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IN THE SUPREME COURT OF THE UNITED STATES

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NESTLE USA, INC.,)

Petitioner,)

v.) No. 19-416

JOHN DOE I, ET AL.,)

Respondents.)

- - - - -

CARGILL, INC.,)

Petitioner,)

v.) No. 19-453

JOHN DOE I, ET AL.,)

Respondents.)

- - - - -

Washington, D.C.

Tuesday, December 1, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

1 APPEARANCES:

2 NEAL K. KATYAL, ESQUIRE, Washington, D.C.;

3 on behalf of the Petitioners.

4 CURTIS E. GANNON, Deputy Solicitor General,

5 Department of Justice, Washington, D.C.;

6 for the United States, as amicus curiae,

7 supporting the Petitioners.

8 PAUL L. HOFFMAN, ESQUIRE, Hermosa Beach, California;

9 on behalf of the Respondents.

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

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 19-416,
5 Nestle USA versus Doe, and the consolidated
6 case.

7 Mr. Katyal.

8 ORAL ARGUMENT OF NEAL K. KATYAL
9 ON BEHALF OF THE PETITIONERS

10 MR. KATYAL: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 The Alien Tort Statute has been around
13 since the earliest days of our nation, and yet
14 this Court has never accepted the type of claim
15 that the plaintiffs bring here. The claim
16 plaintiffs bring alleges something horrific,
17 that locators in Mali sold them as children to
18 an Ivorian farm where overseers forced them to
19 work.

20 The defendants are not the locators,
21 not the overseers, and not the farm. Instead,
22 they are two U.S. corporations, Nestle USA and
23 Cargill. The plaintiffs do not allege that
24 these two owned or operated any farm, and they
25 do not allege that the companies bought anything

1 from farms that used child labor. Instead, the
2 companies are an afterthought, a few of 101
3 paragraphs in their complaint. They claim the
4 companies made decisions in the U.S. and that
5 they had knowledge of child slavery.

6 This lawsuit fails for two independent
7 reasons. First, it's extraterritorial. You've
8 said, when a statute gives no clear indication
9 of an extraterritorial application, it has none.

10 Here, the plaintiffs haven't alleged
11 any domestic injury or even that they've been to
12 the U.S. History and this Court's cases make
13 clear that the ATS's focus is the injury or
14 principal wrongdoing from a tort. Here, that
15 occurred halfway across the globe.

16 And, second, the ATS is about natural
17 persons. *Jesner* recognized there is no specific
18 universal and obligatory international law norm
19 of corporate liability that fully applies to
20 domestic corporations. It's not enough, as the
21 *Jesner* plurality said, to show "liability might
22 be permissible under international law" in some
23 circumstances. Rather, it must be, to use
24 *Sosa*'s language, "accepted by the civilized
25 world and defined with a specificity comparable

1 to the features of the 18th century paradigm."

2 These are some of the most fraught
3 decisions government makes. To say Congress in
4 1789 made them is to read many difficult policy
5 choices into vague statutory text. This Court
6 has generally warned against doing that and
7 specifically with the ATS every single time.

8 CHIEF JUSTICE ROBERTS: Now, Mr.
9 Katyal, in this case, no foreign country has
10 objected to the United States hailing its own
11 citizens into its own courts. And why should we
12 be cautious in terms of international relations
13 in such a case? And what objection would
14 foreign countries have to ensuring that U.S.
15 corporations follow customary international law?

16 MR. KATYAL: So, Your Honor, first of
17 all, I don't think that that's the relevant test
18 because, in Nabisco, what you said was even if
19 international friction is "not necessarily the
20 result in every case," the potential for
21 friction militates against recognizing foreign
22 injury claims. And I think that's true
23 generally.

24 And then, with respect to here, I do
25 think that there's three different impacts on

1 foreign policy that would be recognized -- that
2 would -- that would occur if you were to
3 recognize corporate liability in this case.

4 One is, in *Jesner*, you talked about
5 the surrogacy problem with the injury nation.
6 The -- the plurality said that plaintiffs can
7 still use corporations as surrogate defendants
8 to challenge corporate governance and said
9 that's what was going on in *Kiobel*.

10 CHIEF JUSTICE ROBERTS: Well, we can
11 always --

12 MR. KATYAL: And that very case --

13 CHIEF JUSTICE ROBERTS: -- we can
14 always address that concern with addressing
15 aiding and abetting.

16 MR. KATYAL: I agree that that's one
17 way to do this, but I think this Court in *Jesner*
18 recognized that -- that doing it -- that if you
19 were to recognize corporate liability, you would
20 in some circumstances get this.

21 And, in addition, the *para nation*
22 concern, I think, would apply just as well,
23 because it would be an end run around *Jesner* to
24 permit foreign corporations like Nestle to be
25 sued because of their domestic subs, like in

1 this case, but not others.

2 And finally --

3 CHIEF JUSTICE ROBERTS: Thank you.

4 Thank you, counsel.

5 Justice Thomas.

6 JUSTICE THOMAS: Thank you, Mr. Chief

7 Justice.

8 Mr. Katyal, the tote -- on a slightly
9 different matter, do you agree with the D.C.
10 Circuit and the Fourth Circuit that there is a
11 universal norm on aiding and abetting liability?

12 MR. KATYAL: We do not, Your Honor.
13 We think that -- that if you were to reach that
14 question, that for the reasons the Solicitor
15 General said, there is no such norm.

16 In Hamdan at Footnote 40, you said --
17 you said something similar. The domestic
18 precedents, like Central Bank, I think, are
19 clear on this. But I think our most important
20 point, Justice Thomas, is that, here, aiding and
21 abetting would translate to aiding and
22 amorphousness in this particular case because
23 there's two axes here. One is
24 extraterritoriality, which is already blinking
25 red here because there is no U.S. injury or

1 principal wrong.

2 And now the plaintiffs want to add
3 this ambiguous concept of aiding and abetting,
4 and you'd be left with an extremely broad
5 statute with no congressional analog whatsoever
6 if you were to accept their interpretation.

7 JUSTICE THOMAS: The -- what about the
8 petition, the Respondents here say that even
9 though there may not be an international norm or
10 a universal norm on corporate liability, that
11 that's different in the case of slavery --
12 slavery? What's your response to that?

13 MR. KATYAL: Well -- well, first of
14 all, Your Honor, I think that the norm that
15 they're asserting is not child slavery but
16 aiding and abetting child slavery. And they
17 fail their own test. They have not a single
18 case that says there is such a norm of aiding
19 and abetting that.

20 And I think this Court has recognized
21 that the test is a more general one. It's not
22 specific norm-by-norm. But, as *Jesner* and as
23 the -- the language that you joined in *Jesner*
24 indicates, it's a much more general test of is
25 there a universal specific and obligatory norm.

1 And, here, there isn't. The only
2 evidence they can even point to about child
3 slavery in particular is one source, a 1930
4 Liberia report, that says, although government
5 officials used their authority to force labor,
6 there's no evidence that the only corporation in
7 the country did so.

8 That doesn't come close to meeting
9 their burden, that high bar that you and the
10 rest of the Court have talked about. You have
11 to proceed with great caution. It's really
12 their severe burden to produce evidence showing
13 some sort of norm here, and they haven't.

14 And so, Justice Thomas --

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice --
17 Justice Breyer.

18 JUSTICE BREYER: Let me go back to the
19 corporate liability. One of the three incidents
20 that led to the statute, I take it, was the
21 Marbois affair of 1784, and there was a French
22 adventurer who assaulted the Secretary of the
23 French Legion in Philadelphia and there was no
24 legal remedy for the assault.

25 Now that's so, isn't it? This statute

1 was designed, in part, to give a remedy. But
2 suppose instead of, I think Mr. Marbois, I'm not
3 certain which -- which of the parties he is, but
4 suppose instead of him going up and hitting the
5 French Secretary, he had been the president of a
6 corporation and they all sat around and said: I
7 have a great idea. Let's hit the French
8 Secretary. So they pass a resolution and went
9 out and hit the French Secretary.

10 Why should that make a difference?

11 MR. KATYAL: So, Justice Breyer, three
12 things.

13 First, I think your example points to
14 the ex -- the separate argument about
15 extraterritoriality, and I just want to make
16 clear that they are distinct. Marbois and the
17 other incident really underscore that those are
18 about injury in the United States, which you
19 don't have here.

20 JUSTICE BREYER: Well, that's true,
21 but I'm not asking about that.

22 MR. KATYAL: I understand.

23 JUSTICE BREYER: I'm abstracting from
24 that and just speaking of I don't see why exempt
25 all corporations, including domestic

1 corporations, from this -- the scope of the
2 statute.

3 MR. KATYAL: Right. But, Your Honor,
4 the difference is, in Marbois, under your
5 hypothetical, there very well would be a remedy
6 against the individual perpetrators, and that's
7 exactly what international law requires time and
8 again.

9 You don't go after the corporation,
10 but you absolutely have a remedy. We're not
11 here seeking any sort of corporate impunity.
12 We're just saying you have to go after the
13 individual unless the statute and Congress makes
14 a different choice.

15 And most notably, Justice Breyer, in
16 the TVPA, which is the most closely analogous
17 statute, it is an ATS cause of action. And I'm
18 just saying no corporate liability.

19 JUSTICE BREYER: No, but I'm asking
20 you really what's the reason why, if everything
21 had been done in Marbois by a corporation, why
22 would you want to make the corporation immune
23 from the statute?

24 MR. KATYAL: For -- for two reasons:
25 One, because there's already a separate remedy

1 of going after the individuals, and second,
2 because corporate liability, as Congress
3 recognized in the TVPA, has any number of other
4 difficulties, such as mens rea.

5 This Court in *Jesner* cited *Malesko* for
6 saying that if you go after corporations and
7 imbue them with liability, then people don't go
8 after individual wrongdoers and, as a matter of
9 deterrence, you might want to go after them --

10 JUSTICE BREYER: Oh, by the way, the
11 individual also --

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice -- Justice Alito.

