, offering for sale, distribution, or advertising of goods or services; and (4) that the defendant's use of the mark is likely to confuse consumers." *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 152 (4th Cir. 2012) (internal quotes omitted).

5. **FEDERAL UNFAIR COMPETITION** — "In order to prevail under §§ 32(1) and 43(a) of the Lanham Act for . . . unfair competition . . . a complainant must demonstrate that it has a valid, protectible trademark and that the defendant's use of a colorable imitation of the trademark is likely to cause confusion among consumers." *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 930 (4th Cir. 1995)

See Amended Complaint, ROA Doc. 48 at 12-20. Of the five Counts, only the count of expropriation directly hinges upon any transfer of property. RDNH involves an effort to recover a domain that was transferred per a registrant's anti-infringement policy; however, it and the three remaining claims center not on any questions regarding how or why property was obtained but rather whether there is infringement upon one's valid trademark.

After a year of attempts, France.com perfected service and the Defendants promptly filed a motion to dismiss on both 12(b)(1) and 12(b)(6) grounds. *See* ROA Doc. 19. In their 12(b)(1) arguments, Appellants asserted that the Foreign Sovereign Immunities Act shielded the sovereign actors from suit. *Id.,* Doc. 20. France.com argued that FSIA "commercial activities" and "expropriation" exceptions applied. *Id.,* Doc. 32.

On May 31, 2019, the District Court granted the 12(b)(6) Motion giving Plaintiff leave to amend and denied the 12(b)(1) Motion, finding that the issue "regarding the application of the [FSIA] would be best raised after discovery has concluded." App.20a-21a. France.com filed an Amended Complaint. ROA Doc. 48.

On October 2, 2019, Appellants filed another 12(b)(1) Motion to Dismiss the Amended Complaint. ROA Doc. 61. The District Court denied Appellants' 12(b)(1) Motion, stating:

> The Motion to Dismiss . . . is hereby Denied. The Federal Rule of Civil Procedure 12(b)1 arguments raised in Defendants' brief state that Plaintiff has failed to allege an applicable exception to the Foreign Sovereign Immunities Act ("FSIA") and that the suit violates the principles of comity. The Court does not find that these issues call for dismissal at this time; as noted in the Court's Order of May 31, 2019, they "would best be raised after discovery has concluded."

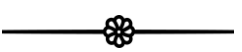
App.17a-19a.

The French Republic appealed, arguing that the gravamen of the plaintiff's suit was the French Court

ruling directing France.com to transfer its domain to The French Republic or pay a fine. France.com countered that the gravamen of the suit was not the French Court ruling but rather was both how The French Republic effectuated the transfer of the domain and how use of domain infringed on France.com's registered trademark. The Court of Appeals, without mentioning individual claims in the suit outside of recounting procedural history, held the gravamen of the entire suit was the non-commercial French Court ruling and none of France.com's claims (both the one related to the 'taking' of the domain and the four related to the misuse of the trademark) could proceed against the sovereign.[8]

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[8] The Court of Appeals held a "study of the complaint makes clear that the conduct that the Corporation asserts "actually injured" it [was] not subsequent use of the website, but the adverse French judgment holding that <France.com> properly belongs to the French State. All asserted injuries alleged in the complaint flow from that French judgment." *See France.com, Inc. v. French Republic*, 992 F.3d 248, 253 (4th Cir. 2021). Plaintiff's amended complaint clearly asserts that Defendant's use of the domain name is the activity that infringes upon Plaintiff's rights in the trademark and it is clear error to hold otherwise. *See e.g.* Amended Complaint, ROA Doc. 48 at 18 ("Defendants' use of the <france.com> domain name, which is identical to Plaintiff's FRANCE.COM mark, has caused and is causing a likelihood of confusion, mistake, or deception as to the source, origin, sponsorship or approval of the services of Defendants in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)."). If Plaintiff had failed to assert that there was infringing use of its trademark, the District Court could have granted a dismissal on 12(b)(6) grounds. It did not and The French Republic did not appeal the finding that the Amended Complaint properly stated a claim for trademark infringement and other infringement related claims. The Fourth Circuit has now deemed all of those properly plead claims mere "artful pleading" without explication. App.10(a).



