

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. :

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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.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	JUAN C. BASOMBRIO, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	EDWIN S. KNEEDLER, ESQ.	
7	On behalf of United States, as amicus curiae,	
8	supporting reversal	23
9	ORAL ARGUMENT OF	
10	JEFFREY L. FISHER, ESQ.	
11	On behalf of the Respondent	34
12	REBUTTAL ARGUMENT OF	
13	JUAN C. BASOMBRIO, ESQ.	
14	On behalf of the Petitioner	59
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:02 a.m.)

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

6 Mr. Basombrio.

7 ORAL ARGUMENT OF JUAN C. BASOMBRIO

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

24 MR. BASOMBRIO: Yes, Your Honor.

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

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

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

12 JUSTICE KAGAN: Well, 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. BASOMBRIIO: 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. BASOMBRIIO: 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. BASOMBRIIO: 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. BASOMBRIIO: Right.

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

15 MR. BASOMBRIIO: Right.

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

18 MR. BASOMBRIIO: Right.

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

21 MR. BASOMBRIIO: 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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a.m 1:13 3:2 62:10	57:13 58:24	10:10 50:3 54:1	31:15	49:13 53:17,25
able 37:10 56:5	actor 5:19	allegations 17:15	appreciate 23:11	54:8 59:1 60:13
aborad 40:5	acts 4:6 7:14,14 9:8	40:8	Arabia 25:21,25	61:2,8,8,23 62:6
above-entitled 1:11	9:20 14:3,6 17:15	allege 48:7	26:2 28:1 39:24	Austrian 35:24
62:11	20:8 22:23 45:6	alleged 4:4,10 8:14	40:25	41:16 47:19
abroad 18:14,15	50:2,4,5 58:13	9:18,21 17:16	arguable 40:22	automatically
31:2 32:17 34:19	actual 39:24	alleges 37:15 46:20	arguably 40:13	28:11
40:12 44:17,17,21	add 53:12	alleging 20:6 37:16	argue 9:9 37:3	available 47:19,20
45:19 50:22 56:8	added 13:21	allow 45:5 49:23	argument 1:12 2:2	58:10
56:12	addition 48:22	alternative 12:13	2:5,9,12 3:3,7	avails 48:15
absolutely 19:12	61:15 62:1	23:1	11:11 12:13,17,21	awful 48:1
36:25	additional 61:19	amended 46:8	23:15 26:19 34:2	
academic 18:11	address 33:18	Amerada 21:6	37:19 41:11 42:6	B
accept 49:9	adequacy 53:15	American 38:21	42:7 43:6 46:3,16	back 8:24 11:15
accident 3:12 4:7	adhesion 55:8	amicus 1:19 2:7	46:23 49:9 50:20	13:7 17:18 29:4
8:12 14:4 49:11	admiralty 55:14	23:16 34:12	54:8 58:8 59:17	35:6 36:18 37:23
49:13 53:25 61:2	adopt 56:22	amorphous 56:16	arguments 22:15	43:7 44:5 48:14
acknowledge 11:20	adopts 56:5,14	amount 61:19	54:14	50:10 57:12
act 7:16,17,18	adversary 38:8	analysis 3:18 5:8	arises 9:19 10:19	background 4:12
10:19 15:24 17:2	affect 12:25	6:11,12,14 7:9,22	35:9 49:12,12	4:16
18:18 22:11 28:21	AG 1:3	16:4 17:21 18:7	arising 5:16 49:11	bad 59:24
43:14	agency 3:14 9:24	18:23 19:18 20:23	arising-from 5:2	balance 23:11
acting 5:19	11:11 12:13 22:10	20:24 35:17 53:10	arose 57:6,8	banc 7:11 23:7
action 3:11,19 4:2	23:6	54:13,17	arrives 61:10	Bancec 23:5
7:11 9:19 12:9	agent 18:13 23:4	analyze 3:17	artful 49:25	based 3:11,19 5:15
14:15 16:6 17:11	34:16 35:2 45:8	answer 9:16 10:25	asked 34:7 36:19	8:19,22 10:12
24:21 28:3 50:14	56:21	11:3,7 12:2,12	39:15 60:25	11:11 13:19 17:7
59:25 60:13	agree 6:13 9:23,25	17:25 18:9,10,18	asking 5:3,4 8:23	21:3 24:10,10,21
actions 7:10 21:7	10:4 15:9 23:3	20:3,9,13,19 34:8	17:22 53:7,23	25:20 29:17 34:21
activities 4:5 7:1	35:19 43:2	34:10 36:19 38:1	aspects 6:13	35:21,22 36:20
32:3 40:13,22	agrees 3:13 50:4	41:6 43:1 53:9	asserted 61:15	37:8,12 38:9,10
41:3,16,18 44:10	Ah 51:25	61:7	assertion 26:25	39:22 43:19 45:2
58:16	airline 14:22 16:7	answered 18:16	assume 30:15 35:5	47:22 54:1
activity 3:23,24,24	16:10 17:3 32:5,6	45:24 46:6 53:3	35:5 49:10	based-on 5:2 10:4
4:1 7:4,23 8:20	33:8 41:16 42:19	answering 47:17	Attorney 1:17	13:8 17:10 18:25
10:12 13:10,12,14	42:19 55:6	antecedent 26:3	attribution 22:17	27:12 45:3 56:23
13:18,19 14:23	airlines 32:12,19	anybody 60:24	22:22	56:24,24
21:15,18,25 22:1	airplane 17:12	anyway 18:2 31:16	Australia 43:10	based-upon 3:15
22:5 24:17,19	aligned 6:19	apart 12:15	Australian 43:9	3:17 5:9 6:22,24
25:2,15,15 26:3,6	Alito 8:18 9:14	APPEARANCES	Austria 3:12 4:7,13	16:4 24:3,23
26:6,21 29:17	16:15 26:12 42:3	1:14	8:13,17 9:1,2,8,19	25:18 27:6 28:4
31:24 32:1 36:21	42:21,24 43:1,8	applies 18:2 22:11	9:20 10:12,13,14	31:22,24 32:1,17
38:12,13,21 39:18	43:17 60:15,19	24:15 51:18,22	10:19 11:4 12:4,5	41:12 43:6 56:5
39:19 41:1 42:4	61:3,14,21 62:3	53:19,21 54:12	13:5 14:4 16:20	60:16
42:18 43:3,5	Alito's 27:20 46:21	apply 54:9,18	20:7 27:2 29:19	bases 15:6
	allegation 9:4	applying 27:17,18	47:8 48:4 49:12	basically 5:3 29:1

