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

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

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

1 don't have the commercial State action division.

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

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

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

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

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

23 MR. BASOMBRIO: Yes, Your Honor.

24 JUSTICE KAGAN: Do you think that it's the
25 same test? In other words, is the test a specific

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

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

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

24 So it seems -- I guess the question is: Why
25 should we think of these two questions as at all

1 different? And I don't know, by the way, I mean, that
2 it would hurt you if they were the same, because it
3 might just be there would be no specific jurisdiction
4 here, you know? But I guess I'm having trouble of
5 thinking why it is that there -- that there would be a
6 different test.

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

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

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

25 Isn't the work in substantial contact with

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

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

11 This Court said you have to focus on the
12 acts. Here, the acts --

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

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

20 MR. BASOMBRIO: It's a three-step analysis.
21 First, you identify the activity.

22 Secondly, you decide whether it is
23 commercial or not.

24 JUSTICE SOTOMAYOR: Whether it's --

25 MR. BASOMBRIO: And third, whether there's

1 substantial contact.

2 JUSTICE SOTOMAYOR: -- commercial or
3 sovereign.

4 MR. BASOMBRIO: So there are three steps.

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

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

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

16 All of these things --

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

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

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

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

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

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

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

22 JUSTICE KAGAN: Would -- would you agree
23 and -- and as you've been doing, take out the agency
24 question -- but would you agree if -- if what had
25 happened here was that the ticket was not honored, you

1 know -- the plaintiff bought a ticket, and the ticket
2 was not honored, and -- and the suit was where the
3 ticket was purchased, would you agree that that's
4 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 -- and 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 --

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.

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
10 a 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? So then the plane takes off.

9 And then in Vienna, because of the
10 negligence in New York, it's a rough landing, somebody
11 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
17 bring it in the United States. And the difference
18 between your scenario and this case is that in that
19 scenario, the service was provided, started in --
20 starting in the United States. There's contact with the
21 United States because the foreign airline came here and
22 conducted a commercial activity in the United States.

23 JUSTICE GINSBURG: Because it's --

24 MR. BASOMBRIO: That's what --

25 JUSTICE GINSBURG: -- a typical tort.

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

7 So the two-side 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
4 Nelson, or has you -- have you got to decide there's
5 only one 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 in our
9 national treaties that deal with -- with airline cases.

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

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

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

22 MR. BASOMBRIO: That may be different.
23 Again, because the transportation was provided from the
24 United States geographically, there -- there is no doubt
25 in that question that commercial act was carried on in

1 the United States by the airline. And that's different
2 here.

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

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

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

22 MR. BASOMBRIIO: Yeah.

23 JUSTICE KENNEDY: One -- one answer might be
24 because otherwise there would be no necessity for a
25 statute. Due process applies anyway. But the

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

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

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

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

19 MR. BASOMBRIO: Yes, Your Honor.

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

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

3 JUSTICE KAGAN: Not general jurisdiction.

4 MR. BASOMBRIO: Right.

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

11 MR. BASOMBRIO: Right.

12 JUSTICE KAGAN: It's critical to the due
13 process analysis that there be a relationship and a real
14 relationship between the particular contact with the
15 United States and the lawsuit in the exact same way that
16 this statute focuses on. And so, again, I don't know if
17 it hurts you. It might be, as Justice Ginsburg says,
18 that there wouldn't be specific jurisdiction here for a
19 corporation. But -- but -- but why shouldn't we treat
20 those two things exactly the same way?

21 MR. BASOMBRIO: There is -- there is -- if I
22 may answer that two parts of your question. First,
23 there is no specific jurisdiction if OBB were a private
24 entity because the respondent is not suing for breach of
25 the ticket. It's not alleging that it was not honored.

1 She's suing for something that happened in Austria. The
2 specific acts happened outside the United States.

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

5 MR. BASOMBRIO: Right.

6 JUSTICE KAGAN: And you can make the exact
7 same answer in the completely private context. And you
8 --

9 MR. BASOMBRIO: Right.

10 JUSTICE KAGAN: -- could well be right. I'm
11 going to ask Mr. Fisher about that. But it's not an
12 answer for why the test should be different.

13 MR. BASOMBRIO: The test -- the test -- my
14 belief is that the test should incorporate due process
15 analysis. But because we are also dealing with subject
16 matter jurisdiction, which is a different analysis than
17 personal jurisdiction, there are other policy
18 considerations. The policy considerations decisions
19 that Congress made were based on territory. If one
20 want -- if one looks at the first, the second, and the
21 third clause, they're all territory-based distinctions.
22 In -- in the case *Amerada Hess*, this Court held that
23 tort actions are meant to be encompassed by the second
24 section of the -- of the exception, the non --
25 noncommercial torts exception. That requires that the

1 tort happened in the United States in order to be -- to
2 have subject matter on personal jurisdiction. It
3 wouldn't fit here.

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

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

12 I would like to --

13 JUSTICE SCALIA: What provision are you --
14 what provision are you referring to?

15 MR. BASOMBRIIO: I'm pro -- referring to the
16 first clause of the commercial activity exception, that
17 it requires that the commercial activity be conducted,
18 carried out in the United States. That means that
19 within the territory of the United States. And I
20 reached that conclusion by comparing it to the third
21 clause which refers to commercial activity outside of
22 the United States having a direct effect in the
23 United States, Your Honor.

24 JUSTICE SCALIA: I see.

25 MR. BASOMBRIIO: Now if I may just say one

1 point about agency. There is no dispute here that if
2 the definition in the Act applies, RP doesn't fit within
3 it. Now, this Court has recently held that we are
4 guided by the language of the statute.

