



1           IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -  
3   BUDHA ISMAIL JAM, ET AL.,                    )  
4                                    Petitioners,                    )  
5                                    v.                                    ) No. 17-1011  
6   INTERNATIONAL FINANCE CORPORATION,        )  
7                                    Respondent.                    )  
8   - - - - -

9  
10                                   Washington, D.C.  
11                                   Wednesday, October 31, 2018

12  
13                   The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 11:08 a.m.

16  
17   APPEARANCES:  
18   JEFFREY L. FISHER, ESQ., Stanford, California; on  
19            behalf of the Petitioners.  
20   JONATHAN ELLIS, Assistant to the Solicitor General,  
21            Department of Justice, Washington, D.C.; for the  
22            United States as amicus curiae, supporting the  
23            Petitioners.  
24   DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on  
25            behalf of the Respondent.

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

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 17-1011, Jam versus  
5 International Finance Corporation.

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF THE PETITIONERS

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

11 The IOIA gives international  
12 organizations "the same immunity from suit as  
13 is enjoyed by foreign governments."

14 The plain text of this provision,  
15 coupled with the structure of the IOIA and the  
16 drafting history, make clear that the same  
17 immunity provision gives international  
18 organizations the same immunity that foreign  
19 governments are entitled to today under the  
20 Foreign Sovereign Immunity Act.

21 Starting with the text, my opponents  
22 do not dispute that, as a general rule, when a  
23 statutory provision refers to another body of  
24 law, especially, as here, in the present tense,  
25 that body of law is incorporated as of the

1 moment of suit in any given case.

2 And, indeed, they don't dispute --

3 JUSTICE BREYER: So the -- the  
4 hornbooks that I looked up, I mean, going back  
5 forever, don't say quite that. They say that's  
6 true as long as the changes are consistent with  
7 the purpose of the adopting statute. And,  
8 indeed, the Indian case, you know, the word was  
9 "now," was it now 1934 or now later? In the  
10 case we wrote last term that Justice Gorsuch  
11 wrote, the word was "monetary relief." Does  
12 that mean as of the past, or does it mean what  
13 we call money relief now? I mean, there are  
14 many cases like that.

15 And here the word is "is." Does the  
16 word "is" refer to the past, is at the moment a  
17 passage, or later? The two arguments that I'd  
18 like you to address that are opposite you are,  
19 one, states do many things, nations, many, many  
20 things, and so, if we take immunity from them  
21 for commercial things, we leave lots of  
22 immunity with them for those other things.

23 But international organizations, some  
24 of them, do only one thing: lend money or the  
25 equivalent. And if we take immunity from them,

1 that's the end of the immunity or close.

2 That's one argument.

3 The second is this: If we decide  
4 against you, and we've made a mistake, or along  
5 comes a case where they really should have  
6 immunity, the President and the State  
7 Department can give it to them.

8 If we decide with you, well, if along  
9 comes a case where they should enjoy the  
10 immunity, no, nobody can do anything. Did I  
11 say that correctly? Have you got the  
12 argument --

13 MR. FISHER: Okay.

14 JUSTICE BREYER: -- or have I said it  
15 backwards?

16 MR. FISHER: No, no, no.

17 JUSTICE BREYER: Did I say it right?

18 MR. FISHER: So I think you gave me  
19 two things and then one before it, which was  
20 the statutory text.

21 JUSTICE BREYER: Yes. That's right.

22 MR. FISHER: So let me start with the  
23 statutory text, Justice Breyer. And the word  
24 "is" in this Court's jurisprudence always,  
25 always means at the time of suit, not at the

1 time the statute was passed. And we've cited  
2 reams of cases to that effect. My opponents  
3 cite only one case on the other side, that's an  
4 Armed Career Criminal Act case. Even there,  
5 "is" didn't mean at the time of suit; it meant  
6 at the time of the prior conviction. So "is"  
7 is on our side of this case.

8 But, in *Carcieri*, which is the "now"  
9 case, the Indian case, the Court went out of  
10 its way in that opinion to say the insertion of  
11 the word "now" takes us out of the ordinary  
12 situation, which is when the referenced law  
13 applies at the time of suit. And so you can  
14 look at the Sutherland treatise, which dates  
15 back to 1904, on this principle.

16 And look at its -- in -- in your own  
17 case, Justice Breyer, I think if I was going to  
18 give you one case, it would be the *Steamboat*  
19 versus *Chase* case we cite in our reply brief.  
20 That's interpreting the Judiciary Act, which  
21 goes all the way back to the founding, of  
22 course, and says where the common law is  
23 competent to give a remedy, such and such a  
24 remedy is permissible.

25 And in *Steamboat*, the Court rejected

1 the exact argument the other side makes here,  
2 which is, first of all, that the law had to be  
3 incorporated at the time of suit and, second of  
4 all, that there was something different about  
5 the common law as to a statute at the time of  
6 the enactment. So all of the textual stuff is  
7 in our favor.

8 Now you've also asked me two other  
9 questions and let me address them. So starting  
10 with the commercial activity exception as  
11 applied to a group like the IFC, when you  
12 answer -- when you think of that question, it's  
13 a question of how close you -- you put the lens  
14 into what's going on here.

15 So if you just take a foreign state as  
16 the -- as the comparator here, a foreign state  
17 itself does all kinds of things. Like you  
18 said, Justice Breyer, they are not commercial  
19 activity. But a foreign state might have a  
20 bank, for example, that does almost all  
21 commercial activity.

22 And so the same thing is true with  
23 international organizations, and let me answer  
24 that in a few different steps. So, first of  
25 all, look at the sweep of international



1 organizations. Many do things like regulation,  
2 for example, managing fisheries. They do  
3 things like dispute resolution, law  
4 enforcement, Interpol. They do scientific  
5 research and agricultural research. All of  
6 those things are non-commercial activities on  
7 the other side.

8 Then you have the category, the  
9 special category, of lending banks, but even  
10 within lending banks, not all the things that  
11 lending banks do are commercial activity. The  
12 IFC itself on its website talks about how it  
13 gives advice to foreign governments about  
14 legislation that ought to be passed regulating  
15 financial transactions with the private sector.  
16 That is not probably commercial activity.

17 And then, even within lending  
18 activities, Justice Breyer, just take the World  
19 Bank, it has five separate institutions. Now  
20 the IFC is on one side. What the IFC does is  
21 -- is loan money at market rates for profit for  
22 private sector projects. There are other  
23 components of the World Bank and there are  
24 other lending institutions that are  
25 international organizations that give grants

1 for public works programs or that do the kind  
2 of spending that governments do. And the  
3 government's argued in past cases, and we think  
4 they're probably right, that that is not  
5 commercial activity either.

6 So, when the other side says, well,  
7 everything is commercial activity, it's no  
8 different than the foreign state coming to this  
9 and saying, well, if the Bank of Switzerland  
10 does commercial activity, then we're -- we're  
11 stuck. Well, no, no, no, it's just how closely  
12 you look at the problem.

13 JUSTICE BREYER: What about -- the  
14 third was if we -- if we decide with you -- if  
15 we decide against you, see, that would mean  
16 there is sovereign immunity. But there  
17 shouldn't be in a particular case, the State  
18 Department can waive it and they have to be --  
19 response.

20 But if we decide for you, and then  
21 there's a case where there really shouldn't be  
22 sovereign immunity or, rather -- rather, there  
23 really should be, I guess -- see, that's what  
24 I'm getting mixed up. You see, if we decide  
25 against you and they really should have

1 sovereign immunity in this case, nobody can do  
2 anything. So, knowing nothing about the  
3 future, it seems a little safer, the first,  
4 than the second.

5 MR. FISHER: Well, I'm going to turn  
6 back in a moment to the law and why that just  
7 can't fit within the law, but as to just the  
8 policy question you're asking me, even there --

9 JUSTICE BREYER: Well, you can look --  
10 the reason I ask policy questions is because  
11 the hornbook said, yes, apply it as of now as  
12 long as it's consistent with the purpose of the  
13 statute. And the purpose of the statute, going  
14 back to 1945 and the U.N. and everything, was  
15 to get these organizations to locate here.

16 So it's not just policy for policy.  
17 It's policy for purpose. And purpose is tied  
18 into how you interpret the language.

