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IN THE SUPREME COURT OF THE UNITED STATES

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OBB PERSONENVERKEHR AG, :

Petitioner : No. 13-1067

v. :

CAROL P. SACHS. :

- - - - - x

Washington, D.C.

Monday, October 5, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

JUAN C. BASOMBRIO, ESQ., Costa Mesa, Cal.; on behalf of Petitioner.

EDWIN S. KNEEDLER, ESQ., Deputy Attorney General, Department of Justice, Washington, D.C.; on behalf of United States, as amicus curiae, supporting reversal.

JEFFREY L. FISHER, ESQ., Stanford, Cal.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning, first this term, in Case 13-1067,
5 OBB Personenverkehr v. Sachs.

6 Mr. Basombrio.

7 ORAL ARGUMENT OF JUAN C. BASOMBRIO

8 ON BEHALF OF THE PETITIONER

9 MR. BASOMBRIO: Mr. Chief Justice, and may
10 it please the Court:

11 This personal injury action is based upon an
12 accident that occurred in Austria. If this Court
13 agrees, there's no need to reach the other question
14 related to agency, so I will start first with the
15 based-upon issue.

16 In Nelson, this Court set forth a framework
17 to analyze the based-upon question. And this Court held
18 that courts must begin their analysis by identifying the
19 particular conduct on which the action is based. The
20 decision uses words such as basis, foundation, and
21 gravamen. So here --

22 JUSTICE GINSBURG: But in -- in that case,
23 there was a distinction between State activity -- that
24 is, police activity -- and the commercial activity in
25 hiring the plaintiff. Here, I think it's conceded that

1 the activity -- running a railroad -- that's commercial.
2 So we don't have the commercial/State action division.

3 MR. BASOMBRIO: Yes, Your Honor, that's
4 correct. Here, there are two alleged commercial
5 activities. One of them is the sale of the ticket in
6 the United States, and the other one are the acts and
7 omissions that resulted in the accident in Austria.

8 So what I would suggest is that we look at
9 the complaint and see what it is that the plaintiff has
10 alleged.

11 JUSTICE KENNEDY: Just as a matter of
12 background, suppose a hypothetical case -- no foreign
13 sovereign. It was a private corporation in Austria.
14 Would there then be jurisdiction under the Due Process
15 Clause in your view? You don't have to prevail on -- on
16 that issue, but as a background issue, what -- do you
17 have a position?

18 MR. BASOMBRIO: Our position is that if OBB
19 was a private entity, there would not be jurisdiction
20 over OBB. There would not be general jurisdiction after
21 this Court holding in Daimler and there would also --

22 JUSTICE KENNEDY: And Daimler is your best
23 case for that proposition?

24 MR. BASOMBRIO: Yes, Your Honor.

25 JUSTICE KAGAN: Do -- do you think that it's

1 the same test? In other words, is the test a specific
2 jurisdiction test here, based-on, arising-from, that we
3 are basically asking the same question as we would be
4 asking if this were a -- a foreign corporation?

5 MR. BASOMBRIO: I don't believe so, Your
6 Honor. Let me explain, if I may, why not. Congress
7 could have chosen that wording in the personal
8 jurisdiction analysis in the case law, but they decided
9 on another phrase, based-upon, instead. So I believe
10 that what this Court needs to do is give some
11 guidance --

12 JUSTICE KAGAN: Well, the why -- I mean, it
13 doesn't seem to me that that wording is very different
14 from the wording that we've used in specific
15 jurisdiction cases. The wording here is "based on" --
16 we've used "arising out of." Sometimes we've used
17 "related to." In some respects -- I mean, it's pretty
18 clear that the FSIA is meant to ensure that when a
19 foreign government is acting as a commercial actor, it
20 gets treated like a foreign corporation. And the
21 language here is very similar, right? There's the
22 insistence on a sufficient contact, a minimum contact,
23 and then there is the insistence on a particular kind of
24 relationship between that contact -- contact and the
25 claim.

1 So it seems -- I guess the question is: Why
2 should we think of these two questions as at all
3 different? And I don't know, by the way, I mean, that
4 it would hurt you if they were the same, because it
5 might just be there would be no specific jurisdiction
6 here, you know? But I guess I'm having trouble of
7 thinking why it is that there -- that there would be a
8 different test.

9 MR. BASOMBRIO: The reason why is because
10 the FSIA takes place of the -- both the subject matter
11 jurisdiction analysis and the personal jurisdiction
12 analysis. Both are combined into one test. So although
13 I would agree certainly that some aspects of the
14 personal jurisdictional analysis are part of that test,
15 it goes beyond that. It also goes into subject matter
16 jurisdiction which is a different set of policy
17 determinations that Congress made that are in some way
18 overlapping of the personal jurisdiction questions, but
19 I don't think they're completely aligned.

20 JUSTICE SOTOMAYOR: I'm -- I'm sorry.
21 I'm -- I don't even understand why we're talking about
22 based-upon.

23 As Justice Ginsburg said, there's no dispute
24 here that whether the based-upon is the ticket sale or
25 the operation of the train, both of them are commercial

1 activities.

2 Isn't the work in substantial contact with
3 the United States? Isn't that what we should be looking
4 at instead? Was this commercial activity substantial
5 enough? The operation of the train and the ticket sale
6 here, did it have a substantial contact with the
7 United States?

8 MR. BASOMBRIO: There's a three-step
9 analysis, Your Honor, in Nelson. First, you have to
10 identify the particular conduct, the actions, not the
11 causes of action, which is what the en banc court did.
12 They focused on the legal claims.

13 This Court said you have to focus on the
14 acts. Here, the acts --

15 JUSTICE SOTOMAYOR: So we did that in the
16 context of deciding when something was a sovereign act
17 as opposed to a commercial act. We know this is a
18 commercial act.

19 So -- and we -- I'm just confused. Why
20 isn't the work -- why shouldn't the work be done by
21 substantial contact with the U.S.?

22 MR. BASOMBRIO: It's a three-step analysis.
23 First, you identify the activity. Secondly, you decide
24 whether it is commercial or not.

25 JUSTICE SOTOMAYOR: Whether it's --

1 MR. BASOMBRIO: And third, whether there's
2 substantial contact.

3 JUSTICE SOTOMAYOR: -- commercial or
4 sovereign.

5 MR. BASOMBRIO: So there are three steps.

6 What I'm saying is that the Ninth Circuit
7 erred. They didn't look at the conduct first. They
8 looked at the legal claims. If you look at the --

9 JUSTICE SOTOMAYOR: Even if they had looked
10 at the conduct, it's commercial.

11 MR. BASOMBRIO: It's commercial. But if you
12 look at the conduct and you identify it as the accident
13 in Austria -- which is what the plaintiff claimed. In
14 JA 15, paragraphs 3 to 8, they alleged that there was an
15 unsafe boarding platform, a gap at the platform,
16 et cetera, et cetera.

17 All of these things happened in Austria --

18 JUSTICE ALITO: But how do you propose --
19 how do you propose that we determine whether it's based
20 on commercial activity?

21 Take their failure-to-warn claim. Why isn't
22 that based on something that occurred in the
23 United States? You're just -- are you just asking us
24 to -- to step back and say, well, in that case we -- we
25 really think they're just trying -- they have a -- they

1 have a tort that occurred in Austria, a negligence tort
2 that occurred in Austria, and they're just trying to
3 plead around it with these other claims?

4 MR. BASOMBRIO: Well, there's no allegation
5 in the Complaint that the failure to warn was something
6 that happened in the United States. It's found in the
7 same set of paragraphs, 3 through 8, that relate to the
8 acts and omissions in Austria.

9 It also would make no sense to argue that
10 there was a failure to warn in the United States because
11 that would mean that the Eurail Pass itself would have
12 to warn about all conditions at hundreds of potential
13 railroad stations in Europe.

14 JUSTICE ALITO: Well, it might be -- it
15 might be a claim that couldn't prevail, but why does
16 that answer the question?

17 MR. BASOMBRIO: Well, the failure to warn
18 that's alleged relates to the facts that arise in
19 Austria, and, therefore, the cause of action arises in
20 Austria because that's where the acts or omissions
21 occurred if -- if one looks at what's alleged in the
22 Complaint itself.