<p>31:1 37:12 basis 3:20 40:5,14 40:16 48:8 60:17 Basombrio 1:15 2:3,13 3:6,7,9 4:3 4:18,24 5:5 6:9 7:8,22 8:1,5,11 9:4,17 10:5,9,18 10:23 11:1,10,19 11:23,25 12:7,18 13:1,23 14:13,17 14:25 15:13,17,22 16:7,24 17:12,24 18:6,21 19:3,7,10 19:16 20:2,11,15 20:18,21 21:24 22:9 59:15,17,19 60:18,21 61:5,20 61:25 62:5 began 55:21 57:13 behalf 1:15,18,20 2:4,7,11,14 3:8 23:16 34:3 56:2 59:18 belief 20:22 believe 5:5,9 11:25 12:3,12,19 13:2 23:2 45:2 53:6 59:24 best 4:22 better 38:11 beyond 6:15 blank 17:22 board 61:11 boarding 8:15 53:15 54:1,5 boat 32:24 body 27:9 bonds 44:14 bought 10:2,15 34:16 43:9 bounce 56:17 breach 10:5,7,9,10 10:16,19 12:3,8 13:2,4 20:5 28:3,9 45:14 51:6 52:5</p>	<p>58:25,25 61:4,6,7 61:16,23 breached 12:23 45:19 56:8 breaches 44:11 Breyer 29:13,19,21 29:23 30:3,7 35:24 36:7,16,17 37:5,25 38:4,16 39:10,14,25 40:16 40:18,19 46:8 51:4,14,17,21,25 52:3,7,8,11,13,16 52:20,25 53:4 58:20,23 59:3,5,7 brief 29:14 34:10 34:12 37:6,8,15 37:20 38:13 44:25 56:10 58:4,5 briefing 50:18 briefs 29:25 bring 14:15,17 15:3 16:6 28:17 37:23 44:5 61:23 Britain 36:22 broad 44:11 45:14 broaden 26:23 brochure 35:6 brought 10:16 12:4 15:10 32:22 37:10 37:14 43:16 51:1 51:9 54:11 56:13 57:17 Burger 28:13 business 29:9,10 48:15 56:3 57:21 but-for 35:15 buy 35:7 47:1,14 48:12 57:1 buying 47:5,10 56:21</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 1:15 2:1,3,13 3:1 3:7 Cal 1:15,20</p>	<p>California 51:8 53:19,21,24 call 45:1 called 59:25 Canada 28:22 candor 54:7 care 45:13 47:3,6,7 47:22 48:1,7 61:10,10,13 careful 37:19 Carnival 55:10 CAROL 1:6 carried 13:10,12,14 13:18,19 17:2 22:2 carrier 45:5 carry 44:1 case 3:4,22 4:12,23 5:8 8:24 10:6,8,16 10:25 11:5,9 12:11,25 14:15,19 15:10,13 16:14 21:6 25:4 26:10 26:19 27:9,22 28:15,21 29:3 30:21 32:6,6 34:20 35:20,25 36:15,19,22 37:24 40:10 41:2,7 43:15,23 44:12,13 44:14,14,23 45:16 49:3 53:2,19,21 54:20 55:2,4,14 55:20,22 56:2 59:3,23,25 62:9 62:10 cases 5:15 16:11 24:25 25:6 27:12 31:8 33:22 34:24 37:7 44:8,16 45:17,18 48:15 55:23,25 56:13,18 cause 9:19 12:8 16:1 17:11 50:14 caused 15:24 26:18 27:21</p>	<p>causes 7:11 17:7 55:24 59:24 60:12 causing 15:5 cert 55:2 certain 22:19 certainly 6:13 36:5 55:17 cetera 8:16,16 challenge 50:2 challenged 53:20 challenging 50:4,5 change 38:8 Charter 36:24 Chief 3:3,9 10:20 14:5,14 15:14,18 15:23 16:3,15 23:13,18 32:23 33:2,24 34:4 39:9 39:11,16 41:4,9 41:14 42:10 46:25 47:9,21 48:6 50:9 59:14,19 62:8 Chief's 15:8 choice 53:9,14 54:12,14,16,21 choose 15:20 chosen 5:7 circuit 8:6 22:16 26:22 39:5,6 53:18 60:22 circumstances 52:21 cited 37:8 cites 37:20 citizen 56:10 citizens 44:16 47:19 claim 5:25 8:21 9:15 12:3 13:2,4 16:21 26:7,13,15 28:6,7,9 29:15 30:12,13,15,18,22 31:10,10,14,15 35:9 37:9,14 38:9 39:22 46:24 49:10 49:11,21,21 51:1</p>	<p>57:5 61:3,4,8,16 61:24 claim-by-claim 60:16 claimed 8:13 claiming 31:2 claims 7:12 8:8 9:3 26:8,11,11 28:25 29:7 30:10 31:13 31:15 38:8 49:17 59:22,23,24 61:15 61:22 clarify 11:25 clause 4:15 21:5,14 21:17,25 22:5 24:18,19 55:4 clauses 54:25 55:12 55:18 clear 5:18 37:6 41:5 colleagues 22:15 combined 6:12 come 13:6 21:14 28:22 38:19 51:18 comes 53:21 comity 60:5 commercial 3:24 4:1,4 5:19 6:25 7:4,17,18,24 8:3 8:10,11,20 13:10 13:12,13,18,19 14:23 17:2 18:5 21:15,18,25 22:1 22:5 24:17,19 25:2,14 26:3,5,21 32:3 36:21 38:21 39:18 40:13,22 41:8,15,18 42:18 43:3 44:10 50:5 57:13,15,17,19 58:13,16 commercial/State 4:2 commission 40:14 common 45:11 54:17 57:12</p>
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<p>company 19:15 33:7,14 34:25 35:6,8 57:25 58:3 comparing 22:4 complaint 4:9 9:5 9:22 15:20 17:7 17:14,15 60:17,20 completely 6:19 20:13 complicated 16:9 conceded 3:25 concerned 39:20 41:7 concerns 24:16 conclusion 22:4 concussion 14:12 conditions 9:12 conduct 3:19 7:10 8:7,10,12 14:1,2 15:5,11 18:14 25:19,20,21,25 26:17 27:20,21 31:17,18 34:18,19 34:22 45:6 conducted 14:22 22:1 confronted 30:20 confused 7:19 Congress 5:6 6:17 21:3 23:24 25:1 29:11 congressional 58:14 connecting 48:20 connection 24:21 27:3 28:10,12 34:21 48:21 consideration 60:4 considerations 21:1,2 consisted 51:7 constitutional 13:22 contact 5:22,22,24 5:24 7:2,6,21 8:2 13:15 14:21 19:19</p>	<p>34:15 35:13 43:22 44:3 49:2,2 59:10 contacts 19:13,15 contains 23:22 context 7:16 20:13 25:8,14 45:3 46:24 52:18 55:5 55:16 contract 10:6,7,16 12:3,23,24 13:2 26:11 28:2,3,6,7,9 28:12 30:12,15 36:12 37:24 40:4 40:11 44:7,17 45:17 49:21 51:5 51:5,6,22 52:4 54:22 55:8 57:10 58:25 59:1 61:16 61:24 contracts 28:13 50:21 55:1 56:1,6 contractual 59:22 control 23:3,5,6,8,8 23:9 conveniens 51:19 convention 28:24 30:9 conventional 61:15 conventions 16:9 37:9,11 55:23 conversant 38:20 conversation 43:7 converting 49:20 corporation 4:13 5:4,20 19:25 corporations 25:4 correct 4:4 10:18 15:13,14 45:16 48:10 53:2 Costa 1:15 counsel 13:6 23:13 25:18 59:14 62:8 counterargument 18:3 countries 38:17 country 25:12</p>	<p>29:25 30:5 36:20 38:25 39:3 44:3,9 44:19 45:12,18 46:18 47:16 54:11 56:6,7,14 58:13 58:16,24 59:12 country's 39:3 couple 34:7 course 18:22 19:11 47:11 court 1:1,12 3:10 3:12,16,17 4:21 5:10 7:11,13 12:18 13:25 21:6 22:13 23:1,4,7,19 25:18,20 26:1,8 26:14 27:16 28:13 30:20,21,24 33:18 34:5 37:18 39:19 40:21 41:4 44:5,8 50:19,22 52:13 53:21,24 54:9,18 55:2 56:4,14,21 56:24 58:8,9,11 59:20,25 60:4 Court's 26:4 28:14 48:14 55:11 courts 3:18 25:10 25:11 39:1,5 45:21 52:21 56:15 56:18 60:22,22 cover 42:23 covered 32:20 43:3 55:23 covering 34:17 create 43:5 50:13 created 44:9,19 45:12,18 46:4,7 48:2 creates 35:1 credible 37:18 critical 19:17 47:15 Cruise 55:10 curiae 1:19 2:7 23:16</p>	<p style="text-align: center;">D</p> <p>D 3:1 59:8 D.C 1:8,18 23:24 39:5 Daimler 4:21,22 deal 16:10 39:1 44:13 dealing 20:23 53:11 53:13 deals 21:14 decide 7:23 16:5 37:13 51:22 52:14 52:21 decided 5:8 12:22 54:15 59:25 60:5 deciding 7:16 55:20 55:22,24 decision 3:20 15:16 55:11 decisions 21:2 declaration 58:15 deemed 27:3 defendant 34:9 54:19 60:11 defendant's 26:17 defendants 60:3 defined 22:20,24 59:10 definition 13:9,11 22:11 23:2 59:7 degree 23:5 deliver 51:7 delivering 38:15 Department 1:18 depending 32:9 47:13 depends 52:12,15 57:6 deprive 22:23 Deputy 1:17 describe 27:17 38:13 describing 32:2 design 53:16 designed 25:8 54:2 54:3,5</p>	<p>detail 58:5 determination 24:11 60:16 determinations 6:17 determine 8:19 26:14 50:23 determined 32:17 develops 23:4 difference 14:18 22:16 26:19 36:7 36:11 48:7 52:8 52:11 different 5:13 6:3,8 6:16 15:19 16:23 16:24 17:3 20:20 20:24 24:8,24 29:5 30:1 32:24 35:20 41:15,17 47:7 48:3 52:21 55:16 different-- 14:25 differently 49:18 difficult 52:22 difficulty 50:11 direct 21:13 22:6 disagree 10:21,24 11:2,4,7 12:11 discussed 28:14 discusses 25:17 discussion 13:24 17:19 25:22 26:4 26:5 41:10 59:21 dishonor 12:4 dismissed 60:6 dispute 6:23 22:10 distinction 3:23 18:4 26:5 distinctions 21:5 distinguish 26:10 42:19 57:8 distinguishing 25:14 39:18 40:25 district 58:8,9 division 4:2 doing 9:24 27:17</p>
---	---	--	---	---