REASONS FOR GRANTING THE PETITION

While this Court's precedent has been clear, the Fourth Circuit and other Circuit Courts of Appeal have misapplied a portion of that precedent—understanding this Court's statement in *Sachs* that the "analysis in *Nelson* . . . did not undertake such an exhaustive claim-by-claim, element-by-element analysis of the Nelsons' 16 causes of action . . . " as meaning that Courts do not need to analyze actual claims presented when determining the gravamen or gravamina of a suit with multiple distinct claims. *OBB Personenverkeher v. Sachs*, 577 U.S. 27, 34-35 (2015) (emphasis added) *discussing Saudi Arabia v. Nelson*, 507 U.S. 349, 357, 113 S.Ct. 1471, 1477, 123 L.Ed.2d 47 (1993).[9] In the Fourth Circuit's opinion, there is

[9] Some Circuits have expressly misapplied the language from *Sachs*. *See Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 108 (2d Cir. 2016) ("*Sachs* makes clear that in assessing whether an action is 'based upon' acts outside the United States, for FSIA purposes, we look not to the analysis of each individual claim, but to the overall question where a lawsuit's foundation is geographically based.") and *Jam v. Int'l Fin. Corp.*, Nos. 20-7092, 20-7097, 2021 U.S. App. LEXIS 19956, at *5-6 (D.C. Cir. July 6, 2021) (holding "[m]ore recently, in . . . *Sachs* the Supreme Court clarified that the gravamen analysis does not require courts to undertake a claim-by-claim, element-by-element analysis, but rather to "zero[] in on the core of [the] suit.") (internal cites and quotes omitted). The Fourth Circuit did not directly assert that they were free from the constraints of assessing France.com's individual claims; however, the court obviously employed that mis-application of *Sachs* as they evidently viewed France.com's claims as mere "artful pleading," the practice this Court was striving to avoid in its entire discussion of element-by-element tests in *Sachs*. App.10(a). Simply put, if the Fourth Circuit did not understand

not even passing mention of France.com's individual claims beyond a cursory recounting of procedural history. That counters both the spirit and letter of this Court's FSIA jurisprudence. The fact that some Circuits have misunderstood the holding in *Sachs* while still reaching a result seemingly tied to single claims or multiple closely related claims does not negate their misunderstanding or eliminate the need for this Court's clarification. Their misunderstanding can lead to the result below—a court dispensing with any analysis of individual claims presented because it believes wrongly that this Court has said it can. In so doing, the Fourth Circuit ignores the warning in both *Nelson* and *Sachs* that, in itself supports France.com's position, that the outcomes in both cases are dependent on the type of claims raised in each.

The FSIA is a crucial tool in the effort to steady the pendulum between the interests of foreign sovereigns and those of citizens with legal claims arising out of a sovereigns' activity in the market. The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 30, 136 S.Ct. 390, 393, 193 L.Ed.2d 269 (2015) *quoting Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683 (1989). The Act grants limited immunity shielding sovereigns from the jurisdiction of U.S. courts. *See* 28 U.S.C. § 1604. That deliberately narrow immunity codifies the "restrictive

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Sachs as allowing courts to disregard individual claims presented in a suit, it could not have reached the conclusion that a registered trademark owner, when confronted with an entity using its trademark for a commercial purpose was merely engaged in artful pleading when asserting trademark infringement.

theory of sovereign immunity." *See* 134 Cong. Rec. H6484-01. In enacting the FSIA, Congress recognized that while the concerns of foreign states must be considered, citizens should not be barred from the courthouse door simply because alleged wrongdoers are sovereigns. *Id.* As such, the FSIA include exceptions for acts by sovereigns who expropriate U.S. property or are engaged in commercial activity within the United States. 28 U.S.C. § 1605(a)(2)-(3). Over the past 45 years, that intersection between the rights of citizens alleging wrongs and the interests of foreign states has provided opportunities for this Court to clarify the bounds of FSIA exceptions. In order for the 'commercial activities exception' to apply, the overarching requirement is that the lawsuit is "based upon . . . commercial activity." 28 U.S.C. § 1605(a)(2). The manner of determining what a suit is 'based upon' or its 'gravamen' is the sole focus of the instant petition —and this Court's prior instruction in the area is clear—it is the activity giving rise to the specific claim that is key, not preceding conduct disconnected to it.[10]

The issue in this Petition is narrow—dealing only with how courts are to determine the gravamen in FSIA suits—but the importance of that narrow issue is immense. The determination of the gravamen of suits is the essential first step of any FSIA analysis and the Fourth Circuit's analysis risks not only swinging the FSIA pendulum in favor of sovereigns but doing so in an unpredictable way that eliminates certainty for litigants and, as is the case here, threatens to bar citizens from the courthouse without their individual claims ever having been considered.

