IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. AIRSERVICES AUSTRALIA, Relators, v. THE HONORABLE J. DAN CONKLIN, CIRCUIT JUDGE, CIRCUIT COURT OF GREENE COUNTY, Respondent.	)	No. SC92405

BRIEF OF RELATOR AIRSERVICES AUSTRALIA

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JURISDICTIONAL STATEMENT

The underlying action has been pending since 2008. On July 29, 2010, Defendant Lambert Leasing, Inc. ("Lambert") filed a third-party petition in the underlying action, seeking contribution and indemnity against several parties, including Relator Airservices Australia ("ASA"). Exhibit A. The Respondent is the Circuit Judge presiding over the underlying action. On November 9, 2010, ASA filed a motion to dismiss for lack of personal jurisdiction. Exhibit B. On June 1, 2011, Respondent heard oral argument on ASA's motion. Exhibit G (transcript). On November 10, 2011, Respondent entered an order denying ASA's motion to dismiss without explanation.

On January 9, 2012, ASA filed a petition in the Missouri Court of Appeals, Southern District, seeking a writ of prohibition or mandamus. *State ex rel. Airservices Australia v. Conklin*, No. SD31789. On January 18, 2012, the Court of Appeals denied the petition.

On May 1, 2012, this Court issued a preliminary writ of prohibition.

This Court has jurisdiction to issue extraordinary writs under Article V, Section 4 of the Missouri Constitution. The relators sought relief from the Missouri Court of Appeals prior to seeking relief in this Court. *See* Rule 84.22(a). A writ proceeding is an appropriate method to challenge whether a trial court has exceeded its jurisdiction. *See e.g.*, *State ex rel. Director of Revenue, State of Missouri v. Gaertner*, 32 S.W.3d 564, 566 (Mo. banc 2000); *State ex rel. York v. Daugherty*, 969 S.W.2d, 223, 224 (Mo. banc 1998); *State ex rel. K-Mart Corp. v. Hollinger*, 986 S.W.2d 165, 169 (Mo. banc 1999).

STATEMENT OF FACTS

On July 29, 2010, Defendant Lambert Leasing, Inc. ("Lambert"), filed a third-party petition in the underlying action, seeking contribution and indemnity against several parties, including Relator Airservices Australia ("ASA"). Exhibit A. The Respondent is the circuit judge presiding over the underlying action, which has been pending since 2008.

On November 9, 2010, ASA filed a motion to dismiss for lack of personal jurisdiction. Exhibit B. The undisputed evidence before the Respondent was that ASA maintains its principal place of business in Australia and occasionally does some consulting work in Asia and the Middle East. Exhibit C (attached affidavit of Andrew C. Clark). ASA was established in Australia by Act of Parliament in 1995 when the Civil Aviation Authority was split into two government bodies, ASA and the Civil Aviation Authority. ASA is a statutory body corporate that is wholly owned by the Australian government. *Id.*

ASA has several statutory functions, as outlined in its enabling legislation, the Air Services Act 1995. These include providing services and facilities in Australia for the purpose of giving effect to international agreements relating to the safety, regularity, or efficiency of air navigation; promoting and fostering civil aviation in Australia; carrying out activities to protect the environment in Australia from the effects of aircraft; and other statutory functions prescribed by regulations, the Air Navigation Act of 1920, or the Aviation Transport Security Act of 2004. *Id.* ASA provides air traffic services and air traffic control for aircraft that fly into, out of, or across the Australian Flight Information

Region ("FIR," commonly known as Australian airspace). ASA also provides an aeronautical information service, an aeronautical radio navigation service, and an aeronautical telecommunications service for aircraft that fly into, out of, or through Australia. *Id.* ASA provides rescue and fire fighting services. *Id.*

ASA has never provided any of its services or facilities in Missouri. *Id.* ASA has never provided aeronautical information about Australia in Missouri. *Id.* ASA has never collected, distributed, or published any aeronautical data about Missouri or in Missouri. *Id.* ASA has never offered or sold any goods or services in Missouri. *Id.*

ASA has never transacted any business in Missouri. *Id.* ASA has never engaged in any activities or work in Missouri. *Id.* ASA has not entered into any contracts in Missouri. *Id.* ASA has never entered into any contracts that chose Missouri law for resolving disputes. *Id.* ASA has never entered any contracts that designated Missouri as the forum for litigating any disputes. *Id.*