23 JUSTICE KAGAN: Would -- would you agree
24 and -- and, as you've been doing, take out the agency
25 question -- but would you agree if -- if what had

1 happened here was that the ticket was not honored. You
2 know, the plaintiff bought a ticket, and the ticket was
3 not honored, and -- and the suit was where the ticket
4 was purchased, would you agree that that's based-on?

5 MR. BASOMBRIO: If this was a breach of
6 contract case --

7 JUSTICE KAGAN: Just a breach of contract
8 case.

9 MR. BASOMBRIO: -- and the breach -- the
10 allegation of the breach was that when the Respondent
11 showed up they did not honor the ticket, that would be
12 based upon an activity in Austria because it's in
13 Austria that that ticket got honored.

14 JUSTICE KAGAN: In Austria, even though she
15 bought the ticket in the United States? You think even
16 the breach of contract case could not be brought in the
17 United States?

18 MR. BASOMBRIO: Correct, because the -- the
19 wrongful act, the breach, arises in Austria.

20 CHIEF JUSTICE ROBERTS: What about --

21 JUSTICE KENNEDY: Suppose we disagree
22 with that --

23 MR. BASOMBRIO: I'm sorry?

24 JUSTICE KENNEDY: Suppose we disagree with
25 that answer? Do you lose the case?

1 MR. BASOMBRIO: I'm sorry?

2 JUSTICE KENNEDY: Suppose we disagree with
3 the answer that you gave to Justice Kagan. Suppose we
4 disagree that that suit has to be in Austria. Can you
5 still prevail on the facts of this case?

6 The hypothetical was the ticket is not
7 honored. Suppose we disagree with your answer. Can you
8 still prevail on the facts that it -- that it did, in
9 fact, occur in this case?

10 MR. BASOMBRIO: Yes, but I would still
11 prevail based on the agency argument that we have
12 presented.

13 JUSTICE SCALIA: But you --

14 JUSTICE KAGAN: Could you go back and
15 explain to me what -- I'm sorry.

16 JUSTICE SCALIA: You -- you'd lose on -- on
17 the other point.

18 MR. BASOMBRIO: Well --

19 JUSTICE SCALIA: You -- you acknowledge that
20 you would lose on the other point if -- if that
21 hypothetical came out the other way?

22 MR. BASOMBRIO: No, I do not.

23 JUSTICE SCALIA: Oh.

24 MR. BASOMBRIO: I believe -- let me clarify,
25 Your Honor, if I may.

1 My answer to Justice -- Justice Kagan was
2 that I believe that a breach of contract claim for
3 dishonor of the ticket in Austria has to be brought in
4 Austria.

5 JUSTICE KAGAN: Because --

6 MR. BASOMBRIO: Justice -- because that's
7 where the breach occurred that gives rise to the cause
8 of action.

9 Justice Kennedy said to me, suppose that we
10 disagree with you, can you still win the case? And my
11 answer was, I could still win, I believe, under the
12 agency alternative argument.

13 JUSTICE SCALIA: But not --

14 JUSTICE KAGAN: What about apart --

15 JUSTICE SCALIA: -- not under -- under the
16 argument you're -- you're first making?

17 MR. BASOMBRIO: Not if the Court ruled
18 against me, no. But I believe --

19 JUSTICE SCALIA: On that -- why? Why? I
20 mean, couldn't -- couldn't you make the argument that
21 the question ought to be decided not -- not by where
22 the -- where the contract was breached but where the
23 contract was made? I mean, we could hold -- we could
24 hold that, and that would not affect your case.

25 MR. BASOMBRIO: That's true. I -- I do not

1 believe that a breach of contract claim under the fact
2 scenario that you provided, Your Honor, would give rise
3 to a claim in the United States because the breach
4 happened -- would have happened in Austria.

5 JUSTICE SCALIA: Counsel, I want to come
6 back to Justice Kagan's speculation of -- of whether
7 based-on is -- is nothing more than due process.

8 It seems to me that the definition of
9 commercial activity carried on in the United States by a
10 foreign state is the due process test. The definition
11 is, "A commercial activity carried on in the
12 United States by a foreign state means commercial
13 activity carried on by such state and having substantial
14 contact with the United States." That sounds to me
15 like -- like the due process test.

16 But what is required here is not just a
17 commercial activity carried on in the United States, it
18 has to be based on a commercial activity carried on in
19 the United States. And it seems to me that is
20 something -- something added to the -- to the
21 constitutional test.

22 MR. BASOMBRIIO: Yes, Your Honor. And that's
23 why I started my discussion by referring to this
24 holding -- the holding of this Court in Nelson which has
25 to look at the particular conduct.

1 The particular conduct at issue is not the
2 sale of the ticket, it's the acts and omissions that
3 resulted in the accident in Austria.

4 CHIEF JUSTICE ROBERTS: What -- what if
5 there are acts or omissions in two -- let's say you have
6 a flight from New York to Vienna. And in New York,
7 someone negligently sets or whatever they do with the
8 landing gear, okay?

9 So then the plane takes off, and then in
10 Vienna, because of the negligence in New York, it's a
11 rough landing, somebody gets a concussion.

12 MR. BASOMBRIO: Uh-huh.

13 CHIEF JUSTICE ROBERTS: Where is the
14 gravamen of the action in that case? Can you bring that
15 in -- in the United States?

16 MR. BASOMBRIO: Potentially, you could bring
17 it in the United States. And the difference between
18 your scenario and this case is that in that scenario,
19 the service was provided, started in -- starting in the
20 United States. There's contact with the United States
21 because the foreign airline came here and conducted a
22 commercial activity in the United States.

23 JUSTICE GINSBURG: Because it's --

24 MR. BASOMBRIO: That's what different--

25 JUSTICE GINSBURG: -- a typical tort. If

1 the negligence occurs in one place, and the impact is
2 the other, you could bring the suit in either place, as
3 far as our notions of personal jurisdictions, either
4 injury in the state or conduct in the state causing
5 injury outside it. Those are typical long-arm bases of
6 jurisdictions.

7 So the Chief's hypothetical where the
8 negligence occurred in the United States, that you agree
9 would be a case that could be brought in the
10 United States because the relevant conduct occurred
11 there.

12 MR. BASOMBRIO: Correct, in that case --

13 CHIEF JUSTICE ROBERTS: Well, correct. I
14 don't understand, then, what gravamen means in the
15 Nelson decision. Gravamen means one place, right?

16 MR. BASOMBRIO: Right.

17 CHIEF JUSTICE ROBERTS: Or do you think you
18 could have a lot of different -- I mean, if it's the
19 gravamen of your complaint, I think you have to choose,
20 don't you, one or the other?

21 MR. BASOMBRIO: Well, I would -- I was -- I
22 would understand your example, Chief Justice, to mean
23 that the act that caused the injury was whatever they
24 didn't do upon takeoff to the plane, or -- or -- as I
25 understood your example, that cause of that injury was

1 in the United States.

2 CHIEF JUSTICE ROBERTS: So can you have more
3 than one place under the based-upon analysis in Nelson,
4 or has you -- have you got to decide there's only one
5 place where you could bring the action?

6 MR. BASOMBRIO: Well, the airline example --
7 and this is something I thought about. It's somewhat a
8 complicated example because we have conventions,
9 international treaties that deal with -- with airline
10 cases.

11 I would imagine that, theoretically, there
12 could be one more -- more than one location, but not on
13 the facts of this case.

14 JUSTICE ALITO: In the Chief Justice's
15 example, he -- he stated that there was negligence in
16 the United States. But what if there's no evidence of
17 that?

18 There's a -- there's a problem with the
19 landing gear when the plane lands in Austria, and the
20 claim is that there was a failure to inspect in the
21 United States, or a failure to do proper maintenance in
22 the United States. Would that be different?

23 MR. BASOMBRIO: That may be different.
24 Again, because the transportation was provided from the
25 United States geographically, there -- there is no doubt

1 in that question that commercial act was carried on in
2 the United States by the airline. And that's different
3 here.

4 JUSTICE SCALIA: I suppose it's -- it's --
5 it's proper to say that where you have negligence that
6 causes an injury, the -- the complaint is based on both.
7 You -- you don't have liability without the negligence.
8 You don't have liability without the injury. So why
9 can't you say based-on, in -- in that situation, would
10 enable either one to -- to sustain the cause of action?