15 JUSTICE ALITO: Mr. Katyal, many of
16 your arguments lead to results that are pretty
17 hard to take. So suppose a U.S. corporation
18 makes a big show of supporting every cause de
19 jure but then surreptitiously hires agents in
20 Africa to kidnap children and keep them in
21 bondage on a plantation so that the corporation
22 can buy cocoa or coffee or some other
23 agricultural product at bargain prices.

24 You would say that the victims who
25 couldn't possibly get any recovery in the courts

1 of the country where they had been held should
2 be thrown out of court in the United States,
3 where this corporation is headquartered and does
4 business?

5 MR. KATYAL: Justice Alito, I have
6 three buckets of answers to this, and this is
7 really the heart of the case in many ways, so
8 I'll try to briefly outline them and then hope
9 to detail them.

10 So the first is that that hypothetical
11 is, of course, very far removed from the facts
12 of this case, where they allege minimal U.S.
13 conduct, not some sort of operation run from the
14 United States.

15 Second, I don't think your
16 hypothetical states a violation of the Alien
17 Tort Statute because there is no domestic
18 injury.

19 But third and most importantly, your
20 hypothetical does violate other statutes. As
21 you said and the Court said in *Jesner*, the ATS
22 "will seldom be the only way to hold
23 perpetrators liable."

24 And in your hypothetical, there are
25 five different mechanisms that would prevent any

1 abuse. First is foreign law, the law of the
2 Ivory Coast. There are already criminal
3 sanctions there, and the State Department and
4 Department of Labor says those are being used.

5 And, indeed, when Congress makes
6 statutes extraterritorial, like the TVPA, they
7 require exhaustion of those foreign remedies
8 first before one can sue in the United States.

9 Second, there's sometimes specific
10 liability under specific statutes. Like the
11 Genocide Convention in your hypothetical, it
12 might violate the territorial --
13 Extraterritorial Criminal Force Labor Bar in 18
14 U.S.C. 1581 to 94.

15 Third, you can bar goods from entering
16 the United States under 19 U.S.C. 1307, and,
17 indeed, the plaintiffs' attorneys are doing that
18 against the defendants right now.

19 Fourth, sometimes there's U.S.
20 liability if an individual acts as a principal.

21 And, lastly, if there's any doubt
22 about this, Congress can specify a specific
23 remedy, an alternative. They pass
24 extraterritorial laws all the time. And,
25 indeed, if the violation is so clear of

1 international law and the laws of nations, I
2 would suspect that would be easy.

3 But I think implicit in --

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.

6 JUSTICE ALITO: Thank you, Mr. Katyal.
7 My time is up.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor.

10 JUSTICE SOTOMAYOR: Counsel, as I
11 listen to you, I -- and your answers to Justice
12 Alito's questions, it seems to me that his
13 hypotheticals all pointed to the fact that the
14 aiding and abetting by the corporation happened
15 in the United States.

16 That's -- that's a serious question
17 here about whether there were enough allegations
18 that the acts of this corporation had a
19 sufficient tie to the United States. I put that
20 argument aside.

21 But we know that under the ATS the
22 first Congress wanted the ATS to cover piracy.
23 We also know that those who provided assistance
24 to pirates were themselves held liable, whether
25 they committed it on land or the sea, as aiders

1 and abettors.

2 And it boggles my mind to think that
3 the aiding and abetting had to have happened on
4 the sea and not on the land because the first --
5 1799 imposed criminal liability for wherever the
6 assistance occurred.

7 And so my difficulty is, in
8 understanding your answer, why it is that the
9 ATS would not have seen aiding and abetting as
10 its own form of criminal liability and the issue
11 being whether there were enough ties to the
12 jurisdiction in which it occurred.

13 I take -- I'm not -- I don't need an
14 answer from you that says to me there wasn't
15 enough here. I need an answer that says, why
16 wouldn't the framers have seen aiding and
17 abetting in this way?

18 MR. KATYAL: So, Justice Sotomayor, we
19 certainly don't think that the complaint does
20 say anything like what they claim at the red
21 brief at page 5. There's a huge delta between
22 the two. But we would argue --

23 JUSTICE SOTOMAYOR: I just said to you
24 I know that there's a question about the
25 allegations.

1 MR. KATYAL: Right. So --

2 JUSTICE SOTOMAYOR: Those are the
3 substantive issues.

4 MR. KATYAL: -- so then, with -- with
5 respect to the law, first of all, I think
6 piracy, as the Court recognized in *Kiobel* at
7 121, is a category unto itself because the high
8 seas are jurisdictionally unique and governed by
9 no single sovereign.

10 And the reason why, I think --

11 JUSTICE SOTOMAYOR: But they're not
12 jurisdictionally unique if it happens on land.

13 MR. KATYAL: Well, then I think of
14 what --

15 JUSTICE SOTOMAYOR: And aiding and
16 abetting said, if you assist in any way on the
17 sea or on land, you're liable.

18 MR. KATYAL: But I think the problem
19 is, when you translate anything from piracy -- I
20 think the Court's been -- urged great caution in
21 exercising -- in trying to draw too much from
22 piracy because there isn't, of course, another
23 sovereign involved there the way there is, for
24 example, in this very case, where they're
25 challenging the conduct in Ivory Coast and where

1 there's a remedy in the foreign country.

2 And the reason why I think Congress
3 hasn't always recognized aiding and abetting,
4 even with specific statutes that deal with it,
5 is because it does lead to an amorphous form of
6 liability.

7 CHIEF JUSTICE ROBERTS: Justice Kagan.

8 MR. KATYAL: And so --

9 JUSTICE SOTOMAYOR: Mr. Katyal, would
10 you --

11 CHIEF JUSTICE ROBERTS: Justice Kagan.

12 JUSTICE KAGAN: Mr. Katyal, is child
13 slavery, not aiding and abetting it but the
14 offense itself, is that a violation of a
15 specific universal and obligatory norm?

16 MR. KATYAL: We're -- we're not --
17 yes, I think we're not challenging that here.
18 It's just the aiding and abetting.

19 JUSTICE KAGAN: Okay. So, if that's
20 right, could a former child slave bring a suit
21 against an individual slaveholder under the ATS?

22 MR. KATYAL: So they -- if it were --
23 if it weren't extraterritorial and it wasn't a
24 corporate action, yes.

25 JUSTICE KAGAN: Yeah, no problem

1 extraterritorial, no problem aiding and
2 abetting, just a straight suit.

3 MR. KATYAL: Correct.

4 JUSTICE KAGAN: Okay. And could the
5 same child -- former child slave in the same
6 circumstances bring a suit against 10
7 slaveholders?

8 MR. KATYAL: You know, if they -- if
9 they met the -- you know, the requirements under
10 the -- the law, yeah, sure. I mean, if they --

11 JUSTICE KAGAN: Okay. So if --

12 MR. KATYAL: -- if it was a plausible
13 allegation.

14 JUSTICE KAGAN: -- if you could bring
15 a suit against 10 slaveholders, when those 10
16 slaveholders form a corporation, why can't you
17 bring a suit against the corporation?

18 MR. KATYAL: Because the corporation
19 requires an individual form of liability under a
20 -- a -- a norm, a specific norm, of -- of --
21 under international law, which doesn't exist
22 here. I think Sosa in Footnote --

23 JUSTICE KAGAN: I -- I -- I guess what
24 I'm asking is, like, what sense does this make?
25 This goes back to Justice Breyer's question.

1 What sense does this make? You have a suit
2 against 10 slaveholders, 10 slaveholders decide
3 to form a corporation specifically to remove
4 liability from themselves, and now you're saying
5 you can't sue the corporation?

6 MR. KATYAL: Justice Kagan, I think
7 that's exactly the question you and others
8 repeatedly asked in *Jesner*, and the Court found
9 no foreign court liability because of these
10 policy regs that what --

11 JUSTICE KAGAN: I'm just asking for a
12 reason, Mr. Katyal.

13 MR. KATYAL: Right. And the reason --
14 I think there are two different reasons. One is
15 that when you -- the cite to *Malesko* from *Jesner*
16 shows, when you go after individuals, you often
17 can go after the -- the true wrongdoers. Once
18 you go after the corporate form, you get bogged
19 down with questions of mens rea in a collective
20 enterprise --

21 JUSTICE KAGAN: There's an amicus
22 brief --

23 MR. KATYAL: -- which you really don't
24 --

25 JUSTICE KAGAN: -- Mr. -- sorry to

1 interrupt, Mr. Katyal. There's an amicus brief
2 by Professor Hathaway that details the long
3 history of imposing liability on slave ships.
4 Those were not individuals, were they?

5 MR. KATYAL: No. And, Justice Kagan,
6 we don't doubt that Congress can pass a statute
7 to deal -- to -- to expand -- to have corporate
8 liability, but notably in the TVPA, they didn't
9 do that, which is the most closely analogous
10 statute. And you could ask the same question --

11 JUSTICE KAGAN: Thank you, Mr. Katyal.

12 MR. KATYAL: -- how does this make
13 sense?

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch.

17 JUSTICE GORSUCH: Good morning,
18 Mr. Katyal. I -- I'd actually like to pick up
19 on -- on this questioning. I don't see anything
20 in the language of the statute for the rationale
21 which Justice Breyer was alluding to for the
22 ATS. I think the brief for the United States
23 provides a mechanism for aliens to remedy wrongs
24 that would otherwise be held against them and
25 perhaps be lawful causes for war against the

1 United States.

2 And on -- on -- on those two lines, on
3 the language and on the rationale that this
4 Court has long adopted, recognized for the ATS,
5 why would we exempt --

6 MR. KATYAL: So --

7 JUSTICE GORSUCH: I understand your
8 policy arguments.

9 MR. KATYAL: -- so, Justice Gorsuch,
10 the text refers to law of nations. And what you
11 said -- what you said and others in -- in cases
12 is that that requires looking into whether
13 there's a specific obligatory norm.

14 And, here, there isn't one. The
15 question is not are you exempting corporations,
16 but, rather, they're -- are they included as a
17 subject of the law of nations, which is the text
18 of the ATS.