ASA has never leased, owned, possessed, or used any real estate in Missouri. *Id.* ASA is not an insurance company, does not provide insurance services, and has never contracted to insure any person, property or risk in Missouri. *Id.* ASA does not have any office, post office box, or telephone number in Missouri. *Id.* Outside of the underlying action, ASA has never participated in any court proceeding in Missouri. *Id.* ASA has no business license in Missouri. *Id.* ASA has not paid taxes in Missouri. *Id.* ASA has never had a registered agent in Missouri. *Id.* ASA has not engaged in any advertising in Missouri. *Id.*

On April 12, 2011, Lambert filed a memorandum in opposition to ASA's motion to dismiss. Exhibit D. Lambert's theory was that the circuit court had personal jurisdiction over ASA pursuant to a federal statute, the Foreign Sovereign Immunities Act.

On June 1, 2011, Respondent heard oral argument on ASA's motion. Exhibit G (transcript). At the hearing, Lambert's counsel admitted that he did not know of any contacts between ASA and the State of Missouri. *Id*. at 46-47.

On November 10, 2011, Respondent entered an order denying ASA's motion to dismiss without explanation. Exhibit H.

On January 9, 2012, ASA filed a writ petition in the Missouri Court of Appeals, Southern District, seeking the relief requested in this petition. *State ex rel. Airservices Australia v. Conklin*, No SD31789. On January 18, 2012 the Court of Appeals denied the petition.

On May 1, 2012, this Court issued a preliminary writ of prohibition.

POINTS RELIED ON

I. The Court should issue a writ prohibiting Respondent from denying ASA's motion to dismiss for lack of personal jurisdiction because ASA is not subject to personal jurisdiction in Missouri under Missouri law in that ASA did not engage in any acts enumerated in the long-arm statute, ASA has no contacts with Missouri, and maintaining an action against ASA in Missouri would offend traditional notions of fair play and substantial justice.

§ 506.500, RSMo

Sloan-Roberts v. Morse Chevrolet, Inc., 44 S.W.3d 402 (Mo. App. 2001).

Schilling v. Human Support Services, 978 S.W.2d 368 (Mo. App. 1998).

II. The Court should issue a writ prohibiting Respondent from denying ASA's motion to dismiss for lack of personal jurisdiction because the FSIA does not create personal jurisdiction over ASA in Missouri in that such an interpretation of the FSIA is contrary to its plain terms, conflicts with the historical context of the bill's passage, violates basic tenets of statutory construction, contravenes the United State Constitution and principles of federalism, and offends traditional notions of fair play and substantial justice.

28 U.S.C. § 1330

Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

In re Marriage of Hendrix, 183 S.W.3d 582 (Mo. banc 2006).

ARGUMENT

This is a simple case. ASA has no contacts with Missouri, apart from defending against Lambert's improper efforts to drag ASA into the underlying case. Under the settled law and the undisputed facts, the circuit court lacks personal jurisdiction over ASA. By its plain terms, the federal statute to which Lambert refers does not create personal jurisdiction where none exists in state court. To hold otherwise would be contrary to the longstanding recognition by this Court and the Supreme Court of the United States that state boundaries matter, and that whether a party can be compelled to defend a case in a particular state implicates the United States Constitution and the state's long-arm statute. Lambert's argument to the contrary is unsupported.

ASA respectfully requests the Court to issue a writ of prohibition directing Respondent to refrain from taking any other action as to ASA in the underlying action other than to dismiss it for lack of personal jurisdiction. In the alternative, the Court should issue a writ of mandamus directing Respondent to set aside his order denying ASA's motion to dismiss and enter an order dismissing ASA for lack of personal jurisdiction.

A writ of prohibition is available: (1) to prevent a usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction, or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted. *State ex rel. Houska v. Dickhaner,* 323 S.W.3d 29, 32 (Mo. banc 2010).