19 MR. FISHER: So let me give you the  
20 practical answer and then the purpose answer.

21 On the practical answer,  
22 organizations, especially if they want a  
23 headquarter here or are headquartered here, are  
24 fully able to -- to lobby Congress or the  
25 executive branch for special immunity. And

1     there are many examples across international  
2     organizations.

3             Take the Organization of American  
4     States, OAS. And the Solicitor General  
5     discusses this in -- the organization in its  
6     brief. In 1994, it negotiated a special  
7     immunity provision for itself to get more than  
8     the ordinary restrictive form of immunity that  
9     was available under the IOIA.

10            So there are -- there are pathways  
11     available, and they have been used even more  
12     so.

13            Remember, the United States, as you  
14     say, has a -- has a sometimes principal  
15     interest in these organizations. So it is  
16     quite responsive to them when they come and  
17     say: We need more than the IOIA gives us.

18            But, Justice Breyer, let me turn back  
19     to the -- the original purpose, which was the  
20     legislative history is quite clear on what the  
21     purpose was. As you say, this was partly to  
22     create a form of immunity to give some comfort  
23     to these organizations. But the question is,  
24     what form of immunity did they ask for and what  
25     did they get?

1           What they did is they came to Congress  
2           and said treat us like foreign governments.  
3           Give us immunity, as Congress put it in a  
4           Senate report, of a governmental nature. And  
5           so what did Congress do? It gave them exactly  
6           what they asked for. It said we're going to  
7           treat you as a default measure like a foreign  
8           government.

9           And, remember, the words of the  
10          statute are "same immunity." "Same immunity"  
11          as is enjoyed by federal governments. So we're  
12          going to give you the same immunity, subject to  
13          the President's ability to just -- adjust it  
14          and subject to your own ability and your own  
15          treaty to negotiate for more, and subject,  
16          thirdly, to Congress's ability to give you some  
17          immunity that you don't have even by way of  
18          your own treaty.

19          JUSTICE SOTOMAYOR: Can we go to that  
20          issue raised in part? The special immunity, I  
21          know, was even negotiated by the U.N., I think,  
22          in the 1990s, and OAS and others, but assume  
23          that we're in your regiment, and Justice Breyer  
24          made the assumption that if a lawsuit came to  
25          us now under your theory, and it was limited

1 immunity, that the President or Congress could  
2 give immunity to the other side.

3 I don't think so.

4 JUSTICE BREYER: No, it's the  
5 opposite.

6 JUSTICE SOTOMAYOR: The opposite. The  
7 President can't decrease it, correct? So that  
8 problem still remains with your --

9 MR. FISHER: Well --

10 JUSTICE SOTOMAYOR: Yeah.

11 MR. FISHER: -- I think it -- it may  
12 or may not remain, Justice Sotomayor.

13 JUSTICE SOTOMAYOR: That's my --

14 MR. FISHER: Certainly, we could -- we  
15 would say we can go forward on this suit  
16 because -- because there is no such law.

17 If that law were passed, you'd have  
18 two questions. One is, did Congress make it  
19 retroactive? And you look to Altmann to think  
20 about how to judge the retroactivity of  
21 immunity provisions. And then, if it were  
22 retroactive, whether that were permissible.

23 But, you know, we're a long way from  
24 -- from that sort of a situation. I think the  
25 important thing going forward -- and this is, I

1 think, what the concern is on the other side,  
2 is not so much about this case but about  
3 incentives and policies going forward -- they  
4 have every opportunity to negotiate in one form  
5 or another or to procure a heightened form of  
6 immunity.

7           And, Justice Sotomayor, let me say one  
8 more thing to you and Justice Breyer about, you  
9 know, the idea of the executive branch getting  
10 involved. This is one of the problems, I  
11 submit, with the other side's argument.

12           Remember, part of the goal of the FSIA  
13 in the first section of the Act in Section 1602  
14 is to get -- is to get the executive branch out  
15 of the immunity business.

16           Congress made the determination that  
17 it was a bad idea to have every case turning on  
18 individualized suggestions of immunity and  
19 executive branch political policy. And so the  
20 other side, by importing the common law of  
21 1945, would reintroduce that problem into  
22 international organization immunity in a way  
23 that we don't think would be very good  
24 politically or very workable in the courts.

25           And I'd hasten to add that even under

1 the rule of 1945, if the question were what  
2 does the executive branch think about any given  
3 lawsuit or any given immunity for any given  
4 type of suit, that would just lead you right  
5 back to the FSIA, and it would lead you back to  
6 the same conclusion that we submit to you here.

7 So either pathway, whether, Justice  
8 Breyer, you start with the way you've always  
9 looked at cases, with the word "is" and the  
10 word "same" and the reference canon that I've  
11 described and say all of those things lead you  
12 to a time of suit rule, or if you start with  
13 the law of 1945 and say, what was the law in  
14 1945?

15 Well, Hoffman and -- in Ex Parte Peru  
16 were clear that the law of 1945 was the  
17 executive branch decides, and it's not for the  
18 Court -- this is -- I'm going to give you the  
19 Court's own language -- it's not for the Court  
20 to give immunity where the executive branch has  
21 not seen fit to give it.

22 And if that were the test, you'd come  
23 right back to where you -- where I started  
24 here, which is that the FSIA would control or,  
25 at the bare minimum, the executive branch



1 position in this lawsuit on the type of  
2 immunity that ought to apply in this situation  
3 would control. So --

4 JUSTICE GORSUCH: Mr. Fisher, if I can  
5 pick up on Justice Breyer's question. The  
6 reference canon, I take all -- all of your  
7 points, but sometimes, let's say we have a  
8 statute that -- that refers to another statute.

9 Usually, we would look at the second  
10 statute that's being incorporated as of the  
11 time of -- of the adoption of the first  
12 statute. Right? So if -- if this statute were  
13 to say go look at Section 5 --

14 MR. FISHER: Right.

15 JUSTICE GORSUCH: -- we wouldn't look  
16 at it the way it's been subsequently amended.  
17 We'd look at it as it was originally enacted in  
18 1945.

19 Why isn't that -- that idea pertinent  
20 here, you know, when we refer to a specific  
21 law, we don't take it to evolve over time?

22 MR. FISHER: So for two reasons,  
23 Justice Gorsuch, and one of them, if you'll  
24 forgive me, is going to be something you said  
25 in the Alan Contoe opinion.

1 JUSTICE GORSUCH: I was afraid of  
2 that.

3 (Laughter.)

4 MR. FISHER: But for two reasons. One  
5 is Congress has a choice to make when it writes  
6 legislation. It can lock in a given rule by  
7 setting a specific statutory provision and says  
8 that's the rule we want, just like if Congress  
9 uses a particular word, at the time of the  
10 enactment, the meaning of that word at the time  
11 of enactment would be what Congress -- we'd  
12 assume Congress wanted.

13 Or Congress could do something  
14 different, which is to say, look, we're not  
15 sure exactly of the metes and bounds of the --  
16 of the law. We're just going to tie it to this  
17 other area of law as a general matter. And  
18 that's what Congress did here. It did the  
19 latter.

20 So it took an area of law as a point  
21 of reference and said: Just use that as the  
22 default rule and then adjust as necessary. And  
23 those are just two different pathways Congress  
24 can go down.

25 And they date, as I said, all the way

1 back to the First Judiciary Act there, in the  
2 Sutherland treatise, all the way back to 1904,  
3 and so there's just two different pathways  
4 Congress can go down.

5           And it makes perfect sense, I think,  
6 in a situation like this, especially where you  
7 have a common law doctrine being referenced, at  
8 least a common law at the time, and one that  
9 was, indeed, not just any old common law  
10 doctrine but one that was in a great deal of  
11 flux at the time. So it made every reason --  
12 it made every good reason for Congress to have  
13 a general reference, not a specific one.

14           And then the second reason, Justice  
15 Gorsuch, is the one you mentioned sitting on  
16 the Tenth Circuit, which is that, as time goes  
17 by, it becomes all the more stilted or  
18 antiquated or even foolish sometimes to try to  
19 answer questions in the modern day according to  
20 what some bygone era doctrine would have  
21 required, and especially a bygone era doctrine  
22 like this.