5 I understand that arguments have been made
6 by my colleagues and also by the Ninth Circuit that
7 there is a difference between invocation of immunity and
8 attribution. This is the point I want to make. Section
9 1604 is the invocation section. That's the section that
10 states that certain people, those defined as the foreign
11 State can invoke immunity.

12 Section 1605 is an attribution section. It
13 says whose acts deprive you of immunity. And because
14 foreign State is a defined term, we are limited to the
15 limitations in the FSIA.

16 In the alternative, if this Court were to
17 move away from the definition, I believe we would all
18 agree that there has to be some element of control. The
19 test that this Court develops for agent has to have
20 either the degree of control in Bancec or something
21 lesser. But all agency law requires control, and that's
22 where the en banc court missed the mark. They didn't
23 require any control. And if one requires control, it
24 has to be reversed because there was no control here.

25 If there are no pending questions, I would

1 appreciate reserving the balance of my time for
2 rebuttal.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Kneedler.

5 ORAL ARGUMENT OF EDWIN S. KNEEDLER
6 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
7 SUPPORTING REVERSAL

8 MR. KNEEDLER: Mr. Chief Justice, and may it
9 please the Court. I'd like to start with the point
10 about whether the FSIA simply incorporates due process
11 standards, and we think it does not. It contains its
12 own statutory terms which require interpretation.
13 Congress did not simply incorporate the D.C. Long-Arm
14 Statute or due process principles or phrase the -- the
15 statute in that way. It enacted specific statutory
16 terms. And it's --

17 JUSTICE SOTOMAYOR: So is it the
18 "based-upon" language or the substantial context
19 language?

20 MR. KNEEDLER: It's both. It's both and
21 in -- in the United States which is an important point I
22 want to make. The -- one of the reasons it's very
23 different from just due process is because this -- the
24 FSIA governs subject matter jurisdiction, personal
25 jurisdiction to be sure, but based -- based upon a

1 determination of immunity of a foreign State. And it
2 does that by drawing, as was mentioned before, a strict
3 territorial line that runs throughout all the
4 exceptions. For example, the intentional -- the tort
5 exception applies only to torts in the United States.
6 And the property exception concerns property in the
7 United States. And the focus of the commercial activity
8 exception is also, at least under clause one -- well,
9 all of them -- but clause one is commercial activity in
10 the United States that also has a substantial
11 connection, but the action has to be based upon, as
12 Justice Scalia pointed out.

13 JUSTICE KAGAN: Well, but how is "based
14 upon" different from the language we routinely use in
15 specific jurisdiction cases? In other words, it just
16 seems as though Congress, in line with its objective of
17 treating foreign government engaging in commercial
18 activity in the same way as they would be treated in the
19 foreign corporations case, in line with that objective,
20 used language that's virtually synonymous with the
21 language that we use in specific jurisdiction cases.

22 MR. KNEEDLER: But -- but it -- it did it in
23 the context of a statutory structure that is designed to
24 protect foreign sovereign immunity and not to draw U.S.
25 courts into what could be very sensitive international

1 questions of having U.S. courts pass judgment on what
2 happens in a foreign country.

3 JUSTICE KENNEDY: Well, except it did so in
4 the context of distinguishing between commercial
5 activity and sovereign activity.

6 MR. KNEEDLER: In -- in Nelson -- actually,
7 the pertinent paragraph in Nelson that discusses
8 "based-upon," as counsel pointed out, the Court said you
9 start with what is the conduct that -- that the suit is
10 "based-upon." And the Court said the conduct there was
11 the conduct that took place in Saudi Arabia. And then
12 it had a discussion that said to be sure there was
13 recruitment that -- that preceded that, and that
14 recruitment put the employee in the position to be in
15 the hospital in Saudi Arabia where the conduct occurred.
16 But the focus was on, as the Court said, those torts in
17 Saudi Arabia, not the -- not the antecedent commercial
18 activity in the United States.

19 That discussion in the Court's opinion
20 preceded its discussion of the distinction between
21 commercial activity and -- and sovereign activity. It
22 had to do what -- with what is the focus of the claim.
23 And there the Court was focusing on tort claims that
24 happened outside the United States. And we think it's
25 very important in this case to distinguish between tort

1 claims and contract claims.

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

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

20 JUSTICE KENNEDY: If we want to give
21 "based-upon" a separate substantive effect in this
22 statute and so that it means something more substantial
23 than mere due -- than what would suffice for due
24 process, what -- what body of law, case law do we look
25 to?

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

2 JUSTICE KENNEDY: If I want to find out
3 about "based-on," what kind of cases am I supposed to
4 read?

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

15 JUSTICE KAGAN: So Mr. --

16 MR. KNEEDLER: -- that happened in Saudi
17 Arabia.

18 JUSTICE KAGAN: In -- in my contract hypo,
19 if the -- if the suit was a breach of contract action,
20 do you think it would be "based-upon"? Just a straight,
21 like, you don't -- you didn't honor my ticket?

22 MR. KNEEDLER: On -- on a contract claim, I
23 think that there well -- may well be a contract claim
24 here. But I think it's important to recognize that a
25 breach of contract claim, just because there is some

1 connection with the United States, does not
2 automatically -- even for due process purposes, some
3 connection of a contract to the forum is not enough.
4 The Court made that point in Burger King about contracts
5 which was discussed in the -- in the Court's Walden v.
6 Fiore case.

7 JUSTICE GINSBURG: Mr. Kneedler, before
8 you -- before you finish, you bring up an interest in
9 relations with other nations. Do you know -- I mean,
10 there are other nations that have similar legislation to
11 the Foreign Sovereign Immunities Act. Do we know how
12 this case would come out, say, in Canada, Germany, or
13 France under similar legislation?

