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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.

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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 hauling 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 amorphous
22 in this particular case because there's two axes
23 here. One is extraterritoriality, which is
24 already blinking red here because there is no
25 U.S. injury or principal wrong.

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

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

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

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

25 And, here, there isn't. The only

1 evidence they can even point to about child
2 slavery in particular is one source, a 1930
3 Liberia report, that says, although government
4 officials used their authority to force labor,
5 there's no evidence that the only corporation in
6 the country did so.

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

13 And so, Justice Thomas --

14 JUSTICE THOMAS: Thank you.

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

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

24 Now that's so, isn't it? This statute
25 was designed, in part, to give a remedy. But

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

9 Why should that make a difference?

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

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

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

21 MR. KATYAL: I understand.

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

1 statute.

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

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

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

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

23 MR. KATYAL: For two reasons: One,
24 because there's already a separate remedy of
25 going after the individual, and second, because

1 corporate liability, as Congress recognized in
2 the TVPA, has any number of other difficulties,
3 such as mens rea.

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

9 JUSTICE BREYER: Oh, by the way, the
10 individual --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice -- Justice Alito.

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

23 You would say that the victims who
24 couldn't possibly get any recovery in the courts
25 of the country where they had been held should

1 be thrown out of court in the United States,
2 where this corporation is headquartered and does
3 business?

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

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

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

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

23 And in your hypothetical, there are
24 five different mechanisms that would prevent any
25 abuse. First is foreign law, the law of the

1 Ivory Coast. There are already criminal
2 sanctions there, and the State Department and
3 Department of Labor says those are being used.

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

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

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

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

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

1 would suspect that would be easy.

2 But I think implicit in --

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor.

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

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor.

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

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

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

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

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

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

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

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

25 MR. KATYAL: Right. So --

1 JUSTICE SOTOMAYOR: Those are the
2 substantive issues.

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

9 And the reason why, I think --

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

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

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

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

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

6 CHIEF JUSTICE ROBERTS: Justice Kagan.

7 MR. KATYAL: And so --

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

10 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

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

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

24 JUSTICE KAGAN: Yeah, no problem
25 extraterritorial, no problem aiding and

1 abetting, just a straight suit.

2 MR. KATYAL: Correct.

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

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

10 JUSTICE KAGAN: Okay. So if --

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

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

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

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

1 against 10 slaveholders, 10 slaveholders decide
2 to form a corporation specifically to remove
3 liability from themselves, and now you're saying
4 you can't sue the corporation?

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

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

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

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

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

24 JUSTICE KAGAN: -- Mr. -- sorry to
25 interrupt, Mr. Katyal. There's an amicus brief

1 by Professor Hathaway that details the long
2 history of imposing liability on slave ships.
3 Those were not individuals, were they?

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

10 JUSTICE KAGAN: Thank you, Mr. Katyal.

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

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

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

25 And on -- on -- on those two lines, on

1 the language and on the rationale that this
2 Court has long adopted, recognized for the ATS,
3 why would we exempt --

4 MR. KATYAL: So --

5 JUSTICE GORSUCH: I understand your
6 policy arguments.

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

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

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

23 And our fundamental -- or it imposes
24 lots of problems like mens rea and the like.
25 And fundamental --

1 JUSTICE GORSUCH: I don't believe you
2 -- okay. I -- I -- I -- I understand your
3 responses there. I don't believe you did get a
4 chance to fully respond to Justice Kagan on the
5 last point. I would like an answer to that.
6 And that is we do know one thing about the ATS,
7 is that it did permit in rem jurisdiction
8 against things, in particular, pirate ships.

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

14 MR. KATYAL: For -- for the exact
15 reasons --

16 JUSTICE GORSUCH: Briefly.

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

25 JUSTICE GORSUCH: Thank you,

1 Mr. Katyal.

2 MR. KATYAL: -- which is not
3 something --

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh.

7 JUSTICE KAVANAUGH: Thank you, Chief
8 Justice.

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

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

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

25 All we're suggesting is to preserve

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

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

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

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett.