23           If I understand the other side's  
24 position correctly, basically, the question  
25 they're having -- they would want every federal

1 court to ask in these cases is, what would the  
2 Truman Administration's State Department have  
3 wanted to do in this case?

4 And when you have things like this,  
5 which didn't even -- an organization that  
6 didn't even exist at the time, sometimes doing  
7 activities that weren't even contemplated at  
8 the time, things like sovereign wealth funds,  
9 which foreign sovereigns now engage in, for  
10 example, who knows what the State Department  
11 would have thought then.

12 I think there's every reason then to  
13 fall back on the reference canon. And if I can  
14 say one more thing before reserving my time, if  
15 you have any doubt about just the plain text  
16 argument I've given you, I would urge you to  
17 compare the text in Section 288a to the text --  
18 Section 288d, which has the exact dichotomy  
19 that -- that I've been discussing today.

20 One subsection, subsection (a), says  
21 that the same immunity rules apply, and  
22 subsection (b) says that foreign officials --  
23 I'm sorry, international organization officials  
24 are entitled to absolute immunity.

25 So this is yet another reason why if

1 the other side were correct and if Congress had  
2 wanted to lay down the rule they did, why would  
3 they not have just used the absolute immunity  
4 language in subsection (b) of subsection (d)  
5 and that, indeed, was the original draft of  
6 this act that was discarded.

7 So I could go on, but I'd rather save  
8 the rest of my time for rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Mr. Ellis.

12 ORAL ARGUMENT OF JONATHAN ELLIS FOR  
13 THE UNITED STATES, AS AMICUS  
14 CURIAE, SUPPORTING THE PETITIONERS

15 MR. ELLIS: Mr. Chief Justice, and may  
16 it please the Court:

17 If I could, I'd just like to pick up  
18 right where my -- my friend left off. There's  
19 been a lot of discussion so far this morning on  
20 the text of Section 288a. We agree that the  
21 Petitioners have the far better reading of that  
22 phrase in isolation, but I think it really  
23 settles the deal when you look at the entire  
24 structure of the Act.

25 The -- the IOIA doesn't just grant

1 immunity in Section 288a(b), but it provides a  
2 whole host of immunities and it does it in two  
3 different ways. In several different  
4 provisions, the Act sets a fixed rule of  
5 immunity. So archives are inviolable and  
6 officers and employees of the organizations are  
7 immune from suit with respect to their official  
8 acts.

9 And then there are a -- a host, a  
10 collection of three provisions that set the  
11 immunity by reference to foreign governments.  
12 There's Section 288a(d), Section 288d(a), and  
13 there's Section 288a(b), the one at issue here.

14 Respondents concede that the  
15 referential language in those other two  
16 provisions do refer to the state of the law as  
17 it is today.

18 It's only the one that's at issue in  
19 this case that they say was frozen. We don't  
20 see how that can be, and that's particularly  
21 true when you look at the drafting history that  
22 my friend referred to.

23 JUSTICE KAGAN: Mr. Ellis, before you  
24 get to that, another part of the structure is  
25 this provision that deals with presidential

1 authority, and that's essentially a roll-back  
2 authority of immunity.

3           Doesn't that make a lot more sense,  
4 that provision, if you assume that Congress  
5 meant for there to be absolute immunity? In  
6 other words, the presidential authority is a  
7 one-way ratchet. The President can only under  
8 this provision roll it back. It can't increase  
9 it.

10           So, to me, if I -- if -- if -- if --  
11 if the immunity -- if the immunity is less than  
12 absolute, you would think that they would have  
13 given the presidential authority both ways.

14           MR. ELLIS: Sure. The reason that  
15 argument doesn't work is because Section 288,  
16 the President's authority under that provision,  
17 doesn't just apply to Section 288a(b). It  
18 applies to all of the immunities provided by  
19 the IOIA.

20           And as I was just describing, some of  
21 those are fixed immunity rules that are not  
22 absolute. And so, for instance, the officers  
23 and employees of international organizations do  
24 not receive diplomatic immunity. That was a  
25 big deal at the time.

1           And -- and yet the President can't --  
2           couldn't grant that up. I think what that  
3           provision shows is that Congress wanted to  
4           provide international organizations at most the  
5           immunity from suit and other privileges of  
6           immunities that foreign governments received  
7           and not more so.

8           And yet Respondents are here today  
9           asking you for exactly that, more immunity --

10           JUSTICE BREYER: But on that --

11           MR. ELLIS: -- than foreign  
12           governments receive.

13           JUSTICE BREYER: But look, whatever  
14           other things it refers to, the provision allows  
15           the President to waive immunity, not to grant  
16           immunity. And your argument is they have  
17           immunity. Right?

18           Do I have -- I get this backwards.  
19           This is the third time I've got it backwards.

20           (Laughter.)

21           JUSTICE BREYER: Sorry. The provision  
22           allows the person to be sued. Is that right?

23           MR. ELLIS: It does allow them to be  
24           sued.

25           JUSTICE BREYER: Okay. So I was



1 right. I had it backwards the first time but  
2 not the second, not the third.

3 (Laughter.)

4 JUSTICE BREYER: All right. It allows  
5 the President to waive the immunity.

6 MR. ELLIS: That's right.

7 JUSTICE BREYER: Okay. It doesn't  
8 allow him to grant the immunity.

9 MR. ELLIS: It does in a sense. I  
10 mean --

11 JUSTICE BREYER: But the power to  
12 waive the immunity, at least in this section,  
13 amounts to nothing if they have no immunity  
14 because, for example, all they do is lend  
15 money.

16 MR. ELLIS: So -- so a couple --

17 JUSTICE BREYER: That's -- that's --  
18 and the other way, it seems to work itself out.

19 MR. ELLIS: Understood.

20 JUSTICE BREYER: Okay.

21 MR. ELLIS: A couple responses to  
22 that, Your Honor.

23 JUSTICE BREYER: That's the question,  
24 I think.

25 MR. ELLIS: Glad to be able to address

1 that. Number -- number one, just to be clear,  
2 we -- they do have a great deal of immunity. I  
3 mean, foreign -- international organizations  
4 and foreign states are presumptively immune.  
5 And I would agree with almost everything  
6 that -- maybe everything that -- that my friend  
7 said about why the commercial activity  
8 exception, even with regard to IFC and -- and  
9 most -- more importantly, with regard to the  
10 vast sweep of these organizations, is not going  
11 to eliminate immunity.

12 I would add one more, is that even a  
13 case like this, we have serious doubts, I  
14 think -- we think, in fact, from what we know,  
15 this suit isn't going to be able to go forward  
16 regardless of the answer to the question  
17 presented, because in addition to having -- to  
18 being connected in some way to commercial  
19 activity, there must be a much stronger nexus.  
20 It must be based on commercial activity that  
21 occurs in the United States.

22 We think the Court's decision in OBB  
23 makes clear that the way you apply that is to  
24 ask: What's the gravamen of this suit? It's  
25 not enough to have some attenuated connection,

1 but what's the gravamen?

2 And the gravamen of this suit as we  
3 understand it is -- is tortious conduct that  
4 occurred in India, injuries that occurred in  
5 India. And we don't think -- we have serious  
6 doubts that this is going to be able to go  
7 forward even under restrictive immunity.

8 And so we do not think that what we're  
9 doing is opening the floodgates here; rather,  
10 that the sort of concerns that would be barred  
11 -- cases that would be barred by Respondent's  
12 absolute rule of immunity and would be allowed  
13 by ours are -- are sort of quintessential  
14 domestic disputes, contract disputes with your  
15 contractor who renovated the building, the slip  
16 and fall at the -- at the organization's  
17 headquarters, or the driving accident on the  
18 streets of New York and D.C.

19 JUSTICE SOTOMAYOR: Do you have -- do  
20 you have any idea about how many of these kinds  
21 of organizations are headquartered in the  
22 United States?

23 MR. ELLIS: I think the numbers are in  
24 the 20 to 30 range. There's about -- somewhere  
25 80-some organizations that have been designated

1 for protection under IOIA and 20-some that have  
2 -- I think are headquartered in the United  
3 States.

