

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: OBB PERSONENVERKEHR AG, Petitioner v. CAROL P.  
SACHS  
CASE NO: No. 13-1067  
PLACE: Washington, D.C.  
DATE: Monday, October 5, 2015  
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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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P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Basombrio.

ORAL ARGUMENT OF JUAN C. BASOMBRIO

ON BEHALF OF THE PETITIONER

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

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

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

JUSTICE GINSBURG: But in -- in that case, there was a distinction between State activity -- that is, police activity -- and the commercial activity in 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. BASOMBRIIO: 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, but 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. BASOMBRIIO: 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. BASOMBRIIO: 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 KENNEDY: On what --

14 JUSTICE SCALIA: But you --

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

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

19 MR. BASOMBRIO: Well --

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

23 MR. BASOMBRIO: No, I do not.

24 JUSTICE SCALIA: Oh.

25 MR. BASOMBRIO: I believe -- let me clarify,

1 Your Honor, if I may.

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

6 JUSTICE KAGAN: Because --

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

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

14 JUSTICE SCALIA: But not --

15 JUSTICE GINSBURG: What about apart --

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

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

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

1           MR. BASOMBRIO: That's true. I -- I do not  
2 believe that a breach of contract claim under the fact  
3 scenario that you provided, Your Honor, would give rise  
4 to a claim in the United States because the breach  
5 happened -- would have happened in Austria.

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

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

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

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

1 to look at the particular conduct.

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

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

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

13 MR. BASOMBRIO: Uh-huh.

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

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

24 JUSTICE GINSBURG: Because it's --

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

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

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

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

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

17 MR. BASOMBRIO: Right.

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

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



1 understood your example, that cause of that injury was  
2 in the United States.

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

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

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

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

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

24 MR. BASOMBRIO: That may be different.  
25 Again, because the transportation was provided from the

1 United States geographically, there -- there is no doubt  
2 in that question that commercial act was carried on in  
3 the United States by the airline. And that's different  
4 here.

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

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

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

24 MR. BASOMBRIIO: Yeah.

25 JUSTICE KENNEDY: One -- one answer might be

1 because otherwise there would be no necessity for a  
2 statute. Due process applies anyway. But the  
3 counterargument is, well, there has to be because the  
4 statute makes the distinction between sovereign and  
5 commercial and so it has a real purpose.

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

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

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

21 MR. BASOMBRIO: Yes, Your Honor.

22 JUSTICE KENNEDY: But, of course, my  
23 question was suppose that the due process analysis is  
24 sufficient to sustain jurisdiction. Then what? Then  
25 does based-on still have a separate meaning as a

1 separate requirement that has to be met and has not been  
2 met here? And if so, why?

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

5 JUSTICE KAGAN: But not general  
6 jurisdiction.

7 MR. BASOMBRIO: Right.

8 JUSTICE KAGAN: I was really talking about  
9 specific jurisdiction.

10 MR. BASOMBRIO: Okay.

11 JUSTICE KAGAN: And, of course, Justice  
12 Scalia is absolutely right with respect to general  
13 jurisdiction, that all you look at is the contacts. But  
14 with respect to specific jurisdiction -- this is a  
15 company that doesn't have pervasive contacts --

16 MR. BASOMBRIO: Right.

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

22 And so, again, I don't know if it hurts you.  
23 It might be, as Justice Ginsburg says, that there  
24 wouldn't be specific jurisdiction here for a  
25 corporation. But -- but -- but why shouldn't we treat

1 those two things exactly the same way?

2 MR. BASOMBRIO: There is -- there is -- if I  
3 may answer that two parts of your question. First,  
4 there is no specific jurisdiction if OBB were a private  
5 entity because the Respondent is not suing for breach of  
6 the ticket; it's not alleging that it was not honored.  
7 She's suing for something that happened in Austria. The  
8 specific acts happened outside the United States.

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

11 MR. BASOMBRIO: Right.

12 JUSTICE KAGAN: And you can make the exact  
13 same answer in the completely private context. And  
14 you --

15 MR. BASOMBRIO: Right.

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

18 MR. BASOMBRIO: Right.

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

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

1 considerations.