19 And you talked about the rationale
20 about not letting things go unremedied, but as I
21 just said to Justice Kagan, there are remedies.
22 You can go after the individuals. So you don't
23 need to go after the corporations, and, indeed,
24 doing so imposes lots of liability.

25 And our fundamental -- or it imposes

1 lots of problems, like mens rea and the like.

2 And fundamental --

3 JUSTICE GORSUCH: I don't believe you
4 -- okay. I -- I -- I -- I understand your
5 responses there. I don't believe you did get a
6 chance to fully respond to Justice Kagan on the
7 last point. I would like an answer to that.

8 And that is we do know one thing about the ATS,
9 is that it did permit in rem jurisdiction
10 against things, in particular, pirate ships.

11 If in rem jurisdiction was part of the
12 ATS's contemplation, why wouldn't corporate
13 liability, which then didn't exist, I mean, it
14 didn't exist in widespread form, but why
15 wouldn't the same concept apply?

16 MR. KATYAL: For -- for the exact
17 reasons --

18 JUSTICE GORSUCH: Briefly.

19 MR. KATYAL: -- that the Court said in
20 *Jesner*, Justice Gorsuch, which is -- you know,
21 the same argument was made there. And what the
22 Court said is that doesn't come close to meeting
23 the kind of specific universal obligatory norm,
24 and the Court has to proceed with great caution
25 because you're being asked to fashion a common

1 law remedy --

2 JUSTICE GORSUCH: Thank you,
3 Mr. Katyal.

4 MR. KATYAL: -- which is not
5 something --

6 JUSTICE GORSUCH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh.

9 JUSTICE KAVANAUGH: Thank you, Chief
10 Justice.

11 Good morning, Mr. Katyal. The Alien
12 Tort Statute was once an engine of international
13 human rights protection. Your position,
14 however, would allow suits by aliens only
15 against individuals, as you've said, and only
16 for torts international law recognized that
17 occurred in the United States.

18 And Professor Koh's amicus brief on
19 behalf of former government officials, for
20 example, says that your position would "gut the
21 statute." So why should we do that?

22 MR. KATYAL: Well, I really feel like
23 that's some overheated rhetoric. You know,
24 after all, for 200 plus years this statute's
25 been around, there's not a successful example of

1 a case like this ever, Justice Kavanaugh.

2 All we're suggesting is to preserve
3 the status quo as it's always been. I
4 understand there's some policy arguments for why
5 you might want something else, but that's really
6 something addressed to a different branch of
7 government.

8 And for all the reasons the Court said
9 in *Jesner* and you said in your dissent in *Exxon*
10 *versus Doe*, recognizing corporate liability here
11 or making it extraterritorial in the way that
12 the plaintiffs want raises a host of really
13 difficult intricate policy questions, which are
14 best left handled by the other branch, not by
15 courts.

16 I mean, this is an extraordinary thing
17 they're asking the Court to do in fashioning a
18 common law remedy, and that's why every decision
19 of this Court says proceed with great caution.
20 They have the highest of bars, and they haven't
21 come close to meeting them.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett.

25 JUSTICE BARRETT: Mr. Katyal, a lot of

1 the questions you've been asked thus far focus
2 on whether there's a specific universal and
3 obligatory norm here. And that, you know, as
4 many of my colleagues have pointed out, raises
5 some complications.

6 Do you agree that this is a case that
7 would be better resolved at Sosa step 2?

8 MR. KATYAL: We think, you know, for
9 -- just as the Jesner plurality said, you know,
10 the -- the evidence bleeds over from step 1 to
11 step 2. We think the evidence for step 1 on
12 corporate liability is overwhelming, and we also
13 think that the extraterritoriality, which is
14 independent, is really pretty -- is very, very
15 clear because, as the Court said in Morrison,
16 there's always some U.S. conduct that can be
17 pointed to in any case. And it'll be a craven
18 watchdog if you can just use that to get out of
19 the extraterritoriality bar.

20 And this case is a perfect example of
21 this. There's very limited U.S. conduct that is
22 alleged in the complaint, and yet they want to
23 make the hugest of federal cases out of it.

24 JUSTICE BARRETT: Well, if we do
25 resolve it at Sosa step 2, when would we ever

1 recognize a cause of action? Because, you know,
2 most cases will raise the same -- let's focus on
3 the separation of powers prong. Most cases
4 raise this question of the intricate policy
5 questions that may be better left to Congress.
6 I mean, we've been very restrained in the Bivens
7 context about recognizing more causes of action.

8 I mean, would this just kind of halt
9 recognition of new causes of action altogether
10 if we adopt your position?

11 MR. KATYAL: No, Justice Barrett.
12 We're not making the position -- we're not
13 taking the position that Justice Scalia said --
14 you know, it's obviously available to you. But
15 we certainly think that things outside of the
16 Blackstone three that rise to the level of
17 universality, to -- to use a prior form --
18 formulation of Justice Kavanaugh, things like
19 torture, genocide, crimes against humanity, and
20 war crimes, for example, would, I think, all
21 meet that Sosa step 2 even though they're not
22 part of the original Blackstone three.

23 We don't think you --

24 JUSTICE BARRETT: It's not if a
25 corporation was -- was the perpetrator sued in

1 any of those cases?

2 MR. KATYAL: Right. We don't think
3 that -- that --

4 JUSTICE BARRETT: Court cases.

5 MR. KATYAL: Right. Absolutely. It
6 wouldn't be corporate liability. There's no
7 international law norm that meets their burden
8 there, but you could go after them as
9 individuals. And, of course, Congress could
10 pass a specific statute to deal with it, as they
11 have sometimes. The very -- you know, like the
12 TVPRA. And the very fact that --

13 JUSTICE BARRETT: Thank you,
14 Mr. Katyal. My time's expired.

15 CHIEF JUSTICE ROBERTS: A minute to
16 wrap up, counsel.

17 MR. KATYAL: Thank you. The hard
18 hypotheticals I think shouldn't obscure the far
19 easier task before this Court. Nestle USA and
20 Cargill are not akin to Justice Alito's
21 hypothetical of a direct enslaver or anything
22 like that. The allegations in this complaint
23 don't allege anything close to that level of
24 wrongdoing.

25 And when there are those allegations

1 of such wrongdoing, there are five different
2 parts -- paths, apart from the ATS, to protect
3 human rights. And this Court has always said
4 great caution has to be exercised when
5 recognizing a new cause of action, even in the
6 face of hard facts.

7 And our concern is that with -- even
8 with -- without such great caution, further
9 complaints like this will proliferate and go on
10 for decades, with harm to our foreign policy,
11 separation of powers, and other policy
12 objectives.

13 This Court's been clear that the bar
14 against extraterritoriality is a high one. And
15 the allegations in this complaint and other ATS
16 suits don't come close to meeting it.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Gannon.

20 ORAL ARGUMENT OF CURTIS E. GANNON
21 FOR THE UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING THE PETITIONERS

23 MR. GANNON: Thank you, Mr. Chief
24 Justice, and may it please the Court:

25 The United States condemns child

1 slavery and trafficking. Congress has expressly
2 provided for criminal and civil liability for
3 forced labor in certain circumstances. And the
4 federal government has specifically supported
5 efforts to eliminate the worst forms of child
6 labor at cocoa farms in Cote d'Ivoire.

7 But this Court should not extend the
8 reach of the Alien Tort Statute to encompass
9 Respondents' claims in this case for two
10 principal reasons.

11 First, the ATS does not authorize
12 liability for domestic corporations for the same
13 reasons that the majority and the plurality in
14 *Jesner* found that foreign corporations are not
15 liable. As the *Jesner* majority said, a decision
16 to extend liability from natural persons to
17 corporations must be made by Congress rather
18 than the judiciary.

19 And, second, the aiding and abetting
20 conduct alleged against defendants does not
21 overcome the bar against extraterritorial
22 application of the ATS.

23 CHIEF JUSTICE ROBERTS: Counsel, I
24 want to ask you the same question I asked Mr.
25 Katyal. We don't have objections from foreign

1 countries in this case. As far as we can tell,
2 they're perfectly comfortable having U.S.
3 citizens, U.S. corporations hailed into their U
4 -- in U.S. courts.

5 What should we make of that, and
6 doesn't that suggest we ought to be a little
7 more -- a little less cautious about finding a
8 cause of action here?

9 MR. GANNON: Well, in general, you
10 recognize correctly, I think, that you should be
11 cautious about extending the cause of action.

12 In previous cases, you've recognized
13 that this is a question about whether there's a
14 general threat posed by these types of cases,
15 and whether or not there's a threat posed by
16 this specific case, cases against domestic
17 corporations can, indeed, be used as proxy
18 challenges to foreign governments or to foreign
19 parent or subsidiary corporations.

20 And the United States has raised
21 specific foreign policy concerns in cases
22 involving U.S. corporations, including Doe
23 against Exxon, Polimeni and American Isuzu,
24 other cases.

25 But even in this case, the allegations

1 are somewhat inchoate even though the case is 15
2 years old, but there are ways, as Mr. Katyal
3 pointed out, that this case could still threaten
4 foreign affairs interests if it comes to
5 fruition because --

6 CHIEF JUSTICE ROBERTS: Counsel, if --
7 if the United States corporation sent domestic
8 employees to the Ivory Coast for the express
9 purpose of setting up a cocoa farm that uses
10 child slavery, would that conduct touch and
11 concern the United States as we use those terms
12 in Kiobel?

13 MR. GANNON: Well, I think that it --
14 it depends on how much conduct happens in the
15 United States and how much conduct happens
16 overseas. We think that the Court has clarified
17 that the way Kiobel is talking about that, it's
18 whether the -- whether the conduct touches the
19 territory of the United States. And we think
20 that it's the conduct in question, not the --
21 not the citizenship of the parties, and --

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas.

25 JUSTICE THOMAS: Thank you, Mr. Chief

1 Justice.

2 Counsel, the -- I'm intrigued by my
3 colleagues' questions on the corporate form and
4 the -- but -- and I seem to remember that in the
5 past the government has argued that the
6 corporate form shouldn't make that difference as
7 -- the difference in a case. And it's certainly
8 not quite the argument or maybe even the
9 opposite argument that you're making now.