4 JUSTICE SOTOMAYOR: That are  
5 commercial like this one?

6 MR. ELLIS: No, no, no. No, I did  
7 not -- no.

8 JUSTICE SOTOMAYOR: We're --  
9 everybody's assuming --

10 MR. ELLIS: Right.

11 JUSTICE SOTOMAYOR: -- a floodgate.

12 MR. ELLIS: Sure. No, there are --

13 JUSTICE SOTOMAYOR: Including Justice  
14 Breyer.

15 MR. ELLIS: -- there are a number of  
16 development banks, but even then, even -- even  
17 the development banks, even if you talk about  
18 the World Bank, it's not clear that those  
19 commercial activities are the sorts that the --  
20 the FSIA captures with the commercial activity  
21 exception. Lending there is to sovereign  
22 governments.

23 And -- and as the Court has been -- as  
24 lower courts have explained, that sort of  
25 commercial activity is not the sort that a

1 private party could engage in. So it's not the  
2 sort that the commercial activity exception  
3 picks up.

4 JUSTICE BREYER: Well, I -- I have the  
5 IFC, the IMF, the World Bank, the  
6 Inter-American Development Bank, the Asian  
7 Development Bank, the African Development Bank,  
8 the International Development Association. So  
9 I --

10 MR. ELLIS: Sure. I --

11 JUSTICE BREYER: -- I've got -- that's  
12 only half of them.

13 MR. ELLIS: That -- that's -- that --  
14 I'm not sure what percentage that is. I want  
15 to point out that some of those  
16 organizations --

17 JUSTICE BREYER: There are a lot.

18 MR. ELLIS: -- have their own immunity  
19 provision in the -- in their charter. And so  
20 that's what we think -- if you look at the  
21 history, that's what -- that's how it has been  
22 dealt with. For organizations that require  
23 absolute immunity, we've entered into  
24 agreements.

25 I would point again to the OAS

1 agreement, where the State Department is just  
2 crystal-clear that what OAS did in that  
3 agreement was to negotiate absolute immunity  
4 because they thought that's what they needed in  
5 order to put their headquarters here.

6 JUSTICE KAGAN: But Mister --

7 MR. ELLIS: We agreed to that and we  
8 said: But, hey, this is not our usual  
9 practice. Ordinarily, we -- we afford only  
10 restrictive immunity. We point to the FSIA.

11 JUSTICE KAGAN: Mr. Ellis, I -- I  
12 guess I'm not sure I -- I quite understood what  
13 you meant. As to the core lending activities  
14 of these multinational development banks, in  
15 other words, making loans where private actors  
16 would not make loans, do you have a view as to  
17 whether that counts as a commercial activity or  
18 not?

19 Did you say that that would not count  
20 as a commercial activity because they're making  
21 loans that the -- that the private market would  
22 not make?

23 MR. ELLIS: No. I'm -- I'm not saying  
24 that it's -- that it's enough that they're  
25 making loans that a -- that a private -- they

1       couldn't find a private party to provide. I'm  
2       saying if the nature of the loan is such that  
3       it's -- it's not the sort of transaction that a  
4       private party would enter into, so think about  
5       the IMF that grants -- that lends to sovereigns  
6       and they do so on the requirement that the  
7       sovereign enact certain restrictions --  
8       regulations and change their -- their -- their  
9       laws in order to assure that they don't need  
10      the money again.

11                 That is the sort of thing that's been  
12      held by lower courts, and we've advocated, is  
13      not a commercial activity. That's just not the  
14      sort of transaction that a private party can  
15      enter -- enter into. It's not just that a  
16      private party didn't. It's that -- that no one  
17      -- that's not something that you can do.  
18      That's a sovereign act.

19                 JUSTICE BREYER: But can you give  
20      me --

21                 MR. ELLIS: Or a quasi-sovereign act.

22                 JUSTICE BREYER: -- anything to assure  
23      me? Because when I looked through this list, I  
24      thought that there were development banks like  
25      the World Bank, which is a pretty big deal, as

1 well as in Asia, in Africa, we're trying to  
2 encourage development all over the world, and  
3 suddenly by removing the sovereign immunity  
4 because the plaintiff will claim this is a  
5 commercial activity.

6 MR. ELLIS: So -- so --

7 JUSTICE BREYER: And you're not  
8 denying it.

9 MR. ELLIS: And so --

10 JUSTICE BREYER: So what is the  
11 assurance that the government can give us that  
12 this isn't going to lead to a lot of lawsuits  
13 and this isn't going to interfere with perhaps  
14 activity that the United States traditionally  
15 has been very much in favor of?

16 MR. ELLIS: Absolutely. Let me -- let  
17 me give you a couple things. I think we've  
18 given you a number of -- of points already this  
19 morning as to why we don't think the floodgates  
20 are going to open.

21 If -- if there's one more, I'll say  
22 just look at the -- the charter of these  
23 organizations. Look at the IFC's charter.  
24 They already waive suit, waive immunity for  
25 suits going directly to their core activities.



1 They -- they, in fact, indicate that they --  
2 they need to waive suit in these suits.

3 And so I -- I think when you're  
4 talking about what are the suits that are going  
5 to come up under commercial activity, many of  
6 them are already going forward because the IFC  
7 and the World Bank and others have waived their  
8 immunity.

9 JUSTICE GINSBURG: And they need to  
10 because?

11 MR. ELLIS: They need to because no  
12 one's going to enter into a financial  
13 transaction with them if they -- they know they  
14 can't sue if it -- if it goes south.

15 The other thing -- I want to also  
16 focus the Court on the -- on the suits that we  
17 know are not going to go forward on the  
18 absolute immunity side. We're talking about  
19 suits by -- by U.S. citizens and residents  
20 about domestic conduct and they're seeking  
21 redress in U.S. courts.

22 These are the suits that foreign  
23 governments are -- are able to be sued on and  
24 don't have immunity. And we don't see any  
25 reason why international organizations should

1 not also be subject to suit in those  
2 circumstances, and we think that's exactly what  
3 the Congress was trying to do when it enacted  
4 Section 288 in 1945.

5 If there are no -- no further  
6 questions, we ask the Court to reverse.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Mr. Verrilli.

10 ORAL ARGUMENT OF DONALD B. VERRILLI  
11 ON BEHALF OF THE RESPONDENT

12 MR. VERRILLI: Thank you, Mr. Chief  
13 Justice, and may it please the Court:

14 The IOIA prescribes a standard of  
15 virtual absolute immunity that is fixed and not  
16 evolving. We know that because the text  
17 incorporated common law terms that had a  
18 settled meaning of virtually absolute immunity  
19 and because a fixed standard makes the most  
20 sense in light of the statutory context and  
21 purpose.

22 Now the reason that Congress enacted  
23 the IOIA was to fulfill treaty obligations that  
24 committed us to provide virtually absolute  
25 immunity. Those treaty obligations did not

1     commit us to treat international organizations  
2     the same as foreign states were treated.  They  
3     committed us to the substantive standard of  
4     virtually absolute immunity.

5             And, therefore, if -- if -- if the  
6     language in Section 288b is interpreted in the  
7     way my friends on the other side suggest --

8             JUSTICE SOTOMAYOR:  So why didn't  
9     Congress say that the way it did in the other  
10    provisions of this Act?  And if it intended  
11    that in no change, it could have said it and  
12    given the very exception it gave, which is that  
13    the President or the executive could reduce  
14    immunity, which was the standard at the time.

15            MR. VERRILLI:  So let me start with  
16    the basic question.  We think if the Court  
17    applies the normal rules of construction that  
18    it applies in statutory interpretation cases,  
19    that Congress did say that it was providing  
20    virtually absolute immunity.

21            And I think a case in particular that  
22    I would point the Court to is the Neder  
23    decision, 527 U.S., and in particular to page  
24    21 of the Neder decision.  That's a case --  
25    that case, of course, was about whether mail

1 fraud and wire fraud incorporated a materiality  
2 standard. This is an opinion by Chief Justice  
3 Rehnquist, unanimous for the Court on this  
4 point. The Court said first we look to the  
5 text, of course, and when looking to the text,  
6 if we -- if -- and in looking to the text,  
7 based solely on a natural reading of the full  
8 text, materiality wouldn't be an element of the  
9 fraud statute.

