SUPREME COURT OF THE UNITED STATES

No. 91–522

SAUDI ARABIA, KING FAISAL SPECIALIST HOSPITAL AND ROYSPEC, PETITIONERS *v.*
SCOTT NELSON ET UX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 23, 1993]

JUSTICE STEVENS, dissenting.

Under the Foreign Sovereign Immunities Act (FSIA), a foreign state is subject to the jurisdiction of American courts if two conditions are met: The action must be "based upon a commercial activity" and that activity must have a "substantial contact with the United States."[1] These two conditions should be

[1]Section 1605 of the FSIA provides:

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . . . . .

"(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U. S. C. §1605(a)(2).

The key terms of this provision are defined in §1603. Section 1603(e) defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States." Section 1603(d), in turn, defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." Thus, interpolating the definitions from §1603 into §1605(a)(2) produces this equivalence:

"A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a regular course of commercial conduct or a particular commercial transaction carried on by such state and

separately analyzed because they serve two different purposes. The former excludes commercial activity from the scope of the foreign sovereign's immunity from suit; the second identifies the contacts with the United States that support the assertion of jurisdiction over the defendant.[2]

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having substantial contact with the United States."

[2]See, *e.g.*, *Maritime International Nominees Establishment* v. *Republic of Guinea*, 224 U. S. App. D. C. 119, 130, n. 18, 693 F. 2d 1094, 1105, n. 18 (1982) ("the immunity determination involves considerations distinct from the issue of personal jurisdiction, and the FSIA's interlocking provisions are most profitably analyzed when these distinctions are kept in mind"). See also J. Dellapenna, Suing Foreign Governments and Their Corporations 66, 144 (1988) ("The nexus rules must be analyzed separately from the substantive immunity rules . . . in order to understand jurisdictional questions under the Act" and because "the laws regulating . . . jurisdiction . . . and immunity serve different purposes, and thus require different dispositions") (footnotes omitted).

In this case, as JUSTICE WHITE has demonstrated, petitioner's operation of the hospital and its employment practices and disciplinary procedures are "commercial activities" within the meaning of the statute, and respondent's claim that he was punished for acts performed in the course of his employment was unquestionably "based upon" those activities. Thus, the first statutory condition is satisfied; petitioner is not entitled to immunity from the claims asserted by respondent.

Unlike JUSTICE WHITE, however, I am also convinced that petitioner's commercial activities—whether defined as the regular course of conduct of operating a hospital or, more specifically, as the commercial transaction of engaging respondent "as an employee with specific responsibilities in that enterprise," Brief for Respondents 25–have sufficient contact with the United States to justify the exercise of federal jurisdiction. Petitioner Royspec maintains an office in Maryland and purchases hospital supplies and equipment in this country. For nearly two decades the Hospital's American agent has maintained an office in the United States and regularly engaged in the recruitment of personnel in this country. Respondent himself was recruited in the United States and entered into his employment contract with the hospital in the United States. Before traveling to Saudi Arabia to assume his position at the hospital, respondent attended an orientation program in Tennessee. The position for which respondent was recruited and ultimately hired was that of a monitoring systems manager, a troubleshooter, and, taking respondent's allegations as true, it was precisely respondent's performance of those responsibilities that led to the hospital's retaliatory actions against him.

Whether the first clause of §1605(a)(2) broadly author-izes "general" jurisdiction over foreign entities that engage in substantial commercial activity in this

country, or, more narrowly, authorizes only "specific" jurisdiction over particular commercial claims that have a substantial contact with the United States,[3] petitioners' contacts with the United States in this case are, in my view, plainly sufficient to subject petitioners to suit in this country on a claim arising out of its nonimmune commercial activity relating to respondent. If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be a touchstone of our inquiry; for as JUSTICE WHITE explains, *ante*, at 4, n. 2, 6, when a foreign nation sheds its uniquely sovereign status and seeks out the benefits of the private marketplace, it must, like any private party, bear the burdens and responsibilities imposed by that marketplace. I would therefore affirm the judgment of the Court of Appeals.[4]

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[3]Though this case does not require resolution of that question (because petitioners' contacts with the United States satisfy, in my view, the more narrow requirements of "specific" jurisdiction), I am inclined to agree with the view expressed by Judge Higginbotham in his separate opinion in *Vencedora Oceanica Navigacion, S. A.* v. *Compagnie Nationale Algerienne de Navigation*, 730 F. 2d 195, 204–205 (1984) (concurring in part and dissenting in part), that the first clause of §1605(a)(2), interpreted in light of the relevant legislative history and the second and third clauses of the provision, does authorize "general" jurisdiction over foreign entities that engage in substantial commercial activities in the United States.

[4]My affirmance would extend to respondents' failure to warn claims. I am therefore in agreement with JUSTICE KENNEDY's analysis of that aspect of the case.