10 I'd like you to -- if you can, to
11 respond to some of the concerns raised by my
12 colleagues with respect to the corporate form
13 and to at least explain or correct me if I'm
14 wrong about your prior positions, the
15 government's prior positions, as to the coverage
16 of the corporate form.

17 MR. GANNON: Justice Thomas, we did
18 previously not urge the Court to adopt a
19 categorical rule eliminating corporate liability
20 under the ATS. But we're trying to be
21 consistent with the Court's precedents here, and
22 *Jesner* rejected key parts of our argument there
23 and key parts of our reasoning, and it
24 reinforced a connection between the ATS caution
25 that the Court should have about recognizing new

1 forms of liability and extensions of liability
2 in other areas such as Bivens. It reinforced
3 that connection in Hernandez.

4 And we've consistently opposed
5 corporate liability in the context of Bivens,
6 and under that rubric, we think that the same
7 answer applies here.

8 And we -- the question that the Court
9 is asking is whether there is reason to doubt
10 whether Congress would want this damages remedy
11 to be available for artificial persons.

12 And we know that there are times when
13 Congress makes that decision. It did so in the
14 Torture Victim Protection Act. This Court did
15 so in Malesko.

16 And now that Jesner has made foreign
17 corporations not liable, it would be especially
18 incongruous to discriminate on the basis of the
19 defendant's nationality in the corporate context
20 because we know that that's not happening in the
21 context of natural persons.

22 The Marbois incident that Justice
23 Breyer brought up has been discussed by Sosa and
24 Kiobel, and in both cases, the Court assumed
25 that both the Frenchman and the New York

1 constable who assaulted an ambassador in the
2 United States would be liable.

3 So, if both foreign and U.S. natural
4 persons are liable, we think that Congress
5 should be the one that makes the decision that
6 U.S. corporations would be discriminated against
7 in a way that foreign corporations are not.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: I'd like to hear, if
12 you would, the government's answer to the same
13 question that I think Justice Thomas --
14 everybody's been asking, use Justice Kagan's
15 example if you want or my example, of what's new
16 about suing corporations?

17 When I looked it up once, there were
18 180 ATS lawsuits against corporations. Most of
19 them lost but on other grounds. So why not sue
20 a domestic corporation?

21 You can't sue the individual because,
22 in my hypothetical, the individuals have all
23 moved to Lithuania. All you have is the
24 corporate assets in the bank and minutes that
25 prove it was a corporate decision.

1 What's new about it? Why is it
2 creating a form of action? What's the reason it
3 shouldn't be there? In -- I -- I don't see --
4 is it a different rule again for partnership?
5 Different rule again for, I don't know, limited
6 liability companies or -- I mean, there are many
7 forms of doing business. Why?

8 MR. GANNON: Well, we think that in
9 Jesner and in Malesko the Court recognized that
10 extending liability to a corporate --
11 corporation is a marked extension of liability.

12 JUSTICE BREYER: Then you missed my
13 question unless you're going to answer it there.
14 What's extending it? As I said, there have been
15 -- there are suits abroad. I think I've seen
16 citations to them. And suits, many -- tens,
17 hundreds perhaps, 200, 180, brought against
18 corporations under the ATS.

19 MR. GANNON: Yes. But many of those
20 suits now need to be thrown out under Jesner
21 because they were foreign corporations.

22 JUSTICE BREYER: Yeah, yeah.

23 MR. GANNON: And Malesko demonstrated
24 that merely having an underlying form of civil
25 liability for individuals doesn't necessarily

1 mean that it should be extended to corporations.
2 And you're right, there may be a background rule
3 that corporations are generally liable for the
4 torts of their agents.

5 But we're not looking at this at Sosa
6 step 1. We think this is controlled by Sosa
7 step 2. And Congress has used two different
8 models. They've used the Torture Victim
9 Protection Act, where they ruled out all
10 artificial persons. Only natural persons can be
11 sued. So that takes care of all your questions
12 about corporations or limited liability
13 companies or partnerships or anything else.
14 Only natural persons can be sued under the
15 Torture Victim Protection Act for something that
16 everybody understands is a violation of the law
17 of nations.

18 Now Congress did take a different
19 route in the Trafficking Victims Protection Act
20 where they ultimately recognized a civil remedy,
21 but it departs from the ATS in multiple ways.
22 It didn't make the civil provision retroactive.
23 It doesn't discriminate between a U.S.
24 corporation and a foreign corporation found in
25 the United States. It's arguably

1 extraterritorial at Morrison step 1 in a way
2 that the ATS is not. And it provides a specific
3 cause of action with details that are tailored
4 to the particular violations at issue. So --

5 CHIEF JUSTICE ROBERTS: Justice Alito.

6 JUSTICE ALITO: Are you aware of ATS
7 suits based on conduct that occurred in the
8 United States? Why would someone bring such a
9 claim?

10 MR. GANNON: Well, if the -- I think
11 that the canonical example would have been
12 something like the Marbois incident. If the
13 only cause of action was something that needed
14 to be brought under the law of nations, then the
15 ATS would have provided jurisdiction for that.

16 JUSTICE ALITO: Yeah, that -- I mean,
17 that was -- that was necessary under domestic
18 law as it existed at the time. But, under
19 current circumstances, have there been ATS suits
20 based on conduct in the United States?

21 MR. GANNON: It -- it -- I'm not aware
22 of suits that are -- that are entirely
23 U.S.-based, Justice Alito.

24 JUSTICE ALITO: Won't your arguments
25 about aiding and abetting and

1 extraterritoriality all lead to essentially the
2 same result as holding that a domestic
3 corporation cannot be sued under the ATS?
4 Corporations always act through natural persons,
5 so if a corporation can't aid and abet, there --
6 there will be only a sliver of activity where
7 they could be responsible under respondeat
8 superior, isn't that true?

9 MR. GANNON: Well, I think, whether or
10 not the Court recognizes aiding and abetting
11 liability, there will be a separate question
12 about whether respondeat superior type of
13 liability should apply.

14 I think Sosa and -- and in other
15 cases, the Court has suggested that there could
16 be other limits. And, obviously, Congress knows
17 how to impose those sorts of limits. And in the
18 civil action it provided in 1595 for -- for
19 crimes associated with slavery and forced labor,
20 it specifically extended that action to whoever
21 knowingly benefits financially or receiving
22 anything of value from a venture that engaged in
23 that underlying conduct.

24 And so I think part of the question is
25 going to be whether you recognize aiding and

1 abetting liability or whether you're going to
2 require the corporation to commit the actual
3 tort or its agents to commit the actual
4 underlying tort.

5 JUSTICE ALITO: All right. Yeah.
6 Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor.

9 JUSTICE SOTOMAYOR: Counsel, I -- I'm
10 -- I think I'm reading your brief right, that
11 you don't think there's an aiding and abetting
12 liability at all under international law.

13 But both Blackstone and the first
14 Congress recognized that facilitating piracy was
15 a crime, and this Court reaffirmed that in nine
16 -- 1795 in the Talbot case. Post-World War II,
17 military tribunals held individuals liable for
18 assisting the German government's war crimes.
19 The international criminal tribunals for the
20 former Yugoslavia and for Rwanda, the Special
21 Court of Sierra Leone all have imposed aiding
22 and abetting liability.

23 So I'm having a very hard time
24 accepting that if an individual aided and
25 abetted in the United States or anywhere else

1 that we couldn't hold that individual liable.

2 Could you explain to me why -- I'm
3 going to set aside the corporate for a moment.
4 Could you set aside for me why you think
5 international law -- there's not an
6 international law against aiding and abetting
7 something as hideous as child slavery?

8 MR. GANNON: We -- we are not
9 disputing the international law level of this
10 analysis, Justice Sotomayor. Just as with the
11 question about corporate liability, we think
12 that this is something that a court, if it wants
13 to reach the question, could do entirely at step
14 2 of Sosa.

15 And so even assuming that there's a
16 sufficiently defined norm at international law
17 at step 1, the question is still going to be
18 whether the Court would recognize an extension
19 of --

20 JUSTICE SOTOMAYOR: All right. Now --

21 MR. GANNON: -- liability for aiding
22 and abetting that --

23 JUSTICE SOTOMAYOR: -- now let me stop
24 at Sosa step 2. I'm -- I -- I don't know if I
25 misread your brief or it's become more nuanced

1 now, but however, your answer's more nuanced
2 now.

3 MR. GANNON: Okay.

4 JUSTICE SOTOMAYOR: It doesn't make
5 sense to me -- it might make sense to me in
6 accordance with our rule in *Jesner* that we
7 shouldn't hold corporations liable for --
8 foreign corporations liable for conduct that
9 they conduct in foreign countries. I see all of
10 the foreign and domestic conflicts that could
11 occur there.

12 I do not see the same conflict with
13 holding an American corporation liable for the
14 acts -- for acts it commits here, putting aside
15 that -- the allegations and their sufficiency in
16 this case, taking the hypothetical that Justice
17 Alito set forth where most of the conduct was --
18 aiding and abetting conduct occurred here, it
19 just -- I do not understand why international
20 law would not have seen that as proper exercise
21 of our power to say that our domestic
22 corporations cannot aid and abet in the United
23 States and be held liable under the ATS.

24 CHIEF JUSTICE ROBERTS: Briefly,
25 counsel.

1 MR. GANNON: Yes, briefly, our reason
2 is not one of international law. It is that
3 under Central Bank of Denver, the Court has
4 recognized that when Congress recognizes primary
5 civil liability, that doesn't incorporate the
6 expansion associated with aiding and abetting
7 liability, unless Congress separately provides
8 for that.

9 CHIEF JUSTICE ROBERTS: Justice Kagan.

10 JUSTICE KAGAN: Mr. Gannon, one of the
11 amicus briefs in this case says that many of the
12 countries around the world with the strongest
13 rule of law systems do hold their own
14 corporations civilly liable for the kinds of
15 actions at issue here. And the amicus brief
16 says that's true of the United Kingdom, France,
17 Germany, Japan, Canada. Do you know of anything
18 that suggests otherwise?