10           And then the Court says: But that  
11 does not end the inquiry because, in  
12 interpreting statutory language, there's a  
13 necessary second step. And this is -- I'm  
14 coming to the point that I think governs here,  
15 which is that it is a well-established rule of  
16 construction, a rule of construction, that  
17 where Congress uses terms that have accumulated  
18 settled meaning under the common law, a court  
19 must infer, must infer, unless the statute  
20 dictates otherwise, that Congress means to  
21 incorporate the established meaning of those  
22 terms. Now the --

23           JUSTICE GINSBURG: What about the  
24 argument that there wasn't an established  
25 meaning in -- what was it -- 1945, that it --

1 the -- the status of the immunity was in flux?  
2 It had been absolute, but then we were going  
3 over -- the State Department was advising the  
4 court whether immunity should be given in a  
5 particular case.

6 MR. VERRILLI: There's a bit of a  
7 suggestion to that effect in the brief of the  
8 United States, Your Honor, but I would  
9 respectfully suggest that is not a fair  
10 characterization of where things stood in 1945  
11 at all.

12 It is true that some people within the  
13 State Department in 1945 thought that immunity  
14 should move to a more restrictive standard, but  
15 the Justice Department would not even advance  
16 that standard in this Court, at the request of  
17 the State Department, and this Court did not  
18 describe the immunity as being in flux. This  
19 Court said the standard was virtually absolute  
20 immunity.

21 If one looks even in 1952 at the Tate  
22 Letter, the Tate Letter didn't say the law was  
23 in flux in the United States. It said the  
24 United States was hewing to the standard of  
25 virtually absolute immunity, but other

1 countries were moving towards a standard of  
2 restrictive immunity and, therefore, we ought  
3 to reconsider what we're doing.

4 So I just -- I mean, the Court can  
5 read these materials for -- for itself, but I  
6 just respectfully do not think it's a fair  
7 consideration of where things stood in 1945 at  
8 all.

9 And then, if I could, I'd like to pick  
10 up on a related point that came up in the brief  
11 of the United States. It's another statement  
12 in the brief of the United States, and it came  
13 up in argument today that, look, this really  
14 isn't a problem because for those organizations  
15 that need immunity that goes beyond the -- the  
16 restrictive immunity, we've always understood  
17 that they get -- they can go get a special  
18 statute and they've gone and gotten special  
19 statutes.

20 The United States says on page 27 of  
21 its brief, precisely because the IOIA didn't  
22 provide that level of immunity, they give these  
23 three examples: IMF, World Trade Organization,  
24 and Organization of American States.

25 I'd like to take a minute and go

1 through each of them because it doesn't hold up  
2 with respect to each of them. With respect to  
3 the IMF, for example, it is true the IMF, you  
4 know, it has a -- has a treaty. There was a  
5 statute that gave that treaty effect under U.S.  
6 law, which ended up providing for absolute  
7 immunity.

8 But it can't possibly be that that was  
9 undertaken based on any sense that the IOIA  
10 didn't provide that level of immunity because  
11 the IMF statute was enacted in July of 1945,  
12 and the IOIA wasn't enacted until five months  
13 later. So it can't possibly substantiate what  
14 the government was saying.

15 If one looks at the WTO treaty, it is  
16 true with respect to that treaty that it  
17 committed us to a very wide scope of  
18 immunities. It said that the United -- that  
19 the United States will commit to providing all  
20 or virtually all of the immunities provided  
21 under a whole different U.N. convention, the  
22 U.N. convention on specialized agencies.

23 Now that convention has all kinds of  
24 tax immunities and property immunities that go  
25 way beyond what the IOIA provides. So, of

1 course, they needed another statute in order to  
2 make those treaty commitments. That doesn't  
3 prove anything about whether anybody thought  
4 that the IOIA failed to provide virtually  
5 absolute immunity.

6 In fact, the historical evidence, I  
7 think, really, to the extent it points in any  
8 direction, it points very much more in our  
9 direction. And the best way to see that is  
10 with respect to the way the United Nations was  
11 treated under -- by the executive branch in  
12 this country.

13 Now we signed the U.N. charter in  
14 1945, committed us to provide what the charter  
15 describes as the necessary immunities. Then  
16 the U.N. Convention on Immunities was  
17 negotiated in 1946, which said that the U.N.  
18 should get virtually absolute immunity. Not  
19 the same immunity as foreign states, virtually  
20 absolute immunity.

21 Now the United States did not ratify  
22 that convention until 1970. So, on the theory  
23 that my friends on the other side have, from  
24 the moment of the Tate Letter in 1952 when  
25 foreign state immunity became restrictive and



1 not virtually absolute anymore, we were in  
2 violation of the commitment we made in the U.N.  
3 charter.

4 Now, if that was true, you would  
5 certainly expect the State Department, A, to  
6 address it in the Tate Letter, but there's  
7 nothing in there. It's a classic case of the  
8 dog that didn't bark. And, B, you would expect  
9 them to try to do something about it, like get  
10 the U.N. convention ratified immediately,  
11 because, otherwise, we were going to be out of  
12 -- out of compliance with our obligations to  
13 the granddaddy of all international  
14 organizations, the United Nations.

15 But there's not a -- from 1952 until  
16 the ratification of the convention in 1970, you  
17 can't find one word by anybody in the executive  
18 branch ever saying that. What you do find --

19 JUSTICE SOTOMAYOR: What commercial  
20 activities was the U.N. doing at that time?

21 MR. VERRILLI: Well --

22 JUSTICE SOTOMAYOR: I know today it's  
23 a very different organization, but it's not  
24 clear to me that there was much going on that  
25 was commercial at its initial stages.

1           MR. VERRILLI: I take that point, Your  
2 Honor, but what I would say in response is that  
3 there was a very great deal of sensitivity  
4 about the whole package of -- of immunities  
5 that were available to the U.N. and its  
6 diplomats and its -- and its workers.

7           And there was concern all along from  
8 1952 to 1970 that -- that -- where the  
9 executive was urging Congress to ratify the  
10 convention, but the only things ever mentioned  
11 were the diplomats -- immunities for diplomatic  
12 individuals.

13           And then, when you get to 1970 and you  
14 actually look at the Senate report accompanying  
15 the ratification, this was not in our brief,  
16 but it's at page 31 of the brief of the -- of  
17 the scholars who filed the brief in support of  
18 us. It quotes the Senate report from 1970, and  
19 what the Senate report says is we're not  
20 granting the U.N. any -- the U.N. as an  
21 organization any immunity it didn't already  
22 have under the IOIA.

23           So, as late as 1970, it was just quite  
24 clear that everybody understood the IOIA  
25 conferred virtually absolute immunity. And, of

1 course, that's because it was -- it was enacted  
2 to comply with our treaty obligations.

3 It wasn't enacted to make sure that,  
4 come what may, that international organizations  
5 would get treated the same as foreign states.  
6 That is -- you know, that's the best way to  
7 think about it, is it's just a completely  
8 anachronistic way of thinking about the body of  
9 materials in front of you.

10 JUSTICE KAGAN: But even what you just  
11 said, Mr. Verrilli, it wasn't enacted to make  
12 sure that foreign organizations would get  
13 treated the same as foreign states.

14 I mean, that's exactly what the  
15 language of the thing says.

16 MR. VERRILLI: Well, so I guess a  
17 couple of things about that. I think the right  
18 way to think about the language, Justice Kagan,  
19 is that it was a means to an end in 1945 when  
20 it was enacted.

21 It was not the end in itself to assure  
22 equivalence of treatment come what may. It was  
23 the means by which Congress ensured that it  
24 would fulfill its treaty commitments which were  
25 -- and those treaty commitments were to provide

1 virtually absolute immunity.

2           And we know, the Senate report says  
3 we're enacting this provision to fulfill our  
4 treaty commitments. And our treaty  
5 commitments, again, were not to treat them the  
6 same. They were to provide virtually absolute  
7 immunity. So --

8           JUSTICE KAGAN: Do you think it was --  
9 you answered Justice Ginsburg's questions about  
10 how far we were from the Tate Letter in 1945,  
11 but do you think it was inconceivable to  
12 Congress that the common law of immunity would  
13 change?

14           MR. VERRILLI: Well, I -- I -- I can't  
15 say that it would be inconceivable to anybody,  
16 but what I can say is if one looks at the  
17 debates surrounding the passage of the IOIA,  
18 is, once again, it's a dog that didn't bark.