Prohibition is appropriate where the lower court lacks either personal jurisdiction or subject matter jurisdiction. *State ex rel. Specialized Transport, Inc. v. Dowd,* 265 S.W.3d 858, 861 (Mo. App. 2008); *State ex rel. Blase v. Richardson,* 242 S.W.3d 469, 470 (Mo. App. 2008); *State ex rel. Perkins Coie LLP v. Messina,* 138 S.W.3d 815, 818 (Mo. App. 2004). It has also been held that mandamus can be appropriate to order a lower court to set aside an order denying a motion to dismiss and to dismiss a party as a defendant when there is a lack of personal jurisdiction. *State ex rel. Honda Research & Development Co. v. Adolf,* 718 S.W.2d 550, 551 (Mo. App. 1986).

I. The Court should issue a writ prohibiting Respondent from denying ASA's motion to dismiss for lack of personal jurisdiction because ASA is not subject to personal jurisdiction in Missouri under Missouri law in that ASA did not engage in any acts enumerated in the long-arm statute, ASA has no contacts with Missouri, and maintaining an action against ASA in Missouri would offend traditional notions of fair play and substantial justice.

Missouri courts employ a two-step analysis when determining whether a defendant is subject to personal jurisdiction. *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 231 (Mo. banc 2010). First, a court determines whether a defendant's conduct falls within the scope of the Missouri long-arm statute. *Id*. If so, the court then evaluates whether the defendant has sufficient minimum contacts with the state. *Id.* When a defendant contends the court lacks personal jurisdiction, the burden shifts to the plaintiff to make a prima facie showing of jurisdiction. *Sloan-Roberts v. Morse Chevrolet, Inc.*, 44 S.W.3d 402, 406 (Mo. App. 2001)

Missouri's long-arm statute is codified as section 506.500, RSMo: "Any . . . corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such . . . corporation . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts." *Id*. The acts enumerated in the section include "the commission of a tortious act within the state." *Id.* Allegations of extraterritorial tortious acts that yield consequences within Missouri are sufficient to support the exercise of personal jurisdiction. *Id.*; *see Bryant*, 310 S.W.3d at 232. Although a defendant's commission of an extraterritorial tortious act may support

the exercise of personal jurisdiction, the defendant must also have minimum contacts with Missouri. *State ex rel. William Ranni Associates, Inc. v. Hartenbach*, 742 S.W.2d 134, 137 (Mo. banc 1987).

Courts acquire general personal jurisdiction over an out-of-state defendant only if the defendant's contacts with Missouri are systematic, continuous, and substantial enough to furnish personal jurisdiction over any cause of action, even one that is unrelated to the defendant's contact with the forum. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). By contrast, courts may acquire specific personal jurisdiction over an out-of-state defendant when a lawsuit arises from or is related to the defendant's contact with the forum. *Id.* In some cases, single or isolated acts by a defendant in a state, because of their nature and quality and the circumstances of their commission, provide sufficient minimum contacts to support jurisdiction for liability arising from those acts. *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 318 (1946).

Courts may exercise specific personal jurisdiction if the non-resident defendant has minimum contacts with the forum state, such that maintaining a lawsuit against the defendant in the forum state will not offend traditional notions of fair play and substantial justice. *Int'l Shoe*, 326 U.S. at 316. To meet the requirements of the Due Process Clause of the United States Constitution, such minimum contacts must show that a defendant purposefully availed itself of the privilege of transacting business in Missouri and could reasonably anticipate being haled into court here. *Id.* at 319; *State ex rel. William Ranni Associates, Inc.*, 742 S.W.2d at 137-38. The minimum contacts test is not applied mechanically. *Sloan-Roberts,* 44 S.W.3d at 409. Rather the facts of each case must be

weighed to determine whether the requisite affiliating circumstances are present. *Id.* Random, fortuitous or attenuated contacts cannot create jurisdiction. *Id.*

The factors considered in determining whether a defendant has minimum contacts with the state include: 1) the nature and quality of the contacts, 2) the quantity of those contacts, 3) the relationship of the cause of action to those contacts, 4) Missouri's interest in providing a forum for the cause of action, and 5) the convenience of the parties. *Schilling v. Human Support Services*, 978 S.W.2d 368, 371 (Mo. App 1998). A court should also consider additional related factors before exercising personal jurisdiction over a non-resident defendant. *Id.* These factors are: 1) the burden on the defendant, 2) the interest of the forum state, 3) the plaintiff's interest in obtaining relief, 4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversies, and 5) the shared interest of the several states in furthering fundamental substantive social policies. *Id.*

A. The long-arm statute does not subject ASA to personal jurisdiction.

The Missouri long-arm statute, section 506.500, RSMo, provides that a corporation that does any of the acts enumerated in the statute submits itself to the jurisdiction of the courts of this state as to any cause of action arising from the doing of such acts. The acts include transaction of any business within this state, the making of any contract within this state, the commission of a tortious act within this state, the ownership, use, or possession of any real estate situated in this state, or contracting to insure any person, property, or risk located within this state at the time of contracting.