14 MR. KNEEDLER: The European Convention
15 provides for jurisdiction over tort claims, which
16 this -- which this basically is, only with respect to
17 torts that arise in the territory, which is -- which is
18 the case here in our own tort exception, which is an
19 important -- going back to Justice Kagan's question --
20 an important reason why this is different from due
21 process.

22 Tort claims under the FSIA, under -- under
23 Exemption (5), Paragraph (a)(5), arise only when the
24 tort occurs in the United States. And even business
25 torts -- the House Report refers to business torts in

1 the United States because there was a -- Congress was
2 drawing a territorial line. And we --

3 JUSTICE BREYER: The Netherlands -- the
4 Netherlands and Switzerland have filed a brief, haven't
5 they, in which they said that this injury, the claim
6 that's pursued against here, the facts that underlie it,
7 are based upon activity that took place in
8 Switzerland --

9 MR. KNEEDLER: Right.

10 JUSTICE BREYER: -- I say in Austria.

11 MR. KNEEDLER: Right.

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

13 MR. KNEEDLER: Right.

14 JUSTICE BREYER: -- under their law. Is
15 there any indication -- I saw none in any of these
16 briefs -- that there's any country in the world that
17 would reach a different result --

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

19 JUSTICE BREYER: -- with lawyers on both
20 sides? And I'm sure one of the lawyers would have told
21 us if they'd found a country that would have reached.

22 MR. KNEEDLER: The same general point is
23 true in the UN convention on -- on immunity.

24 With respect to tort claims --

25 JUSTICE KAGAN: Mr. Kneeder, how about --

1 there is a contract claim in this lawsuit, so there is
2 a -- is a kind of warranty of fitness kind of claim.
3 How -- how about that? Why -- if you think that the --
4 let's assume that the contract claim, which is like you
5 didn't honor my ticket, that there would be personal
6 jurisdiction over, how do we separate out the warranty
7 of habitability or fitness claim?

8 MR. KNEEDLER: Because I think -- I think
9 that's very parallel to what this Court confronted in
10 the Nelson case where the -- the court said the failure
11 to warn -- there was a claim there too -- a failure to
12 warn about the hazard -- about the potential tort. And
13 the -- and the court said, it -- it would not recognize
14 jurisdiction by that sort of faint of language. You
15 can't recharacterize something that is basically a tort
16 abroad by claiming that there was a failure to warn --

17 JUSTICE KAGAN: Is -- is that a typical --

18 MR. KNEEDLER: -- about the tort. We think
19 that's true here.

20 JUSTICE KAGAN: Is that a typical thing or
21 an unusual thing to do in jurisdiction cases? In other
22 words, to say, we're just not going to look at this
23 claim by claim. We're going to ask about the whole gist
24 of the lawsuit.

25 MR. KNEEDLER: We think that, at least for

1 tort claims, again, under our -- our position you look
2 at the foundation of the claim, the gravamen of the
3 claim. And applying that principle to tort claims,
4 anyway, it's proper to look about where -- where the
5 conduct occurred, the tortious -- the injury-causing
6 conduct occurred other than the injury itself?

7 JUSTICE SCALIA: Can the gravamen be in more
8 than one place?

9 MR. KNEEDLER: Pardon me?

10 JUSTICE SCALIA: Is -- the "based-upon"
11 language, does it identify a single place, or could it
12 be "based-upon" activity in -- in two jurisdictions?

13 MR. KNEEDLER: Well, it -- it could be
14 "based-upon" activity in two jurisdiction -- two
15 jurisdictions. The House Report describing this talks
16 about commercial activities occurring in whole or in
17 part in the United States.

18 JUSTICE SCALIA: But not in the airline
19 case. You would not say that the airline case, the
20 gravamen was the negligence in the United States and the
21 injury when the plane landed.

22 MR. KNEEDLER: I think depending on where
23 the tort occurred, it may -- it may just be in the place
24 where the -- where the negligence occurred. But I do
25 want to say that for airlines --

1 JUSTICE SCALIA: It can't be both.

2 MR. KNEEDLER: It could be -- it could be
3 because the question under the FSIA is whether you can
4 sue in the United States. Whether you can sue abroad is
5 not determined by "based-upon" language in the -- in the
6 FSIA. But the -- with respect to airlines, those --
7 those are covered by the Montreal Protocol which
8 provides a variety of jurisdictions for suits to be
9 brought.

10 CHIEF JUSTICE ROBERTS: Well, you're not
11 suggesting the result be different if it were a boat,
12 are you?

13 MR. KNEEDLER: No, I --

14 CHIEF JUSTICE ROBERTS: Well --

15 MR. KNEEDLER: No, but I -- but the
16 hypotheticals, a lot of them, the transporter have --

17 JUSTICE SOTOMAYOR: If this was a private
18 company --

19 JUSTICE KENNEDY: In your hypothetical.

20 JUSTICE SOTOMAYOR: -- would there be
21 jurisdiction here?

22 MR. KNEEDLER: I'm sorry?

23 JUSTICE SOTOMAYOR: If this were a private
24 company, not the State, would there be jurisdiction
25 here?

1 MR. KNEEDLER: I think probably not, but
2 I -- but I think -- I think it would be a good idea for
3 the Court not to address the due process and just focus
4 on the -- on the statutory terms here, because the
5 question -- question of virtual presence by purchasing a
6 ticket on the Internet can arise in all sorts of ways
7 for due process purposes in private cases. And -- and
8 here, we have a statute to focus on.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Kneedler.