11 MR. BASOMBRIO: In the airplane example,
12 perhaps either jurisdiction. In this example, if you
13 look at the Complaint -- and we're guided by the
14 allegations of the Complaint, it is -- the acts are only
15 alleged to have happened and the omissions to have
16 happened --

17 JUSTICE KENNEDY: Getting back to our
18 earlier discussion, questions from me and from Justice
19 Kagan, it seemed to me you have to say the due process
20 analysis is insufficient under this statute because --
21 then fill in the blank. And Justice Scalia was asking
22 you the same question.

23 MR. BASOMBRIO: Yeah.

24 JUSTICE KENNEDY: One -- one answer might be
25 because otherwise there would be no necessity for a

1 statute. Due process applies anyway. But the
2 counterargument is, well, there has to be because the
3 statute makes the distinction between sovereign and
4 commercial and so it has a real purpose.

5 MR. BASOMBRIO: Right. The due process
6 analysis is incorporated into the statute, but it's not
7 the only thing to think about. For example --

8 JUSTICE GINSBURG: You did answer, I
9 think -- you did answer, rendering Justice Kennedy's
10 question somewhat academic, that there would be no
11 specific jurisdiction in the United States if all that
12 happened here was a ticket purchase from an agent where
13 the injurious conduct occurred abroad and the railroad
14 operates solely abroad.

15 You answered that whether it were the due
16 process specific jurisdiction inquiry or the Foreign
17 Sovereign Immunities Act, the answer would be the same,
18 that the ticket sale in the United States was not
19 enough.

20 MR. BASOMBRIO: Yes, Your Honor.

21 JUSTICE KENNEDY: But, of course, my
22 question was suppose that the due process analysis is
23 sufficient to sustain jurisdiction. Then what? Then
24 does based-on still have a separate meaning as a
25 separate requirement that has to be met and has not been

1 met here? And if so, why?

2 MR. BASOMBRIO: It has not been met here
3 because from a general jurisdictional perspective --

4 JUSTICE KAGAN: But not general
5 jurisdiction.

6 MR. BASOMBRIO: Right.

7 JUSTICE KAGAN: I was really talking about
8 specific jurisdiction. And, of course, Justice Scalia
9 is absolutely right with respect to general
10 jurisdiction, that all you look at is the contacts. But
11 with respect to specific jurisdiction -- this is a
12 company that doesn't have pervasive contacts --

13 MR. BASOMBRIO: Right.

14 JUSTICE KAGAN: -- it's critical to the due
15 process analysis that there be a relationship, and a
16 real relationship between the particular contact with
17 the United States and the lawsuit in the exact same way
18 that this statute focuses on.

19 And so, again, I don't know if it hurts you.
20 It might be, as Justice Ginsburg says, that there
21 wouldn't be specific jurisdiction here for a
22 corporation. But -- but -- but why shouldn't we treat
23 those two things exactly the same way?

24 MR. BASOMBRIO: There is -- there is -- if I
25 may answer that two parts of your question. First,

1 there is no specific jurisdiction if OBB were a private
2 entity because the Respondent is not suing for breach of
3 the ticket; it's not alleging that it was not honored.
4 She's suing for something that happened in Austria. The
5 specific acts happened outside the United States.

6 JUSTICE KAGAN: Yes. Well, that's an answer
7 for why there is no specific jurisdiction here.

8 MR. BASOMBRIIO: Right.

9 JUSTICE KAGAN: And you can make the exact
10 same answer in the completely private context. And
11 you --

12 MR. BASOMBRIIO: Right.

13 JUSTICE KAGAN: -- could well be right. I'm
14 want to ask Mr. Fisher about that.

15 MR. BASOMBRIIO: Right.

16 JUSTICE KAGAN: But it's not an answer for
17 why the tests should be different.

18 MR. BASOMBRIIO: The test -- the test -- my
19 belief is that the test should incorporate due process
20 analysis. But because we are also dealing with subject
21 matter jurisdiction, which is a different analysis than
22 personal jurisdiction, there are other policy
23 considerations.

24 The policy considerations decisions that
25 Congress made were based on territory. If one want --

1 if one looks at the first, the second, and the third
2 clause, they're all territory-based distinctions. In --
3 in the case *Amerada Hess*, this Court held that tort
4 actions are meant to be encompassed by the second
5 section of the -- of the exception, the non --
6 noncommercial torts exception. That requires that the
7 tort happened in the United States in order to be -- to
8 have subject matter on personal jurisdiction. It
9 wouldn't fit here.

10 Justice Ginsburg referred to direct effects.
11 That would come under the third clause, which deals with
12 commercial activity outside of the U.S.; again, a
13 territorial line, having an effect here.

14 The first clause draws the territorial line
15 here and says that commercial activity has to happen in
16 this side of the line within the United States. And
17 that's what we don't have here.

18 I would like to --

19 JUSTICE SCALIA: What provision are you --
20 what provision are you referring to?

21 MR. BASOMBRIO: I'm pro -- referring to the
22 first clause of the commercial activity exception, that
23 it requires that the commercial activity be conducted,
24 carried out in the United States. That means that
25 within the territory of the United States. And I

1 reached that conclusion by comparing it to the third
2 clause, which refers to commercial activity outside of
3 the United States having a direct effect in the
4 United States, Your Honor.

5 JUSTICE SCALIA: I see.

6 MR. BASOMBRIO: Now if I may just say one
7 point about agency. There is no dispute here that if
8 the definition in the Act applies, RP doesn't fit within
9 it.

10 Now, this Court has recently held that we
11 are guided by the language of the statute. I understand
12 that arguments have been made by my colleagues and also
13 by the Ninth Circuit that there is a difference between
14 invocation of immunity and attribution. This is the
15 point I want to make. Section 1604 is the invocation
16 section. That's the section that states that certain
17 people, those defined as the foreign state, can invoke
18 immunity.

19 Section 1605 is an attribution section. It
20 says whose acts deprive you of immunity. And because
21 foreign state is a defined term, we are limited to the
22 limitations in the FSIA.

23 In the alternative, if this Court were to
24 move away from the definition, I believe we would all
25 agree that there has to be some element of control. The

1 test that this Court develops for agent has to have
2 either the degree of control in Bancec or something
3 lesser. But all agency law requires control, and that's
4 where the en banc court missed the mark. They didn't
5 require any control. And if one requires control, it
6 has to be reversed because there was no control here.

7 If there are no pending questions, I would
8 appreciate reserving the balance of my time for
9 rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Kneedler.

12 ORAL ARGUMENT OF EDWIN S. KNEEDLER

13 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

14 SUPPORTING REVERSAL

15 MR. KNEEDLER: Mr. Chief Justice, and may it
16 please the Court:

17 I'd like to start with the point about
18 whether the FSIA simply incorporates due process
19 standards, and we think it does not. It contains its
20 own statutory terms which require interpretation.
21 Congress did not simply incorporate the D.C. Long-Arm
22 Statute or due process principles or phrase the -- the
23 statute in that way. It enacted specific statutory
24 terms. And it's --

25 JUSTICE SOTOMAYOR: So is it the based-upon

1 language or the substantial-context language?

2 MR. KNEEDLER: It's both. It's both and in
3 the -- in the United States, which is an important point
4 I want to make. The -- one of the reasons it's very
5 different from just due process is because this -- the
6 FSIA governs subject matter jurisdiction and personal
7 jurisdiction to be sure, but based -- based upon a
8 determination of immunity of a foreign state. And it
9 does that by drawing, as was mentioned before, a strict
10 territorial line that runs throughout all the
11 exceptions. For example, the intentional -- the tort
12 exception applies only to torts in the United States.
13 And the property exception concerns property in the
14 United States. And the focus of the commercial activity
15 exception is also, at least under clause one -- well,
16 all of them -- but clause one is commercial activity in
17 the United States that also has a substantial
18 connection, but the action has to be based upon, as
19 Justice Scalia pointed out.

20 JUSTICE KAGAN: Well, but how is based-upon
21 different from the language we routinely use in specific
22 jurisdiction cases? In other words, it just seems as
23 though Congress, in line with its objective of treating
24 foreign government engaging in commercial activity in
25 the same way as they would be treated in the foreign

1 corporations case, in line with that objective, used
2 language that's virtually synonymous with the language
3 that we use in specific jurisdiction cases.