19 MR. GANNON: Well, I'm not sure about
20 other countries, but I do think that one point
21 is that they are doing that as a matter of
22 domestic law and not always with an analogy that
23 is like the ATS.

24 And, here, the United States Congress
25 has actually provided for liability, civil

1 liability, for many violations of international
2 law.

3 JUSTICE KAGAN: I guess the point I'm
4 making here, Mr. Gannon, is -- you know, the
5 Chief Justice started out by saying that other
6 countries have not objected here. And that's
7 true, but one might make a broader point, that
8 the first Congress enacted the ATS in response
9 to its concerns about other nations being
10 offended by our failure to remedy international
11 law violations.

12 And one might ask why one would think
13 that another country would be less offended by
14 leaving a foreign victim without a remedy when
15 that victim is injured by a U.S. corporation
16 rather than by a U.S. -- a U.S. individual and,
17 indeed, that most of the countries around the
18 world with which we're usually associated as a
19 rule of law nation do not make that distinction.

20 MR. GANNON: One reason is because we
21 don't think that civil liability under the ATS
22 is the only way that Congress has to ensure that
23 we are holding U.S. persons accountable for
24 violations of human rights.

25 Under the Torture Victim Protection

1 Act, Congress didn't think that corporations
2 needed to be held liable in order for us to
3 effectuate our obligations to prevent torture.

4 And, similarly, Congress has provided
5 for other remedies besides the TV -- besides the
6 ATS. It has criminal consequences, the types of
7 things that Justice Sotomayor was talking about
8 for piracy, those were originally
9 criminal cases.

10 JUSTICE KAGAN: Thank you, Mr. Gannon.
11 Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch.

14 JUSTICE GORSUCH: I have no questions.
15 Thank you, Chief.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh.

18 JUSTICE KAVANAUGH: Thank you, Chief
19 Justice.

20 And good morning, Mr. Gannon.

21 Footnote 21 in Sosa instructs the
22 courts to pay attention or give serious weight
23 to the executive branch's view of the case's
24 impact on foreign policy.

25 In your view, are you -- does this

1 case have an impact on foreign policy, or are
2 you making a more general argument about the
3 ATS?

4 MR. GANNON: We're primarily making a
5 more general argument about the ATS under step 2
6 of the Sosa analysis.

7 JUSTICE KAVANAUGH: Okay. So are you
8 making any Footnote 21 argument at all about
9 this particular case having an impact on foreign
10 policy?

11 MR. GANNON: Not specifically. We are
12 saying that there are allegations in the
13 complaint that if this case were ultimately
14 brought to fruition, that, like the other types
15 of cases that have previously presented
16 concerns, may well point up a particular foreign
17 relations problem because they implicate the
18 actions of foreign officials potentially.

19 And separately we do say that there is
20 a potential interaction here between the
21 allegations of liability here and efforts that
22 the executive branch, Congress, other
23 governments are making in order to help solve
24 and ameliorate the human rights situation in
25 forced labor chains, that the Harkin-Engel

1 protocol is used by plaintiffs here as evidence
2 of liability rather than an instance where a
3 U.S. corporation is in -- is engaging in good
4 faith in efforts to try to ameliorate human
5 rights abuses.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett.

9 JUSTICE BARRETT: Counsel, I have a
10 question about aiding and abetting liability and
11 extraterritoriality. You say that the focus of
12 the tort should be the primary conduct, so,
13 here, what was happening in Cote d'Ivoire,
14 rather than the aiding and abetting, which you
15 characterize as secondary.

16 But why should that be so? I mean,
17 let's imagine you have a U.S. corporation or
18 even a U.S. individual that is making plans to
19 facilitate the use of child slaves, you know,
20 making phone calls, sending money specifically
21 for that purpose, writing e-mails to that
22 effect. Why isn't that conduct that occurs in
23 the United States something that touches and
24 concerns, you know, or should be the focus of
25 conduct, however you want to state the test?

1 MR. GANNON: Well, I -- I think that
2 there are two different ways of looking at that.
3 We do think that the focus test requires us to
4 look at the object of the statute's solicitude,
5 including the conduct that the statute seeks to
6 regulate.

7 And to the extent that the U.S.
8 corporation in your hypothetical is going to
9 engage in all of this conduct overseas, even
10 though some planning efforts -- activities
11 happen in the United States, if the actual tort
12 and the victims are happening and are located in
13 Cote d'Ivoire, then we think that that's where
14 the focus of the conduct associated with the --
15 with the tort is.

16 Now, if you just want to focus on the
17 aiding and abetting allegations or just say
18 we're only going to look at the -- at the
19 conduct by the U.S. corporation instead of the
20 people on the ground who are engaging in the
21 underlying tort, we still think that the
22 allegations in this case don't specifically
23 state enough in order to state a claim that
24 would not be extraterritorial.

25 JUSTICE BARRETT: Thank you.

1 CHIEF JUSTICE ROBERTS: A minute to
2 wrap up, Mr. Gannon.

3 MR. GANNON: Thank you, Mr. Chief
4 Justice.

5 Concerns that the political branches
6 have not moved quickly enough to resolve forced
7 labor problems in corporate supply chains in
8 this industry or elsewhere are not a license for
9 this Court to expand tort liability under the
10 ATS.

11 Having already ruled out ATS liability
12 for foreign corporations, the Court should not
13 adopt a different rule for U.S. corporations.
14 The contrast between the Torture Victim
15 Protection Act and the Trafficking Victims
16 Protection Act show that is a policy choice that
17 could go either way and the decision should be
18 made by Congress.

19 And if the Court reaches the question
20 of extraterritoriality, then even assuming that
21 aiding and abetting is actionable, the focus of
22 any forced labor tort here was overseas. That's
23 where the injury happened and where any
24 substantial assistance was provided.

25 So plaintiffs' claims call for an

1 impermissibly extraterritorial application of
2 the ATS. We urge the Court to reverse.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Hoffman.

6 ORAL ARGUMENT OF PAUL L. HOFFMAN

7 ON BEHALF OF THE RESPONDENTS

8 MR. HOFFMAN: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 The first Congress in the Alien Tort
11 Statute provided a federal forum for foreign
12 citizens to bring cases for law of nations
13 violations without limitation as to defendants
14 for a series of tort liability.

15 Plaintiffs are former child slaves
16 seeking compensation from two U.S. corporations
17 which maintain a system of child slavery and
18 forced labor in their Ivory Coast supply chain
19 as a matter of corporate policy to gain a
20 competitive advantage in the U.S. market.

21 International norms prohibiting child
22 slavery and forced labor are indisputably
23 specific, universal, and obligatory. The norms
24 apply directly to private parties, including
25 corporations.

1 Unlike Kiobel and Jesner, this case
2 does not seek to assert U.S. jurisdiction over
3 foreign corporations for actions against other
4 foreign citizens they took on foreign soil.
5 This case alleges violations of long-established
6 norms prohibiting child slavery and forced labor
7 by U.S. corporations from the United States.

8 The founders were particularly
9 concerned about actions of U.S. citizens that
10 might lead to foreign entanglements, and their
11 response was to provide for a federal judicial
12 forum to resolve such disputes based on the rule
13 of law.

14 The recent discovery of legal opinions
15 written by Thomas Jefferson and Edmund Randolph
16 in the 1790s make it clear that the ATS applied
17 when U.S. citizens violated the law of nations
18 on foreign soil and that the ATS's broad
19 language applied to violations beyond the
20 Blackstone norms without any need for further
21 congressional action.

22 These claims fit comfortably within
23 the text, history, and purpose of the ATS and
24 this Court's holding in Sosa, and it should be
25 allowed to proceed.

1 CHIEF JUSTICE ROBERTS: Counsel, this
2 case, of course, involves United States citizens
3 and United States courts. But, in the context
4 of that action, much of the focus is going to be
5 on conduct overseas, and those responsible for
6 that can be brought into court either as
7 witnesses or for aiding and abetting.

8 So why doesn't this type of action
9 present the same international relations
10 concerns that we've noted in -- in the prior
11 cases in this area?

12 MR. HOFFMAN: Well, the -- this --
13 this case is not different in many respects from
14 any transnational litigation. There -- there
15 certainly have been no problem with discovery
16 and other matters in most of these cases that
17 have gotten to discovery.

18 The Ivory Coast has -- has not
19 objected to the case at any point, hasn't said
20 anything about it. I think Mr. Gannon has said
21 that the United States has no particular
22 objection about this particular case on foreign
23 policy grounds within the Footnote 21 context or
24 others. So there really is no evidence that
25 that's true.

1 Moreover, Congress already decided in
2 the Trafficking Victim Protection Act that
3 forced labor and child slavery and -- or slavery
4 generally in supply chains is something for
5 which damage remedies are appropriate. And --
6 and, obviously, the Congress doesn't think that
7 those issues present any -- any of those
8 problems.

9 CHIEF JUSTICE ROBERTS: The -- the
10 TVPRA that you just mentioned, I think, is -- is
11 pertinent here. Congress is addressing the sort
12 of questions that you would have the Court
13 resolve as a matter of, I suppose, federal
14 common law.

15 And doesn't what Congress did in the
16 TVPRA suggest that they are cognizant of these
17 questions, they are active in the area, and it's
18 -- it's time for the Court to get out of the
19 unusual situation where it's -- it's making
20 rather than just interpreting law?

21 MR. HOFFMAN: Well, our -- our
22 response to that, Mr. Chief Justice, is that our
23 case arose, at least for these six former child
24 slaves, at a time when the TVPRA was not deemed
25 to be explicitly extraterritorial.

1 CHIEF JUSTICE ROBERTS: So then going

2 --

3 MR. HOFFMAN: And so I think --

4 CHIEF JUSTICE ROBERTS: -- well, then
5 -- then going forward, in other words, has --
6 has Congress sort of take -- taken the ball down
7 going -- going forward, whatever the precise
8 consequence may be in your litigation?

9 MR. HOFFMAN: It -- it is certainly
10 true that the TVPRA is broader than the ATS
11 claims that we are making in this case and that
12 it is -- seems very likely that any case from
13 2008 on would use the -- the Trafficking Victim
14 Protection Act rather than the ATS in making
15 these kinds of claims.