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[10] *Nelson*, 507 U.S. at 349; *Sachs*, 577 U.S. at 27.

Both the letter and intent behind FSIA exceptions are clear—sovereigns should generally be immune from suit when acting as sovereigns,[11] but when the sovereign acts as a traditional player in the market, their actions should face the same potential liabilities as any other actor. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct. 2160, 2166, 119 L.Ed.2d 394 (1992); *Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555, 562-563 (2d Cir. 2020), *cert. denied*, 141 S.Ct. 1069 (2021).

By determining that a factual predicate outside of the individual claims or elements served is the gravamen of France.com's suit, the Fourth Circuit took the actual activity of the sovereign giving rise to injury out of the equation—for if a trademark infringement suit can be divorced from the actual questions of how a trademark is used or misused and can instead actually be based upon how an actor obtained access to trademarked property, the commercial activity exception is rendered meaningless. In the Court of Appeals opinion below, the objective and well-reasoned standard that a suit is based upon those elements causing actual injury and damages alleged in a claim falls in favor of a subjective and endlessly malleable standard. A standard which is no standard at all.

Granting the instant Petition is necessary to steady the pendulum in the Fourth Circuit and bring its gravamen analysis in line with this Court's decisions in *Nelson*, *Sachs*, and their progeny.

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[11] Of course, that general rule has exceptions. *See* 28 U.S.C. § 1605A (terrorism exception to the FSIA).

ARGUMENT

I. PRECEDENT REQUIRES COURTS TO ANALYZE INDIVIDUAL CLAIMS IN DETERMINING THE GRAVAMEN/GRAVAMINA WHERE, AS HERE, A PLAINTIFF BRINGS DISTINCT CLAIMS ADDRESSING SEPARATE PROPERTY INTERESTS.

A. The Court of Appeals Erred in Not Analyzing Distinct Claims Presented to Determine Whether the Gravamina of Individual Claims Supported the District Court's Order.

For the FSIA commercial activities exception to apply in a given case, "the action [must be] based upon commercial activity carried on in the United States by the foreign state . . . .." 28 U.S.C. § 1605 (a)(2). The Court of Appeals decision dismissed all of the Plaintiff's five (5) claims because it found the action was based upon a non-commercial French Court ruling. App.1a-14a, 15a-16a. As the lawsuit consisted of five separate claims, it is clear error to determine what the suit is 'based upon' without a passing analysis of the claims actually presented.[12]

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[12] Without even a cursory analysis, it appears the decision of the Court of Appeals preceded consideration of the case. Even the sole claim alleging the domain transfer was improper (expropriation) deserves some analysis. It is difficult to understand how the claim could be based upon the French Court ruling when 1) there was no ruling executed (The French Republic effectuated the domain transfer outside of the parameters dictated by the French Court), and 2) the French ruling is still on appeal in the French legal system. Since the merits of that

The Court of Appeals decision finding the gravamen of a suit is a factual predicate disconnected from the actual claims or elements of a suit runs counter to the analysis this Court has mandated—and, in fact, The Fourth Circuit's own precedent. As this Court explained, while the FSIA does not define 'based upon,' "guidance is hardly necessary. 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." *Nelson*, 507 U.S. 349, 357, 113 S.Ct. 1471, 1477, 123 L.Ed.2d 47 (1993) (internal citations omitted) (emphasis added); accord, *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) ("An action is based upon the elements that prove the claim, no more and no less"); *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 272 U.S. App. D.C. 240, 246, 855 F.2d 879, 885 (1988). As *Nelson* states, determining the basis of a claim requires examination of the elements which would entitle a plaintiff to recovery under the plaintiff's theory of the case. The defense theory, their characterization of the plaintiff's theory, or a what court finds important in a factual timeline is not the metric by which this Court has said one determines the basis of a claim. *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 357, 113 S.Ct. 1471, 1476-1477 (1993). Confronting a case where a plaintiff lodged claims related to

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ruling are still being adjudicated in France, any disputed transfer would have to deal with activity that was outside of that official French judicial process. Without explication it is akin to saying the lawsuit about the accident at the grocery store is really based upon a person's decision that they needed milk.

trademark infringement, the Fourth Circuit chose not only to disregard the elements plead under plaintiff's theory of the case but also to disregard the actual claims plead.