19           You can't find a single person  
20 anywhere saying anything remotely like the  
21 proposition that we need to adopt a standard  
22 that will evolve over time because we have a  
23 concern that foreign sovereign immunity law  
24 will evolve over time.

25           That just was not any part of

1 anybody's thinking at that time. They were  
2 trying -- you have to remember this is coming  
3 out of the Bretten Woods system. We have  
4 Bretten Woods. We set up all these  
5 organizations.

6           They have a -- they have a desperate  
7 mission in front of them to try to rebuild the  
8 world -- the world after the carnage of World  
9 War II. There's a lot of pressure on Congress  
10 to get these organizations up and going and  
11 give them the immunity we promised them so they  
12 can go out and do their work. That's what led  
13 to the enactment of the IOIA.

14           It was none of these other things, as  
15 I said. I really think if you look at the  
16 historical materials, it's the -- the gloss  
17 that my friends on the other side are trying to  
18 put on it is completely anachronistic. They're  
19 taking a different concept that they've come up  
20 with now and trying to retrofit the historical  
21 facts to match it, and it just isn't right.

22           JUSTICE BREYER: Is that -- is that --  
23 the Russians at that time, '45 and so forth,  
24 were putting all these businesses into state  
25 entities. So my guess is there were -- there

1 were a number of cases, and what I thought I  
2 heard Mr. Fisher say is, if we really go back  
3 and look at this, we'll see that the status quo  
4 before this passed was not absolute immunity,  
5 but the status quo was a kind of mess, where  
6 sometimes the State Department would say give  
7 them immunity and sometimes the State  
8 Department would say not.

9 Now what -- what is the actual  
10 situation as far as you've been able to find  
11 it?

12 MR. VERRILLI: So I don't --  
13 respectfully, with respect to my friends on the  
14 other side, I don't think that's a fair  
15 characterization of the historical materials.

16 JUSTICE GINSBURG: That's the same --  
17 the answer you gave to me is the answer you  
18 would give to Justice Breyer?

19 MR. VERRILLI: Yes.

20 JUSTICE GINSBURG: Same question?

21 MR. VERRILLI: Yes. I mean, it's just  
22 not there. I mean, look at what this Court's  
23 cases said. This Court's cases didn't say  
24 anything like that.

25 The -- the -- the government's briefs

1 to this Court didn't say anything like that.  
2 When this Court has looked back on the law in  
3 Verlinden and in Samantar, it hadn't said  
4 anything like that. It said the standard was a  
5 common law standard of virtually absolute  
6 immunity.

7 And that's, in fact, how the Tate  
8 Letter describes it too. And then, as a  
9 process matter --

10 JUSTICE BREYER: Okay, I got it.

11 MR. VERRILLI: -- my friends on the  
12 other side have made this argument that, well,  
13 our position would also require you to go back  
14 to the process of the State Department making  
15 an ad hoc case-by-case determination, but  
16 that's wrong too.

17 And that's clear on the face of the  
18 statute that it's wrong. And the reason -- and  
19 -- and that's right in Section 288. This  
20 creates an entirely different mechanism.

21 What the -- what the IOIA says is that  
22 -- that the President shall have the authority  
23 under executive order, once Congress has  
24 enacted a statute, to grant an international  
25 organization the privileges and immunities.

1           And if you look at the face of the  
2 statute, it's obvious that they are granted on  
3 a categorical basis in gross by an executive  
4 order, not on a case-by-case basis by the State  
5 Department when law -- when a lawsuit is --  
6 when a -- when a lawsuit is filed.

7           And then, similarly, in terms of the  
8 President's authority as to an executive order  
9 to reduce or eliminate the -- the immunity of  
10 an international organization, that -- it's --  
11 again, it's completely different than the  
12 situation that -- than the common law process  
13 at work. So, obviously, Congress made a  
14 judgment that it was going to put a different  
15 structure and system in place.

16           And the fact that Congress did that, I  
17 do say -- I do think quite clearly presupposes  
18 that there's a -- the existence of a  
19 substantive standard being prescribed. And the  
20 substantive standard, as I said, is virtually  
21 absolute immunity.

22           And then, in terms of the structural  
23 indicators in the statutory text, going back to  
24 a question you asked, Justice Sotomayor, I  
25 really think the most telling one, to -- to



1 show you I think why my friends on the other  
2 side's case is completely anachronistic and  
3 we're correct -- is Section 288f, which you can  
4 find at page 6a of the appendix to the blue  
5 brief.

6 That provision says that the  
7 privileges, exemptions, and immunities of  
8 international organizations and then of -- of  
9 members and employees, et cetera, shall be  
10 granted notwithstanding the fact that similar  
11 privileges, exemptions, and immunities granted  
12 to a foreign government, et cetera, et cetera,  
13 may be conditioned upon the existence of  
14 reciprocity by that foreign government.

15 So right there in the text it  
16 decouples the treatment of international  
17 organizations from the treatment of foreign  
18 states. Even in a situation in which the  
19 United States would not grant the full range of  
20 virtually absolute immunity because it wasn't  
21 being -- receiving reciprocal treatment, this  
22 statute says the international organization  
23 gets it. So --

24 JUSTICE GINSBURG: How do you deal  
25 with the argument that we just heard, that we

1 can compare 288a on the one hand, which --  
2 which keeps the international organizations in  
3 tune with foreign sovereigns, and 288 -- was it  
4 b and d?

5 MR. VERRILLI: Yes. I do think that  
6 the -- the differences break down into two  
7 categories, Your Honor. There -- some of the  
8 provisions do prescribe fixed standards.  
9 That's true. But those fixed standards, as we  
10 explained in our brief or at least tried to,  
11 are always situations in which the IOIA is  
12 conferring a narrower set of immunities on --  
13 on diplomats and individuals than the common  
14 law would have at the time.

15 So incorporation of the standard in  
16 the way this 288a(b) did wouldn't accomplish  
17 the objective there because there was -- they  
18 were quite consciously trying to narrow the  
19 overall scope of immunities and not give the  
20 individuals who worked at these organizations  
21 the same full treatment that diplomats got who  
22 -- from foreign states.

23 Now the second subcategory are the  
24 provisions where the -- the statute says that  
25 their -- the treatment shall be the same. But

1 there's two things about that that are  
2 significant.

3           One is it says they shall be the same  
4 as under another statutory provision. And as  
5 we said, we think that's vitally important  
6 here. We think it's quite clear that, in  
7 addition to Justice Breyer's points about the  
8 reference canon, that the reference canon  
9 applies when one statute incorporates another.  
10 It doesn't apply when one statute incorporates  
11 the common law. And, here, they were  
12 incorporating statutes.

13           And if you look at those provisions  
14 anyway, they're basically just instructions to  
15 the executive branch, when do you fingerprint  
16 the people when they're coming in? What do you  
17 do about that -- this detail or that detail?

18           They don't go to the heart of the  
19 matter at all. And the heart of the matter  
20 here is the immunity being conferred on these  
21 international organizations.

22           I just want to make a point about that  
23 and then, if I could, talk about the  
24 consequences that will ensue, I think, if we go  
25 down the path that my friends on the other side

1 are suggesting.

2 I think this is a critical point. I  
3 just want to make sure it's clear. Another  
4 reason why you shouldn't draw this equivalence  
5 -- and it can't be that Congress really  
6 intended to draw the equivalence between  
7 foreign states and international organizations  
8 such that they would just move in tandem no  
9 matter what -- is that immunity is granted for  
10 different reasons.

11 The reason you give an international  
12 organization immunity is a functional reason,  
13 not a status reason. It's not about according  
14 the appropriate respect to the sovereigns,  
15 because international organizations aren't  
16 sovereigns. They're separate juridical  
17 persons.

18 And what's quite clear -- it's clear  
19 from the U -- the San Francisco report on the  
20 foundation of the U.N., it's clear from the  
21 Senate report in 1945, it's clear from all the  
22 commentators that we discussed in our brief,  
23 it's clear from the Restatement of Foreign  
24 Relations, which we've cited in our brief, that  
25 you grant immunity to international

1 organizations so that they can carry out their  
2 functions effectively. And -- and just take --  
3 let me take a minute and kind of elaborate on  
4 that because I think it's critical.