11 Mr. Fisher.

12 ORAL ARGUMENT OF JEFFREY L. FISHER

13 ON BEHALF OF THE RESPONDENT

14 MR. FISHER: Mr. Chief Justice, and may it
15 please the Court:

16 I'd like to start with Justice Sotomayor's
17 question which I think has been asked a couple of other
18 times today, which is, what would the answer be if this
19 were a private defendant? In Footnote 11 of our brief
20 on Page 33, we explain why the answer would be that
21 there would be specific jurisdiction.

22 And in the Gibson-Dunn amicus brief at Pages
23 25 to Page 29, they give a fuller explanation. No
24 response --

25 JUSTICE GINSBURG: Why -- why, Mr. Fisher?

1 There is one contact with the United States. A pass is
2 bought from a travel agent in Massachusetts, a pass
3 covering 30-odd railroads. That's all that happened in
4 the United States. All of the relevant conduct, the
5 tortious conduct occurred abroad. I don't know of a
6 single case where we have said specific jurisdiction can
7 be based on a connection that had nothing to do with the
8 injurious conduct.

9 MR. FISHER: But, Justice Ginsburg, I think
10 there are plenty of cases that support the proposition
11 that when a company markets and sells a product in a
12 jurisdiction, that creates specific jurisdiction.
13 That's what OBB did through its agent, RPE, is market
14 and sell its product.

15 JUSTICE KAGAN: No. But not for everything.
16 I mean, let's assume this. Let's assume that I get a
17 brochure from the Vienna Opera Company, and I send back
18 the order form, I'd like to buy tickets, okay. Now, for
19 sure, if the Vienna Opera Company refused to honor my
20 tickets, I have a claim, and it arises out of the fact
21 that they have marketed my tickets in the United States.
22 But now they honor my tickets, and I go up the stairs,
23 and I slip in a puddle, and I injure myself. What does
24 that have to do with the only contact that they've in
25 the United States? I mean, at that point, you're just

1 saying it's a but-for test, and everything would be
2 included. But I don't know of a sensible specific
3 jurisdiction analysis that would -- that would run like
4 that.

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

10 JUSTICE BREYER: In the -- in the Austrian
11 case of the Opera, there is an implied warranty that the
12 Opera is fit for the purposes. The Opera house is fit
13 for the purposes which it serves. Okay. Same thing.
14 Not too hard to draft that.

15 MR. FISHER: I'm not sure. And if somebody
16 did draft that, it would certainly be subject to a
17 12(b) (6) --

18 JUSTICE BREYER: What's the difference
19 between saying that they have to warrant their product,
20 which is an Opera house, to be safe, to say that they
21 have to warrant their trains safe for -- for passage? I
22 can't see a difference. And it seems to me it's very
23 normal in a contract to say that the seller of the
24 product is implicitly warranting fitness. Isn't it?

25 MR. FISHER: Well, all I can say is in this

1 case, we're suing on the exact warranty that gives rise
2 from this ticket sale, Justice Breyer. And I think --

3 JUSTICE BREYER: That's -- that's the
4 problem. I take it to go back to the questions you were
5 asked from your answer, you have found no case in any
6 country where a waiver of sovereign immunity based on
7 commercial activity supports you. And if so, what is
8 that case? Switzerland and Britain or rather,
9 Netherlands say no. EU Treaty says no. The UN Charter
10 says no. And they have all these lists of language
11 which, while not absolutely against you, leans against
12 you. So I want to know what is there in the law of
13 sovereign immunity particularly that argue -- leans in
14 your favor?

15 MR. FISHER: So Justice Breyer, to -- let me
16 be clear about what is and is not in that brief. There
17 are no cases that I don't think any party has cited.
18 What the -- what that brief says is that based on the
19 language in various conventions that this claim wouldn't
20 be able to be brought somewhere else. But the language
21 in those conventions are things like arise under, based
22 upon, and so you basically end up in the same situation
23 as you are here which is having to decide whether this
24 claim can be brought.

25 Remember that brief also alleges and it

1 actually spends more time alleging that there is no
2 proper principle-agent relationship, which I think is --
3 the Court has probably realized is not a very credible
4 argument. So I think you should be careful about
5 putting too much weight on a brief that simply cites
6 some treaty language. But I think the point I want to
7 make -- and this -- for the hypotheticals and to bring
8 it back to my case, and I also tie in the contract.

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

11 MR. FISHER: We have none, and they have
12 none. I have not found a case.

13 JUSTICE BREYER: All right. Okay. All
14 right.

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

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

20 MR. FISHER: I think the better reading of
21 the word activity in the statute for the reasons we
22 describe in our brief is the overall integrated activity
23 of running the railway train enterprise which includes
24 selling the product and delivering the product.

25 JUSTICE BREYER: I see our interests, but

1 I'm thinking there are 190 some odd countries in the
2 world. Many of them do have governments that run
3 various kinds of enterprises. When they come to the
4 United States, perhaps not being totally conversant with
5 American law, they might think if my commercial activity
6 in the United States really gives rise to some problem
7 in the United States, I expect to be sued. But where
8 what really gives rise to it -- you see, I have to use
9 language like that -- takes place in my country, I
10 expect it will be my courts that will deal with it.

11 MR. FISHER: Well, I don't know why any
12 country would have thought that about this country's law
13 because before this -- you know, up until this point,
14 the law in the lower courts, the D.C. circuit and the
15 Second Circuit, and most -- most specifically, have held
16 that in this exact situation, there is jurisdiction --

17 CHIEF JUSTICE ROBERTS: Well, maybe --

18 MR. FISHER: And Justice Breyer --

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

23 MR. FISHER: No. I'm glad you asked about
24 Nelson, Mr. Chief Justice, because the paragraph in
25 Nelson that Mr. Kneeder is referring to is

1 distinguishing sovereign activity from commercial
2 activity. The court in Nelson did not have before it
3 and was not concerned with the geographic nexus, and you
4 know that because in that paragraph where it lists the
5 things upon which the Nelsons' claim is not truly based,
6 it lists not only the recruitment in the United States
7 but the actual employment in Saudi Arabia.