4 MR. KNEEDLER: But -- but it -- it did it in
5 the context of a statutory structure that is designed to
6 protect foreign sovereign immunity and not to draw U.S.
7 courts into what could be very sensitive international
8 questions of having U.S. courts pass judgment on what
9 happens in a foreign country. For --

10 JUSTICE KENNEDY: Well, except it did so in
11 the context of distinguishing between commercial
12 activity and sovereign activity.

13 MR. KNEEDLER: In -- in Nelson -- actually,
14 the pertinent paragraph in Nelson that discusses
15 based-upon, as counsel pointed out, the Court said you
16 start with what is the conduct that -- that the suit is
17 based upon. And the Court said the conduct there was
18 the conduct that took place in Saudi Arabia. And then
19 it had a discussion that said, to be sure, there was
20 recruitment that -- that preceded that, and that
21 recruitment put the employee in the position to be in
22 the hospital in Saudi Arabia where the conduct occurred.

23 But the focus was on, as the Court said,
24 those torts in Saudi Arabia, not the -- not the
25 antecedent commercial activity in the United States.

1 That discussion in the Court's opinion preceded its
2 discussion of the distinction between commercial
3 activity and -- and sovereign activity. It had to do
4 what -- with what is the focus of the claim. And there
5 the Court was focusing on tort claims that happened
6 outside the United States. And we think it's very
7 important in this case to distinguish between tort
8 claims and contract claims.

9 JUSTICE ALITO: What if you have a tort
10 claim that has one element in the United States, how
11 do -- how does a court determine whether the gravamen of
12 the claim is in the United States or elsewhere?

13 MR. KNEEDLER: I think -- I think focusing
14 on what -- on what the defendant's conduct is that
15 actually caused the injury. And here, the -- the only
16 difference between this case and Nelson is the argument
17 that the purchase of the ticket, which is the -- by the
18 way, the only commercial activity that was relied upon
19 below. The Ninth Circuit says this at Phaneuf 13 and
20 Footnote 4. Respondent is now trying to broaden that
21 into the entire operations of the railroad which would
22 actually be an assertion of general jurisdiction.
23 Anything that would arise in the operation of a railroad
24 in -- in Austria could be the subject of a suit if it
25 was deemed to have substantial connection with the

1 United States.

2 JUSTICE KENNEDY: If we want to give
3 based-upon a separate substantive effect in this statute
4 and so that it means something more substantial than
5 mere due -- than what would suffice for due process,
6 what -- what body of law, case law do we look to?

7 MR. KNEEDLER: Well, I think in Nelson --

8 JUSTICE KENNEDY: If I want to find out
9 about based-on, what kind of cases am I supposed to
10 read?

11 MR. KNEEDLER: Well -- well -- and Nelson
12 itself, I think, is very instructive on this because,
13 first of all, the Court in Nelson did not -- did not
14 describe what it was doing as simply applying due
15 process standards. It was applying the statutory terms.
16 And it -- again, it -- it focused on the particular
17 conduct -- and this goes to Justice Alito's question as
18 well -- it focused on the conduct that really caused the
19 injury, which in that case was the -- were the
20 intentional torts --

21 JUSTICE KAGAN: So Mr. --

22 MR. KNEEDLER: -- that happened in Saudi
23 Arabia.

24 JUSTICE KAGAN: In -- in my contract hypo,
25 if the -- if the suit was a breach of contract action,

1 do you think it would be based-upon? Just a straight,
2 like, you don't -- you didn't honor my ticket?

3 MR. KNEEDLER: On -- on a contract claim, I
4 think that there well -- may well be a contract claim
5 here. But I think it's important to recognize that a
6 breach of contract claim, just because there is some
7 connection with the United States, does not
8 automatically -- even for due process purposes, some
9 connection of a contract to the forum is not enough.
10 The Court made that point in Burger King about contracts
11 which was discussed in the -- in the Court's Walden v.
12 Fiore case.

13 JUSTICE GINSBURG: Mr. Kneedler, before
14 you -- before you finish, you bring up an interest in
15 relations with other nations.

16 Do you know -- I mean, there are other
17 nations that have similar legislation to the Foreign
18 Sovereign Immunities Act. Do we know how this case
19 would come out, say, in Canada, Germany, or France under
20 similar legislation?

21 MR. KNEEDLER: The European Convention
22 provides for jurisdiction over tort claims, which
23 this -- which this basically is, only with respect to
24 torts that arise in the territory, which is -- which is
25 the case here in our own tort exception, which is an

1 important -- going back to Justice Kagan's question --
2 an important reason why this is different from due
3 process.

4 Tort claims under the FSIA, under -- under
5 Exemption (5), Paragraph (a)(5), arise only when the
6 tort occurs in the United States. And even business
7 torts -- the House Report refers to business torts in
8 the United States because there was a -- Congress was
9 drawing a territorial line. And we --

10 JUSTICE BREYER: The Netherlands -- the
11 Netherlands and Switzerland have filed a brief, haven't
12 they, in which they said that this injury, the claim
13 that's pursued against here, the facts that underlie it,
14 are based upon activity that took place in Switzerland.

15 MR. KNEEDLER: Right.

16 JUSTICE BREYER: In Austria.

17 MR. KNEEDLER: Right.

18 JUSTICE BREYER: And so they wouldn't --

19 MR. KNEEDLER: Right.

20 JUSTICE BREYER: -- under their law.

21 Is there any indication -- I saw none in any
22 of these briefs -- that there's any country in the world
23 that would reach a different result?

24 MR. KNEEDLER: I -- as far as -- --

25 JUSTICE BREYER: They've put lawyers on both

1 sides, and I'm sure one of the lawyers would have told
2 us if they'd found a country that would have reached --

3 MR. KNEEDLER: And this --

4 JUSTICE BREYER: -- result.

5 MR. KNEEDLER: The same general point is
6 true in the UN convention on -- on immunity with respect
7 to tort claims --

8 JUSTICE KAGAN: Mr. Kneedler, how about --
9 there is a contract claim in this lawsuit, so there is
10 a -- is a kind of warranty of fitness kind of claim.
11 How -- how about that? Why -- if you think that the --
12 let's assume that the contract claim, which is like you
13 didn't honor my ticket, that there would be personal
14 jurisdiction over, how do we separate out the warranty
15 of habitability or fitness claim?

16 MR. KNEEDLER: Because I think -- I think
17 that's very parallel to what this Court confronted in
18 the Nelson case where the -- the Court said the failure
19 to warn -- there was a claim there too, a failure to
20 warn about the hazard -- about the potential tort. And
21 the -- and the court said, it -- it would not recognize
22 jurisdiction by that sort of feint of language. You
23 can't recharacterize something that is basically a tort
24 abroad by claiming that there was a failure to warn --

25 JUSTICE KAGAN: Is -- is that a typical

1 thing --

2 MR. KNEEDLER: -- about the tort. We think
3 that's true here.

4 JUSTICE KAGAN: Is that a typical thing or
5 an unusual thing to do in jurisdiction cases? In other
6 words, to say, we're just not going to look at this
7 claim by claim, we're going to ask about the whole gist
8 of the lawsuit.

9 MR. KNEEDLER: We think that, at least for
10 tort claims, that, again, under our -- our position you
11 look at the foundation of the claim, the gravamen of the
12 claim. And applying that principle to tort claims,
13 anyway, it's proper to look about where -- where the
14 conduct occurred, the tortious -- the injury-causing
15 conduct occurred rather than the injury itself?

16 JUSTICE SCALIA: Can the gravamen be in more
17 than one place?

18 MR. KNEEDLER: Pardon me?

19 JUSTICE SCALIA: Is -- the based-upon
20 language, does it identify a single place, or could it
21 be based-upon activity in -- in two jurisdictions?

22 MR. KNEEDLER: Well, it -- it could be
23 based-upon activity in two jurisdiction -- two
24 jurisdictions. The House Report describing this talks
25 about commercial activities occurring in whole or in

1 part in the United States.

2 JUSTICE SCALIA: But not in the airline
3 case. You would not say that the airline case, the
4 gravamen was the negligence in the United States and the
5 injury when the plane landed?

6 MR. KNEEDLER: I think, depending on where
7 the tort occurred, it may -- it may just be in the place
8 where the -- where the negligence occurred.

