SUPREME COURT OF THE UNITED STATES

Syllabus

SAUDI ARABIA ET AL. *v.* NELSON ET UX.

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

No. 91–522. Argued November 30, 1992—Decided March 23, 1993

The respondents Nelson, a married couple, filed this action for damages against petitioners, the Kingdom of Saudi Arabia, a Saudi hospital, and the hospital's purchasing agent in the United States. They alleged, among other things, that respondent husband suffered personal injuries as a result of the Saudi Government's unlawful detention and torture of him and petitioners' negligent failure to warn him of the possibility of severe retaliatory action if he attempted to report on-the-job hazards. The Nelsons asserted jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §1605(a)(2), which confers jurisdiction where an action is ``based upon a commercial activity carried on in the United States by the foreign state.'' The District Court dismissed for lack of subject-matter jurisdiction. The Court of Appeals reversed, concluding that respondent husband's recruitment and hiring were ``commercial activities'' upon which the Nelsons' action was ``based'' for purposes of §1605(a)(2).

Held: The Nelsons' action is not ``based upon a commercial activity'' within the meaning of the first clause of §1605(a)(2), and the Act therefore confers no jurisdiction over their suit. Pp. 6–14.

(a) This action is not ``based upon'' a commercial activity. Although the Act does not define ``based upon,'' the phrase is most naturally read to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case, and the statutory context confirms that the phrase requires something more than a mere connection with, or relation to, commercial activity. Even taking the Nelsons' allegations about respondent husband's recruitment and employment as true, those facts alone entitle the Nelsons to

nothing under their theory of the case. While these arguably commercial activities may have led to the commission of the torts that allegedly injured the Nelsons, it is only those torts upon which their action is "based" for purposes of the Act. Pp. 6–9.

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(b) Petitioners' tortious conduct fails to qualify as ``commercial activity'' within the meaning of the Act. This Court has ruled that the Act largely codifies the so-called ``restrictive'' theory of foreign sovereign immunity, *Republic of Argentina* v. *Weltover, Inc.,* 504 U. S. ___, ___, and that a state engages in commercial activity under that theory where it exercises only those powers that can also be exercised by private citizens, rather than those powers peculiar to sovereigns, *id.,* at ___. The intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) boils down to abuse of the power of the police. However monstrous such abuse undoubtedly may be, a foreign state's exercise of that power has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. The Nelsons' argument that respondent husband's mistreatment constituted retaliation for his reporting of safety violations, and was therefore commercial in character, does not alter the fact that the powers allegedly abused were those of police and penal officers. In any event, that argument goes to the purpose of petitioners' conduct, which the Act explicitly renders irrelevant to the determination of an activity's commercial character. Pp. 9–13.

(c) The Nelsons' attempt to claim failure to warn is merely a semantic ploy. A plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity. Cf. *United States* v. *Shearer,* 473 U. S. 52, 54–55 (opinion of Burger, C. J.). Pp. 13–14.

923 F. 2d 1528, reversed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined, and in which KENNEDY, J., joined except for the last paragraph of Part II. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part. KENNEDY, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN and STEVENS, JJ., joined as to Parts I–B and II. STEVENS, J., filed a dissenting opinion.