The record shows that ASA did not commit any of the acts set forth in the long-arm statute. Lambert's pleading alleges that ASA collected and distributed data related to air travel in Australia. Exhibit A. It contends that ASA was negligent in the collection and distribution of that data. While ASA has the statutory function, as outlined in its enabling legislation, of carrying out activities relating to the operation of aircraft in Australian air space, ASA has never conducted any such activities in Missouri. Exhibit C (attached affidavit of Andrew C. Clark). ASA has never collected, distributed or published any aeronautical data about or in Missouri. *Id.* It has never offered or sold any goods or services in Missouri. *Id.* Nor has it ever transacted any business or entered any contracts in Missouri. *Id.* And there is no evidence that ASA engaged in any tortious act that had consequences in Missouri; the third-party petition has been filed here only because the plaintiffs in the underlying action chose this forum in which to litigate their claims against the defendants.

In short, there is no evidence to establish that ASA engaged in any acts enumerated in the long-arm statute. Thus, the trial court cannot exercise personal jurisdiction over ASA. If Lambert wishes to seek contribution or indemnity from ASA, it must do so in a forum in which it can establish personal jurisdiction over ASA.

B. ASA lacks minimum contacts with Missouri.

For the trial court to exercise personal jurisdiction, ASA must have had sufficient minimum contacts with Missouri. *Sloan-Roberts,* 44 S.W.3d at 409. ASA's evidence is unrefuted that ASA has never had any contacts of any kind with Missouri at any time. Exhibit C (attached affidavit of Andrew C. Clark). ASA is an Australian statutory body

corporate that is wholly owned by the Australian government. *Id.* Its only places of business are in Australia. *Id.* ASA has never had any office, post office box or telephone number in Missouri. *Id.* Outside of this case, ASA has not participated in any court proceedings in Missouri. *Id.* ASA has no business license in Missouri. *Id.* ASA has never had any employees who lived or worked in Missouri. *Id.* ASA has never engaged in any advertising in Missouri. *Id.*

ASA lacks any kind of contacts with Missouri, let alone any minimum contacts with this state. Without evidence of any contact, the trial court cannot exercise personal jurisdiction over ASA.

C. Maintaining an action against ASA in Missouri would offend traditional notions of fair play and substantial justice.

To complete its analysis, the Court should consider Missouri's interest in providing a forum for this cause of action and the convenience of the parties involved. *Schilling*, 978 S.W.2d at 371. It should also evaluate other related factors, such as: 1) the burden on ASA, 2) the interest of Lambert in obtaining relief, 3) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy and 4) the shared interest of the several states in furthering the fundamental substantive social policies. *Id.*

Defending this lawsuit in Missouri could create a significant inconvenience for ASA. Defending the matter in this state would be a tremendous challenge for the organization and its employees, since corporate representatives and/or fact witnesses

would be forced to appear during discovery and trial in a distant forum that they did not select and with which they have had no contacts.

In addition, Missouri does not have any significant interest in resolving this third-party action or furthering any substantive social policies through it. There are no novel theories of law being introduced by Lambert and no pressing legal issues that would alter the development or evolution of jurisprudence in federal or state courts in Missouri. There are no legal issues in this third-party action that would warrant continued involvement of Missouri courts.

Furthermore, dismissing the claims against ASA will not deprive Lambert of any relief. If the claims against ASA are dismissed, Lambert will still have an opportunity to file an action against ASA elsewhere, if it chooses. Because the existing claims in the underlying case are based on contribution and indemnity, and there has been no disposition of the underlying claims upon which the request for contribution and indemnity are based, no prejudice will result for Lambert at this time.

Dismissing this action would not create any judicial inefficiency for Lambert, which would simply have the option of pursuing ASA in another venue.