9 But I do want to say that for airlines --

10 JUSTICE SCALIA: It can't be both?

11 MR. KNEEDLER: Oh, it could be -- it could
12 be because the question under the FSIA is whether you
13 can sue in the United States. Whether you can sue
14 abroad is not determined by based-upon language in
15 the -- in the FSIA.

16 But the -- with respect to airlines,
17 those -- those are covered by the Montreal Protocol
18 which provides a variety of jurisdictions for suits to
19 be brought --

20 CHIEF JUSTICE ROBERTS: Well, you're not
21 suggesting the result be different if it were a boat,
22 are you?

23 MR. KNEEDLER: No, I --

24 CHIEF JUSTICE ROBERTS: Well --

25 MR. KNEEDLER: No, but I -- but the

1 hypotheticals, a lot of them, the transporter have --

2 JUSTICE SOTOMAYOR: If this was a private
3 company --

4 MR. KNEEDLER: -- an airline.

5 JUSTICE KENNEDY: In your hypothetical.

6 JUSTICE SOTOMAYOR: -- would there be
7 jurisdiction here?

8 MR. KNEEDLER: I'm sorry?

9 JUSTICE SOTOMAYOR: If this were a private
10 company, not the state, would there be jurisdiction
11 here?

12 MR. KNEEDLER: I think probably not, but
13 I -- but I think it's -- I think it would be a good idea
14 for the Court not to address the due process and just
15 focus on the -- on the statutory terms here, because the
16 question -- question of virtual presence by purchasing a
17 ticket on the Internet can arise in all sorts of ways
18 for due process purposes in private cases. And -- and
19 here, we have a statute to focus on.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Kneedler.

22 Mr. Fisher.

23 ORAL ARGUMENT OF JEFFREY L. FISHER

24 ON BEHALF OF THE RESPONDENT

25 MR. FISHER: Mr. Chief Justice, and may it

1 please the Court:

2 I'd like to start with Justice Sotomayor's
3 question which I think has been asked a couple of other
4 times today, which is, what would the answer be if this
5 were a private defendant? In footnote 11 of our brief
6 on page 33, we explain why the answer would be that
7 there would be specific jurisdiction.

8 And in the Gibson-Dunn amicus brief at pages
9 25 to 29 they give a fuller explanation. No response --

10 JUSTICE GINSBURG: Why -- why, Mr. Fisher?
11 There is one contact with the United States. A pass is
12 bought from a travel agent in Massachusetts, a pass
13 covering 30-odd railroads. That's all that happened in
14 the United States. All of the relevant conduct, the
15 tortious conduct occurred abroad.

16 I don't know of a single case where we have
17 said specific jurisdiction can be based on a connection
18 that had nothing to do with the injurious conduct.

19 MR. FISHER: But, Justice Ginsburg, I think
20 there are plenty of cases that support the proposition
21 that when a company markets and sells a product in a
22 jurisdiction, that creates specific jurisdiction.
23 That's what OBB did through its agent, RPE, is market
24 and sell its product.

25 JUSTICE KAGAN: No, but not for everything.

1 I mean, let's assume this. Let's assume that I get a
2 brochure from the Vienna Opera Company, and I send back
3 the order form, I'd like to buy tickets, okay? Now, for
4 sure, if the Vienna Opera Company refused to honor my
5 tickets, I have a claim, and it arises out of the fact
6 that they have marketed my tickets in the United States.

7 But now they honor my tickets, and I go up
8 the stairs, and I slip in a puddle, and I injure myself.
9 What does that have to do with the only contact that
10 they've in the United States? I mean, at that point,
11 you're just saying it's a but-for test, and everything
12 would be included. But I don't know of a sensible
13 specific jurisdiction analysis that would -- that would
14 run like that.

15 MR. FISHER: I agree with everything you
16 said. But this case is different because our lawsuit is
17 based on the duty of safe passage that gave rise in that
18 sale -- in that ticket sale. So we're suing based on
19 the promise and the offer --

20 JUSTICE BREYER: In the -- in the Austrian
21 case of the Opera, there is an implied warranty that the
22 Opera is fit for the purposes -- the opera house is fit
23 for the purposes which it serves. Okay? Same thing.
24 Not too hard to draft that.

25 MR. FISHER: I'm not sure. And if somebody

1 did draft that, it would certainly be subject to a
2 12(b) (6) --

3 JUSTICE BREYER: What's the difference
4 between saying that they have to warrant their product,
5 which is an opera house, to be safe, to say that they
6 have to warrant their trains safe for -- for passage? I
7 can't see a difference. And it seems to me it's very
8 normal in a contract to say that the seller of the
9 product is implicitly warranting fitness. Isn't it?

10 MR. FISHER: Well, all I can say is in this
11 case, we're suing on the exact warranty that gives rise
12 from this ticket sale, Justice Breyer. And I think --

13 JUSTICE BREYER: That's -- that's the
14 problem. I take it to go back to the questions you were
15 asked, from your answer, you have found no case in any
16 country where a waiver of sovereign immunity based on
17 commercial activity supports you. And if so, what is
18 that case? Switzerland and Britain -- or rather,
19 Netherlands, say no. The EU Treaty says no. The
20 UN Charter says no. And they have all these lists of
21 language which, while not absolutely against you, leans
22 against you.

23 So I want to know what is there, in the law
24 of sovereign immunity particularly, that leans in your
25 favor.

1 MR. FISHER: So, Justice Breyer, to -- let
2 me be clear about what is and is not in that brief.
3 There are no cases that I don't think any party has
4 cited. What the -- what that brief says is that based
5 on the language in various conventions, that this claim
6 wouldn't be able to be brought somewhere else. But the
7 language in those conventions are things like arise
8 under, based upon, and so you basically end up in the
9 same situation as you are here which is having to decide
10 whether this claim can be brought.

11 Remember that brief also alleges and it
12 actually spends more time alleging that there is no
13 proper principle-agent relationship, which I think is --
14 the Court has probably realized is not a very credible
15 argument. So I think you should be careful about
16 putting too much weight on a brief that simply cites
17 some treaty language.

18 But I think the point I want to make, and
19 this -- for the hypotheticals and to bring it back to my
20 case, and I also tie in the contract --

21 JUSTICE BREYER: No. But I'm taking your
22 answer to my question being we have none.

23 MR. FISHER: We have none, and they have
24 none. I have not found --

25 JUSTICE BREYER: All right. Okay. All

1 right.

2 MR. FISHER: You can ask him on rebuttal.

3 JUSTICE SOTOMAYOR: Could you tell me, your
4 adversary claims you've been trying to change what your
5 claim is. Is it based on the ticket sale? Or is it
6 based on the operation of the train?

7 MR. FISHER: I think the better reading of
8 the word "activity" in the statute for the reasons we
9 describe in our brief is the overall integrated activity
10 of running the railway train enterprise, which includes
11 selling the product and delivering the product.

12 JUSTICE BREYER: I see our interests, but
13 I'm thinking there are 190-some-odd countries in the
14 world. Many of them do have governments that run
15 various kinds of enterprises. When they come to the
16 United States, perhaps not being totally conversant with
17 American law, they might think if my commercial activity
18 in the United States really gives rise to some problem
19 in the United States, I expect to be sued. But where
20 what really gives rise to it -- you see, I have to use
21 language like that -- takes place in my country, I
22 expect it will be my courts that will deal with it.

23 MR. FISHER: Well, I don't know why any
24 country would have thought that about this country's
25 law, because before this -- you know, up until this

1 point, the law in the lower courts, the D.C. Circuit and
2 the Second Circuit, and most -- most specifically, have
3 held that in this exact situation, there is
4 jurisdiction.

5 CHIEF JUSTICE ROBERTS: Well, maybe --

6 MR. FISHER: And Justice Breyer --

7 CHIEF JUSTICE ROBERTS: -- if would've
8 read -- if they had read our opinion in Nelson, that
9 would have given them a good inclination to read
10 sovereign immunity the way Justice Breyer suggests.

11 MR. FISHER: No. I'm glad you asked about
12 Nelson, Mr. Chief Justice, because the paragraph in
13 Nelson that Mr. Kneedler is referring to is
14 distinguishing sovereign activity from commercial
15 activity. The Court in Nelson did not have before it
16 and was not concerned with the geographic nexus, and you
17 know that because in that paragraph where it lists the
18 things upon which the Nelsons' claim is not truly based,
19 it lists not only the recruitment in the United States
20 but the actual employment in Saudi Arabia.