<p>57:20 58:16 domestic 51:5,5 doubt 17:1 58:7 draft 36:3,5 dramatically 56:19 draw 25:9 drawing 24:12 29:12 draws 21:17 dressed 50:2 due 4:14 13:8,11,16 17:20 18:2,6,16 18:23 19:17 20:22 23:21,25 24:8 27:8,8,17 28:11 29:5 33:18,22 48:15 51:12 58:5 duties 45:12,18 56:6 57:8,9 duty 35:21 44:9,19 45:13 46:4,7,17 47:3,6,7 50:13 57:6 61:9,10,13</p> <hr/> <p style="text-align: center;">E</p> <p>E 2:1 3:1,1 59:9 earlier 17:19 41:10 44:6 46:22 earth 50:22 educational 44:18 EDWIN 1:17 2:6 23:15 effect 21:16 22:6 27:6 60:8 effectively 42:6 effects 21:13 either 15:3,4 17:11 17:13 23:5 50:15 50:16 element 23:3 26:13 51:3 53:22 employee 25:24 employment 39:24 40:9,24 44:16,17 50:21 56:9 en 7:11 23:7</p>	<p>enable 17:11 enacted 24:1 encompassed 21:7 enforce 56:6 enforceable 55:12 engaged 41:16 engaging 25:2 engineer 56:11 enjoy 60:3 ensure 5:18 entered 40:3 51:5 enterprise 38:14 42:1 43:4 enterprises 38:19 entire 26:24 43:3 60:6,17,20 entities 60:7 entitle 40:9 entitled 58:12,17 entity 4:19 20:5 erred 8:7 especially 56:16 ESQ 1:15,17,20 2:3 2:6,10,13 establishes 61:12 et 8:16,16 EU 36:23 Eurail 9:11 47:23 61:18 Europe 9:13 European 28:24 events 44:20 62:6 Everybody 50:4 evidence 16:17 exact 19:20 20:12 36:15 39:7 58:21 exactly 20:1 60:21 62:3 example 15:23 16:1 16:7,9,16 17:12 17:13 18:8 24:14 25:12 51:7 examples 42:17 exception 21:8,9,25 24:15,16,18 29:3 57:13</p>	<p>exceptions 24:14 Exemption 29:8 expect 38:23 39:1 explain 5:6 11:16 34:10 explanation 34:13 exploration 56:11 extra 62:4</p> <hr/> <p style="text-align: center;">F</p> <p>fact 11:9 13:2 35:9 42:5 44:11 48:11 55:1 factor 51:18 facts 9:18 11:5,8 16:14 29:16 40:9 failure 9:5,10,17 16:21,22 30:21,22 31:2 51:7 failure-to-warn 8:21 Fair 49:1 fairest 42:16 fall 46:2,17 fancy 49:20 far 15:4 30:2 favor 37:4 feint 30:25 figuring 50:19 filed 29:14 56:2 fill 17:22 finance 44:15 56:1 find 27:11 60:19 finish 28:17 43:1 Fiore 28:15 first 3:4,4,14 7:9,23 8:7 12:17 20:3 21:4,17,25 27:16 45:1 54:21 57:5 Fisher 1:20 2:10 20:17 34:1,2,4,14 34:23 35:19 36:4 36:14 37:5 38:2,6 38:11 39:2,10,15 40:15,18,21 41:13 41:20 42:4,12,15</p>	<p>42:22 43:2,12,20 44:23,24 45:10,21 46:6,14,19 47:9 48:5,10,18 49:1,6 49:15,24 51:12,16 51:20,23 52:2,6 52:10,12,15,19,24 53:1,8,12,18 54:7 55:10,15 57:3,23 58:22 59:2,4,6 fit 21:12 22:11 36:1 36:1 fitness 30:13,18 36:13 flight 14:7 focus 7:13 24:17 26:1,7 33:19,23 focused 7:12 27:19 27:21 focuses 19:21 focusing 26:8,16 footnote 26:23 34:9 foreign 4:12 5:4,19 5:20 13:11,13 14:22 18:17 22:20 22:24 24:11 25:2 25:3,9,12 28:20 43:24 44:9 45:5 56:3 58:15 form 35:7 formation 52:4 formed 40:14 forth 3:16 forum 28:12 48:13 51:18 54:24,24 55:3,11,18,24 found 9:6 30:5 36:19 38:3 foundation 3:20 31:14 framework 3:16 France 28:22 Francisco 51:8 free 61:18 friend 45:15 FSIA 5:18 6:10</p>	<p>22:25 23:21 24:9 29:7 32:15,18 41:22 45:22 54:11 55:25 full 60:8 fuller 34:13 fund 56:2 further 50:11</p> <hr/> <p style="text-align: center;">G</p> <p>G 3:1 gap 8:15 gas 56:11 gear 14:9 16:20 general 1:17 4:20 19:4,5,12 26:25 30:8 41:11,18 42:8 48:24 geographic 39:20 41:8 50:6 geographically 17:1 Germany 28:22 getting 17:18 41:23 Gibson 58:4 Gibson-Dunn 34:12 56:1 Ginsburg 3:22 6:23 12:15 14:24 15:1 18:9 19:23 21:13 28:16 34:14,23 44:24 45:11 48:18 53:11,13,23 54:8 55:7 56:20 57:5 57:19,23 gist 31:10 give 5:10 13:3 27:5 34:13 48:24,25 56:10 60:7 given 39:13 56:7 gives 12:8 36:15 38:22,24 46:16 47:6 glad 39:15 go 11:15 35:11 36:18 56:11 57:12</p>
---	---	--	--	--