II. The Court should issue a writ prohibiting Respondent from denying ASA's motion to dismiss for lack of personal jurisdiction because the FSIA does not create personal jurisdiction over ASA in Missouri in that such an interpretation of the FSIA is contrary to its plain terms, conflicts with the historical context of the bill's passage, violates basic tenets of statutory construction, contravenes the United State Constitution and principles of federalism, and offends traditional notions of fair play and substantial justice.

Lambert's reliance on the FSIA is misplaced. Any personal jurisdiction analysis performed under the FSIA does not apply to actions pending in state court, including the underlying action against ASA. Instead, the exercise of personal jurisdiction over ASA depends solely on the traditional analysis performed by Missouri courts. As noted, under that analysis, ASA has not had sufficient minimum contacts with Missouri.

Lambert's arguments before Respondent sought an analysis of sovereign immunity related to ASA. In the terms that were widely employed before *J.C.W. ex rel. Webb v. Wyciskalla,* 275 S.W.3d 249 (Mo. banc 2009), an argument based on sovereign was considered an argument about ***subject matter jurisdiction***. *See Hart v. U.S.,* 630 F.3d 1085, 1088 (8th Cir. 2011); *Eubank v. Kansas City Power & Light Co.,* 626 F.3d 424, 426 (8th Cir. 2010). ASA's motion to dismiss and this request for writ of prohibition or mandamus are based on ***personal jurisdiction***. Subject matter jurisdiction and personal jurisdiction are distinct concepts in the law. *See In re Marriage of Hendrix,* 183 S.W.3d 582, 588 (Mo. banc 2006). Even after *J.C.W.*, this distinction is fatal to Lambert's arguments.

A. The historical context of the FSIA demonstrates that Congress did not intend to address personal jurisdiction analysis in state courts.

Chief Justice Marshall recognized the doctrine of sovereign immunity two hundred years ago. *Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812). As a matter of comity, members of the international community would waive the right to exercise jurisdiction over other sovereigns. *Republic of Austria v. Altmann,* 541 U.S. 677, 688 (2004). Since sovereign immunity was a matter of international comity, the Judicial branch deferred to the decisions of the other branches, particularly the Executive. *Id*. at 689. Accordingly, state courts followed the federal judiciary and deferred to the Executive branch.

In 1952, Jack B. Tate, the Acting Legal Adviser of the State Department, authored a letter (now known as the "Tate Letter") that explained that the State Department should begin restricting the application of sovereign immunity depending on whether the foreign state was acting in a public or private capacity. *Id*. at 690. In the aftermath of the Tate Letter, initial responsibility for sovereign immunity determinations remained with the Executive branch, namely the State Department. *Id*. However, if foreign nations did not request immunity from the State Department, individual courts determined whether sovereign immunity existed, "generally by reference to prior State Department decisions." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). Due to conflicting decisions by multiple courts and two branches of government, the application of sovereign immunity lacked uniformity and predictability. *Id*.

In 1976, when Congress passed the FSIA, it sought to entrust foreign sovereign immunity decisions with one branch of government and create uniformity in its application. In the findings accompanying the FSIA, Congress included that "the determination of United States courts of the claims of foreign states to immunity . . . would serve the interests of justice . . . ." 28 U.S.C. § 1602. Considering the historical context, Lambert misconstrues language from subsequent Supreme Court decisions by arguing before Respondent that the FSIA is the "sole basis" for a state court's personal jurisdiction over a foreign state.

The FSIA is not the "sole basis" for determining whether a state court may exercise personal jurisdiction over a foreign state, but rather the "sole basis" for determining if a court grants a foreign state sovereign immunity. The cases that Lambert cites support the historical purpose of the FSIA. The FSIA created a sole source for sovereign immunity analysis, as opposed to the inconsistent court and State Department decisions, and vested decision-making power with the courts. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) ("§ 1604 [of the FSIA] bars federal and state courts from exercising jurisdiction" when the FSIA says the foreign state is immune); *In re Tamimi*, 176 F.3d 274, 277 (4th Cir. 1999) ("the FSIA sets forth the sole and exclusive standards to resolve sovereign immunity issues raised by a foreign state . . .").