21 JUSTICE BREYER: Well, he has a paragraph in
22 Nelson, one sentence of which helps you, that he says
23 the Nelsons -- you know, they negotiated with the
24 Nelsons in the United States. They entered into a
25 contract in the United States. The Nelsons are heard

1 aborad. I take it that's the basis of it, and this
2 helps you.

3 But he says before even taking each of the
4 Nelsons' allegations about the recruitment and
5 employment is true, those facts entitle the Nelsons to
6 nothing under their theory of the case, which isn't
7 contract. But, he goes on to say, it's these torts,
8 which happened in the hospital abroad and not the
9 arguably commercial activities that preceded their
10 commission that formed the basis for the Nelsons' suit.

11 MR. FISHER: So --

12 JUSTICE BREYER: The basis for. You see.
13 And so --

14 MR. FISHER: Justice Breyer --

15 JUSTICE BREYER: -- that's why I'm thinking
16 it does not help you.

17 MR. FISHER: When the Court said the
18 arguable commercial activities that preceded it, they
19 were talking not only about the recruitment in the
20 United States but also the employment itself in Saudi
21 Arabia. And they were distinguishing that from the
22 police activity of seizing somebody and holding him in
23 jail, which was what the case was really about which
24 were sovereign activities.

25 So the Court in Nelson -- Mr. Chief Justice,

1 to be clear, I'm not saying Nelson supports me. I think
2 Nelson simply doesn't answer this question because you
3 were concerned in that case with sovereign versus
4 commercial, not geographic nexus.

5 CHIEF JUSTICE ROBERTS: So in line with the
6 discussion we had earlier about specific jurisdiction,
7 is your argument that general jurisdiction is enough to
8 support based-upon under the statute?

9 MR. FISHER: No, Your Honor. I --

10 CHIEF JUSTICE ROBERTS: Well, I thought you
11 talked about just all of the different commercial
12 activities that the Austrian airline engaged in in the
13 United States. And if it's all of the different
14 commercial activities, that sounds like general
15 jurisdiction, not the specific jurisdiction.

16 MR. FISHER: No. I think OBB is subject to
17 jurisdiction under the -- or -- I'm sorry, I should say
18 does not have sovereign immunity under the FSIA for its
19 train operation of selling tickets and getting people
20 rides on the trains. It wouldn't be subject to
21 jurisdiction if it had some -- if it had a mining
22 enterprise on the side or something else that didn't
23 even touch the United States.

24 JUSTICE KENNEDY: Well, suppose --

25 MR. FISHER: So the activity --

1 JUSTICE KAGAN: Yes. But in point of fact,
2 that's all OBB does. So, effectively, your argument is
3 an argument that OBB is subject to jurisdiction in a
4 general jurisdiction kind of way with respect to
5 everything that they do. And, you know, I think what
6 the Chief Justice is suggesting is, like, that seems
7 wrong.

8 MR. FISHER: Well, let me say two things,
9 Justice Kagan.

10 (Laughter.)

11 MR. FISHER: Thank you. I think that is the
12 fairest reading of the statute, and Mr. Kneeder was
13 talking about the House Report. One of the examples in
14 the House Report of a commercial activity was running an
15 airline. It's hard to distinguish running an airline
16 from running a train system.

17 JUSTICE ALITO: Well, suppose --

18 MR. FISHER: So the terms of the statute do
19 cover that.

20 If -- Justice Alito, may I -- may I just say
21 one more thing to Justice Kagan?

22 JUSTICE ALITO: Sure. Finish your answer.

23 MR. FISHER: Which is if you didn't agree
24 that the term "commercial activity" covered the entire
25 enterprise, then you would ask the question whether the

1 activity of selling tickets is enough to create a
2 based-upon argument in a specific jurisdiction since we
3 went back to the conversation we've been having.

4 JUSTICE ALITO: Suppose Ms. Sachs was
5 Australian, and she bought this ticket on the Internet
6 in Australia. Would you say that there would be no
7 sovereign immunity in the suit in the United States?

8 MR. FISHER: Well, there wouldn't
9 necessarily be sovereign -- there may not be sovereign
10 immunity under the terms of the Act. But obviously,
11 there would be a number of reasons why that case
12 couldn't be brought --

13 JUSTICE ALITO: But there would be -- there
14 would be -- there would not be immunity because it was
15 based on the running of the railroad.

16 MR. FISHER: Right. Which -- which -- on
17 the -- taking everything else the same, has substantial
18 contact to the United States. But all the -- all we're
19 talking about in this case is immunity. Section 1330,
20 where it has jurisdiction over foreign states,
21 has -- says that that jurisdiction has to be in
22 personam. And obviously, that would carry with it the
23 requirements for in personam jurisdiction which would
24 require a contact in this country.

25 And this is one thing I want to make sure,

1 is the Court understands to bring us back to the
2 hypotheticals we were talking about earlier and to tie
3 in the contract hypothetical, it's important for the
4 Court to understand there are all manner of cases where
5 a duty is created in this country by way of a foreign
6 state's commercial activities, and then injuries or
7 breaches occur a broad. In fact, this is rather the
8 oddball case.

9 The more typical case is a high-finance deal
10 like the bonds case in the Weltover case, other kinds of
11 international finance and loans. There are many
12 employment cases where United States citizens sign an
13 employment contract or are lured abroad, study abroad
14 programs in the educational sphere, all kinds of
15 situations where a duty is created in this country, but
16 then all of the events that the lawsuit turns out to be
17 about happen abroad.

18 JUSTICE KAGAN: Well, if --

19 MR. FISHER: If that's the case --

20 JUSTICE GINSBURG: Mr. Fisher, you -- you
21 recognize -- I think you recognized in your brief that
22 this -- you can call it a question of first impression.
23 You -- you said, I believe, based on -- the meaning of
24 based-on in this context is an open question.

25 And if it is an open question, why should we

1 allow a foreign carrier to be sued in the United States
2 for acts or omissions overseas -- the negligent conduct
3 occurred overseas -- when the only link, the single link
4 is a ticket, a pass, purchased from a -- a travel agent
5 in the United States?

6 MR. FISHER: For all the reasons I was just
7 saying, Justice Ginsburg, because it is utterly common
8 for duties to be created in this country -- here, the
9 duty of safe passage and of utmost care -- and then the
10 breach to occur a broad.

11 My -- my friend on the other side was
12 correct to say this case is indistinguishable from
13 contract cases. There are -- there are all kinds of
14 cases where duties are created in this country and then
15 breached abroad.

16 JUSTICE KAGAN: But if that's true --

17 MR. FISHER: The lower courts have always
18 held that the FSIA --

19 JUSTICE KAGAN: If that's true, I don't
20 understand why you answered my hypothetical question the
21 way you did, because in my hypothetical question I
22 thought you said that there would not be jurisdiction to
23 sue in the United States when I slip and fall in Vienna.

24 And -- but you could make the same argument.
25 Well, there was a duty created in the United States, and

1 that's what I'm suing on.

2 MR. FISHER: I think when I answered your
3 question I was imagining there wasn't a duty created.
4 Maybe as Justice Breyer amended the hypothetical, there
5 might be --

6 JUSTICE KAGAN: Well, there's -- I mean, the
7 only thing that's happened in the United States is that
8 I've purchased a ticket there. That's -- that's what
9 I've done.

10 MR. FISHER: Right.

11 JUSTICE KAGAN: So I take it that your
12 argument is that purchase of a ticket gives rise to a
13 duty which is then violated when I slip and fall in
14 another country.

15 MR. FISHER: I would say if the plaintiff
16 alleges that in the lawsuit, then there would not be
17 sovereign immunity. And then Justice Alito's -- I think
18 as he was saying earlier, you would have a -- perhaps a
19 very strong 12(b)(6) argument that there's no such State
20 law claim that actually gave rise in that context.

21 CHIEF JUSTICE ROBERTS: If -- if you get on
22 the train in Vienna, and you buy your ticket in Vienna
23 and you get on the train in Vienna, there is on the
24 train operator some duty of care, isn't there?