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

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

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

21           I would like to --

22           JUSTICE SCALIA: What provision are you --  
23 what provision are you referring to?

24           MR. BASOMBRIO: I'm pro -- referring to the  
25 first clause of the commercial activity exception, that

1 it requires that the commercial activity be conducted,  
2 carried out in the United States. That means that  
3 within the territory of the United States. And I  
4 reached that conclusion by comparing it to the third  
5 clause, which refers to commercial activity outside of  
6 the United States having a direct effect in the  
7 United States, Your Honor.

8 JUSTICE SCALIA: I see.

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

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

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

1           In the alternative, if this Court were to  
2 move away from the definition, I believe we would all  
3 agree that there has to be some element of control. The  
4 test that this Court develops for agent has to have  
5 either the degree of control in Bancec or something  
6 lesser. But all agency law requires control, and that's  
7 where the en banc court missed the mark. They didn't  
8 require any control. And if one requires control, it  
9 has to be reversed because there was no control here.

10           If there are no pending questions, I would  
11 appreciate reserving the balance of my time for  
12 rebuttal.

13           CHIEF JUSTICE ROBERTS: Thank you, counsel.

14           Mr. Kneedler.

15           ORAL ARGUMENT OF EDWIN S. KNEEDLER

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

17           SUPPORTING REVERSAL

18           MR. KNEEDLER: Mr. Chief Justice, and may it  
19 please the Court:

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



1 statute in that way. It enacted specific statutory  
2 terms. And it's --

3 JUSTICE SOTOMAYOR: So is it the based-upon  
4 language or the substantial-context language?

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

23 JUSTICE KAGAN: Well, but how is based-upon  
24 different from the language we routinely use in specific  
25 jurisdiction cases? In other words, it just seems as

1    though Congress, in line with its objective of treating  
2    foreign government engaging in commercial activity in  
3    the same way as they would be treated in the foreign  
4    corporations case, in line with that objective, used  
5    language that's virtually synonymous with the language  
6    that we use in specific jurisdiction cases.

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

13                   JUSTICE KENNEDY:  Well, except it did so in  
14   the context of distinguishing between commercial  
15   activity and sovereign activity.

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

1                   But the focus was on, as the Court said,  
2 those torts in Saudi Arabia, not the -- not the  
3 antecedent commercial activity in the United States.  
4 That discussion in the Court's opinion preceded its  
5 discussion of the distinction between commercial  
6 activity and -- and sovereign activity. It had to do  
7 what -- with what is the focus of the claim. And there  
8 the Court was focusing on tort claims that happened  
9 outside the United States. And we think it's very  
10 important in this case to distinguish between tort  
11 claims and contract claims.

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

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

1 Anything that would arise in the operation of a railroad  
2 in -- in Austria could be the subject of a suit if it  
3 was deemed to have substantial connection with the  
4 United States.

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

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

11 JUSTICE KENNEDY: If I want to find out  
12 about based-on, what kind of cases am I supposed to  
13 read?

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

24 JUSTICE KAGAN: So Mr. --

25 MR. KNEEDLER: -- that happened in Saudi

1 Arabia.

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

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

16 JUSTICE GINSBURG: Mr. Kneedler, before  
17 you -- before you finish, you bring up an interest in  
18 relations with other nations.

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

24 MR. KNEEDLER: The European Convention  
25 provides for jurisdiction over tort claims, which

1 this -- which this basically is, only with respect to  
2 torts that arise in the territory, which is -- which is  
3 the case here in our own tort exception, which is an  
4 important -- going back to Justice Kagan's question --  
5 an important reason why this is different from due  
6 process.

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

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

18 MR. KNEEDLER: Right.

19 JUSTICE BREYER: In Austria.

20 MR. KNEEDLER: Right.

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

22 MR. KNEEDLER: Right.

23 JUSTICE BREYER: -- under their law.

24 Is there any indication -- I saw none in any  
25 of these briefs -- that there's any country in the world

1 that would reach a different result?