Thus, the historical conflicts between the State Department and court decisions leading to the passage of the FSIA support that Congress intended to ensure the uniform application of ***sovereign immunity***, not personal jurisdiction in state courts. For the

purposes of its motion to dismiss in the underlying action, ASA has not requested the court to look to the FSIA to determine if ASA is entitled to sovereign immunity. Rather, ASA requests that a Missouri court apply traditional Missouri personal jurisdiction analysis consistent with the provisions of the FSIA.

B. Basic tenets of statutory construction demonstrate the FSIA does not create personal jurisdiction in state courts

Contrary to Lambert's unsupported arguments, the statutory language does not permit an interpretation that the FSIA is the "sole basis" for state personal jurisdiction analysis. The FSIA features two discrete sections: one that addresses subject matter jurisdiction and one that addresses personal jurisdiction. By its plain language, the section that addresses personal jurisdiction does not apply to cases pending in state courts. Accordingly, the only way to evaluate personal jurisdiction over ASA is under the traditional long-arm and constitutional framework that is well-settled in this state. Under that analysis, as noted, the Court lacks personal jurisdiction over ASA.

Part of the framework of the FSIA is a section (in Chapter 97 of Title 28 of the United States Code) that addresses claims of sovereign immunity (or subject matter jurisdiction) in state and federal courts: "The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of

judgments rendered against them in connection with their commercial activities. ***Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.***" 28 U.S.C. § 1602 (emphasis added). By its terms, this provision applies in state and federal courts: "courts of the United States and of the States." For the Court's convenience, section 1602 is set forth in Exhibit I and in the appendix to this brief.

Also under the umbrella of the FSIA is the following provision (part of Chapter 85 of Title 28 of the United States Code): "The ***district courts shall have original jurisdiction*** without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a) (emphasis added).

Another part of section 1330 addresses personal jurisdiction over claims against foreign states in federal district courts: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which ***the district courts*** have jurisdiction under subsection (a) where service has been made under section 1608 of this title." 28 U.S.C. § 1330(b) (emphasis added).

By the plain terms of these sections, the discrete subject matter jurisdiction section of the FSIA applies to cases pending in both federal and state courts. But the separate personal jurisdiction section does not. That personal jurisdiction section only applies to cases pending in federal district courts. In at least three distinct instances, the plain

language of the FSIA establishes that Congress did not intend for the FSIA to supplant traditional state personal jurisdiction rules.

First, while section 1602 states "claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter," in its motion to dismiss ASA has not asserted a "claim of a foreign state to immunity." Instead, ASA claims the trial court does not have personal jurisdiction over it. The provisions set forth in 28 U.S.C. § 1602-1611 – which apply in state court – are not part of any personal jurisdiction analysis.

Second, while section 1602 states that the sovereign immunity analysis applies in both "courts of the United States and of the States," section 1330(b) states that the personal jurisdiction section only applies to the "district courts." The underlying action is not lodged in a federal district court, but rather in a state court.

Third, section 1602 states that only Chapter 97 of Title 28 of the United States Code applies in "courts of the United States and of the States." Conversely, 28 U.S.C. § 1330(b) is in Chapter 85 of Title 28, and contains no reference to state court. When Congress includes particular language in one section of a statute but omits it in another section of the same act, "it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997). Thus, the sovereign immunity analysis and the personal jurisdiction analysis are distinct. In other words, while the sovereign immunity analysis may apply to cases pending in state court, the personal jurisdiction analysis only applies to cases pending in federal courts and not to cases in state courts.

The timing of the passage of the FSIA supports this conclusion. The key statutory provisions, 28 U.S.C. §§ 1602-1611 and 28 U.S.C. § 1330(b) were considered and passed by Congress at the same time. All were sections of public law 94-583 and were enacted October 21, 1976. If Congress intended to have the personal jurisdiction analysis of 28 U.S.C. § 1330(b) apply to cases in state courts, it would have drafted the statute with specific reference to state courts – just as it did with 28 U.S.C. § 1602. Courts may not read into a statute a legislative intent contrary to the intent made evident by the plain language. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994); *Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood,* 107 S.W.3d 235, 239 (Mo. banc 2003).