16 So our case is really an exceptional
17 case that arises before that. And I think that
18 the TVPRA answers the Sosa step 2 problems that
19 have been raised by the defendants and by -- by
20 the United States in its submissions to date.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas.

24 JUSTICE THOMAS: Thank you, Mr. Chief
25 Justice.

1 But the -- but the TVPA seems to
2 suggest that Congress does not see the ATS the
3 way you do. Obviously, there, you don't have
4 corporate liability and you don't have aiding
5 and abetting liability. So why shouldn't we
6 take that as an indication that Congress sought
7 limitations on -- on the ATS jurisdiction?

8 MR. HOFFMAN: Well, for one, the
9 Congress made it very clear when it passed the
10 TVPA that it was complementary to the Alien Tort
11 Statute and was not meant to displace it in any
12 way. And the language of the TVPA is different
13 from the ATS both in terms of its language, its
14 history, and its purpose.

15 It's not clear that -- that aiding and
16 abetting is not available under the TVPA, but --
17 but this Court certainly decided in Mohamad that
18 corporate liability is not available.

19 But the Court has said that it looks
20 to the most analogous statute. And what we
21 contend is that the Trafficking Victim
22 Protection Act, which deals specifically with
23 forced labor and slavery in supply chains, is
24 the most analogous.

25 And so whatever Congress thought about

1 corporate liability for claims of torture or
2 extrajudicial execution, Congress has made it
3 very clear that they believe that there should
4 be corporate liability when it comes to
5 knowingly benefiting from forced labor and
6 slavery in -- in the supply chain.

7 JUSTICE THOMAS: Are you -- just as a
8 matter of curiosity, you bring this under the
9 ATS, but could you have brought the same cause
10 of action or a similar cause of action under
11 different provisions or a different law or the
12 -- I'm -- I'm just thinking of whether or not
13 you could -- this could have been in diversity
14 or something else.

15 MR. HOFFMAN: I -- I -- I think that
16 this particular case in the way that it was
17 originally framed could not have been brought
18 under diversity jurisdiction because it -- it --
19 it included both citizens and non-citizens on
20 the other side. So diversity was not available,
21 but -- but the ATS directly applied --

22 JUSTICE THOMAS: Yeah.

23 MR. HOFFMAN: -- under the terms.

24 JUSTICE THOMAS: On a separate matter,
25 there seems to be some suggestion in the

1 arguments, the -- in some of the other arguments
2 that there's no new -- even though there's no
3 universal norm for aiding and abetting in the
4 civil context, it may well be in the criminal
5 context. What's your reaction to that?

6 MR. HOFFMAN: Well, I think, first of
7 all, our position is that aiding and abetting or
8 accessory liability in tort was widely available
9 at the time --

10 JUSTICE THOMAS: Yeah.

11 MR. HOFFMAN: -- it was passed. But
12 -- but, on the international level, it is our
13 position that the international community has
14 come up with specific universal and obligatory
15 norms with respect to aiding and abetting
16 serious violations of international human rights
17 law, which would include these norms for sure.

18 And, in fact, that's -- all the
19 circuits that have decided this question have
20 found that there is aiding and abetting
21 liability in ATS claims. They have differed
22 sometimes about the standards, sometimes adding
23 requirements that don't appear to be in the
24 customary international law norm, but they all
25 have recognized that there's -- that there are

1 aiding -- that there is aiding and abetting
2 under international law.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer.

6 JUSTICE BREYER: I'd like your views
7 on the following: Assume that there is
8 corporate liability for domestic corporations.
9 Assume that there is aiding and abetting
10 liability.

11 Now what counts as aiding and abetting
12 for purposes of this statute? When I read
13 through your complaint, it seemed to me that all
14 or virtually all of your complaint amount to
15 doing business with these people. They help pay
16 for the farm. And that's about it. And they
17 knowingly do it.

18 Well, unfortunately, child labor, it's
19 terrible, but it exists throughout the world in
20 many, many places. And if we take this as the
21 norm, particularly when Congress is now working
22 in the area, that will mean throughout the world
23 this is the norm.

24 And I don't know, but I have concern
25 that treating this allegation, the six that you

1 make here, as aiding and abetting falling within
2 that term for purposes of this statute, if other
3 nations do the same, and we do the same, could
4 have very, very significant effects.

5 I'm just saying I'm worried about
6 that. And I -- I want you to explain to me how
7 this should work.

8 MR. HOFFMAN: Well, Your Honor, we are
9 not taking the position that -- we're just
10 saying cocoa beans -- did enough to satisfy
11 aiding and abetting. Our position is that
12 what's really going on here is that these
13 corporations have set up a supply chain where
14 they know where cocoa beans are being made by
15 means of child slave labor, forced labor. They
16 know that that's where the cheap beans come
17 from. They have used things like financing and
18 payment --

19 JUSTICE BREYER: Yes, that sounds like
20 a business, a business that does business
21 blinking their eyes or open eyes with farmers
22 and others throughout the world who use child
23 labor.

24 MR. HOFFMAN: But -- but --

25 JUSTICE BREYER: Now, in this case, do

1 we want a judge to say you can't do that
2 anymore?

3 MR. HOFFMAN: Well, what -- what we're
4 saying is that a court should decide based on
5 the international principles of aiding and
6 abetting whether the -- these corporate
7 defendants have crossed the line between merely
8 doing business and facilitating that system.

9 The -- the amicus brief filed for
10 Tony's Chocolonely and the small and mid-sized
11 chocolate companies indicate exactly how
12 companies do business without facilitating child
13 slave labor in the Ivory Coast. It can be done.
14 There are requirements by -- by our allies in
15 Europe about how it should be done.

16 Who is doing it and not imposing
17 aiding and abetting liability for this
18 high-level kind of corporate decision-making and
19 policy would give these companies an unfair
20 competitive advantage on child labor that
21 violates these fundamental norms in ways that --
22 that our allies and others urge to eliminate.

23 JUSTICE BREYER: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Alito.

25 JUSTICE ALITO: Mr. Hoffman, I'm

1 interested in what your complaint alleges about
2 the mens rea of these particular defendants
3 regarding forced child labor.

4 You've had 15 years now to refine your
5 complaint, and I assume you've chosen your words
6 with care. In paragraph 50 on page 319 of the
7 Joint Appendix, you allege that "Defendants" in
8 general "not only purchased cocoa from farms
9 and/or farm cooperatives which they knew or
10 should have known relied on forced child labor."

11 So even putting aside the question of
12 which defendants you're referring to, you don't
13 even allege that they actually knew about forced
14 child labor.

15 Do you go further any place in the
16 complaint? And, if not, is "should have known,"
17 which is basically recklessness, enough for
18 aiding and abetting liability under either
19 international law or U.S. law?

20 MR. HOFFMAN: Your Honor, I don't
21 think that "should have known" would -- would
22 satisfy, but knowledge would satisfy the
23 international standards for aiding and abetting,
24 and we do -- we do contend that these defendants
25 knew exactly what they were doing in that supply

1 chain.

2 JUSTICE ALITO: Yeah, where -- where
3 do you -- where do I look in the complaint to
4 find that?

5 MR. HOFFMAN: Well, Your Honor, we --
6 we have alleged knowledge. The Ninth Circuit
7 interpreted our complaint as satisfying both
8 knowledge and purpose standard in terms of the
9 -- our aiding and abetting allegations.

10 JUSTICE ALITO: Yeah. Well, I -- I
11 read the complaint. Where do I find an
12 allegation of knowledge?

13 MR. HOFFMAN: Sorry, Your Honor. I
14 have to make sure to find this for you. You
15 know, we have -- I -- I think when you -- if you
16 take the allegations -- I don't have the
17 paragraph. What we have alleged is that these
18 defendants are intimately involved in the
19 cocoa-growing area and that they're not -- they
20 have knowledge because of the reports that have
21 been issued, because they -- they -- they send
22 their own people to investigate, and -- and --
23 and they file their reports back to the
24 headquarters, that they're intimately involved
25 with what goes on in their supply chain.

1 So we have alleged knowledge. Whether
2 we, you know -- the "should have known" is
3 superfluous, I think, to that, to the -- we've
4 alleged that they actually know about these
5 things --

6 JUSTICE ALITO: See here, this is an
7 important point, and this is something you have
8 to allege even under notice pleading. And I
9 assume you're really careful -- you were careful
10 about what you alleged because you don't want to
11 incur Rule -- Rule 11 liability.

12 So, after 15 years, is it too much to
13 ask that you allege specifically that the -- the
14 defendants involved -- the defendants who are
15 before us here specifically knew that forced
16 child labor was being used on the farms or farm
17 cooperatives with which they did business? Is
18 that too much to ask?

19 MR. HOFFMAN: And -- and -- and we've
20 -- we've been given an opportunity to amend our
21 complaint, as the Ninth Circuit has given us
22 that ability to lay this out. We have more
23 information, actually, since the second amended
24 complaint based on continuing investigation and
25 trips to the region.

1 And -- and, yes, we -- we can allege
2 that they knew that they were involved with the
3 farms in the region that supply child -- that
4 supply -- that involve child slave labor,
5 including the -- the -- the six former child
6 slaves who are plaintiffs in this case.

7 JUSTICE ALITO: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor.

10 JUSTICE SOTOMAYOR: Counsel, just so I
11 understand, you believe that the aiding and
12 abetting exists if they knew -- simply if they
13 knew that child labor was being used to produce
14 the cocoa beans and they bought the product?

15 MR. HOFFMAN: No, that's -- that's not
16 our position, Your Honor.

17 JUSTICE SOTOMAYOR: All right. So
18 knowledge that child labor was being used you
19 don't claim is enough.

20 MR. HOFFMAN: That's right.

21 JUSTICE SOTOMAYOR: Your complaint, as
22 I see it, alleges that there was some
23 decision-making in the United States to buy
24 these products from these kinds of farms. I
25 presume that's knowing that they're child labor.