B. *Nelson* and *Sachs* Require That Courts Analyze Individual Distinct Claims to Determine the Gravamen for FSIA Purposes.

Determining applicability of the commercial activities' exception to the FSIA begins with "identifying the particular conduct on which [an] action is "based" . . . ." *Nelson*, 507 U.S. at 356–57, 113 S.Ct. at 1477. In *Nelson*, an employee in Saudi Arabia was imprisoned and tortured. The employee attempted to sue under the FSIA commercial activities exception (generally) because of commercial activity related to his employment. This Court disagreed, finding the activity giving rise to the complaint was the tortious activity, not the commercial activity preceding it, that the activity giving rise to the actual claim was determinate.

Cases cited approvingly in *Nelson* reveal a consistent approach to determining gravamen.[13] [14] Most

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[13] *See Nelson,* at 557 *citing Callejo v. Bancomer, S. A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (expressly rejecting an approach where a District Court looked beyond the actual events giving rise to a suit to find a non-commercial gravamen and holding "under the FSIA, sovereign immunity depends on the nature of those acts of the defendant that form the basis of the suit. Here, the act complained of was . . . breach of . . . contractual obligations . . . .") and *Santos* v. *Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) (holding a claim is "based upon" events . . . if those events establish a legal element of the claim.").

cases *citing Nelson* are likewise clear. Even Fourth Circuit precedent cites *Nelson* as requiring an analysis of actual claims asserted. In *Globe Nuclear Servs. & Supply (GNSS), Ltd. v. AO Techsnabexport*, the Fourth Circuit reversed a district court decision divining a lawsuit's gravamen outside of each claim's elements, the court explained that "[t]he district court's capacious view of the conduct upon which [the] lawsuit is "based" cannot be reconciled with the Supreme Court's decision in *Nelson* . . . The Fourth Circuit stressed that under *Nelson* a court "must turn [its] attention . . . to the specific claim[s] . . .asserted . . . and the elements of claim[s] that, if proven, would entitle [a plaintiff] to relief." *Globe Nuclear*, 376 F.3d 282,

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14 In non-FSIA infringement cases, the meaning of 'gravamen' is clear. As the Fifth Circuit held in *Jim S. Adler, P.C. v. McNeil Consultants, L.L.C.*:

> A likelihood of confusion is "[t]he gravamen for any action of trademark infringement." *Soc'y of Fin. Exam'rs v. Nat'l Ass'n of Certified Fraud Exam'rs Inc.*, 41 F.3d 223, 225 (5th Cir. 1995) (*quoting Marathon Mfg. Co. v. Enerlite Prods.*, 767 F.2d 214, 217 (5th Cir. 1985)). To evaluate whether there is a likelihood of confusion, our circuit uses a non-exhaustive list of factors known as the "digits of confusion." *Xtreme Lashes, LLC v. Xtended Beauty, Inc.*, 576 F.3d 221, 227 (5th Cir. 2009). The initially identified digits are: "(1) the type of trademark; (2) mark similarity; (3) product similarity; (4) outlet and purchaser identity; (5) advertising media identity; (6) defendant's intent; (7) actual confusion; and (8) care exercised by potential purchasers." *Id.* Besides being simply examples, those eight digits also are fact-specific and flexible, and "[n]o digit is dispositive."

Jim S. Adler, No. 20-10936, 2021 U.S. App. LEXIS 23761, at *6-7 (5th Cir. Aug. 10, 2021).

286-87 (4th Cir. 2004). Further, directly on point with what France.com alleges is clear error in the current case is The Fourth Circuit's recognition that "[w]hile [background] activities led to the conduct that eventually injured the [plaintiffs], they are not the basis for the [plaintiff's] suit. Even taking . . . the [plaintiff's] allegations about [background facts] as true, those facts alone entitle [plaintiff] to nothing under their theory of the case."). *Globe Nuclear*, 376 F.3d at 287-88 *quoting Nelson*, 507 U.S. at 359. The Fourth Circuit's decision below cannot be reconciled with *Nelson* or their own applications of *Nelson*.