<p>goes 6:15,15 27:20 40:11 going 29:4 31:9,10 48:14 good 33:17 39:13 54:8 goods 51:7 govern 53:15 54:4 governed 55:3,18 government 5:19 25:2 55:17 governments 38:18 governs 24:9 grava-person's 50:25 gravamen 3:21 14:15 15:15,16,20 26:14 31:14,19 32:7 50:15,15,17 50:23,24 51:16 52:22 56:5,14,17 56:23 57:1 60:19 60:23 61:21 62:5 guess 6:1,6 49:16 guidance 5:11 guided 17:14 22:14</p> <hr/> <p style="text-align: center;">H</p> <p>habitability 30:18 hand 50:24 happen 21:18 44:21 51:11 happened 8:17 9:6 10:1 13:5,5 17:16 17:17 18:13 20:7 20:8 21:10 26:8 27:25 34:17 40:12 46:11 49:22 56:25 62:3 happens 25:12 56:12 hard 36:3 42:19 hazard 30:23 heaps 50:20 hear 3:3 heard 40:4</p>	<p>hedge 56:2 held 3:17 21:6 22:13 39:7 45:22 53:18 help 40:20 helps 40:1,6 Hess 21:6 high-finance 44:13 highlights 50:11 highly 57:15 hired 56:11 hiring 3:25 hold 12:24,25 58:2 holding 4:21 13:25 13:25 41:1 53:20 54:10 57:16 60:10 honestly 53:8 honor 4:3,24 5:6 7:9 10:11 12:1 13:3,23 18:21 22:7 28:5 30:16 35:8,11 41:13 60:21 honored 10:1,3,13 11:7 20:6 hospital 25:25 40:12 house 29:10 32:2 36:1,9 42:17,18 hundreds 9:12 hurt 6:4 62:1 hurts 19:22 hypo 28:2 hypothetical 4:12 11:6,22 15:8 33:9 44:7 45:24,25 46:8 56:9 hypotheticals 33:4 37:23 44:6</p> <hr/> <p style="text-align: center;">I</p> <p>idea 33:17 49:10 59:24 identify 7:10,23 8:12 31:23 identifying 3:18</p>	<p>imagine 16:12 imagining 46:7 Immunities 18:18 28:21 immunity 22:17,21 22:23 24:11 25:9 30:9 36:20 37:3 39:14 41:22 43:11 43:14,18,23 46:21 50:1 58:12,13,17 60:2,3,8,12 impact 15:2 implicitly 36:13 implied 35:25 59:23 important 24:6 26:10 28:8 29:4,5 44:7 47:18 48:11 54:9 60:4 impression 45:1 improvement 51:2 inclination 39:13 included 35:16 includes 38:14 59:13 including 60:7 incorporate 20:22 23:24 incorporated 18:7 incorporates 23:21 indication 29:24 indistinguishable 45:16 industry 55:6 injure 35:12 injured 61:1 injuries 44:10 50:22 injurious 18:14 34:22 injury 3:11 15:5,6 15:24 16:1 17:7,9 26:18 27:22 29:15 31:18 32:8 injury-causing 31:17</p>	<p>inquiry 18:17 insistence 5:22,23 inspect 16:21 instant 48:20 instructive 27:15 insufficient 17:21 integrated 38:13 intentional 24:14 27:23 interest 28:17 interests 38:16 international 16:10 25:10 44:15 52:18 60:5 Internet 33:21 43:9 interpretation 23:23 invocation 22:17 22:18 invoke 22:20 60:12 issue 3:15 4:16,16 14:2 54:23 issues 60:5</p> <hr/> <p style="text-align: center;">J</p> <p>JA 8:14 jail 41:2 JEFFREY 1:20 2:10 34:2 JUAN 1:15 2:3,13 3:7 judgment 25:11 jurisdiction 4:14 4:19,20 5:2,8,15 6:5,11,11,16,18 17:13 18:12,17,24 19:6,9,13,14,24 20:4,10,24,25 21:11 24:9,10,25 25:6 26:25 28:25 30:17,25 31:8 32:1 33:11,14 34:11,21 35:1,1 35:17 39:8 41:10 41:11,19,19,21,25 42:7,8 43:6,24,25</p>	<p>44:2 46:1 48:8,17 48:20,24,25 51:13 58:1,6,8 jurisdictional 6:14 19:4 jurisdictions 15:4,7 31:24 32:2,21 Justice 1:18 3:3,9 3:22 4:11,22,25 5:12 6:20,23 7:15 7:25 8:3,9,18 9:14 9:23 10:7,14,20 10:21,24 11:2,3 11:13,14,15,17,20 11:24 12:2,2,6,7 12:10,14,15,16,20 13:6,7 14:5,14,24 15:1,14,18,23 16:3,15 17:5,18 17:19,22,25 18:9 18:10,22 19:5,8 19:11,11,17,23 20:9,12,16,19 21:13,22 22:8 23:13,18 24:3,22 24:23 25:13 26:12 27:5,11,20,24 28:2,16 29:4,13 29:19,21,23 30:3 30:7,11 31:3,7,19 31:22 32:5,13,23 33:2,6,9,10,13,24 34:4,6,14,23 35:4 35:24 36:7,16,17 37:5,25 38:4,7,16 39:9,10,11,14,16 39:25 40:16,18,19 41:4,9,14 42:3,5 42:10,13,21,24,25 43:1,8,17 44:22 44:24 45:11,20,23 46:8,10,15,21,25 47:10,21 48:6,18 49:4,8,16 50:9 51:4,14,17,21,25 52:3,7,8,11,13,16</p>
---	--	---	---	---