The cases cited by Lambert in the trial court also support the distinction between the FSIA's sovereign immunity section and personal jurisdiction section. For example, in *In re Tamimi,* the Fourth Circuit stated: "The FSIA sets forth the sole and exclusive standard to be used to resolve ***sovereign immunity*** issues raised by a foreign state in federal and state courts." 176 F.3d 274, 277 (4th Cir. 1999) (emphasis added). *Tamimi* clearly does not hold that any analysis other than the FSIA's sovereign immunity analysis applies in state court. The United States Supreme Court made this distinction clear when it stated: "§ 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and § 1330(a) confers jurisdiction ***on district courts*** to hear suits brought by United States citizens and by aliens when a foreign state is not entitled to immunity." *Argentine Republic*, 488 U.S. at 434 (emphasis added). The Supreme Court held that section 1330 confers jurisdiction on district courts; it said nothing about state courts.

C. Interpreting the FSIA to be the sole basis for state personal jurisdiction analysis regarding foreign sovereigns restricts states' autonomy and violates principles of federalism and the United States Constitution.

The uniform operation of federal law in all states is a desirable goal. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944). However, it is a "serious thing . . . to adopt a rule of construction which precludes the execution of state laws by state authority in a matter normally within state power." *Id.* Statutory construction calls for great wariness "when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority." *Palmer v. Com. of Mass.*, 308 U.S. 79, 83-84 (1939). Since personal jurisdiction analysis in state courts is a state power, the FSIA should be interpreted as reserving personal jurisdiction analysis to the states.

If the FSIA were construed to supplant Missouri's traditional personal jurisdiction analysis, it would undermine Missouri's historical ability to determine when its courts will exercise jurisdiction over nonresident defendants. The Supreme Court has held that due process demands that, in order to subject a defendant to personal jurisdiction, the defendant must "have certain *minimum* contacts with [the forum state] such that maintenance of the suit against him does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. While the "minimum contacts" test is undoubtedly the least protection a state can give a nonresident defendant and comply with the United States Constitution, many states have enacted long-arm statutes that

provide nonresident defendants more protection than the constitutional minimum. *See, e.g.,* Me. Rev. Stat. tit. 14, § 704-A (2009); Del. Code. tit. 10 § 3104. Indeed, Missouri's personal jurisdiction analysis requires that a nonresident defendant's conduct fall within the scope of the Missouri long-arm statute, before ever considering whether the nonresident defendant has sufficient minimum contacts. *Bryant*, 310 S.W.3d at 231. Lambert's reading of the FSIA unnecessarily and incorrectly restricts Missouri's autonomy to determine what protections nonresident defendants receive in its own courts.

Lambert argued before Respondent that jurisdiction under the FSIA is outside the principles of federalism and that state borders are irrelevant in determining whether a state court may exercise personal jurisdiction over ASA in Missouri. However, the Supreme Court has explicitly stated that it has "never [accepted] the proposition that state lines are irrelevant for jurisdictional purposes, nor could [it], and remain faithful to the principles of federalism embodied in the Constitution." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293. In personal jurisdiction analysis, state borders do not solely demarcate boundaries to protect defendants from being haled into an inconvenient forum, but serve the dual purpose of ensuring that a state "does not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 292-93. Accordingly, Missouri incorporates its responsibility as a coequal sovereign into the secondary considerations of its personal jurisdiction analysis. *Schilling*, 978 S.W.2d at 371 (listing the interest of the interstate judicial system as a factor).

If Lambert's interpretation of the FSIA were accepted, state lines would be eliminated as guarantors of the coequality of states. Lambert cites ASA's alleged

contacts with Colorado and alleged potential future contacts with Tennessee as support for a Missouri court's personal jurisdiction over ASA. This interpretation is untenable, because it does not recognize the balance between national and state authority and principles of federalism. First, a state's traditional ability to provide ASA with more protection than Due Process requires would be unilaterally eliminated by federal statute. Second, a state's ability to consider the interests of the interstate judicial system would be removed. Third, since ASA could be haled into a Missouri court despite a complete lack of contacts with the forum, the interests of Colorado and Tennessee would be trampled.

Interpreting the FSIA as the sole basis for state personal jurisdiction analysis would grant Congress a power that is not enumerated in the Constitution, namely the power to compel state courts to employ a certain personal jurisdiction analysis in their own courts. Congress's powers are limited to those enumerated in the Constitution. *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). Therefore, pursuant to the Constitution, Congress has the power to "constitute tribunals inferior to the Supreme Court" (U.S. Const. art. I, § 8, cl. 9) and to ordain and establish inferior Courts (U.S. Const. art. III, § 1). In the section-by-section analysis of the FSIA, Congress recognized that its authority "to prescribe the jurisdiction of ***Federal courts*** (art. I, sec. 8 cl. 9; art. III, sec 1)" derived from the Constitution. H.R. REP. 94-1487. Congress did not articulate a similar constitutionally derived authority for prescribing personal jurisdiction in state courts.