Twenty-two years after *Nelson*, this Court addressed the Ninth Circuit's misapplication of *Nelson* in *OBB Personenverkeher v. Sachs*, 577 U.S. 27, 34-35 (2015). *Sachs* involved a rail passenger injured from a fall through a train platform in Austria. The injured party sued the foreign-owned railway carrier alleging that the purchase of a railway ticket in the United States constituted commercial activity triggering the commercial activities exception. The Ninth Circuit applied *Nelson* as a single-element test to determine whether the commercial activities exception applied. In explaining the importance of considering the actual activity giving rise to claims and referring to the elements which, if proven, would entitle a plaintiff to recovery, the *Nelson* Court was explaining that courts must consider what is actually going on in a given case. Is the case about the employment contract, or is it about the torture? To determine what a case is actually about, a natural aid is to look at what activity the elements (plural) revolve around. The Ninth Circuit cited *Nelson's* reference to elements (macro) and understood it as implementing a single element (micro)

test. This Court rejected the Ninth Circuit's misapplication of *Nelson*, holding:

> The Ninth Circuit overread[] . . . one part of one sentence in *Nelson*, in which we observed that "the phrase ['based upon'] 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." We do not see how that mention of elements—plural—could be considered an endorsement of a one-element test, nor how the particular element the Ninth Circuit singled out for each of Sachs's claims could be construed to entitle her to relief.

Sachs, 577 U.S. at 34 (internal citation omitted). As *Sachs* reiterated, "the [FSIA] itself does not elaborate on the phrase 'based upon[;]'" however, the "decision in *Saudi Arabia v. Nelson* . . . , provides sufficient guidance to resolve this case". *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 33, 136 S.Ct. 390, 395 (2015) (internal citation omitted). Just as the Ninth Circuit confused *Nelson's* discussion of elements (macro) with requiring a single-element test (micro), so too have Courts now misunderstood *Sachs'* language dispensing with the need to look at each and every individual element (micro) as dispensing with the need to consider elements (plural). That reading of *Sachs* is incorrect—as *Sachs* plainly reiterates from *Nelson*, "we explained that a court should identify that 'particular conduct' by looking to the 'basis' or 'foundation' for a claim, 'those elements . . . that, if proven, would entitle a plaintiff to relief . . . .. Under that analysis, we found that the commercial activities, while they 'led to the conduct that eventually injured

the Nelsons,' were not the particular conduct upon which their suit was based. *Sachs*, 577 U.S. at 33–34, 136 S.Ct. at 395 *citing Nelson*, 507 U.S., at 358, 113 S.Ct. at 1471. Critical to a correct reading of each case is the Court's warning in both that Courts must understand the way the decisions apply to the particular facts themselves and do not establish a formulaic one-size-fits-all approach. As this Court wrote

> [a] century ago, in a letter to then-Professor Frankfurter, Justice Holmes wrote that the "essentials" of a personal injury narrative will be found at the "point of contact"—"the place where the boy got his fingers pinched." Letter (Dec. 19, 1915), in Holmes and Frankfurter: Their Correspondence, 1912-1934, p. 40 (R. Mennel & C. Compston eds. 1996). At least in this case, that insight holds true. Regardless of whether Sachs seeks relief under claims for negligence, strict liability for failure to warn, or breach of implied warranty, the "essentials" of her suit for purposes of § 1605(a)(2) are found in Austria

Sachs, 577 U.S. at 36, 136 S.Ct. at 397. Understanding *Sachs* as allowing Courts to disregard actual claims plead in their analysis of the basis of a lawsuit is to miss the entire holding in *Sachs*—that Courts must examine whether they are confronting cases about pinched fingers, cases about contract breaches, cases about infringement, or perhaps cases about all three—and then, and only then, ascertain whether a single gravamen applies to all claims (whether "the essentials" are all found in Austria") or whether distinct claims have distinct gravamina.