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

3 JUSTICE BREYER: They've put lawyers on both  
4 sides, and I'm sure one of the lawyers would have told  
5 us if they'd found a country that would have reached --

6 MR. KNEEDLER: And this --

7 JUSTICE BREYER: -- result.

8 MR. KNEEDLER: The same general point is  
9 true in the UN convention on -- on immunity with respect  
10 to tort claims --

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

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

1 can't recharacterize something that is basically a tort  
2 abroad by claiming that there was a failure to warn --

3 JUSTICE KAGAN: Is -- is that a typical  
4 thing --

5 MR. KNEEDLER: -- about the tort. We think  
6 that's true here.

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

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

19 JUSTICE SCALIA: Can the gravamen be in more  
20 than one place?

21 MR. KNEEDLER: Pardon me?

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

25 MR. KNEEDLER: Well, it -- it could be



1 based-upon activity in two jurisdiction -- two  
2 jurisdictions. The House Report describing this talks  
3 about commercial activities occurring in whole or in  
4 part in the United States.

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

9 MR. KNEEDLER: I think, depending on where  
10 the tort occurred, it may -- it may just be in the place  
11 where the -- where the negligence occurred.

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

13 JUSTICE SCALIA: It can't be both?

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

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

23 CHIEF JUSTICE ROBERTS: Well, you're not  
24 suggesting the result be different if it were a boat,  
25 are you?

1 MR. KNEEDLER: No, I --

2 CHIEF JUSTICE ROBERTS: Well --

3 MR. KNEEDLER: No, but I -- but the  
4 hypotheticals, a lot of them, the transporter have to do  
5 with --

6 JUSTICE SOTOMAYOR: If this was a private  
7 company --

8 MR. KNEEDLER: -- an airline.

9 JUSTICE KENNEDY: In your hypothetical.

10 JUSTICE SOTOMAYOR: -- would there be  
11 jurisdiction here?

12 MR. KNEEDLER: I'm sorry?

13 JUSTICE SOTOMAYOR: If this were a private  
14 company, not the state, would there be jurisdiction  
15 here?

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

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 Mr. Kneedler.

1 Mr. Fisher.

2 ORAL ARGUMENT OF JEFFREY L. FISHER

3 ON BEHALF OF THE RESPONDENT

4 MR. FISHER: Mr. Chief Justice, and may it  
5 please the Court:

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

12 And in the Gibson-Dunn amicus brief at pages  
13 25 to 29 they give a fuller explanation. No response --

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

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

23 MR. FISHER: But, Justice Ginsburg, I think  
24 there are plenty of cases that support the proposition  
25 that when a company markets and sells a product in a

1 jurisdiction, that creates specific jurisdiction.

2 That's what OBB did through its agent, RPE, is market  
3 and sell its product.

4 JUSTICE KAGAN: No, but not for everything.  
5 I mean, let's assume this. Let's assume that I get a  
6 brochure from the Vienna Opera Company, and I send back  
7 the order form, I'd like to buy tickets, okay? Now, for  
8 sure, if the Vienna Opera Company refused to honor my  
9 tickets, I have a claim, and it arises out of the fact  
10 that they have marketed my tickets in the United States.

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

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

24 JUSTICE BREYER: In the -- in the Austrian  
25 case of the Opera, there is an implied warranty that the

1 Opera is fit for the purposes -- the opera house is fit  
2 for the purposes which it serves. Okay? Same thing.  
3 Not too hard to draft that.

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

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

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

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

1 against you.

2 So I want to know what is there, in the law  
3 of sovereign immunity particularly, that argue -- leans  
4 in your favor.

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

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

22 But I think the point I want to make, and  
23 this -- for the hypotheticals and to bring it back to my  
24 case, and I also tie in the contract --

25 JUSTICE BREYER: No. But I'm taking your

1 answer to my question being we have none.

2 MR. FISHER: We have none, and they have  
3 none. I have not found --

4 JUSTICE BREYER: All right. Okay. All  
5 right.

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

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

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

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

1 expect it will be my courts that will deal with it.

2 MR. FISHER: Well, I don't know why any  
3 country would have thought that about this country's  
4 law, because before this -- you know, up until this  
5 point, the law in the lower courts, the D.C. Circuit and  
6 the Second Circuit, and most -- most specifically, have  
7 held that in this exact situation, there is  
8 jurisdiction.