<p>52:20,25 53:4,11 53:13,23 54:7 55:7,13,16 56:20 57:5,19,23 58:20 58:23 59:3,5,7,14 59:20 60:15,19 61:3,6,14,21 62:3 62:8 Justice's 16:15</p> <hr/> <p style="text-align: center;">K</p> <p>Kagan 4:25 5:12 9:23 10:7,14 11:3 11:15 12:2,6 17:20 19:5,8,11 19:17 20:9,12,16 20:19 24:23 27:24 28:2 30:11 31:3,7 35:4 42:5,13,25 44:22 45:20,23 46:10,15 49:4,8 49:16 Kagan's 13:7 29:4 61:6 Kennedy 4:11,22 10:21,24 11:2,13 12:10 17:18,25 18:22 25:13 27:5 27:11 33:9 55:13 55:16 Kennedy's 18:10 kind 5:23 27:12 30:13,13 42:8 49:22 kinds 38:19 44:14 44:18 45:17 50:21 52:17 55:11 57:9 57:9 King 28:13 Kneedler 1:17 2:6 23:14,15,18 24:5 25:7,16 26:16 27:10,14,25 28:6 28:16,24 29:18,20 29:22 30:2,6,8,11 30:19 31:5,12,21</p>	<p>31:25 32:9,14 33:1,3,8,12,16,25 39:17 42:16 49:18 know 6:3,6 7:17 10:2 19:22 28:19 28:21 34:20 35:16 37:2 39:2,4,21 40:2 42:9 47:13 51:14 53:5 55:15 60:23 knowledgeable 53:6,7</p> <hr/> <p style="text-align: center;">L</p> <p>L 1:20 2:10 34:2 landed 32:8 landing 14:9,12 16:20 lands 16:20 language 5:21 22:14 24:4,4,24 25:5,5 30:25 31:23 32:17 36:25 37:9,11,21 38:25 large 56:2 Laughter 42:14 law 5:8 23:6 27:9,9 29:23 37:2 38:21 39:4,5 46:24 51:18,22 53:2,10 53:14,15,17,19,21 54:4,9,12,12,14 54:16,17,21 55:25 lawsuit 19:20 30:12 31:11 35:20 44:20 46:20 51:8 60:6 lawyers 30:3,4 leans 36:25 37:3 left 50:14 legal 7:12 8:8 52:21 57:5,7 legislation 28:20,23 lesser 23:6 let's 14:6 30:15 35:5,5 49:8,9,12 57:12</p>	<p>liability 17:8,9 liable 58:23,25 light 60:10 limit 57:4 limitations 22:25 limited 22:24 line 21:16,17,19 24:13 25:1,4 29:12 41:9 Lines 55:10 link 45:7,7 lists 36:24 39:21,23 little 60:11 loans 44:15 location 16:13 long 47:10 long-arm 15:6 23:24 look 4:8 8:7,8,12 14:1 17:14 19:13 27:9 31:9,14,16 58:20 60:17 61:21 looked 8:8,9 looking 7:3 looks 9:21 21:4 lose 10:25 11:17,21 48:11 loss 51:1 lot 15:19 33:4 48:1 lower 39:5 45:21 lured 44:17</p> <hr/> <p style="text-align: center;">M</p> <p>mainstream 55:25 maintenance 16:22 making 12:17 manner 44:8 mark 23:7 market 35:2 marketed 35:10 marketing 57:10 markets 34:25 Massachusetts 34:16 matter 1:11 4:11 6:10,15 20:24</p>	<p>21:11 24:9 52:3 57:5,11 62:11 mean 5:12,17 6:3 9:11 12:21,24 15:19,23 28:19 35:5,14 46:10 50:16,16 51:14 52:13 54:11 56:23 meaning 18:25 45:2 means 13:13 15:15 15:16 22:2 27:7 60:23,24 meant 5:18 21:7 mentioned 24:12 mere 27:8 Mesa 1:15 met 19:1,2,3 mind 53:24 minimum 5:22 mining 41:25 minutes 59:15 missed 23:7 moment 49:9 Monday 1:9 Montreal 32:20 morning 3:4 move 23:2 51:10 multiple 50:25</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 nations 28:18,20 necessarily 43:13 necessity 18:1 need 3:13 needs 5:10 negligence 9:1 14:11 15:2,9 16:16 17:6,8 32:7 32:11 49:10,11,21 negligent 45:6 54:6 negligently 14:8 54:2,3,5 negotiated 40:2 negotiations 56:7</p>	<p>Nelson 3:16 7:9 13:25 15:16 16:4 25:16,17 26:19 27:10,14,16 30:21 39:12,16,17,19 40:1 41:4,5,6 49:22,25 Nelsons 40:2,3,4,9 Nelsons' 39:22 40:8 40:14 Netherlands 29:13 29:14 36:23 Nevada 51:6,9,13 never 53:1,9,20,24 55:4 58:9 New 14:7,7,11 nexus 39:20 41:8 50:6 Ninth 8:6 22:16 26:22 53:18 non 21:8 51:19 noncommercial 21:9 nonsovereign 60:7 normal 36:12 note 58:7 notions 15:4 number 43:15 54:19 60:2</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 OBB 1:3 3:5 4:18 4:20 20:4 35:2 41:20 42:6,7 48:12 53:19 54:13 58:2,7,12 OBB's 53:15 54:19 objective 25:1,4 obviously 43:14 44:1 occur 11:9 44:11 45:14 50:22 59:11 61:6 occurred 3:12 8:22 9:1,2,21 12:8 15:9</p>
---	---	--	--	--