25 Without regard to -- in other words, there's

1 nothing special about buying a ticket in the
2 United States that gives rise to a unique duty of care
3 that's any different from the duty of care that the
4 railroad owes its passengers in Austria.

5 MR. FISHER: I think that's right, Mr. Chief
6 Justice, but -- as long as you're talking about buying a
7 ticket one place to the other. But of course that's
8 true of any seller of any product that they -- that they
9 stand -- you know, they offer the same thing depending
10 on where you buy it.

11 But the critical thing is where did they
12 sell their ticket? They reached out to this country --
13 and it is worth answering your question with this
14 important point, which is the product that they sold to
15 Ms. Sachs is not available to Austrian citizens. This
16 is a specially-tailored product available only --

17 CHIEF JUSTICE ROBERTS: I understand. But
18 there's nothing unique about the standard of care based
19 upon whether it's a Eurail Pass or something else, is
20 there?

21 I'm just trying to suggest that you're
22 putting an awful lot of weight on the standard of care
23 created by the purchase of the ticket. And -- and
24 that's no different here or whether the ticket was
25 purchased in -- in Austria.

1 MR. FISHER: It would --

2 CHIEF JUSTICE ROBERTS: It makes no
3 difference to what standard of care she would allege if
4 there were some other basis for jurisdiction in the
5 United States?

6 MR. FISHER: That might be correct, but it
7 is important not to lose sight of the fact that she
8 didn't buy her ticket there. OBB reached out into this
9 forum.

10 And just going back to this Court's ordinary
11 due process cases, when a business purposefully avails
12 itself of the protections and the opportunities of a
13 particular jurisdiction --

14 JUSTICE GINSBURG: Mr. Fisher, the
15 purposefully-availed-of test relates to specific
16 jurisdiction, and there has to be an instant connecting.
17 If there is that connection, then you must have, in
18 addition, purposefully-availed-of.

19 But purposefully-availed-of, standing alone,
20 doesn't give you general jurisdiction, and it doesn't
21 give you specific jurisdiction.

22 MR. FISHER: No. Fair enough. But you have
23 to have a contact, and that's the substantial contact
24 test in this -- in this case --

25 JUSTICE KAGAN: But you also have to have a

1 relationship.

2 MR. FISHER: And you have to have a
3 relationship, which we do, because we purchased it here.

4 JUSTICE KAGAN: Well, let's say that I don't
5 accept that argument, okay? Let's just for a moment
6 assume that on a straight negligence claim, the idea
7 that a negligence claim arising from an accident in
8 Austria arises -- let's say I think it arises from the
9 accident in Austria. It does not arise from the
10 purchase of a ticket in the United States, okay?

11 MR. FISHER: Yeah.

12 JUSTICE KAGAN: Now, I guess there's still a
13 question as to whether your warranty claims ought to be
14 treated differently. And I take it what Mr. Kneeder
15 has said about that is, no, they shouldn't be, that's
16 just fancy pleading, it's just a way of converting a
17 negligence claim into a contract claim. It's the same
18 kind of thing that happened in Nelson that we refused to
19 allow. Why isn't that right?

20 MR. FISHER: It's not right because what you
21 were worried about in Nelson is artful pleading to get
22 around true sovereign immunity; in other words, to
23 challenge sovereign acts dressed up as something else.

24 Here there's no allegation that we're
25 challenging sovereign acts. Everybody agrees we're

1 challenging commercial acts. There's only the
2 geographic nexus question. So we can plead a tort
3 however we like subject to Rule 12(b)(6), which they can
4 make on remand.

5 And, Mr. Chief Justice, maybe I could turn
6 back to one of yours questions, because I think it
7 further highlights the difficulty with the other side's
8 test.

9 It has to be enough for a duty to create a
10 cause of action, we say, because otherwise you're left
11 with this gravamen test. And either -- gravamen test
12 has to mean one of two things: Either it has to mean
13 that only one particular place can be the gravamen,
14 which is the way I understood it from their briefing.
15 But as the Court, I think, is figuring out from this
16 argument, you get into all heaps of troubles with
17 contracts, employment, all kinds of other things where
18 the injuries occur abroad, and how on earth is the Court
19 to determine where the gravamen is.

20 On the other hand, if gravamen is sort of a
21 grava-person's test so that you can have many multiple
22 places where a claim can be brought, then I'm at a loss
23 to understand how it's any improvement over the one
24 element --

25 JUSTICE BREYER: How does it work with a

1 domestic contract, an ordinary domestic contract entered
2 into in Nevada, and the breach of the contract, which
3 consisted of a failure, for example, to deliver goods to
4 San Francisco, took place in California, and the lawsuit
5 is brought in Nevada?

6 How does that work? They move -- well, how
7 does it happen?

8 MR. FISHER: Under due process, you'd have
9 jurisdiction in Nevada.

10 JUSTICE BREYER: I know that, but I mean
11 where does the -- where does the --

12 MR. FISHER: The gravamen?

13 JUSTICE BREYER: Yeah, yeah. Does that not
14 come up as to what law applies, as to a factor in forum
15 non conveniens.

16 MR. FISHER: No, it --

17 JUSTICE BREYER: No, it doesn't? How do you
18 decide what law applies? The contract doesn't say.

19 MR. FISHER: The most -- there's a most
20 significant relationship --

21 JUSTICE BREYER: Ah. Most significant
22 relationship. I see.

23 MR. FISHER: -- every State, it says.

24 JUSTICE BREYER: And does it matter whether
25 it's -- is it to the formation of the contract or is it

1 to the breach?

2 MR. FISHER: I think it's sometimes one and
3 sometimes the other, Justice Breyer.

4 JUSTICE BREYER: And what's the difference
5 whether it's the one or the other?

6 MR. FISHER: Pardon me?

7 JUSTICE BREYER: What's the difference?

8 MR. FISHER: It depends --

9 JUSTICE BREYER: I mean how does the Court
10 decide?

11 MR. FISHER: It depends --

12 JUSTICE BREYER: I'm -- I'm simply pointing
13 out that these kinds of problems are not unique to the
14 international context.

15 MR. FISHER: No, I think --

16 JUSTICE BREYER: They arise in many
17 different legal circumstances, and courts have to decide
18 what is the gravamen, and sometimes that's difficult and
19 sometimes it's not.

20 MR. FISHER: Well --

21 JUSTICE BREYER: Am I right about that?

22 MR. FISHER: I've never seen this term used
23 in the case law. And I think the other side was correct
24 when they answered --

25 JUSTICE BREYER: -- the weight of the -- I

1 don't know. You're the one -- I'm not very
2 knowledgeable, and I -- I tend to believe you're more
3 knowledgeable. Therefore, I'm asking you the question.

4 MR. FISHER: Well, all I can do is honestly
5 answer that I've never seen this test used in any choice
6 of law analysis.

7 JUSTICE GINSBURG: If we're dealing --

8 MR. FISHER: I will add that --

9 JUSTICE GINSBURG: If we're dealing with
10 choice of law, is -- is there any serious question of
11 what law would govern the adequacy of OBB's boarding
12 protocol, or their platform design? Would that be any
13 law other than Austria?

14 MR. FISHER: Well, the Ninth Circuit held
15 that California law applies in this case, and OBB has
16 never -- has not challenged that holding. So as the
17 case comes to this Court, California law applies for
18 purposes of the one element --

19 JUSTICE GINSBURG: And I'm -- I'm asking
20 you. Never mind what the California court said.

21 We have an accident in Austria, and it's
22 based on -- the allegation is the boarding protocol was
23 negligently designed, or the platform, the space between
24 the train and the platform, negligently designed.

25 What law would govern whether that platform

1 was negligently designed, whether the boarding protocol,
2 operating protocol was negligent?

3 MR. FISHER: In all candor, Justice
4 Ginsburg, there'd be a pretty good argument that Austria
5 law should apply. And it is important for the Court to
6 understand that simply holding that a suit under the
7 FSIA can be brought in this country does not mean that
8 U.S. law applies. There's a separate choice of law
9 analysis that can be made. And so OBB had the
10 opportunity to make choice of law arguments and has
11 decided not to.

12 But remember, they can do choice of law
13 analysis not only in terms of ordinary common law
14 principles that might apply in a court, but there's a
15 number of ways that a defendant in OBB's position can
16 protect itself in a case like this.