1 But I don't see an allegation other
2 than sending representatives to look at the
3 farms so that knowledge could be imputed that
4 there's any other actual acts of aiding and
5 abetting that you have alleged against the
6 particular U.S. corporations that you're suing.

7 MR. HOFFMAN: Well, our position is
8 that the -- these corporations from their
9 headquarters have controlled every aspect of the
10 supply chain.

11 JUSTICE SOTOMAYOR: But I don't
12 understand what "control" means.

13 MR. HOFFMAN: Well, "control" means --

14 JUSTICE SOTOMAYOR: I -- have you
15 shown that they directed a foreign corporation,
16 even if it's a subsidiary?

17 MR. HOFFMAN: Well, I think it
18 actually acted directly from corporate
19 headquarters. They sent people from corporate
20 headquarters in terms of getting information on
21 the ground, setting up cooperatives,
22 providing --

23 JUSTICE SOTOMAYOR: If you were given
24 leave to amend, you could actually show that
25 they transmitted the money, that they

1 directly -- I'm not talking about their
2 subsidiaries -- that the American corporations
3 actually directed the money to go --

4 MR. HOFFMAN: Yeah, our current
5 understanding is that -- is that these are
6 controlled by the corporate defendants and that
7 we would -- and we've been -- been asked
8 allegations particularly, separating out the
9 foreign corporations that have to be dismissed
10 after *Jesner*, to identify exactly what we
11 contend these domestic corporations have done.

12 And we think we do have enough
13 information to -- to link the decision-making
14 and corporate policy and the issue of getting
15 these cocoa beans from farms that --

16 JUSTICE SOTOMAYOR: Counsel, you're --
17 you're -- you're equivocating on my question.
18 It's not just a decision-making because we've
19 often said that decision-making is not enough
20 aiding and abetting, that you have to follow it
21 with an affirmative act.

22 MR. HOFFMAN: Right.

23 JUSTICE SOTOMAYOR: And so -- so
24 that's what I'm trying to get out of you.

25 MR. HOFFMAN: But the decision --

1 JUSTICE SOTOMAYOR: Can you show that
2 the affirmative act was actually sending money
3 to those places, that they're the funders,
4 direct funders of the farms, et cetera?

5 MR. HOFFMAN: Yes, no, I mean, what --
6 what -- what we've said is there are exclusive
7 marketing relationships that are -- that are
8 controlled by headquarters, that people are sent
9 from headquarters, money is sent from
10 headquarters, equipment is arranged from
11 headquarters, training is arranged for by
12 headquarters.

13 Our allegation is that these U.S.
14 companies control the aspects -- all the aspects
15 of the supply chain that leads directly to harms
16 that our plaintiffs were enslaved on and where
17 many thousands of other children are enslaved.

18 JUSTICE SOTOMAYOR: Thank you,
19 counsel.

20 CHIEF JUSTICE ROBERTS: Justice Kagan.

21 JUSTICE KAGAN: Mr. -- Mr. Hoffman, on
22 the question of corporate domestic liability,
23 the government makes the argument that Jesner
24 changed everything. It originally took the same
25 position that you're taking now on corporate

1 domestic liability. It said that that position
2 is now untenable, that once the Court held that
3 foreign corporations weren't liable, the Court
4 really can't hold that domestic corporations
5 are. What -- what is your response to that?

6 MR. HOFFMAN: Well -- well, first of
7 all, I think that the -- the evidence that
8 justified using Sosa step 2 to eliminate
9 liability against foreign corporations really
10 does exist with respect to domestic corporations
11 sued under the ATS.

12 And, actually, Jesner and Kiobel are
13 of a piece in a way. What -- what this Court
14 has said is that ATS jurisdiction should not be
15 used to police the actions of foreign
16 corporations, particularly when they act
17 primarily on foreign soil, whereas our case is
18 completely different in the sense that the
19 United States has its own responsibilities in
20 these provisions. That was the original plan
21 that you found -- found in the ATS, that we were
22 saying to the world we will enforce the law of
23 nations.

24 And I think that the Jefferson and
25 Randolph opinions recently underscored that,

1 that we made a commitment to the world that when
2 our citizens violate the law of nations, even if
3 it's outside U.S. territory, that we will
4 provide a forum for foreign citizens to do that.

5 Both Kiobel and Jesner deal with
6 completely different situations where there's
7 minimal contact with the United States and where
8 it's really the responsibility of other
9 countries to police their own corporations.

10 In Kiobel, for example, the
11 Netherlands has -- has allowed for a case on
12 behalf of the Kiobel plaintiffs against the same
13 defendants for the same allegations. So the
14 Netherlands has stepped up to police its own
15 corporations.

16 What we're saying is that the United
17 States has that obligation according to the
18 founders' original promise under the Alien Tort
19 Statute.

20 JUSTICE KAGAN: But, you know, as you
21 note, Jesner is a -- is a fractured decision.
22 There's a majority in some places, only a
23 plurality in other places.

24 If you look at that decision, what do
25 you think it tells us about the approach that we

1 need to use to answer the question of domestic
2 corporate liability for child slavery? I mean,
3 what is controlling, do you think, with respect
4 to how we go about answering that question?

5 MR. HOFFMAN: I don't think that there
6 is a controlling majority in *Jesner* about how to
7 approach that question. The plurality does
8 discuss the question of whether there needs to
9 be a specific and universal and obligatory norm
10 of corporate liability.

11 I think, for the reasons that the
12 Solicitor General's Office gave in the *Kiobel*
13 case and in *Jesner*, that corporate tort
14 liability is -- is well established and was
15 understood, I think, to the founders and
16 certainly has been a part of U.S. domestic
17 common law tort liability from the beginning, as
18 soon as there were corporations. And before
19 that, there were ships.

20 So we think that that's not -- that's
21 basically what international law provides, are
22 the prohibitive norms, in this case, child
23 slavery and forced labor. But the means of
24 enforcing them are up to individual states.

25 And in the ATS, our first Congress

1 said that tort liability using common law
2 methods were something that our courts would
3 enforce the law of nations. And there's no
4 requirement that -- that there be mandatory
5 corporate liability. It's up to states.

6 And many states --

7 JUSTICE KAGAN: Thank you, Mr.
8 Hoffman. Thank you.

9 MR. HOFFMAN: Sorry.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch.

12 JUSTICE GORSUCH: Good morning, Mr.
13 Hoffman. I'd like to --

14 MR. HOFFMAN: Good morning.

15 JUSTICE GORSUCH: -- put aside for
16 purposes of my question the corporate versus
17 individual nature of the defendant and focus
18 solely on the cause of action.

19 MR. HOFFMAN: Yes.

20 JUSTICE GORSUCH: And -- and, here,
21 you're asking us to infer a new cause of action
22 for aiding and abetting. And I guess I want to
23 understand why I should be creating new causes
24 of action as a Judge today.

25 We have abandoned federal common law

1 in every other area after Erie, or at least we
2 proclaim to do so. And I'm not sure I
3 understand why the ATS should be different,
4 especially when Congress stands able and ready
5 to create new causes of action, as the Chief
6 Justice has pointed out it's done elsewhere.

7 That would be the appropriate -- more
8 appropriate place to create new legislation, it
9 would seem, and in every respect, what you're
10 asking us to do is a form of legislation.

11 And then finally I throw into the mix
12 Central Bank, which underscores that aiding and
13 abetting liability is a different thing and that
14 often there are good reasons not to have aiding
15 and abetting liability even when there's primary
16 liability.

17 So whatever I think about the
18 question, I have to at least acknowledge there
19 are good arguments for a lawmaker to consider on
20 both sides of that question, which, again, takes
21 me back to my question wondering whether I'm the
22 right person to be making this pitch to rather
23 than a legislator.

24 Can you help me with that?

25 MR. HOFFMAN: Sure, Your Honor.

1 The -- I think the -- the main answer
2 is that this Court in -- in *Sosa* decided that
3 the original authorization that the first
4 Congress made to the courts to enforce the law
5 of nations using common law methods was still
6 viable, notwithstanding *Erie* and notwithstanding
7 many of the arguments that -- that the
8 defendants make in this case, and that if there
9 was a specific universal and obligatory norm of
10 the same degree of definiteness and consensus as
11 the -- the norms that applied in the 18th
12 century, that it was appropriate for this Court
13 to recognize the ability to enforce those norms
14 by tort liability in our courts.

15 And -- and, basically, the -- the
16 norms about child slavery and forced labor are
17 as -- as quintessential *Sosa* qualifying norms as
18 could possibly be imagined.

19 Now, with respect to aiding and
20 abetting liability, for one, I think that if the
21 Court wants to reach that issue, I think it
22 would benefit from full briefing and argument on
23 that issue specifically because those were not
24 exactly in the questions presented, but -- but
25 our position on aiding and abetting liability is

1 that, in fact, the founders understood aiding
2 and abetting liability. There was aiding and
3 abetting liability in British common law that
4 was received in our law.

5 The Bradford opinion talks about U.S.
6 defendants -- U.S. nationals aiding and abetting
7 French -- the French in terms of their attack on
8 Sierra Leone. The Talbot decision, I think, as
9 Justice Sotomayor noticed, deals with aiding and
10 abetting liability.

11 So it's not -- the idea in the Alien
12 Tort Statute was to provide a remedy and
13 reparations when U.S. citizens violated the
14 rights of -- of foreign citizens. And the --
15 the first Congress was not looking to restrict
16 the -- the nature of liability. They were --
17 they would not want to exempt corporations and
18 give them immunity. They would not want to
19 limit the -- the decision to a place of injury.
20 What they were looking to do was to separate the
21 --

22 JUSTICE GORSUCH: That's all for now.
23 I'm afraid my -- my time's expired. Thank you
24 very much.

25 MR. HOFFMAN: I'm sorry.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh.

4 JUSTICE KAVANAUGH: Thank you, Chief
5 Justice.

6 And good morning and welcome,
7 Mr. Hoffman.

8 MR. HOFFMAN: Good morning.

9 JUSTICE KAVANAUGH: I have a different
10 flavor of Justice Gorsuch's broader question
11 about separation of powers. And this case
12 really is a case, I think, about the proper role
13 of the judiciary as compared to the proper role
14 of Congress here in fleshing out the Alien Tort
15 Statute.