23 JUSTICE BARRETT: Mr. Katyal, a lot of
24 the questions you've been asked thus far focus
25 on whether there's a specific universal and

1 obligatory norm here. And that, you know, as
2 many of my colleagues have pointed out, raises
3 some complications.

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

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

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

22 JUSTICE BARRETT: Well, if we do
23 resolve it at Sosa step 2, when would we ever
24 recognize a cause of action? Because, you know,
25 most cases will raise the same -- let's focus on

1 the separation of powers prong. Most cases
2 raise this question of the intricate policy
3 questions that may be better left to Congress.
4 I mean, we've been very restrained in the Bivens
5 context about recognizing more causes of action.

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

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

22 JUSTICE BARRETT: It's not if a
23 corporation was -- was the perpetrator sued in
24 any of those cases?

25 MR. KATYAL: Right. We don't think

1 that --

2 JUSTICE BARRETT: Court cases.

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

11 JUSTICE BARRETT: Thank you,
12 Mr. Katyal. My time's expired.

13 CHIEF JUSTICE ROBERTS: A minute to
14 wrap up, counsel.

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

23 And when there are those allegations
24 of such wrongdoing, there are five different
25 parts -- paths, apart from the ATS, to protect

1 human rights. And this Court has always said
2 great caution has to be exercised when
3 recognizing a new cause of action, even in the
4 face of hard facts.

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

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Gannon.

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

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

23 The United States condemns child
24 slavery and trafficking. Congress has expressly
25 provided for criminal and civil liability for

1 forced labor in certain circumstances. And the
2 federal government has specifically supported
3 efforts to eliminate the worst forms of child
4 labor at cocoa farms in Cote d'Ivoire.

5 But this Court should not extend the
6 reach of the Alien Tort Statute to encompass
7 Respondent's claims in this case for two
8 principal reasons.

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

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

21 CHIEF JUSTICE ROBERTS: Counsel, I
22 want to ask you the same question I asked Mr.
23 Katyal. We don't have objections from foreign
24 countries in this case. As far as we can tell,
25 they're perfectly comfortable having U.S.

1 citizens, U.S. corporations hailed into their --
2 in U.S. courts.

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

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

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

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

23 But even in this case, the allegations
24 are somewhat inchoate even though the case is 15
25 years old, but there are ways, as Mr. Katyal

1 pointed out, that this case could still threaten
2 foreign affairs interests if it comes to
3 fruition.

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

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas.

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

25 Counsel, the -- I'm intrigued by my

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

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

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

1 that connection in Hernandez.

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

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

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

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

20 The Marbois incident that Justice
21 Breyer brought up has been discussed by Sosa and
22 Kiobel. And in both cases, the Court assumed
23 that both the Frenchman and the New York
24 constable who assaulted an ambassador in the
25 United States would be liable.

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

6 JUSTICE THOMAS: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer.

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

15 When I looked it up once, there were
16 180 ATS lawsuits against corporations. Most of
17 them lost but on other grounds. So why not sue
18 a domestic corporation?

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

24 What's new about it? Why is it
25 creating a form of action? What's the reason it

1 shouldn't be there? In -- I -- I don't see --
2 is it a different rule again for partnership?
3 Different rule again for, I don't know, limited
4 liability companies or -- I mean, there are many
5 forms of doing business. Why?

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

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

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

20 JUSTICE BREYER: Yeah, yeah.

21 MR. GANNON: And Malesko demonstrated
22 that merely having an underlying form of civil
23 liability for individuals doesn't necessarily
24 mean that it should be extended to corporations.
25 And you're right, there may be a background rule

1 that corporations are generally liable for the
2 torts of their agents.