8 JUSTICE BREYER: Well, he has a paragraph in
9 Nelson, one sentence of which helps you, that he says
10 the Nelsons -- you know, they negotiated with the
11 Nelsons in the United States. They entered into a
12 contract in the United States. The Nelsons are heard
13 abroad. I take it that's the basis of it, and this
14 helps you. But he says before even taking each of the
15 Nelson's allegations about the recruitment and
16 employment is true, those facts entitle the Nelsons to
17 nothing under their theory of the case which isn't
18 contract. But he goes on to say, it's these torts which
19 happened in the hospital abroad, and not the arguably
20 commercial activities that preceded their commission
21 that formed the basis for the Nelsons' suit.

22 MR. FISHER: So --

23 JUSTICE BREYER: The basis for. You see.

24 And so --

25 MR. FISHER: Justice Breyer --

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

3 MR. FISHER: When the Court said the
4 arguable commercial activities that preceded it, they
5 were talking not only about the recruitment in the
6 United States but also the employment itself in Saudi
7 Arabia. And they were distinguishing that from the
8 police activity of seizing somebody and holding him in
9 jail, which was what the case was really about which
10 were sovereign activities. So the court in
11 Nelson -- Mr. Chief Justice, to be clear, I'm not saying
12 Nelson supports me. I think Nelson simply doesn't
13 answer this question because you were concerned in that
14 case with sovereign versus commercial, not geographic
15 nexus.

16 CHIEF JUSTICE ROBERTS: So in line with the
17 discussion we had earlier about specific jurisdiction,
18 is your argument that general jurisdiction is enough to
19 support based upon under the statute?

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

21 CHIEF JUSTICE ROBERTS: Well, I thought you
22 talked about just all of the different commercial
23 activities that the Austrian airline engaged in in the
24 United States. And if it's all of the different
25 commercial activities, that sounds like general

1 jurisdiction, not the specific jurisdiction.

2 MR. FISHER: No. I think OBB is subject to
3 jurisdiction under the -- or -- I'm sorry. I should say
4 does not have sovereign immunity under the FSIA for its
5 train operation of selling tickets and getting people
6 rides on the trains. It wouldn't be subject to
7 jurisdiction if it had some -- if it had a mining
8 enterprise on the side or something else that didn't
9 even touch the United States.

10 JUSTICE KENNEDY: Well, suppose --

11 MR. FISHER: So the activity --

12 JUSTICE KAGAN: Yes. But in pointing to
13 fact, that's all OBB does. So effectively, your
14 argument is an argument that OBB is subject to
15 jurisdiction in a general jurisdiction kind of way with
16 respect to everything that they do. And, you know, I
17 think what the Chief Justice is suggesting is, like,
18 that seems wrong.

19 MR. FISHER: Well, let me say two things,
20 Justice Kagan.

21 (Laughter.)

22 Thank you. I think that is the fairest
23 reading of the statute, and Mr. Kneedler was talking
24 about the house report. One of the examples in the
25 house report of a commercial activity was running an

1 airline. It's hard to distinguish running an airline
2 from running a train system.

3 JUSTICE ALITO: Well, suppose --

4 MR. FISHER: Terms to the statute do cover
5 that. If -- Justice Alito, may I -- may I just say one
6 more thing to Justice Kagan?

7 JUSTICE ALITO: Finish your answer.

8 MR. FISHER: Which is if you didn't agree
9 that the term commercial activity covered the entire
10 enterprise, then you would ask the question whether the
11 activity of selling tickets is enough to create a based
12 upon argument in a specific jurisdiction since we went
13 back to the conversation we've been having.

14 JUSTICE ALITO: Suppose Ms. Sachs was
15 Australian, and she bought this ticket on the internet
16 Australia. Would you say that there would be no
17 sovereign immunity in the suit in the United States?

18 MR. FISHER: Well, there wouldn't
19 necessarily be sovereign -- there may not be sovereign
20 immunity under the terms of the act. But obviously,
21 there would be a number of reasons why that case
22 couldn't be brought --

23 JUSTICE ALITO: But there would be -- there
24 would be -- there would not be immunity because it was
25 based on the running of the railroad.

1 MR. FISHER: Right. Which -- which -- on
2 the -- taking everything else the same, has substantial
3 contact to the United States. But all the -- all we're
4 talking about in this case is immunity. Section 1330
5 where it has jurisdiction over foreign states
6 has -- says that that jurisdiction has to be in
7 personam. And obviously, that would carry with it the
8 requirements for in personam jurisdiction which would
9 require a contact in this country. And this is one
10 thing I want to make sure is the Court understands to
11 bring us back to the hypotheticals we were talking about
12 earlier and to tie in the contract hypothetical, it's
13 important for the Court to understand there are all
14 manner of cases where a duty is created in this country
15 by way of a foreign State's commercial activities, and
16 then injuries or breaches occur a broad. In fact, this
17 is rather the oddball case.

18 The more typical case is a high finance deal
19 like the bonds case in the Weltover case, other kinds of
20 international finance and loans. There are many
21 employment cases where United States citizens sign an
22 employment contract or are lured abroad, study abroad
23 programs in the educational sphere, all kinds of
24 situations where a duty is created in this country. But
25 then all of the events that the lawsuit turns out to be

1 about happen abroad.