Courts should adopt statutory construction that not only avoids declaring a statute unconstitutional, but casting doubt on its constitutionality. *Rust v. Sullivan,* 500 U.S.

173, 191 (1991). In the absence of a recognized constitutional power enabling Congress to compel states to employ a specific personal jurisdiction analysis over state law claims in state courts, the FSIA should be construed to avoid raising this constitutional issue. The FSIA should be construed as granting personal jurisdiction to ***Federal*** courts, while providing the "sole basis" for state and federal courts to determine if a sovereign immunity claim is available to foreign sovereigns.

This analysis is also consistent with Missouri law. When faced with a conflict in law, the courts of Missouri apply Missouri law to procedural questions. *Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.,* 155 S.W.3d 50, 58 (Mo. banc 2005); *Block Financial Corp. v. America Online, Inc.,* 148 S.W.3d 878, 884 (Mo. App. 2004).

D. Interpreting the FSIA to be the sole basis for state court personal jurisdiction unfairly burdens ASA and will lead to forum shopping.

Due Process requires that a defendant have "minimum contacts" with the forum state so that subjecting him to suit does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe*, 310 U.S. at 316. The consideration of "minimum contacts" protects the defendant from the burden of litigating in a distant or inconvenient forum, *World-Wide Volkswagen*, 444 U.S. at 291-92, and ensures the reasonableness of requiring a corporation to defend a suit in a certain forum, *Int'l Shoe*, 310 U.S. at 317. The Due Process Clause "does not contemplate that a state may make a binding judgment against . . . an individual or corporate defendant with which the state has no contacts, ties or relations." *Id*. at 319. Congress cannot legislate around Due Process.

If the FSIA were the sole basis for personal jurisdiction in state courts, ASA would be unfairly burdened by litigating in a forum with which it had no contacts, ties, or relations. As noted, ASA is a statutory corporation with no contacts to Missouri. However, Lambert argued before Respondent that a Missouri court had personal jurisdiction because ASA has alleged contacts with Colorado and, potentially, Tennessee. The burden faced by ASA if Lambert's argument and Respondent's decision were accepted is the exact burden the Supreme Court has repeatedly held violates Due Process. *Int'l Shoe*, 310 U.S. at 316, 317; *World-Wide Volkswagen,* 444 U.S. at 291-92; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

In federal court, the FSIA seeks to limit the burden on foreign state defendants through a cross reference to venue requirements. *See* 28 U.S.C. §1391(f). The applicable subsection (in Chapter 87 of Title 28 of the United States Code) provides that a civil suit may be brought against a foreign state in any judicial district: (1) where a substantial part of the acts or omissions giving rise to the claim occurred or a substantial portion of the property subject to the action is situated; (2) where the vessel or cargo of a foreign state is situated if brought under 28 U.S.C. §1605(b); (3) where the agency or instrumentality of the foreign state is licensed to do business if brought under 28 U.S.C. § 1603(b); or (4) in the United States District Court for the District of Columbia. Therefore, the FSIA guards against unduly burdening defendants in federal district court. Under Lambert's expansive and unsupported theory, no comparable protection would be available in state court.

Furthermore, if a defendant could be subject to personal jurisdiction in a state court based on alleged contacts with any of the other forty-nine states, as Lambert argues, forum shopping will be the inevitable result.

CONCLUSION

The plain language of the FSIA, its history, principles of federalism, and notions of fair play and substantial justice demonstrate that the separate personal jurisdiction provisions of the statutory scheme do not apply here. Missouri law does not permit the exercise of personal jurisdiction over ASA in light of the complete lack of contacts between ASA and this state. Accordingly, the Court should apply traditional Missouri rules regarding personal jurisdiction and direct Respondent to dismiss the third-party petition as to ASA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This document was filed and served through the Court's electronic notice system on July 2, 2012.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,078, except the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix.

/s/ Jeffery T. McPherson