5 Remember, these are --

6 CHIEF JUSTICE ROBERTS: If you don't  
7 mind, I'm afraid I'm about five minutes behind  
8 you here, but going -- going back to your point  
9 on 288f, you said it's there they're decoupling  
10 the international organizations and the foreign  
11 sovereigns. But, as I go back and read it,  
12 it's simply because the -- the foreign  
13 sovereigns have the capability to use  
14 reciprocity, and the foreign -- and the  
15 multi-country organizations do not.

16 I don't -- I mean, that's the  
17 difference they're drawing there, not something  
18 between the scope of the actual immunities.

19 MR. VERRILLI: Well, I -- well, the  
20 way I read it, Mr. Chief Justice, is what --  
21 what they're doing there is saying even in a  
22 situation in which the United States concludes  
23 that it won't afford a foreign sovereign the  
24 full virtually absolute immunity because of  
25 reciprocity -- in other words, we're not

1 getting it back from them -- even in that  
2 situation, an international organization of --  
3 where those sovereigns are members will still  
4 receive the full level of immunity.

5           And so I think what that tells us is  
6 that what Congress was trying to do in this  
7 statute overall was prescribe a fixed  
8 substantive standard, not a floating standard  
9 where the two things move in tandem. So -- and  
10 I -- I do think it supports that.

11           And if I could just go back to the  
12 functional point, remember, these are  
13 collective bodies and members come together,  
14 they make -- they -- they take resources from  
15 each of their own countries. They put them  
16 into these organizations. They make collective  
17 decisions about how to deploy those resources.

18           And the point of the immunity here is  
19 so that the courts of any country, but  
20 especially the host country, which for the most  
21 important organizations are going to be here in  
22 the United States, can't override the  
23 collective judgments that they make about how  
24 their resources would be deployed and what  
25 conditions they ought to impose, et cetera, by

1 the intervention of domestic law in U.S. courts  
2 and can't redirect the funds that are put into  
3 these organizations to pay massive class action  
4 tort judgments because, of course, the member  
5 countries are contributing this money because  
6 they believe it's going to be put to the use  
7 that the -- for example, the development bank,  
8 the development bank decides it should be put  
9 to, not to pay massive tort judgments.

10           And I think one place you see this  
11 very clearly, if you look at the report of the  
12 San Francisco conference about the founding of  
13 the U.N., the State Department's --  
14 Department's response coming -- report coming  
15 out of that conference, specifically says this.  
16 It says, of course, the United Nations can't be  
17 subject to the jurisdiction of any one state or  
18 its courts.

19           And it's for exactly this reason. And  
20 the same thing is true generally. That's why  
21 you give it, not for functional reasons -- I  
22 mean, excuse me, not for reasons of status but  
23 for functional reasons.

24           And I think a key -- another key  
25 reason why you shouldn't be thinking about this

1 as a standard that evolves, evolves now and  
2 over time, is that those functional reasons  
3 don't evolve now and over time.

4 CHIEF JUSTICE ROBERTS: Well, what  
5 about the point that most of the concerns you  
6 have are going to be dealt with by the  
7 requirement of a nexus to activity in the  
8 United States as opposed to simply abroad,  
9 where the projects are funded?

10 MR. VERRILLI: Yes. I was gratified  
11 to hear the United States say that, but -- and  
12 -- but I could just -- I'll answer Your Honor's  
13 question directly, but I want to broaden it out  
14 a little bit because I think what essentially  
15 the United States is saying here is, look, the  
16 statute leaves one with no choice but to apply  
17 restrictive principles of immunity. You've got  
18 to jump off that cliff, but don't worry, it  
19 will be a soft landing because the FSIA will  
20 take care of a lot of these problems.

21 And I guess what I would say about  
22 that is, in the unlikely event you don't agree  
23 with me, I --

24 (Laughter.)

25 MR. VERRILLI: -- I hope they're



1 right. But there's no guarantee that they're  
2 right.

3 JUSTICE BREYER: Are the -- are the  
4 lending decisions, which may be fairly detailed  
5 and may include dozens of conditions, made  
6 within the United States?

7 MR. VERRILLI: Well, yes, I think  
8 that's a big part of the problem and --

9 JUSTICE BREYER: Is -- is there -- are  
10 there lawsuits that could say that there was  
11 negligence in determining, in a different  
12 country, who the persons were or the conditions  
13 under which the money would be spent? Is that  
14 an American lawsuit, saying what you've done  
15 here is commit the act of negligence or failure  
16 to be a fiduciary here?

17 MR. VERRILLI: That's this lawsuit.  
18 That's this lawsuit, Justice Breyer. That's  
19 exactly what they're alleging.

20 CHIEF JUSTICE ROBERTS: Well, but, I  
21 mean, is that consistent with our opinion in  
22 the OBB case, which I think -- if the complaint  
23 is based, the gravamen of the complaint, not  
24 specific steps along the way, and that was the  
25 issue we dealt with in that case.

1           And I appreciate the fact that it's,  
2           you know, to some extent dependent on the facts  
3           and particular allegations, but it would seem  
4           to me to require a lot more than simply the  
5           specific decisions. I think where -- where's  
6           the gravamen, or gravamen, however you say it,  
7           with what's going on here?

8           MR. VERRILLI: Well, we would  
9           certainly say it's India, of course.

10          CHIEF JUSTICE ROBERTS: Yeah.

11          MR. VERRILLI: And if -- if we have to  
12          defend ourselves on that basis, we will. But I  
13          -- but I -- I think it -- it understates the  
14          real concrete risk here. And what I'd like to  
15          do to illustrate that, if I could, is first  
16          talk about the organizations that are going to  
17          be exposed in a way that they wouldn't be under  
18          the law.

19          And as Justice Breyer indicated  
20          earlier, it's important to remember this has  
21          been the law in the D.C. Circuit for decades,  
22          and there's -- and people have ordered their  
23          affairs based on the assumption that there was  
24          virtually absolute immunity.

25          But with respect -- but with respect

1 to the consequences and the groups affected and  
2 then the types of effects. With respect to the  
3 groups affected, you've got entities like us,  
4 the multilateral development banks, and Justice  
5 Breyer's identified many of them.

6 Now the -- the main ones are here,  
7 here in Washington, D.C., and they're making  
8 their decisions here and, I think critically  
9 too, there are billions of dollars of assets  
10 here.

11 Now we're going to make the OBB  
12 argument for sure, and I hope we win if we have  
13 to make the argument. I -- I hope we win. But  
14 who knows how courts are going to come out on  
15 that issue?

16 We're going to have a lot of fighting  
17 about that. There are probably going to be  
18 matters of degree. There's certainly going to  
19 be significant disincentives arising out of  
20 that uncertainty.

21 There's a whole another group of  
22 entities that, unlike the banks, at least have  
23 articles of agreement where we can try and fall  
24 back on those for alternative arguments of  
25 immunity, where their immunity depends entirely

1 on the statutory grant: the International  
2 Committee of the Red Cross, the World Health  
3 Organization, the fund to fight -- the global  
4 fund to fight AIDS and tuberculosis and  
5 malaria. They are all entirely dependent on  
6 the IOIA for their immunities, and those  
7 immunities are drastically different after  
8 this.

9 And then we do have the issue, I  
10 think, with some organizations that we may even  
11 actually now be out of our -- out of compliance  
12 with our treaty commitments.

13 Now what's going to happen? Here's  
14 what I think is going to happen, and I think  
15 this lawsuit helps you see it.

16 Now the way -- the basis of this  
17 lawsuit is the following: IFC, when it loans  
18 money here, it's loaning money in -- in parts  
19 of the world where private capital won't go  
20 unless we go in there. And very often they  
21 have un-developed legal systems and they  
22 certainly don't have robust environmental  
23 protections or labor protections.

24 So what the IFC has done is lien into  
25 those, has put those kinds of environmental

1 standards and labor standards into its  
2 agreements, saying you want this money to do  
3 this development project, these are the  
4 standards that you've got to live up to.

5 And -- and this lawsuit is that --  
6 that the entity that we loan this money to  
7 didn't live up to the standards and it's our  
8 fault, and so we're being sued here.

9 Well, it's going to create -- if that  
10 kind of a suit can go forward, and hopefully it  
11 won't be able to, Mr. Chief Justice, but if it  
12 can, it's certainly going to create an  
13 extraordinary disincentive for organizations  
14 like ours to lien into those kinds of standards  
15 because we're going to be hoisted by our own  
16 petard.