9 CHIEF JUSTICE ROBERTS: Well, maybe --

10 MR. FISHER: And Justice Breyer --

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

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

25 JUSTICE BREYER: Well, he has a paragraph in



1 Nelson, one sentence of which helps you, that he says  
2 the Nelsons -- you know, they negotiated with the  
3 Nelsons in the United States. They entered into a  
4 contract in the United States. The Nelsons are heard  
5 abroad. I take it that's the basis of it, and this  
6 helps you.

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

15 MR. FISHER: So --

16 JUSTICE BREYER: The basis for. You see.

17 And so --

18 MR. FISHER: Justice Breyer --

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

21 MR. FISHER: When the Court said the  
22 arguable commercial activities that preceded it, they  
23 were talking not only about the recruitment in the  
24 United States but also the employment itself in Saudi  
25 Arabia. And they were distinguishing that from the

1 police activity of seizing somebody and holding him in  
2 jail, which was what the case was really about which  
3 were sovereign activities.

4 So the Court in Nelson -- Mr. Chief Justice,  
5 to be clear, I'm not saying Nelson supports me. I think  
6 Nelson simply doesn't answer this question because you  
7 were concerned in that case with sovereign versus  
8 commercial, not geographic nexus.

9 CHIEF JUSTICE ROBERTS: So in line with the  
10 discussion we had earlier about specific jurisdiction,  
11 is your argument that general jurisdiction is enough to  
12 support based-upon under the statute?

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

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

20 MR. FISHER: No. I think OBB is subject to  
21 jurisdiction under the -- or -- I'm sorry, I should say  
22 does not have sovereign immunity under the FSIA for its  
23 train operation of selling tickets and getting people  
24 rides on the trains. It wouldn't be subject to  
25 jurisdiction if it had some -- if it had a mining

1 enterprise on the side or something else that didn't  
2 even touch the United States.

3 JUSTICE ALITO: Well, suppose --

4 MR. FISHER: So the activity --

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

12 MR. FISHER: Well, let me say two things,  
13 Justice Kagan.

14 (Laughter.)

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

21 JUSTICE ALITO: Well, suppose --

22 MR. FISHER: So the terms of the statute do  
23 cover that.

24 If -- Justice Alito, may I -- may I just say  
25 one more thing to Justice Kagan?

1 JUSTICE ALITO: Sure. Finish your answer.

2 MR. FISHER: Which is if you didn't agree  
3 that the term "commercial activity" covered the entire  
4 enterprise, then you would ask the question whether the  
5 activity of selling tickets is enough to create a  
6 based-upon argument in a specific jurisdiction since we  
7 went back to the conversation we've been having.

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

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

17 JUSTICE ALITO: But there would be -- there  
18 would be -- there would not be immunity because it was  
19 based on the running of the railroad.

20 MR. FISHER: Right. Which -- which -- on  
21 the -- taking everything else the same, has substantial  
22 contact to the United States. But all the -- all we're  
23 talking about in this case is immunity. Section 1330,  
24 where it has jurisdiction over foreign states,  
25 has -- says that that jurisdiction has to be in

1 personam. And obviously, that would carry with it the  
2 requirements for in personam jurisdiction which would  
3 require a contact in this country.

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

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

22           JUSTICE KAGAN: Well, if --

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

24           JUSTICE GINSBURG: Mr. Fisher, you -- you  
25 recognize -- I think you recognized in your brief that

1 this -- you can call it a question of first impression.  
2 You -- you said, I believe, based on -- the meaning of  
3 based-on in this context is an open question.

4 And if it is an open question, why should we  
5 allow a foreign carrier to be sued in the United States  
6 for acts or omissions overseas -- the negligent conduct  
7 occurred overseas -- when the only link, the single link  
8 is a ticket, a pass, purchased from a -- a travel agent  
9 in the United States?

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

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

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

21 MR. FISHER: The lower courts have always  
22 held that the FSIA --

23 JUSTICE KAGAN: If that's true, I don't  
24 understand why you answered my hypothetical question the  
25 way you did, because in my hypothetical question I

1 thought you said that there would not be jurisdiction to  
2 sue in the United States when I slip and fall in Vienna.