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

16 Now Congress did take a different
17 route in the Trafficking Victims Protection Act
18 where they ultimately recognized a civil remedy,
19 but it departs from the ATS in multiple ways.
20 It didn't make the civil provision retroactive.
21 It doesn't discriminate between a U.S.
22 corporation and a foreign corporation found in
23 the United States. It's arguably
24 extraterritorial at Morrison step 1 in a way
25 that the ATS is not. And it provides a specific

1 cause of action with details that are tailored
2 to the particular violations at issue. So --

3 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

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

22 JUSTICE ALITO: Won't your arguments
23 about aiding and abetting and
24 extraterritoriality all lead to essentially the
25 same result as holding that a domestic

1 corporation cannot be sued under the ATS?
2 Corporations always act through natural persons,
3 so if a corporation can't aid and abet, there --
4 there will be only a sliver of activity where
5 they could be responsible under respondeat
6 superior, isn't that true?

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

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

22 And so I think part of the question is
23 going to be whether you recognize aiding and
24 abetting liability or whether you're going to
25 require the corporation to commit the actual

1 tort or its agents to commit the actual
2 underlying tort.

3 JUSTICE ALITO: All right. Yeah.
4 Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor.

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

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

21 So I'm having a very hard time
22 accepting that if an individual aided and
23 abetted in the United States or anywhere else
24 that we couldn't hold that individual liable.

25 Could you explain to me why -- I'm

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

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

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

18 JUSTICE SOTOMAYOR: All right. Now --

19 MR. GANNON: -- liability for aiding
20 and abetting that --

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

1 MR. GANNON: Okay.

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

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

22 CHIEF JUSTICE ROBERTS: Briefly,
23 counsel.

24 MR. GANNON: Yes, briefly, our reason
25 is not one of international law. It is that

1 under Central Bank of Denver, the Court has
2 recognized that when Congress recognizes primary
3 civil liability, that doesn't incorporate the
4 expansion associated with aiding and abetting
5 liability, unless Congress separately provides
6 for that.

7 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

22 And, here, the United States Congress
23 has actually provided for liability, civil
24 liability, for many violations of international
25 law.

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

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

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

23 Under the Torture Victim Protection
24 Act, Congress didn't think that corporations
25 needed to be held liable in order for us to

1 effectuate our obligations to prevent torture.

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

8 JUSTICE KAGAN: Thank you, Mr. Gannon.
9 Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch.

12 JUSTICE GORSUCH: I have no questions.
13 Thank you, Chief.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you, Chief
17 Justice.

18 And good morning, Mr. Gannon.

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

23 In your view, are you -- does this
24 case have an impact on foreign policy, or are
25 you making a more general argument about the

1 ATS?

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

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

9 MR. GANNON: Not specifically. We are
10 saying that there are allegations in the
11 complaint that if this case were ultimately
12 brought to fruition, that, like the other types
13 of cases that have previously presented
14 concerns, may well point up a particular foreign
15 relations problem because they implicate the
16 actions of foreign officials potentially, and
17 separately we do say that there is a potential
18 interaction here between the allegations of
19 liability here and efforts that the executive
20 branch, Congress, other governments are making
21 in order to help solve and ameliorate the human
22 rights situation in forced labor chains, that
23 the Harkin-Engel protocol is used by plaintiffs
24 here as evidence of liability rather than an
25 instance where a U.S. corporation is -- is

1 engaging in good faith in efforts to try to
2 ameliorate human rights abuses.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett.

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

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

23 MR. GANNON: Well, I -- I think that
24 there are two different ways of looking at that.
25 We do think that the focus test requires us to

1 look at the object of the statute's solicitude,
2 including the conduct that the statute seeks to
3 regulate.

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

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

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: A minute to
24 wrap up, Mr. Gannon.

25 MR. GANNON: Thank you, Mr. Chief

1 Justice.

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

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

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

22 So plaintiffs' claims call for an
23 impermissibly extraterritorial application of
24 the ATS. We urge the Court to reverse.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Hoffman.

3 ORAL ARGUMENT OF PAUL L. HOFFMAN

4 ON BEHALF OF THE RESPONDENTS

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

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

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

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

23 Unlike *Kiobel* and *Jesner*, this case
24 does not seek to assert U.S. jurisdiction over
25 foreign corporations for actions against other

1 foreign citizens they took on foreign soil.
2 This case alleges violations of long-established
3 norms prohibiting child slavery and forced labor
4 by U.S. corporations from the United States.