17 Now we've also got a robust internal  
18 accountability mechanism where, if people think  
19 something's gone wrong on one of our projects,  
20 they can come to us and they can say -- they  
21 can say, look, there's a problem here. And  
22 they -- and we investigate. We take internal  
23 remedial measures if we find there's a problem.

24 Well, you know, the factual basis for  
25 the lawsuit is the report of our internal

1 accountability process.

2           So, if they can just grab that and  
3 take it into court and make it the basis for a  
4 class action tort lawsuit in which they can  
5 make a claim for all this money, it's going to  
6 create a powerful disincentive for us not to  
7 engage in that kind of self-policing activity.

8           And I would submit that, you know,  
9 even if things ultimately work themselves out  
10 under the FSIA, and I hope they -- I hope we  
11 don't have to deal with that, but even if we  
12 do, it's going to take a very long time. There  
13 are going to be a lot of difficult cases at the  
14 margin. There are going to be very serious  
15 disincentives immediately.

16           And, conversely, you know, we're a big  
17 fat target here. These organizations have lots  
18 of money. And, of course, foreign plaintiffs  
19 want to sue here. They can bring a class  
20 action. They get liberal discovery. They can  
21 get punitive damages. They get all of these  
22 advantages by suing here.

23           So, instead of suing the person who  
24 actually injured them, the power plant in  
25 India, they come here and sue us.

1           And I really think what you're going  
2     to see here is that this is just going to  
3     become another version of the sorts of  
4     foreign-cubed lawsuits that the Court has been  
5     concerned about under the Alien Tort Statute  
6     where the international organization is just  
7     going to be subbed in for the foreign defendant  
8     and it's going to be subbed in in a situation  
9     where we're going to have a very significant  
10    pile of money.

11           And if I could just close with this  
12    thought -- I'm just going to pick up on Justice  
13    Breyer's thought -- the law in the District of  
14    Columbia, where virtually all these  
15    organizations have been housed, are  
16    headquartered, has been virtually absent  
17    immunity under D.C. Circuit law for decades.  
18    That's the standard everybody's been operating  
19    under.

20           Nobody's suggested that anything has  
21    gone wrong under this statute, that there are  
22    any deleterious policy consequences, that the  
23    interests of the United States are adversely  
24    affected in any way. In fact, if you look at  
25    the amicus brief from the former Secretaries of

1 Treasury and State, they think that the policy  
2 of the government arguing now is going to  
3 disrupt the United States' ability to function  
4 effectively with these organizations.

5 It's all been fine and -- but they're  
6 asking you essentially, to repeat a metaphor,  
7 to jump off a cliff. And hopefully it'll be a  
8 soft landing. But we don't know that. And it  
9 could easily result in a lot of disruption to  
10 the good work that these organizations do.

11 And I guess what I would suggest is  
12 that, if that's going to happen, it ought to  
13 happen through legislation. Congress can look  
14 at this. Congress can change the law if it  
15 wants to. But this has been the law for a very  
16 long time. There's no evidence that it has  
17 done anything other than work well.

18 And, therefore, I think the Court  
19 should affirm the D.C. Circuit. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Four minutes, Mr. Fisher.

23 REBUTTAL ARGUMENT OF JEFFREY L. FISHER  
24 ON BEHALF OF THE PETITIONERS

25 MR. FISHER: Thank you. I'd like to



1 make four points and I'd like to start with the  
2 text of the statute itself and simply say when  
3 Mr. Verrilli talks about the Neder Doctrine and  
4 the Common Law Doctrine, that you look at the  
5 term -- a term's meaning at the time of  
6 enactment, he's mixing apples and oranges.

7           And I think all the citations in our  
8 reply brief should make it absolutely clear  
9 that there's a doctrine on the one hand that  
10 talks about incorporating a body of law, and  
11 there's a doctrine on the other hand about  
12 giving meaning to a specific term. We're in  
13 the former camp here.

14           And as to the point about whether the  
15 common law was evolving at the time, two  
16 things. We'll stand on the papers as to the  
17 fact that it was somewhat in flux.

18           But the more important point is, even  
19 if it weren't in flux, it wouldn't matter one  
20 wit, because the other side is making a  
21 sweeping proposition, which is any general  
22 reference to common law is fixed in time.

23           That would disrupt any number of  
24 federal statutory regimes, from the Federal  
25 Tort Claims Act, enacted the year after this

1 statute, the Equal Access to Justice Act, the  
2 federal government's piracy statute, Federal  
3 Rule of Evidence 501. I could go on and on  
4 with federal statutory regimes that reference  
5 the common law in exactly the same way the  
6 statute does here.

7 The Civil Rights Act of 1866, if you  
8 want one more. All of those would come out the  
9 other way from this Court's jurisprudence and  
10 from all the understanding if the other side is  
11 right about statutory interpretation.

12 So I think the only thing the other  
13 side has is they have a bunch of policy points  
14 to make for this Court.

15 Now we don't think they should  
16 control, but let me answer them. So first as  
17 to our treaty obligations. So one about at the  
18 moment of enactment. My friend kept saying  
19 that there were various agreements in place  
20 that required virtually absolute immunity.

21 None of the agreements use those  
22 words. Instead, what those agreements said is  
23 that certain organizations were entitled to  
24 immunity to allow them to perform their  
25 necessary functions. That's a very different

1 thing than absolute immunity.

2 And it's very different because none  
3 of the organizations involved were performing,  
4 Justice Sotomayor, commercial activities that  
5 were essential to their core functions, not the  
6 U.N., not any of the other organizations.

7 So we weren't in breach of any treaty  
8 rights. And if you have any doubt on that, I  
9 would urge you to look to the federal  
10 government's position then and now. It's not  
11 just a brief filed in this Court.

12 It is the position that four different  
13 Presidential Administrations have taken. The  
14 Carter Administration, right after the FSIA was  
15 passed, the George H. W. Bush Administration,  
16 the Clinton Administration, and now the Trump  
17 Administration, have all consistently held that  
18 the FSIA rules are incorporated into the FSIA.

19 Next, on the floodgates concern. I  
20 explained earlier and I hope you will think  
21 about the fact that, while the core activities  
22 of the IFC might be commercial activity, not  
23 all of the IFC's activities are, and certainly  
24 not all the activities of international  
25 organizations are.

1           But let me add one more thing. My --  
2 my friend talked about big lawsuits of ruinous  
3 liability. Well, there's two very easy ways to  
4 control that.

5           One is, to the extent any claims are  
6 on contracts, they can write their own  
7 contracts and negotiate their own contracts.  
8 As the Solicitor General points out, they can  
9 even deal with third-party beneficiaries in  
10 their contracts if they choose.

11           Secondly, as to tort claims, they can  
12 and, in fact, commonly do indemnify themselves  
13 against tort lawsuits. In this very case,  
14 their agreement indemnifies them against any  
15 judgment and all legal fees.

16           So these organizations have every  
17 manner of method to deal with any potential  
18 liability. And, in fact, they are, which sort  
19 of belies the suggestion that they think  
20 they're absolutely immune from lawsuit.

21           Finally, let me say one thing about  
22 the so-called foreign cubed problem or the  
23 facts of this case. Now, obviously, we think  
24 that we would satisfy the gravamen test. They  
25 have never made that argument. And if they

1 want to make it, we can -- we can have that  
2 conversation in the lower courts.

3 But bear in mind what you're being  
4 asked to do in this case is to announce a  
5 categorical rule for all cases dealing with  
6 international organizations.

7 So my friend in the Solicitor  
8 General's Office talked about just regular tort  
9 slip and fall cases and the like in the United  
10 States. Let me give you one other thing to  
11 think about.

12 Some international organizations  
13 actually do their work in the United States.  
14 The border cooperation -- the Border  
15 Environmental Cooperation Commission does  
16 wastewater treatment plants in Texas and  
17 California.

18 I can't think of any reason why they  
19 would be immune from those infrastructure  
20 projects in a way that no private business or  
21 public government would be.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel. The case is submitted.

24 (Whereupon, at 12:06 p.m., the case  
25 was submitted.)

## Official - Subject to Review

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