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

6 MR. FISHER: I think when I answered your  
7 question I was imagining there wasn't a duty created.  
8 Maybe as Justice Breyer amended the hypothetical, there  
9 might be --

10 JUSTICE KAGAN: Well, there's -- I mean, the  
11 only thing that's happened in the United States is that  
12 I've purchased a ticket there. That's -- that's what  
13 I've done.

14 MR. FISHER: Right.

15 JUSTICE KAGAN: So I take it that your  
16 argument is that purchase of a ticket gives rise to a  
17 duty which is then violated when I slip and fall in  
18 another country.

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

25 CHIEF JUSTICE ROBERTS: If -- if you get on

1 the train in Vienna, and you buy your ticket in Vienna  
2 and you get on the train in Vienna, there is on the  
3 train operator some duty of care, isn't there?

4 Without regard to -- in other words, there's  
5 nothing special about buying a ticket in the  
6 United States that gives rise to a unique duty of care  
7 that's any different from the duty of care that the  
8 railroad owes its passengers in Austria.

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

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

21 CHIEF JUSTICE ROBERTS: I understand. But  
22 there's nothing unique about the standard of care based  
23 upon whether it's a Eurail Pass or something else, is  
24 there?

25 I'm just trying to suggest that you're



1 putting an awful lot of weight on the standard of care  
2 created by the purchase of the ticket. And -- and  
3 that's no different here or whether the ticket was  
4 purchased in -- in Austria.

5 MR. FISHER: It would --

6 CHIEF JUSTICE ROBERTS: It makes no  
7 difference to what standard of care she would allege if  
8 there were some other basis for jurisdiction in the  
9 United States?

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

14 And just going back to this Court's ordinary  
15 due process cases, when a business purposefully avails  
16 itself of the protections and the opportunities of a  
17 particular jurisdiction --

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

23 But purposefully-availed-of, standing alone,  
24 doesn't give you general jurisdiction, and it doesn't  
25 give you specific jurisdiction.

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

4           JUSTICE KAGAN: But you also have to have a  
5 relationship.

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

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

15          MR. FISHER: Yeah.

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

24          MR. FISHER: It's not right because what you  
25 were worried about in Nelson is artful pleading to get

1 around true sovereign immunity; in other words, to  
2 challenge sovereign acts dressed up as something else.

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

9 And, Mr. Chief Justice, maybe I could turn  
10 back to one of yours questions, because I think it  
11 further highlights the difficulty with the other side's  
12 test.

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

24 On the other hand, if gravamen is sort of a  
25 grava-person's test so that you can have many multiple

1 places where a claim can be brought, then I'm at a loss  
2 to understand how it's any improvement over the one  
3 element --

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

10 How does that work? They move -- well, how  
11 does it happen?

12 MR. FISHER: Under due process, you'd have  
13 jurisdiction in Nevada.

14 JUSTICE BREYER: I know that, but I mean  
15 where does the -- where does the --

16 MR. FISHER: The gravamen?

17 JUSTICE BREYER: Yeah, yeah. Does that not  
18 come up as to what law applies, as to a factor in forum  
19 non conveniens.

20 MR. FISHER: No, it --

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

23 MR. FISHER: The most -- there's a most  
24 significant relationship --

25 JUSTICE BREYER: Ah. Most significant

1 relationship. I see.

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

3 JUSTICE BREYER: And does it matter whether  
4 it's -- is it to the formation of the contract or is it  
5 to the breach?

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

8 JUSTICE BREYER: And what's the difference  
9 whether it's the one or the other?

10 MR. FISHER: Pardon me?

11 JUSTICE BREYER: What's the difference?

12 MR. FISHER: It depends --

13 JUSTICE BREYER: I mean how does the Court  
14 decide?

15 MR. FISHER: It depends --

16 JUSTICE BREYER: I'm -- I'm simply pointing  
17 out that these kinds of problems are not unique to the  
18 international context.

19 MR. FISHER: No, I think --

20 JUSTICE BREYER: They arise in many  
21 different legal circumstances, and courts have to decide  
22 what is the gravamen, and sometimes that's difficult and  
23 sometimes it's not.