<p>15:11 18:14 25:25 31:17,18 32:10,11 34:19 45:7 61:7 occurring 32:3 occurs 15:2 29:9 October 1:9 odd 57:15 oddball 44:12 offer 35:23 47:13 Oh 11:24 32:14 oil 56:11 okay 14:9 19:10 35:7 36:2 38:4 49:9,14 omissions 4:7 9:8 9:20 14:3,6 17:16 45:6 open 45:3,4 opera 35:6,8,25 36:1,1,9 operates 18:15 operating 54:6 57:21 operation 6:25 7:5 27:1 38:10 41:23 operations 26:24 operator 47:3 opinion 26:4 39:12 opportunities 48:16 opportunity 54:14 opposed 7:17 oral 1:11 2:2,5,9 3:7 23:15 34:2 order 21:10 35:7 60:7 ordinary 48:14 51:5 54:17 ought 12:22 49:17 outside 15:6 20:8 21:15 22:5 26:9 overall 38:13 overlapping 6:18 overseas 45:6,7 owe 61:13 owes 47:8</p>	<hr/> <p>P</p> <hr/>	<p>phrase 5:9 23:25 Pimentel 60:1 place 6:10 15:2,3 15:16 16:4,6 25:21 29:17 31:20 31:23 32:10 38:25 47:11 50:17 51:8 58:24 59:1 62:7 places 51:1 plaintiff 3:25 4:9 8:13 10:2 46:19 plane 14:10 15:25 16:20 32:8 platform 8:15,15 53:16 54:2,3,4 plead 9:3 50:6 pleading 49:20,25 please 3:10 23:19 34:5 59:20 plenty 34:24 plus 62:4 point 11:18,21 22:10,18 23:20 24:6 28:13 30:8 35:14 37:22 39:5 42:5 47:18 pointed 24:22 25:18 pointing 52:16 police 3:24 41:1 policy 6:16 20:25 21:2 position 4:17,18 25:24 31:13 54:19 potential 9:12 30:23 Potentially 14:17 preceded 25:23 26:4 40:13,22 presence 33:20 presented 11:12 pretty 5:17 54:8 prevail 4:15 9:15 11:5,8,11 prevents 57:17 principle 31:15</p>	<p>principle-agent 37:17 principles 23:25 54:18 print 55:9 private 4:13,19 20:4,13 33:6,13 33:22 34:9 57:20 57:25 58:3 pro 21:24 probably 33:16 37:18 problem 16:19 36:18 38:22 problems 52:17 proceed 60:13,14 process 4:14 13:8 13:11,16 17:20 18:2,6,17,23 19:18 20:22 23:21 23:25 24:8 27:8 27:18 28:11 29:6 33:18,22 48:15 51:12 58:5 product 34:25 35:3 36:8,13 38:15,15 47:12,18,20 programs 44:18 promise 35:23 proper 16:22 17:6 31:16 37:17 property 24:16,16 propose 8:18,19 proposition 4:23 34:24 protect 25:9 54:20 protections 48:16 protocol 32:20 53:16 54:1,5,6 provided 13:3 14:20 16:25 provides 28:25 32:21 provision 21:22,23 54:22 55:4 puddle 35:12</p>	<p>purchase 18:13 26:20 46:16 48:2 49:14 56:25 57:7 purchased 10:4 45:8 46:12 48:4 49:7 purchasing 33:20 purpose 18:5 58:15 purposefully 48:15 purposefully-ava... 48:19,22,23 purposes 28:11 33:22 36:1,2 53:22 pursued 29:16 put 25:24 30:3 54:21,25 putting 37:20 48:1</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>question 3:13,17 5:3 6:1 9:16,25 12:22 17:2,23 18:11,23 20:3 27:20 29:4 32:15 33:20,20 34:7 38:1 41:6 43:4 45:1,3,4,24,25 46:7 47:17 49:17 50:6 53:7,14 56:23 57:24 61:7 questions 6:2,18 17:19 23:10 25:11 36:18 50:10</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 railroad 4:1 9:13 18:14 26:24 27:1 43:19 47:8 55:5 57:20,21,22 railroads 34:17 railway 38:14 reach 3:13 30:1 reached 22:4 30:5 47:16 48:12 58:9</p>
--	-----------------------------	--	---	---