2 JUSTICE KAGAN: Well, if --

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

4 JUSTICE GINSBURG: Mr. Fisher, you -- you
5 recognize -- I think you recognized in your brief that
6 this -- you can call it a question of first
7 impression -- you -- you said, I believe, "based on" --
8 the meaning of "based on" in this context is an open
9 question.

10 And if it is an open question, why should we
11 allow a foreign carrier to be sued in the United States
12 for acts or omissions overseas, and negligent conduct
13 occurred overseas, when the only link, the single link
14 is a ticket, a pass purchased from a -- a travel agent
15 in the United States?

16 MR. FISHER: For all the reasons I was just
17 saying, Justice Ginsburg, because it is utterly common
18 for duties to be created in this country. Here the duty
19 of safe passage and of utmost care, and then the breach
20 to occur a broad.

21 My -- my friend on the other side was
22 correct to say this case is indistinguishable from
23 contract cases. There are -- there are all kinds of
24 cases where duties are created in this country and then
25 breached abroad.

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

2 MR. FISHER: The other Courts have always
3 held that the FSIA --

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

9 And -- but you could make the same argument.
10 Well, there was a duty created in the United States, and
11 that's what I'm suing on.

12 MR. FISHER: I think when I answered your
13 question I was imagining there wasn't a duty created,
14 maybe as Justice Breyer amended the hypothetical, there
15 might be --

16 JUSTICE KAGAN: Well, there's -- I mean, the
17 only thing that's happened in the United States is that
18 I've purchased a ticket there. That's -- that's what
19 I've done.

20 MR. FISHER: Right.

21 JUSTICE KAGAN: So I take it that your
22 argument is that purchase of a ticket gives rise to a
23 duty which is then violated when I slip and fall in
24 another country.

25 MR. FISHER: I would say if the plaintiff

1 alleges that in the lawsuit, then there would not be
2 sovereign immunity. And then Justice Alito's -- I think
3 as he was saying earlier, you would have a -- perhaps a
4 very strong 12(b)(6) argument that there's no such State
5 law claim that actually gave rise in that context.

6 CHIEF JUSTICE ROBERTS: If -- if you get on
7 the train in Vienna, and you buy your ticket in Vienna,
8 and you get on the train in Vienna, there is on the
9 train operator some duty of care, isn't there?

10 Without regard to -- in other words, there's
11 nothing special about buying a ticket in the
12 United States that gives rise to a unique duty of care
13 that's any different from the duty of care that the
14 railroad owes its passengers in Austria.

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

21 But the critical thing is where did they
22 sell their ticket? They reached out to this country --
23 and it is worth answering your question with this
24 important point, which is the product that they sold to
25 Ms. Sachs is not available to Austrian citizens. This

1 is a specially-tailored product available only --

2 CHIEF JUSTICE ROBERTS: I understand. But
3 there's nothing unique about the standard of care based
4 upon whether it's a Eurail Pass or something else, is
5 there?

6 I'm just trying to suggest that you're
7 putting an awful lot of weight on the standard of care
8 created by the purchase of the ticket. And -- and
9 that's no different here or whether the ticket was
10 purchased in -- in Austria.

11 MR. FISHER: It would --

12 CHIEF JUSTICE ROBERTS: It makes no
13 difference to what standard of care she would allege if
14 there were some other basis for jurisdiction in the
15 United States?

16 MR. FISHER: That might be correct, but it
17 is important not to lose site of the fact that she
18 didn't buy her ticket there. OBB reached out into this
19 forum.

20 And just going back to this Court's ordinary
21 due process cases, when a business purposefully avails
22 itself of the protections and the opportunities of a
23 particular jurisdiction --

24 JUSTICE GINSBURG: Mr. Fisher, the
25 purposefully availed of test relates to specific

1 jurisdiction, and there has to be an instant connecting.
2 If there is that connection, then you must have, in
3 addition, purposefully veiled of.

4 But purposefully availed of, standing alone,
5 doesn't give you general jurisdiction, and it doesn't
6 give you specific jurisdiction.

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

10 JUSTICE KAGAN: But you also have to have a
11 relationship.

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

14 JUSTICE KAGAN: Well, let's say I don't
15 accept that argument, okay? Let's just for a moment
16 assume that on a straight negligence claim, the idea
17 that a negligence claim arising from an accident in
18 Austria arises -- let's say I think it arises from the
19 accident in Austria. It does not arise from the
20 purchase of a ticket in the United States, okay?

21 MR. FISHER: Yeah.

22 JUSTICE KAGAN: Now I guess there's still a
23 question as to whether your warranty claims ought to be
24 treated differently. And I take it what Mr. Kneeder
25 has said about that is, no, they shouldn't be, that's

1 just fancy pleading, it's just a way of converting a
2 negligence claim into a contract claim. It's the same
3 kind of thing that happened in Nelson that we refused to
4 allow. Why isn't that right?

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

9 Here there's no allegation that we're
10 challenging sovereign acts. Everybody agrees we're
11 challenging commercial acts, there's only the geographic
12 nexus question. So we can plead a tort however we like
13 subject to Rule 12(b)(6), which they can make on remand.

14 And Mr. Chief Justice, maybe I could turn
15 back to one of yours questions, because I think it
16 further highlights the difficulty with the other side's
17 test.

18 It has to be enough for a duty to create a
19 cause of action, we say, because otherwise you're left
20 with this gravamen test. And either -- gravamen test
21 has to mean one of two things: Either it has to mean
22 that only one particular place can be the gravamen,
23 which is the way I understood it from their briefing.

24 But as the Court, I think, is figuring out
25 from this argument, you get into all heaps of troubles

1 with contracts, employment, all kinds of other things
2 where the injuries occur abroad, and how on earth is the
3 Court to determine where the gravamen is.