16 As you know, Sosa and Jesner and our
17 other cases have said the court -- the courts
18 should not be out in front in fleshing out the
19 cause of action here. It didn't go -- it didn't
20 reject it entirely. It didn't take Justice
21 Scalia's position, but it shouldn't be out in
22 front.

23 And two sources in particular the
24 Court has said to look to to constrain the cause
25 of action to make sure, as Justice Gorsuch said,

1 we're not creating it ourselves, and one is, of
2 course, making sure the norm is sufficiently
3 rooted in international law, as you know.

4 And my concern on that is the language
5 of Sosa doesn't just talk about the norm, as you
6 know, but Footnote 20 specifically directs us to
7 look at the particular perpetrator being sued
8 and the category of perpetrator, whether it's a
9 corporation or individual.

10 And I've looked at this before, as you
11 know, and looked at it again, and I think it's
12 hard to argue that corporate liability in
13 international law is a specific universal and
14 obligatory -- or specific and universal.

15 Foreign law is different. Justice
16 Kagan rightly points that out. And there may be
17 debatable policy reasons for drawing a line
18 between individual and corporate liability, but
19 it's -- but it's hard to argue that it's there
20 in international law.

21 That's my concern in this case, stems
22 -- the question presented on corporate liability
23 stems from Footnote 20 and the content, as I see
24 it, of international law. So I'll give you an
25 opportunity to respond to that.

1 MR. HOFFMAN: Well, Your Honor, I
2 think that the -- the -- the question I think we
3 would argue at Footnote 20 was addressed to the
4 distinction between norms that applied directly
5 to private parties, including corporations,
6 versus norms that required some connection to
7 state action. I think that the citations there
8 make that fairly clear.

9 I don't think it was saying that
10 corporate liability had to be a specific
11 universal and obligatory norm because that's
12 really not the way the international system
13 works. Many governments do impose corporate
14 liability for violations of international law.
15 For example, in a --

16 JUSTICE KAVANAUGH: That's a -- I
17 think that's a different question, though, and
18 that gets to Justice Kagan's point, which I
19 think is a good one, that foreign -- foreign law
20 does impose corporate liability, of course, as
21 does U.S. law in many circumstances, but the
22 international law and the international
23 tribunals have not seemed to do so.

24 MR. HOFFMAN: It's correct that in --
25 in certain international tribunals for -- for

1 reasons specific to those tribunals, did not
2 impose liability on corporations, but the Alien
3 Tort Statute's basically a tort statute. It's a
4 civil tort statute.

5 And I think the international human
6 rights amicus indicates that corporate liability
7 is a general principle of law. It applies in
8 all legal systems. It has applied in our legal
9 system from the beginning. It applied in -- in
10 Britain before we were a nation.

11 In other words, corporate tort
12 liability is the -- is the norm. It's not the
13 exception.

14 JUSTICE KAVANAUGH: Well, except --
15 then the second constraint that the Court has
16 said to look to, of course, is Congress. And
17 you don't see it in the things like the TVPA.

18 You've responded to that, though. And
19 my time's up, so I'll let -- let it go there.

20 MR. HOFFMAN: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett.

23 JUSTICE BARRETT: Counsel, in response
24 to a question by Justice Kagan, you said that
25 the ATS was a statement by the First Congress

1 that we will enforce the law of nations and
2 provide a forum for foreign citizens to do that.

3 But, of course, the ATS also did it to
4 protect the -- you know, the -- the policy
5 interests of the United States and to protect
6 the United States from retaliation by other
7 countries in circumstances in which it failed to
8 provide such a forum.

9 So we've talked a little bit about the
10 foreign policy implications or lack thereof of
11 our recognizing a cause of action against
12 domestic corporations for violations of
13 international law norms, but could you say a
14 little bit about any foreign policy implications
15 that might be the result of our failing to
16 recognize such a cause of action?

17 MR. HOFFMAN: Well, I think that,
18 certainly, the original idea -- and -- and --
19 and this is reflected in the -- the Jefferson
20 and Randolph opinions and in the Bradford
21 opinion with respect to the attack on Sierra
22 Leone -- other countries did protest in those
23 instances acts by U.S. citizens in their
24 territory that violated the law of nations and
25 -- and that the idea of the ATS was to provide

1 that forum so to avoid that kind of protest. It
2 -- it didn't require a --

3 JUSTICE BARRETT: But -- but would we
4 -- I -- I guess my question is, do you think
5 that the United States would face such protest
6 in this circumstance, in this suit?

7 MR. HOFFMAN: Well, it hasn't. I
8 mean -- and -- and for one thing, it's not clear
9 whether there's a forum or there isn't a forum.
10 So the Ivory Coast wouldn't have reason at this
11 point to -- to protest.

12 You know, it's not clear whether, in
13 today's world, there would be protests of the
14 same nature, but it seems to me that the -- that
15 the -- the purpose of the statute was to provide
16 that kind of forum. And Sosa interpreted that
17 to -- to limit it in some respects to certain
18 fundamental international human rights norms
19 without the --

20 JUSTICE BARRETT: Let's return to the
21 question of the potential foreign policy
22 implications of extending liability to domestic
23 corporations in this circumstance.

24 So Mr. Katyal was pointing out that
25 domestic corporations often have relationships

1 with foreign subsidiaries or parent corporations
2 and, therefore, that many of the same concerns
3 that we identified in Jesner would be implicated
4 by the recognition of liability in this context
5 as well.

6 So what do you have to say to that?
7 Would recognizing liability here against a
8 domestic corporation with foreign -- foreign
9 relatives just permit an end run around Jesner?

10 MR. HOFFMAN: I think that in this
11 particular instance, Cargill and Nestle USA are
12 in different circumstances. Cargill is
13 obviously only a U.S. corporation and doesn't
14 raise those issues.

15 The issue with Nestle, I think, if --
16 if it is, in fact, the case that Nestle
17 Switzerland, the parent, is actually the one
18 controlling and that we're wrong, I think that,
19 in fact, under Jesner, probably there can't be a
20 viable ATS claim against Nestle USA.

21 That's not what we believe, but if, in
22 fact, the facts turn out that way, then I think
23 it probably is in conflict with Jesner.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Mr. Hoffman,

1 you can take a few minutes to wrap up.

2 MR. HOFFMAN: Thank you, Mr. Chief
3 Justice.

4 Few international norms are as
5 fundamental as the prohibitions against child
6 slavery and forced labor. Plaintiffs' claims
7 satisfy every Sosa requirement and fit squarely
8 within the text, history, and purpose of the
9 ATS.

10 The ATS represents a commitment to
11 enforce the law of nations in our courts, a
12 commitment Congress has never withdrawn or
13 restricted, and certainly not with respect to
14 child slavery.

15 This Court should reaffirm that
16 commitment and should allow these former child
17 slaves to have their day in court.

18 Thank you, Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Katyal, rebuttal?

22 REBUTTAL ARGUMENT OF NEAL K. KATYAL
23 ON BEHALF OF THE PETITIONERS

24 MR. KATYAL: Four points, Your Honor.

25 First, Nestle and Cargill abhor child

1 slavery. This case isn't about that. It's
2 about whether this old statute applies
3 extraterritorially and who can be sued.

4 When asked by Justices Alito and
5 Sotomayor where in the complaint is there any
6 knowledge of slavery by the defendants, my
7 friend couldn't answer. Zilch.

8 This case is an easy one on
9 extraterritoriality where there is no U.S.
10 injury and little U.S. conduct. Accepting the
11 complaint would create the craven watchdog
12 problem of Morrison. Indeed, a breathtaking
13 kennel of problems, as my friend's opening line
14 admitted that, lawsuits "without limitation on
15 defendants or theories of tort liability."

16 And even if aiding and abetting
17 liability exists, Justice Sotomayor, it doesn't
18 get around extraterritoriality. Rather, its
19 ambiguity highlights the problem, as Justice
20 Breyer's worry to my friend showed. The ATS's
21 focus is still the injury or principal
22 wrongdoing. Otherwise, it's truly aiding and
23 amorphousness.

24 Second, my friend suggests our view
25 guts human rights law. But ours was a law for

1 at least the first 200 years with no practice of
2 ATS liability. Indeed, Congress knows how to
3 fashion specific remedies for the extreme
4 hypotheticals and already has.

5 I heard no answer from my friend to
6 the five mechanisms to prevent abuse.

7 Third, my friend's arguments never
8 grapple with Justice Kavanaugh's point that in
9 every case -- that every case has said that this
10 Court shouldn't be out in front. It's his high
11 burden under *Sosa* to convince you a specific
12 universal norm exists. He doesn't.

13 Fourth and finally, for corporate
14 liability, Justice Breyer, in your query what's
15 new, this Court's majority, not the plurality,
16 Justice Kagan, in *Jesner*, said there are harms
17 to separation of powers and hard policy choices
18 about how to maximize deterrence, foreign
19 investment, and foreign policy.

20 Congress sometimes uses corporate
21 liability and sometimes doesn't, like the TVPA.
22 The queries today about how can we exempt
23 corporations, it makes no sense, could be said
24 about torture, but in the TVPA, Congress said
25 there was no liability for corporations.

1 The fact that there are two reasonable
2 choices shows you should defer to Congress.

3 Same with extraterritoriality.
4 Sometimes Congress extends a statute that way,
5 like genocide, other times it doesn't. Nothing
6 in the ATS says it reaches an injury halfway
7 across the globe.

8 And the new Jefferson and Randolph
9 letters are about U.S. conduct, bringing people
10 to the U.S. as slaves, and they're about
11 alienage jurisdiction under Article III.
12 Neither says the ATS overcomes the
13 extraterritoriality bar.

14 Justice Breyer, you asked, do we want
15 a judge deciding this? This thin and accusatory
16 complaint and my friend's admission of just how
17 open-ended and transformative his liability
18 would be answers that question.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 11:28 a.m., the case
22 was submitted.)

23
24
25

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