Sachs not only reiterated the need to examine individual claims presented in order to determine what a suit is 'based upon,' it made clear that when examining each of the claims presented the gravamen might well lie in different places. As *Nelson* "cautioned[, . . .] the reach of our decision was limited, and similar caution is warranted here . . . we consider here only a case in which the gravamen of each claim is found in the same place." *Sachs*, 577 U.S. at 36 n.2 (internal citation omitted) (emphasis added). The Fourth Circuit was presented with a case with separate individual claims relating to distinct property interests requiring proof of different elements. Rather than analyze the claims separately and determine the gravamen for each as required by *Nelson* and *Sachs*, it picked a preceding non-commercial factual predicate to use as the gravamen for all claims. That approach was in error. Nor can one resolve the Fourth Circuit's error on the basis that the French court ruling is a 'but for' to all claims. App.8a-11a. In *Nelson*, the employment contract was a 'but for' to the eventual torture and imprisonment that led to Nelson's claims. In *Sachs*, the ticket sale was a 'but-for' to the eventual fall through the platform. In both cases, this Court was clear that the gravamen or gravamina of suits is the conduct giving rise to the claims themselves, not a factual 'but for' unrelated to the actual claims and elements (plural). In not analyzing the actual claims asserted in order to ascertain whether the suit was based upon a single gravamen or multiple gravamina, the Fourth Circuit either disregarded or misapplied this Court's precedent.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS IN SISTER CIRCUITS.

France.com alleged each of its five claims to protect its property rights in the domain name <France.com> as well as its valuable rights in U.S. Trademark Registration No. 4514330 for FRANCE.COM. *See United States PTO v. Booking.com B.V.*, 140 S.Ct. 2298, 2302 (2020) ("The owner of a mark on the principal register enjoys valuable benefits, including a presumption that the mark is valid"). While only one of France.com's counts is labeled trademark infringement, other counts focus entirely on infringement as well. Transfer of the domain name to France is only at issue in the claim of expropriation, where a party must show both that rights in property are at issue and that the property was taken. *See Zappia*, 215 F.3d at 251. Reverse domain name hijacking (RDNH) requires a Plaintiff to show it was a registrant of a domain name that was transferred because of a registrar's policy—but such a claim is about infringement.[15] *See Barcelona.com*, 330 F.3d at 626. Each of the remaining three claims deal with statutory rights and remedies created by the Lanham Act. Those claims do not hinge upon or even involve as a defense one's ownership of a domain.

What a Court determines to be the gravamen or gravamina in analyzing claims asserted and whether any claims are based upon commercial activity will depend on the facts in an individual case, but the

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[15] In RDNH, a domain gets transferred because an owner of a trademark complains to a registrar that the domain infringes upon their trademark—the Plaintiff then files suit and shows that their use of the domain was actually not infringing.

error in not conducting an analysis of individual claims is clear. Such error creates an avenue through which a party's claims can be permanently barred without ever being addressed. Other Circuits have applied this Court's precedent accordingly.

In *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213 (11th Cir. 2018), the Eleventh Circuit provided similar guidance. "[T]he [*Sachs*] Court found that the conduct making up the gravamen of Sachs's suit happened in Austria because [a]ll . . . claims turn[ed] on the same tragic episode [occurring there]." *Devengoechea*, 889 F.3d at 1223. *Sachs*, though, "expressly recognized that the gravamina of different claims may occur in different locations . . . ." and "reviewing courts must 'identify the conduct on which [plaintiff] bases his suit' and look to 'the conduct that actually injured [him or her]' and 'therefore that makes up the gravamen of [his] lawsuit.'" *Id.* The Eleventh Circuit then proceeded to examine the plaintiff's two separate claims.

More recently, in *Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555, 562 (2d Cir. 2020), *cert. denied*, 141 S.Ct. 1069 (2021), the Second Circuit applied *Nelson* and *Sachs* in the context of an intellectual property infringement case against a sovereign. In *Pablo Star*, the Welsh government argued (as the French Republic did below) that the promotion of tourism was not commercial activity. In accord with *Sachs* and *Nelson*, the Second Circuit focused on the conduct of the defendant that actually injured the plaintiff. It specifically focused on the act of alleged infringement itself and held that "[f]or purposes of the commercial-activity exception, the relevant "activity" on which the claims are based is the . . . [allegedly infringing]

use of the photographs in question [by the Welsh government." *Pablo Star Ltd.*, 961 F.3d at 560–61.

Both France.com and Pablo Star confronted a foreign sovereign they alleged improperly infringed upon their intellectual property rights (in trademark rights and copyrights respectively) to promote tourism. Both France.com and Pablo Star filed lawsuits with counts of infringement in District Courts. Pablo Star's case was allowed to proceed because the Second Circuit found its claim to be based upon the infringement claimed. France.com's claims were dismissed with prejudice because the Fourth Circuit determined that its claims were mere artful pleading and its case was really based upon something else entirely. That is not only unfair—that similar claims alleged under similar federal statutes would be treated differently by federal courts claiming to apply the same precedent—it is clear error by the Fourth Circuit.