4 On the other hand, if gravamen is sort of a
5 grava person's test so that you can have many multiple
6 places where a claim can be brought, then I'm at a loss
7 to understand how it's an improvement over the one
8 element --

9 JUSTICE BREYER: How does it work with a
10 domestic contract, an ordinary domestic contract entered
11 into in Nevada, and the breach of the contract, which
12 consisted of a failure, for example, to deliver goods to
13 San Francisco, took place in California, and the lawsuit
14 is brought in Nevada?

15 How does that work? They move -- well, how
16 does it happen?

17 MR. FISHER: Under due process, you'd have
18 jurisdiction in Nevada.

19 JUSTICE BREYER: I know that, but I mean
20 where does the -- where does the --

21 MR. FISHER: The gravamen?

22 JUSTICE BREYER: Yeah, yeah. Does that not
23 come up as to what law applies, as to a factor in forum
24 nonconvenience.

25 MR. FISHER: No.

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

3 MR. FISHER: The most -- there's a most
4 significant relationship --

5 JUSTICE BREYER: Ah. Most significant
6 relationship. I see.

7 MR. FISHER: -- every State it says.

8 JUSTICE BREYER: And does it matter whether
9 it's -- is it to the formation of the contract or is it
10 to the breach?

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

13 JUSTICE BREYER: And what's the difference
14 whether it's the one or the other?

15 MR. FISHER: Pardon me?

16 JUSTICE BREYER: What's the difference?

17 MR. FISHER: It depends --

18 JUSTICE BREYER: I mean how does the Court
19 decide?

20 MR. FISHER: It depends --

21 JUSTICE BREYER: I'm -- I'm simply pointing
22 out that these kinds of problems are not unique to the
23 international context.

24 MR. FISHER: No, I think --

25 JUSTICE BREYER: They arise in many

1 different legal circumstances, and Courts have to decide
2 what is the gravamen, and sometimes that's difficult and
3 sometimes it's not.

4 MR. FISHER: Well --

5 JUSTICE BREYER: Am I right about that?

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

9 JUSTICE BREYER: -- the weight of the -- I
10 don't know. You're -- I'm not very knowledgeable, and
11 I -- I tend to believe you're more knowledgeable,
12 therefore, I'm asking you the question.

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

16 JUSTICE GINSBURG: If we're dealing --

17 MR. FISHER: I will add that --

18 JUSTICE GINSBURG: If we're dealing with
19 choice of law, is -- is there any serious question of
20 what law would govern the adequacy of OBB's boarding
21 protocol, or their platform design? Would that be any
22 law other than Austria?

23 MR. FISHER: Well, the Ninth Circuit held
24 that California law applies in this case, and OBB has
25 never -- has not challenged that holding. So as the

1 case comes to this Court, California law applies for
2 purposes of the one element --

3 JUSTICE GINSBURG: But I'm -- I'm asking
4 you. Never mind what the California Court said.

5 We have an accident in Austria, and it's
6 based on -- the allegation is the boarding protocol was
7 negligently designed, or the platform, the space between
8 the train and the platform, negligently designed.

9 What law would govern whether that platform
10 was negligently designed, whether the boarding protocol,
11 operating protocol was negligent?

12 MR. FISHER: In all candor, Justice
13 Ginsburg, there'd be a pretty good argument that Austria
14 law should apply. And it is important for the Court to
15 understand that simply holding that a suit under the
16 FSIA can be brought in this country does not mean that
17 U.S. law applies. There's a separate choice of law
18 analysis that can be made. And so OBB had the
19 opportunity to make choice of law arguments and has
20 decided not to.

21 But remember, they can do choice of law
22 analysis, not only in terms of ordinary common law
23 principles that might apply in a Court, but there's a
24 number of ways that a defendant in OBB's position can
25 protect itself in a case like this.

1 First of all they can put a choice of law
2 provision in the ticket, or in the contract, or whatever
3 might be at issue.

4 Second of all, even as to forum, forum
5 selection clauses can be put into tickets like this, and
6 contracts, and in fact they are. As the United States
7 told the Court at the cert stage of this case, all of
8 these tickets now are governed by a forum selection
9 clause provision, so you'll never see a case like this
10 again. Not only in the railroad context, but even in
11 the airline industry.

12 JUSTICE GINSBURG: And that -- and that
13 works, even though it's an adhesion contract, and it's
14 small print --

15 MR. FISHER: Under Carnival Cruise Lines,
16 this Court's decision, those kinds of forum selection
17 clauses are perfectly enforceable.

18 JUSTICE KENNEDY: That -- that was an
19 Admiralty case, though.

20 MR. FISHER: Well, I don't know why it would
21 be different in this context, Justice Kennedy.
22 Certainly the government says that these are all
23 governed by foreign selection clauses now. We think
24 they are, too.

25 So what you're really deciding in this case,

1 if I could end where perhaps I began, you're not
2 deciding transportation in this case, because all
3 transportation cases are now covered by conventions and
4 form selection causes. What you're really deciding is
5 what the law should be in the mainstream FSIA cases,
6 like finance, like contracts. That's why have filed a
7 case on behalf of a large hedge fund that says, we do
8 business all the time with foreign sovereigns. And
9 we're very worried that if the Court adopts this
10 gravamen and based upon -- we will not be able to
11 enforce contracts and duties in this country that have
12 given rise under negotiations in this country and then
13 are breached abroad. Employment situations, like the
14 hypothetical we give in our brief, where a United States
15 citizen is hired as an engineer to go and do oil and gas
16 exploration and then something happens abroad.