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

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

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

23 CHIEF JUSTICE ROBERTS: Counsel, this
24 case, of course, involves United States citizens
25 and United States courts. But, in the context

1 of that action, much of the focus is going to be
2 on conduct overseas, and those responsible for
3 that can be brought into court either as
4 witnesses or for aiding and abetting.

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

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

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

23 Moreover, Congress already decided in
24 the Trafficking Victim Protection Act that
25 forced labor and child slavery and -- or slavery

1 generally, in supply chains, is something for
2 which damage remedies are appropriate. And --
3 and, obviously, the Congress doesn't think that
4 those issues present any -- any of those
5 problems.

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

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

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

23 CHIEF JUSTICE ROBERTS: So then going
24 --

25 MR. HOFFMAN: And so I think --

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas.

21 JUSTICE THOMAS: Thank you, Mr. Chief
22 Justice.

23 But the -- but the TVPA seems to
24 suggest that Congress does not see the ATS the
25 way you do. Obviously, there, you don't have

1 corporate liability and you don't have aiding
2 and abetting liability. So why shouldn't we
3 take that as an indication that Congress sought
4 limitations on -- on the ATS jurisdiction?

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

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

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

22 And so whatever Congress thought about
23 corporate liability for claims of torture or
24 extrajudicial execution, Congress has made it
25 very clear that they believe that there should

1 be corporate liability when it comes to
2 knowingly benefiting from forced labor and
3 slavery in -- in the supply chain.

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

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

19 JUSTICE THOMAS: Yeah.

20 MR. HOFFMAN: -- under those terms.

21 JUSTICE THOMAS: On a separate matter,
22 there seems to be some suggestion in the
23 arguments, the -- in some of the other arguments
24 that there's no -- even though there's no
25 universal norm for aiding and abetting in the

1 civil context, it may well be in the criminal
2 context.

3 What's your reaction to that?

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

8 JUSTICE THOMAS: Yeah.

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

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

1 JUSTICE THOMAS: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Breyer.

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

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

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

22 And I don't know, but I have concern
23 that treating this allegation, the six that you
24 make here, as aiding and abetting falling within
25 that term for purposes of this statute, if other

1 nations do the same, and we do the same, could
2 have very, very significant effects.

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

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

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

21 MR. HOFFMAN: But -- but --

22 JUSTICE BREYER: But in this case do
23 we want a judge to say you can't do that
24 anymore?

25 MR. HOFFMAN: Well, what -- what we're

1 saying is that a court should decide based on
2 the international principles of aiding and
3 abetting whether the -- these corporate
4 defendants have crossed the line between merely
5 doing business and facilitating that system.

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

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

21 JUSTICE BREYER: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Alito.

23 JUSTICE ALITO: Mr. Hoffman, I'm
24 interested in what your complaint alleges about
25 mens rea of these particular defendants

1 regarding forced child labor.

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

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

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

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

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

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

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

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

24 So we have alleged knowledge. Whether
25 we -- the "should have known" is superfluous, I

1 think, to that, to the -- we've alleged that
2 they actually know about --

3 JUSTICE ALITO: See here, this is an
4 important point, and this is something you have
5 to allege even under notice pleading.

6 And I assume you're really careful --
7 you were careful about what you alleged because
8 you don't want to incur Rule 11 liability. So
9 after 15 years, is it too much to ask that you
10 allege specifically that the -- the defendants
11 involved -- the defendants who are before us
12 here specifically knew that forced child labor
13 was being used on the farms or farm cooperatives
14 with which they did business? Is that too much
15 to ask?

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

23 And -- and, yes, we -- we can allege
24 that they knew that they were involved with the
25 farms in the region that supplies child -- that

1 supplies -- that involve child slave labor,
2 including the -- the -- the six former child
3 slaves who are plaintiffs in this case.