In *Everard Findlay Consulting, LLC v. Republic of Surin.*, 831 F. App'x 599, 600 (2d Cir. 2020), the Second Circuit again looked to the activity connected with a Plaintiff's breach of contract claim to determine whether a FSIA exception applied. *Id.* ("Suriname's conduct in negotiating, entering, and allegedly breaching its promotional services agreement . . . was "commercial activity" within the meaning of the FSIA").

No matter the type of claim, reviewing courts have taken a consistent approach in understanding that *Nelson* and *Sachs* require actual claims presented to be examined in a gravamen analysis. Though seemingly different on their faces, when examined the cases are similar. *Nelson's* torture and *Sachs'* fall couldn't survive the analysis because none of the elements of the claims involved Plaintiffs' alleged threshold com-

mercial activity.[16] *Devengoechea* was allowed to proceed because the commercial activity alleged was directly tied to the individual claims made. *Pablo Star*'s infringement suit could proceed because the commercial activity alleged was the act of infringement. In all of the cases, with all of the claims, one thing remains constant: *Nelson* and *Sachs* require courts to look at the actual claims presented and what activity, if proven, would entitle a plaintiff to recovery under the plaintiff's theory of her case.[17] [18]

The decision of the Court of Appeals is out of step not only with this Court's holdings in *Nelson* and *Sachs*, but also with Circuit Court decisions implementing this Court's precedent. In fact, Petitioner has not found any other case, precedential or not, wherein a court has determined the gravamen of the suit without even making passing reference to the actual claims presented. Without reference to specific

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[16] *See also Garb v. Republic of Poland*, 440 F.3d 579, 581 (2d Cir. 2006) (rejecting claims against a sovereign because the property confiscation at issue was a taking unrelated to subsequent commercial use generations later.)

[17] Unchallenged recent District of Columbia opinions reached similar results. *See Jam v. Int'l Fin. Corp.*, 481 F. Supp. 3d 1 (D.D.C. 2020); *Rodriguez v. Pan Am. Health Org.*, No. CV 20-928 (JEB), 2020 WL 6561448 (D.D.C. Nov. 9, 2020).

[18] While *Jam v. Int'l Fin. Corp.*, Nos. 20-7092, 20-7097, 2021 U.S. App. LEXIS 19956, at *6 (D.C. Cir. July 6, 2021) also looked to the crux of the lawsuit and the activity actually giving rise to a plaintiff's injuries, the Court seemingly has misstated this Court's holding in *Sachs*. While the Court clearly rejected what the Ninth Circuit understood to be a single element test arising from *Nelson*, the Court of Appeals for the District of Columbia has now understood *Sachs* as expressly rejecting a claim-by-claim approach further warranting clarification by this Court.

claims—identifying factual predicates as the gravamen of suits without addressing specific claims or elements of proof needed creates uncertainty for litigants, creates incentive for additional filings, and potentially eliminates the only path of redress for some injuries.[19]

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[19] Potential ramifications of the Fourth Circuit's decision in the Circuit where all .com domains are located are enormous. Divorcing gravamen from the actual claims presented in favor of a factual 'but-for' not only means that a foreign tribunal's actions, as here, can foreclose rights available to registrants under the Lanham Act, but could bar the courthouse doors to any claims under the commercial activities exception where a court can identify a non-commercial predicate. A key problem with the Fourth Circuit's analysis is that it does not only stand for the proposition that a foreign ruling is the non-commercial gravamen if present in a case's factual background (so conceivably if a sovereign used its own judicial process to obtain Amazon.com, Cheddar.com, CocaCola.com, or those valuable rights this Court recently affirmed for Booking.com, at least in the United States the wronged entity would not even have claims arising from subsequent misuse of those domains entertained in the federal courts), it stands for the proposition that Courts can find the gravamen where they will, chalk up a plaintiff's claims to artful pleading (without regard to whether has plead facts to support its claims) and lock the courthouse doors to aggrieved parties without actually analyzing the claims plead.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that certiorari be granted and this matter be scheduled for plenary review. Alternatively, in view of the clear error in the Fourth Circuit in not analyzing distinct claims presented, Petitioner respectfully requests that this Court issue a summary reversal of the Court of Appeals' decision and remand the matter for an appropriate claim-by-claim, gravamina-by-gravamina analysis.

Respectfully submitted,

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