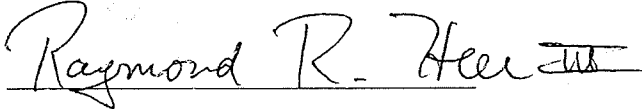
<p>read 27:13 39:12 39:12,13 reading 38:11 42:16 real 18:5 19:19 realized 37:18 really 8:25 19:8 27:21 38:22,24 41:2 55:20,24 reason 6:9 29:5 reasons 24:7 38:12 43:15 45:10 57:4 rebuttal 2:12 23:12 38:6 59:17 recharacterize 31:1 recognize 28:8 30:24 44:25 recognized 44:25 record 61:12 recruitment 25:23 25:24 39:23 40:8 40:23 referred 21:13 referring 13:24 21:23,24 39:17 refers 22:5 29:10 refused 35:8 49:22 regard 47:4 relate 9:7 related 3:14 5:17 relates 9:18 48:19 relations 28:18 relationship 5:24 19:18,19 37:17 49:5,7 51:24 52:1 relevant 15:11 34:18 relied 26:21 remaining 59:16 remand 50:8 58:10 remember 37:15 54:16 57:12 rendering 18:10 Report 29:10 32:2 42:17,18 Republic 60:1,8</p>	<p>require 23:8,23 44:3 required 13:17 requirement 19:1 requirements 44:2 requires 21:9 22:1 23:6,8 reserving 23:11 respect 19:12,14 29:1 30:9 32:19 42:8 respects 5:17 Respondent 1:21 2:11 10:10 20:5 26:23 34:3 60:25 response 34:13 result 30:1,7 32:24 resulted 4:7 14:4 reversal 1:19 2:8 23:17 reversed 23:9 rides 41:24 right 5:21 15:16,17 18:6 19:7,12,16 20:11,15,16,18 29:18,20,22 38:4 38:5 43:20 46:14 47:9 49:23,24 52:25 57:23 60:11 rise 12:8 13:3 35:21 36:15 38:22,24 46:16,24 47:6 56:7 ROBERTS 3:3 10:20 14:5,14 15:14,18 16:3 23:13 32:23 33:2 33:24 39:9,11 41:9,14 46:25 47:21 48:6 59:14 62:8 rough 14:12 routinely 24:24 RP 22:11 RPE 35:2 Rule 50:7 60:6</p>	<p>ruled 12:18 run 35:18 38:18 running 4:1 38:14 42:18,19,20 43:19 runs 24:13</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 1:17 2:1,6 3:1 23:15 Sachs 1:6 3:5 43:8 47:19 safe 35:21 36:9,10 45:13 sale 4:5 6:24 7:5 14:3 18:19 35:22 35:22 36:16 38:9 57:8 59:13 San 51:8 Saudi 25:21,25 26:2 27:25 39:24 40:24 saw 29:24 saying 8:6 35:15 36:8 41:5 45:11 46:22 56:15 says 19:23 21:18 22:23 26:22 36:23 36:24 37:8 40:1,7 43:25 52:2 55:17 56:3 58:14,18 59:8,9 Scalia 11:14,17,20 11:24 12:14,16,20 13:6 17:5,22 19:12 21:22 22:8 24:22 31:19,22 32:5,13 scenario 13:3 14:19 14:19 second 21:4,7 39:6 54:24 57:11 Secondly 7:23 section 21:8 22:18 22:19,19,22,22 43:23 58:15,18 see 4:9 22:8 36:11</p>	<p>38:16,24 40:16 52:1 55:4 57:7 seen 53:1,9 seizing 41:1 selection 54:25 55:3,11,18,24 sell 35:3 47:16 seller 36:12 47:12 selling 38:15 41:23 43:5 57:14 sells 34:25 send 35:6 sense 9:9 57:12 60:11 sensible 35:16 sensitive 25:10 sentence 40:1 separate 18:25 19:1 27:6 30:17 54:12 separating 59:22 serious 53:14 serves 36:2 service 14:20 set 3:16 6:16 9:7 sets 14:8 settings 57:10 58:1 shoes 58:2 showed 10:11 side 21:19 42:1 45:15 53:2 side's 50:11 sides 30:4 sight 48:11 sign 44:16 significant 51:24 51:25 similar 5:21 28:20 28:23 simply 23:21,24 27:17 37:20 41:6 52:16 54:10 56:21 single 31:23 34:20 45:7 56:17 situation 17:10 37:13 39:7 situations 44:19</p>	<p>56:9 slip 35:12 46:2,17 small 55:9 sold 47:18 solely 18:15 somebody 14:12 36:4 41:1 somewhat 16:8 18:11 sorry 6:20 10:23 11:1,16 33:12 41:21 59:8,12 sort 30:25 50:24 sorts 33:21 SOTOMAYOR 6:20 7:15,25 8:3,9 24:3 33:6,10,13 38:7 Sotomayor's 34:6 sounds 13:15 41:18 sovereign 4:13 7:16 8:4 18:4,18 25:9 25:15 26:6 28:21 36:20 37:3 39:14 39:18 41:3,7,22 43:11,13,13 46:21 50:1,2,4 58:12,13 58:17 60:2,3,8 sovereigns 56:4 space 54:2 special 47:5 specially-tailored 47:20 specific 5:1,14 6:5 18:12,17 19:9,14 19:24 20:4,8,10 24:1,24 25:6 34:11,21 35:1,17 41:10,19 43:6 48:19,25 specifically 39:6 speculation 13:7 spends 37:16 sphere 44:18 split 59:24 60:12 stage 55:2</p>
---	--	---	---	---

<p>stairs 35:12 stand 47:13 58:5 standard 47:22 48:1,7 standards 23:22 27:18 standing 48:23 Stanford 1:20 start 3:14 23:20 25:19 34:6 started 13:24 14:20 starting 14:20 state 3:23 13:11,13 13:14 15:5,5 22:20,24 24:11 33:14 46:23 52:2 60:22 state's 44:10 stated 16:16 states 1:1,12,19 2:7 4:6 7:3,7 8:23 9:6 9:10 10:15,17 13:4,10,13,15,18 13:20 14:16,18,21 14:21,23 15:9,11 16:2,17,22,23 17:1,3 18:12,19 19:20 20:8 21:10 21:19 22:2,3,6,7 22:19 23:16 24:6 24:15,17,20 26:3 26:9,13,15 27:4 28:10 29:9,11 32:4,7,16 34:15 34:18 35:10,14 38:20,22,23 39:23 40:3,4,24 41:17 42:2 43:11,22,24 44:16 45:5,9 46:2 46:4,11 47:6 48:9 49:14 55:1 56:10 56:18,22,25 57:18 58:16 59:7,10,11 60:14 61:24 station 61:11 stations 9:13</p>	<p>statue 42:22 statute 17:21 18:2 18:4,7 19:21 22:14 23:25 24:1 27:6 33:23 38:12 41:12 42:16 58:14 statutory 23:23 24:1 25:8 27:18 33:19 step 8:24 steps 8:5 straight 28:4 49:10 street 60:24 strict 24:12 strong 46:23 structure 25:8 study 44:17 sub 59:8,9,9 subject 6:10,15 20:23 21:11 24:9 27:2 36:5 41:20 41:24 42:7 50:7 57:25 submitted 62:9,11 substantial 7:2,4,6 7:21 8:2 13:14 24:20 27:3,7 43:21 49:2 59:10 substantial-context 24:4 substantive 27:6 sue 32:16,16 46:2 sued 38:23 45:5 suffice 27:8 sufficient 5:22 18:24 suggest 4:8 47:25 suggesting 32:24 42:10 60:15 suggests 39:14 suing 20:5,7 35:22 36:15 46:5 60:25 suit 10:3 11:4 15:3 25:19 27:2 28:3 40:14 43:11 54:10 suits 32:21</p>	<p>support 34:24 41:12 supporting 1:19 2:8 23:17 supports 36:21 41:5 suppose 4:12 10:21 10:24 11:2,3,7 12:10 17:5 18:23 42:3,21 43:8 56:20,20 supposed 27:12 Supreme 1:1,12 sure 24:10 25:22 30:4 35:8 36:4 43:1 44:4 sustain 17:11 18:24 Switzerland 29:14 29:17 36:22 synonymous 25:5 system 42:20</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 8:21 9:24 36:18 40:5 46:15 49:18 takeoff 15:25 takes 6:10 14:10 38:25 talked 41:15 talking 6:21 19:8 40:23 42:17 43:23 44:6 47:10 talks 32:2 teeth 58:14 tell 38:7 59:23 tend 53:6 term 3:4 22:24 43:3 53:1 terms 23:23 24:2 27:18 33:19 42:22 43:14 54:17 57:24 61:9 terrible 61:1 territorial 21:16,17</p>	<p>24:13 29:12 territory 21:3 22:3 29:2 territory-based 21:5 test 5:1,1,2 6:8,12 6:14 13:11,16,22 20:21,21,22 23:4 35:15 48:19 49:3 50:12,15,15,25 53:9 56:14,16 tests 20:20 Thank 23:13 33:24 42:15 59:14,19 62:8 theoretically 16:12 theory 40:10 they'd 30:5 thing 18:8 31:4,7,8 36:2 42:25 44:4 46:11 47:13,15 49:22 57:16,20 58:11 61:22 things 8:17 20:1 37:11 39:22 42:12 50:16,21 think 3:25 4:25 6:2 6:19 8:25 10:15 15:18,20 18:8,10 23:22 26:9,16,16 27:10,15 28:4,7,8 30:14,19,19 31:5 31:12 32:9 33:16 33:17,17 34:7,23 36:16 37:7,17,19 37:22 38:11,21 41:5,20 42:9,15 44:25 46:6,21 47:9 49:12 50:10 50:19 52:6,19 53:2 55:18 57:3 thinking 6:7 38:17 40:19 third 8:1 21:4,14 22:4 thought 16:8 39:3</p>	<p>41:14 46:1 three 8:5 59:15 three-step 7:8,22 ticket 4:5 6:24 7:5 10:1,2,2,3,11,13 10:15 11:6 12:4 14:3 18:13,19 20:6 26:20 28:5 30:16 33:21 35:22 36:16 38:9 43:9 45:8 46:12,16 47:1,5,11,16 48:2 48:3,12 49:14 54:22 56:21 57:1 57:8 59:13 61:12 ticket's 57:6 tickets 35:7,9,10,11 41:23 43:5 54:25 55:3 57:14 tie 37:24 44:6 time 23:11 37:16 56:3 times 34:8 today 34:8 59:21 told 30:4 55:2 62:2 tort 9:1,1 15:1 21:6 21:10 24:14 26:8 26:10,12 28:25 29:3,7,9 30:10,23 31:1,5,13,15 32:10 50:6 61:22 tortious 31:17 34:19 torts 21:9 24:15 26:2 27:23 29:2 29:10,10 40:11 59:22 totally 38:20 touch 42:2 train 6:25 7:5 38:10,14 41:23 42:20 47:1,2,3 54:3 61:11,17 trains 36:10 41:24 transportation 16:25 55:22,23</p>
--	---	--	--	--