4 JUSTICE ALITO: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor.

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

12 MR. HOFFMAN: No, that's -- that's not
13 our position, Your Honor.

14 JUSTICE SOTOMAYOR: All right. So
15 knowledge that child labor was being used you
16 don't claim is enough.

17 MR. HOFFMAN: That's right.

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

23 But I don't see an allegation other
24 than sending representatives to look at the
25 farms so that knowledge could be imputed, that

1 there's any other actual acts of aiding and
2 abetting that you have alleged against the
3 particular U.S. corporations that you're suing.

4 MR. HOFFMAN: Well, our position is
5 that these corporations from their headquarters
6 have controlled every aspect of the supply
7 chain.

8 JUSTICE SOTOMAYOR: But I don't
9 understand what "control" means.

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

11 JUSTICE SOTOMAYOR: I -- have you
12 shown that they directed a foreign corporation,
13 even if it's a subsidiary?

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

20 JUSTICE SOTOMAYOR: If you were given
21 leave to amend, you could actually show that
22 they transmitted the money, that they
23 directly -- I'm not talking about their
24 subsidiaries -- that the American corporation
25 actually directed the money to go --

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

9 And we think we have enough
10 information to -- to link the decision-making
11 and corporate policy in the issue of getting
12 these cocoa beans from farms that --

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

19 MR. HOFFMAN: Right.

20 JUSTICE SOTOMAYOR: And so -- so
21 that's what I'm trying to get out of you --

22 MR. HOFFMAN: But the decision --

23 JUSTICE SOTOMAYOR: -- is to show that
24 the affirmative act was actually sending money
25 to those places, that they're the funders,

1 direct funders of the farms, et cetera.

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

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

16 JUSTICE SOTOMAYOR: Thank you,
17 counsel.

18 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

1 foreign corporations weren't liable, the Court
2 really can't hold that domestic corporations
3 are.

4 What -- what is your response to that?

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

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

23 And I think that the Jefferson and
24 Randolph opinions recently underscored that,
25 that we made a commitment to the world that when

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

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

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

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

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

23 If you look at that decision, what do
24 you think it tells us about the approach that we
25 need to use to answer the question of domestic

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

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

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

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

24 And in the ATS, our first Congress
25 said that tort liability using common law

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

5 And many states --

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

8 MR. HOFFMAN: Sorry.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch.

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

13 MR. HOFFMAN: Good morning.

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

18 MR. HOFFMAN: Yes.

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

24 We have abandoned federal common law
25 in every other area after hearing, or at least

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

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

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

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

23 Can you help me with that?

24 MR. HOFFMAN: Sure, Your Honor.

25 I think the -- the main answer is that

1 this Court in -- in *Sosa* decided that the
2 original authorization that the first Congress
3 made to the courts to enforce the law of nations
4 using common law methods was still viable,
5 notwithstanding *Erie* and notwithstanding many of
6 the arguments that -- that the defendants make
7 in this case, and that if there was a specific
8 universal and obligatory norm of the same degree
9 of definiteness and consensus as the -- the
10 norms that applied in the 18th century, that it
11 was appropriate for this Court to recognize the
12 ability to enforce those norms by tort liability
13 in our courts. And -- and basically the -- the
14 norms about child slavery and forced labor are
15 as -- as quintessential *Sosa* qualifying norms as
16 could possibly be imagined.

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

1 abetting liability in British common law that
2 was received in our law.

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

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

19 JUSTICE GORSUCH: My time -- my time's
20 expired. Thank you very much.

21 MR. HOFFMAN: I'm sorry.

22 JUSTICE GORSUCH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh.

25 JUSTICE KAVANAUGH: Thank you, Chief

1 Justice, and good morning and welcome,
2 Mr. Hoffman.

3 MR. HOFFMAN: Good morning.

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

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

18 And two sources in particular, the
19 Court has said to look to, to constrain the
20 cause of action to make sure, as Justice Gorsuch
21 said, we're not creating it ourselves. And one
22 is, of course, making sure is the norm is
23 sufficiently rooted in international law, as you
24 know.

25 And my concern on that is the language

1 of Sosa doesn't just talk about the norm, as you
2 know, but footnote 20 specifically directs us to
3 look at the particular perpetrator being sued
4 and the category of perpetrator, whether it's a
5 corporation or individual.