17 First of all, they can put a choice of law
18 provision in the ticket, or in the contract, or whatever
19 might be at issue.

20 Second of all, even as to forum, forum
21 selection clauses can be put into tickets like this, and
22 contracts, and in fact they are. As the United States
23 told the Court at the cert stage of this case, all of
24 these tickets now are governed by a forum selection
25 clause provision, so you'll never see a case like this

1 again, not only in the railroad context, but even in the
2 airline industry.

3 JUSTICE GINSBURG: And that -- and that
4 works, even though it's an adhesion contract, and it's
5 small print --

6 MR. FISHER: Under Carnival Cruise Lines,
7 this Court's decision, those kinds of forum selection
8 clauses are perfectly enforceable.

9 JUSTICE KENNEDY: That -- that was an
10 admiralty case, though.

11 MR. FISHER: Well, I don't know why it would
12 be different in this context, Justice Kennedy.
13 Certainly the government says that these are all
14 governed by forum selection clauses now. We think they
15 are, too.

16 So what you're really deciding in this case,
17 if I could end where perhaps I began, is you're not
18 deciding transportation in this case, because all
19 transportation cases are now covered by conventions and
20 forum selection causes. What you're really deciding is
21 what the law should be in the mainstream FSIA cases,
22 like finance, like contracts. That's why Gibson-Dunn
23 has filed a case on behalf of a -- of a large hedge fund
24 that says, we do business all the time with foreign
25 sovereigns and we're very worried that if the Court

1 adopts this gravamen based-upon, we will not be able to
2 enforce contracts and duties in this country that have
3 given rise under negotiations in this country and then
4 are breached abroad.

5 Employment situations, like the hypothetical
6 we give in our brief, where a United States citizen is
7 hired as an engineer to go do oil and gas exploration
8 and then something happens abroad.

9 Those cases have always been brought in this
10 country. And if this Court adopts the gravamen test,
11 what you'll be saying is the courts now have some
12 amorphous test that would seem, especially if there is
13 only a single gravamen, that would seem to bounce all of
14 these cases out of the United States courts, which would
15 be dramatically --

16 JUSTICE GINSBURG: Well, suppose -- suppose
17 the Court simply said, buying a ticket from an agent in
18 the United States is not enough, period. We don't adopt
19 any gravamen. The question is, what does based-on mean.
20 And the Court could say based-on is not based-on if all
21 that happened in the United States is the purchase of
22 the ticket. We don't have to buy any gravamen or
23 anything else.

24 MR. FISHER: Well, I think there is two
25 reasons why you couldn't just limit it to that,

1 Justice Ginsburg. First, as a legal matter, our claim
2 depends on the duty that arose when that ticket's
3 purchase was made. And I don't see any legal way to
4 distinguish duties that arose in a ticket sale from
5 other kinds of duties that arise and all kinds of other
6 marketing and contract settings.

7 And second of all, just as a matter of
8 common sense, remember -- let's go back to where we
9 began -- this is a commercial activity exception. If
10 they weren't selling tickets, it wouldn't even be
11 commercial to begin with. So it would be a highly odd
12 holding to say that the one thing that makes this
13 commercial is what prevents it from being brought in the
14 United States.

15 JUSTICE GINSBURG: What makes it commercial
16 is it's a railroad doing the same thing a private
17 railroad would do. It's in -- its business is operating
18 a railroad.

19 MR. FISHER: That's right, Justice Ginsburg.
20 And if you want us to ask the question in terms of
21 whether a private company would be subject to
22 jurisdiction under the same settings here, at least all
23 you have to hold is that OBB should be in the same shoes
24 as a private company.

25 Now, we say in our brief and in the Gibson

1 brief in more detail, why due process wouldn't stand in
2 the way of jurisdiction there. But if you have any
3 doubt about that, you can note that OBB has made a
4 personal jurisdiction argument in the district court
5 that the district court never reached. And so that is
6 available on remand.

7 The only thing before this Court is
8 sovereign immunity and whether OBB is entitled to
9 sovereign immunity for commercial acts in this country
10 and the teeth of a congressional statute that says in
11 the declaration of purpose in Section 1602 that foreign
12 states doing commercial activities in this country
13 should not be entitled to sovereign immunity.

14 And then in Section 1606 says: What we want
15 to do is --

16 JUSTICE BREYER: And we say, look, did --
17 they're -- your exact words.

18 MR. FISHER: Pardon me?

19 JUSTICE BREYER: Are they liable for
20 activity that took place in this country? They are
21 liable for the breach of the contract. The breach of
22 the contract took place in Austria.

23 MR. FISHER: No.

24 JUSTICE BREYER: End of case.

25 MR. FISHER: No.

1 JUSTICE BREYER: Why not?

2 MR. FISHER: Because -- because what the
3 definition of in the United States, Justice Breyer, and
4 this is sub (D) of 1603(c), says that -- I'm sorry, it's
5 sub -- sub (E) of 1603(c) says that "in the
6 United States" is defined as substantial contact with
7 the United States. And so that can occur in whole or in
8 part in this country, and in part -- I'm sorry, in part
9 includes the ticket sale.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Basombrio, you have three minutes
12 remaining.

13 REBUTTAL ARGUMENT OF MR. BASOMBRIO

14 ON BEHALF OF THE PETITIONER

15 MR. BASOMBRIO: Thank you, Mr. Chief
16 Justice, and may it please the Court:

17 Much of our discussion today has been in
18 separating the torts from the contractual claims here in
19 this case, implied warranty claims. Let me tell you why
20 I believe it's a bad idea to split claims on causes of
21 action. This Court decided recently a case called
22 Pimentel in which the Republic of the Philippines had
23 sovereign immunity. But there were also a number of
24 other defendants that did not enjoy sovereign immunity.
25 And this Court, taking into consideration important

1 issues such as international comity, decided that under
2 Rule 19, the entire lawsuit had to be dismissed,
3 including as to nonsovereign entities, in order to give
4 full effect to the sovereign immunity of the Republic of
5 the Philippines.

6 In light of that holding, it would make
7 little sense that when the defendant has the right to
8 invoke immunity, that we would split the causes of
9 action so that some of them would proceed in Austria and
10 some of them would proceed in the United States.

11 JUSTICE ALITO: Are you suggesting the
12 based-upon determination is not done on a claim-by-claim
13 basis, it's -- you look at the entire complaint?

14 MR. BASOMBRIIO: That's why --

15 JUSTICE ALITO: Find the gravamen of the
16 entire complaint?

17 MR. BASOMBRIIO: Yes, exactly, Your Honor.
18 And the circuit courts and the State courts have all
19 understood what gravamen means. They know what it
20 means. And if we just took anybody off the street here
21 and we asked them, why is the Respondent suing, each
22 person would say, because she was injured in a terrible
23 accident in Austria.

24 JUSTICE ALITO: Well, what if the only claim
25 were the breach of warranty claim?

1 MR. BASOMBRIO: Then we would have to ask
2 where did the breach occur. As in Justice Kagan's
3 question, I would answer, if the breach occurred in
4 Austria, then the claim would arise in Austria.

5 Now, the warranty, in terms of the duty of
6 care, there is no duty of care until she arrives at the
7 station and tries to board that train. And even if she
8 didn't have a ticket at all, the record establishes that
9 we would still owe her a duty of care.

10 JUSTICE ALITO: What if she also had, in
11 addition to the claims she's asserted, a conventional
12 breach of contract claim? She said that when they --
13 when she tried to get on the train, they said no, your
14 Eurail Pass doesn't let you get on free, you have to pay
15 an additional amount?

16 MR. BASOMBRIO: That would have said --

17 JUSTICE ALITO: We look to the gravamen of
18 the whole thing and we say, well, the tort claims are in
19 Austria and therefore she can't bring this breach of
20 contract claim in the United States?

21 MR. BASOMBRIO: Well, if she had been -- if
22 she had been hurt and in addition to that, they would
23 have told her --

24 JUSTICE ALITO: Well, exactly what happened
25 here, plus she said they made me pay extra.

1 MR. BASOMBRIO: Then the gravamen would
2 still be Austria because that's where all those events
3 took place.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 The case is submitted.

6 (Whereupon, at 11:05 a.m., the case in the
7 above-entitled matter was submitted.)

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