<p>transporter 33:4 travel 34:16 45:8 treat 19:25 treated 5:20 25:3 49:18 treaties 16:10 treating 25:1 treaty 36:23 37:21 tried 61:17 tries 61:11 trouble 6:6 troubles 50:20 true 13:1 30:9 31:6 40:9 45:20,23 47:12 50:1 truly 39:22 trying 8:25 9:2 26:23 38:8 47:25 turn 50:9 turns 44:20 two 4:4 6:2 14:6 20:1,3 31:24 32:1 32:1 42:12 50:16 57:3 typical 15:1,6 31:3 31:7 44:13</p> <hr/> <p style="text-align: center;">U</p> <p>U.S 7:21 21:15 25:9 25:11 54:12 Uh-huh 14:13 UN 30:9 36:24 underlie 29:16 understand 6:21 15:15,23 22:14 44:8 45:24 47:21 51:2 54:10 understands 44:5 understood 16:1 50:18 60:23 unique 47:6,22 52:17 United 1:1,12,19 2:7 4:6 7:3,7 8:23 9:6,10 10:15,17 13:4,10,13,15,18</p>	<p>13:20 14:16,18,21 14:21,23 15:9,11 16:2,17,22,23 17:1,3 18:12,19 19:20 20:8 21:10 21:19 22:2,3,6,7 23:16 24:6,15,17 24:20 26:3,9,13 26:15 27:4 28:10 29:9,11 32:4,7,16 34:15,18 35:10,14 38:20,22,23 39:23 40:3,4,24 41:17 42:2 43:11,22 44:16 45:5,9 46:2 46:4,11 47:6 48:9 49:14 55:1 56:10 56:18,22,25 57:18 59:7,10,11 60:14 61:24 unsafe 8:15 unusual 31:8 use 24:24 25:6 38:24 uses 3:20 utmost 45:13 utterly 45:11</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:5 3:5 28:14 variety 32:21 various 37:9 38:19 versus 41:7 Vienna 14:7,11 35:6,8 46:2 47:1,1 47:2 view 4:15 violated 46:17 virtual 33:20 virtually 25:5</p> <hr/> <p style="text-align: center;">W</p> <p>waiver 36:20 Walden 28:14 want 13:6 20:17 21:3 22:18 24:7</p>	<p>27:5,11 32:12 37:2,22 44:4 57:24 58:18 warn 9:5,10,12,17 30:22,23 31:2 warrant 36:8,10 warranting 36:13 warranty 30:13,17 35:25 36:15 49:17 59:23 61:4,9 Washington 1:8,18 wasn't 46:7 way 6:3,17 11:22 19:20 20:1 24:1 25:3 26:21 39:14 42:8 44:9 45:25 49:20 50:18 57:7 58:6 ways 33:21 54:19 We'll 3:3 we're 6:21 17:14 31:9,10 35:22 36:15 43:22 50:3 50:4 53:11,13 56:4 we've 5:14,16,16 43:7 weight 37:20 48:1 53:4 Weltover 44:14 went 43:7 weren't 57:14 win 12:11,12 word 38:12 wording 5:7,13,14 5:15 words 3:20 5:1 24:25 31:9 47:4 50:1 58:21 work 7:2,20,20 51:4,10 works 55:8 world 29:25 38:18 worried 49:25 56:4 worth 47:17 would've 39:11</p>	<p>wouldn't 19:24 21:12 29:21 37:10 41:24 43:12 57:14 58:5 wrong 42:11 wrongful 10:19</p> <hr/> <p style="text-align: center;">X</p> <p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <p>yeah 17:24 49:15 51:17,17 York 14:7,7,11</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p style="text-align: center;">1</p> <p>10:02 3:2 10:04 1:13 11 34:9 11:02 62:10 12(b)(6) 36:6 46:23 50:7 13 26:22 13-1067 1:4 3:4 1330 43:23 15 8:14 1602 58:15 1603(c) 59:8,9 1604 22:18 1605 22:22 1606 58:18 19 60:6 190-some-odd 38:17</p> <hr/> <p style="text-align: center;">2</p> <p>2015 1:9 23 2:8 25 34:13 29 34:13</p> <hr/> <p style="text-align: center;">3</p> <p>3 2:4 8:14 9:7</p>	<p>30-odd 34:17 33 34:10 34 2:11</p> <hr/> <p style="text-align: center;">4</p> <p>4 26:23</p> <hr/> <p style="text-align: center;">5</p> <p>5 1:9 29:8,8 59 2:14</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p style="text-align: center;">8</p> <p>8 8:14 9:7</p> <hr/> <p style="text-align: center;">9</p>
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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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