24 MR. FISHER: Well --

25 JUSTICE BREYER: Am I right about that?

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

4                   JUSTICE BREYER: -- the weight of the -- I  
5 don't know. You're the one -- I'm not very  
6 knowledgeable, and I -- I tend to believe you're more  
7 knowledgeable. Therefore, I'm asking you the question.

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

11                   JUSTICE GINSBURG: If we're dealing --

12                   MR. FISHER: I will add that --

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

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

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

25                   We have an accident in Austria, and it's

1 based on -- the allegation is the boarding protocol was  
2 negligently designed, or the platform, the space between  
3 the train and the platform, negligently designed.

4 What law would govern whether that platform  
5 was negligently designed, whether the boarding protocol,  
6 operating protocol was negligent?

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

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

21 First of all, they can put a choice of law  
22 provision in the ticket, or in the contract, or whatever  
23 might be at issue.

24 Second of all, even as to forum, forum  
25 selection clauses can be put into tickets like this, and

1 contracts, and in fact they are. As the United States  
2 told the Court at the cert stage of this case, all of  
3 these tickets now are governed by a forum selection  
4 clause provision, so you'll never see a case like this  
5 again, not only in the railroad context, but even in the  
6 airline industry.

7 JUSTICE GINSBURG: And that -- and that  
8 works, even though it's an adhesion contract, and it's  
9 small print --

10 MR. FISHER: Under Carnival Cruise Lines,  
11 this Court's decision, those kinds of forum selection  
12 clauses are perfectly enforceable.

13 JUSTICE KENNEDY: That -- that was an  
14 admiralty case, though.

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

20 So what you're really deciding in this case,  
21 if I could end where perhaps I began, is you're not  
22 deciding transportation in this case, because all  
23 transportation cases are now covered by conventions and  
24 forum selection causes. What you're really deciding is  
25 what the law should be in the mainstream FSIA cases,



1 like finance, like contracts. That's why Gibson-Dunn  
2 has filed a case on behalf of a -- of a large hedge fund  
3 that says, we do business all the time with foreign  
4 sovereigns and we're very worried that if the Court  
5 adopts this gravamen based-upon, we will not be able to  
6 enforce contracts and duties in this country that have  
7 given rise under negotiations in this country and then  
8 are breached abroad.

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

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

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

1 the ticket. We don't have to buy any gravamen or  
2 anything else.

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

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

19 JUSTICE GINSBURG: What makes it commercial  
20 is it's a railroad doing the same thing a private  
21 railroad would do. It's in -- its business is operating  
22 a railroad.

23 MR. FISHER: That's right, Justice Ginsburg.  
24 And if you want us to ask the question in terms of  
25 whether a private company would be subject to

1 jurisdiction under the same settings here, at least all  
2 you have to hold is that OBB should be in the same shoes  
3 as a private company.

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

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

18 And then in Section 1606 says: What we want  
19 to do is --

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

22 MR. FISHER: Pardon me?

23 JUSTICE BREYER: Are they liable for  
24 activity that took place in this country? They are  
25 liable for the breach of the contract. The breach of

1 the contract took place in Austria.

2 MR. FISHER: No.

3 JUSTICE BREYER: End of case.

4 MR. FISHER: No.

5 JUSTICE BREYER: Why not?

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

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

17 REBUTTAL ARGUMENT OF MR. BASOMBRIO

18 ON BEHALF OF THE PETITIONER

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

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

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

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

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

18 MR. BASOMBRIO: That's why --

19 JUSTICE ALITO: You find the gravamen of the  
20 entire complaint?

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

1 person would say, because she was injured in a terrible  
2 accident in Austria.

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

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

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

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

20 MR. BASOMBRIO: That would have said --

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

25 MR. BASOMBRIO: Well, if she had been -- if

1 she had been hurt and in addition to that, they would  
2 have told her --

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

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

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
9 The case is submitted.

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

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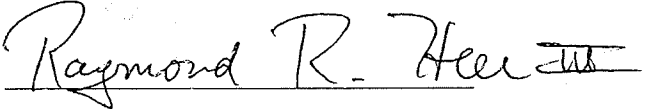
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: OBB PERSONENVERKEHR AG, Petitioner v. CAROL P. SACHS and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Handwritten signature of Raymond R. Heer in cursive script, underlined.

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