17 Those cases have always been brought in this
18 country. And if this Court adopts the gravamen test,
19 what you'll be saying is the courts now have some
20 amorphous test that would seem, especially if there is
21 only a single gravamen, that would seem to bounce all of
22 these cases out of the United States courts, which would
23 be dramatically --

24 JUSTICE GINSBURG: Well, suppose -- suppose
25 the Court simply said, buying a ticket from an agent in

1 the United States is not enough, period. We don't adopt
2 any gravamen. The question is, what does "based on"
3 mean. And the Court could say "based on" is not based
4 on if all that happened in the United States is the
5 purchase of the ticket. We don't have to buy any
6 gravamen or anything else.

7 MR. FISHER: Well, I think there is two
8 reasons why you couldn't just limit it to that, Justice
9 Ginsburg. First, as a legal matter, our claim depends
10 on the duty that arose when that ticket's purchase was
11 made. And I don't see any legal way to distinguish
12 duties that arose in a ticket sale from other duties
13 that arise and all kinds of other marketing and contract
14 settings.

15 And second of all, just as a matter of
16 common sense, remember, let's go back to where we began,
17 this is a commercial activity exception. If they
18 weren't selling tickets, it wouldn't even be commercial
19 to begin with. So it would be a highly odd holding to
20 say that the one thing that makes this commercial is
21 what prevents it from being brought in the
22 United States.

23 JUSTICE GINSBURG: What makes it commercial
24 is it's a railroad doing the same thing a private
25 railroad would do. It's in -- its business is operating

1 a railroad.

2 MR. FISHER: That's right, Justice Ginsburg.
3 And if you want us to ask the question whether in terms
4 of a private company would be subject to jurisdiction
5 under the same settings here, at least all you have to
6 hold is that OBB should be in the same shoes as a
7 private company.

8 Now, we say in our brief and in the Gibson
9 brief in more detail, why due process wouldn't stand in
10 the way of jurisdiction there. But if you have any
11 doubt about that, you can note that OBB has made a
12 personal jurisdiction argument in the district court,
13 that the district court never reached. And so that is
14 available on remand.

15 The only thing before this Court is
16 sovereign immunity and whether OBB is entitled to
17 sovereign immunity for commercial acts in this country
18 in the teeth of a congressional statute that says in the
19 declaration of purpose in Section 1602 that foreign
20 states doing commercial activities in this country
21 should not be entitled to sovereign immunity. And then
22 in Section 1606 says: What we want to do is --

23 JUSTICE BREYER: And we say, look, they're
24 your exact words.

25 MR. FISHER: Pardon me?

1 JUSTICE BREYER: Are they liable for
2 activity that took place in this country? They are
3 liable for the breach of the contract. The breach of
4 the contract took place in Austria. End of case.

5 MR. FISHER: No.

6 JUSTICE BREYER: Why not?

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Basombrio, you have three minutes
17 remaining.

18 REBUTTAL ARGUMENT OF MR. BASOMBRIO

19 ON BEHALF OF THE PETITIONER

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

22 Much of our discussion today has been in
23 separating the torts from the contractual claims here in
24 this case, implied warranty claims. Let me tell you why
25 I believe it's a bad idea to split claims on causes of

1 action. This Court decided recently a case in which the
2 Republic of the Philippines had sovereign immunity, but
3 there were also a number of other defendants that did
4 not enjoy sovereign immunity. And this Court, taking
5 into consideration important issues such as
6 international comity, decided that under Rule 19, the
7 entire lawsuit had to be dismissed, including as to
8 nonsovereign entities, in order to give full effect to
9 the sovereign immunity of the Republic of the
10 Philippines.

11 In light of that holding, it would make
12 little sense that when the defendant has the right to
13 invoke immunity that we would split the causes of action
14 so that some of them would proceed in Austria and some
15 would proceed in the United States.

16 JUSTICE ALITO: You're suggesting that based
17 upon determination is not done on a claim-by-claim
18 basis; it's you look at the entire complaint?

19 MR. BASOMBRIO: That's why --

20 JUSTICE ALITO: Find the gravamen of the
21 entire complaint?

22 MR. BASOMBRIO: Yes, exactly, Your Honor.
23 And the circuit courts and the State courts have all
24 understood what gravamen means. They know what it
25 means. And if we just took anybody off the street here

1 and we asked them, why is the respondent suing, each
2 person would say, because she was injured in a terrible
3 accident in Austria.

4 JUSTICE ALITO: Well, what if the only claim
5 were the breach of warranty claim?

6 MR. BASOMBRIO: Then we would have to ask
7 where did the breach occur. As in Justice Kagan's
8 question, I would answer, if the breach occurred in
9 Austria, then the claim would arise in Austria.

10 Now, the warranty, in terms of the duty of
11 care, there is no duty of care until she arrives at the
12 station and tries to board that train. And even if she
13 didn't have a ticket at all, the record establishes that
14 we would still owe here a duty of care.

15 JUSTICE ALITO: What if she also had in
16 addition to the claims she's asserted a conventional
17 breach of contract claim, she said that when she tried
18 to get on the train, they said no, your Eurail Pass
19 doesn't let you get on free, you have to pay an
20 additional amount? So we look to the gravamen of the
21 whole thing and we say, well, the tort claims are in
22 Austria and therefore she can't bring this breach of
23 contract claim in the United States?

24 MR. BASOMBRIO: Well, she had been -- if she
25 had been in addition to that, they would have told

1 her --

2 JUSTICE ALITO: Well, that's exactly what
3 happened here, plus she said they made me pay extra.

4 MR. BASOMBRIO: Then the gravamen would
5 still be Austria because that's where all those events
6 took place.

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
8 The case is submitted.

9 (Whereupon, at 11:02 a.m., the case in the
10 above-entitled matter was submitted.)

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