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

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

17 That's my concern in this case, stems
18 -- the question presented on corporate liability
19 stems from footnote 20 in the content, as I see
20 it, of international law. So I'll give you an
21 opportunity to respond to that.

22 MR. HOFFMAN: Well, Your Honor, I
23 think that the -- the -- the question on -- I
24 think we would argue at footnote 20 was
25 addressed to the distinction between norms that

1 applied directly to private parties, including
2 corporations, versus norms that required some
3 connection to state action. I think that the
4 citations there make that fairly clear.

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

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

20 MR. HOFFMAN: It's correct that in --
21 certain international tribunals for -- for
22 reasons specific to those tribunals, did not
23 impose liability on corporations, but the Alien
24 Tort Statute's basically a tort statute. It's a
25 civil tort statute.

1 And I think the international human
2 rights amicus indicates corporate liability is a
3 general principle of law. It applies in all
4 legal systems. It is applied in our legal
5 system from the beginning. It applied in -- in
6 Britain before we were a nation.

7 In other words, corporate tort
8 liability is the -- is the norm. It's not the
9 exception.

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

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

16 MR. HOFFMAN: Thank you, Your Honor.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett.

19 JUSTICE BARRETT: Counsel, in response
20 to a question by Justice Kagan, you said that
21 the ATS was a statement by the First Congress
22 that we will enforce the law of nations and
23 provide a forum for foreign citizens to do that.

24 But, of course, the ATS also did it to
25 protect the -- you know, the -- the policy

1 interests of the United States and to protect
2 the United States from retaliation by other
3 countries in circumstances in which it failed to
4 provide such a forum.

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

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

21 And -- and that the idea of the ATS
22 was to provide that forum so -- to avoid that
23 kind of protest. It didn't require a --

24 JUSTICE BARRETT: But -- but would we
25 -- I -- I guess my question is, do you think

1 that the United States would face such protest
2 in this circumstance, in this suit?

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

8 You know, it's not clear whether in
9 today's world, there would be protests of the
10 same nature, but it seems to me that the -- that
11 the -- the purpose of the statute was to provide
12 that kind of forum. And Sosa interpreted that
13 to -- to limit it in some respects to certain
14 fundamental international human rights norms.

15 JUSTICE BARRETT: Let's return to the
16 question of the potential foreign policy
17 implications of extending liability to domestic
18 corporations in this circumstance.

19 So Mr. Katyal is pointing out that
20 domestic corporations often have relationships
21 with foreign subsidiaries or parent corporations
22 and, therefore, that many of the same concerns
23 that we identified in Jesner would be implicated
24 by the recognition of liability in this context
25 as well.

1 So what do you have to say to that?
2 Would recognizing liability here against a
3 domestic corporation with foreign -- foreign
4 relatives just permit an end run around Jesner?

5 MR. HOFFMAN: I think that in this
6 particular instance, Cargill and Nestle USA are
7 in different circumstances. Cargill is
8 obviously only a U.S. corporation and doesn't
9 raise those issues.

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

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

19 JUSTICE BARRETT: Thank you.

20 CHIEF JUSTICE ROBERTS: Mr. Hoffman,
21 you can take a few minutes to wrap up.

22 MR. HOFFMAN: Thank you, Mr. Chief
23 Justice.

24 Few international norms are as
25 fundamental as the prohibitions against child

1 slavery and forced labor. Plaintiffs claims
2 satisfy every Sosa requirement and fit squarely
3 within the text, history, and purpose of the
4 ATS.

5 The ATS represents a commitment to
6 enforce the law of nations in our courts, a
7 commitment Congress has never withdrawn or
8 restricted, and certainly not with respect to
9 child slavery.

10 This Court should reaffirm that
11 commitment and should allow these former child
12 slaves to have their day in court.

13 Thank you, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Katyal, rebuttal?

17 REBUTTAL ARGUMENT OF NEAL K. KATYAL
18 ON BEHALF OF THE PETITIONERS

19 MR. KATYAL: Four points, Your Honor.
20 First, Nestle and Cargill abhor child slavery.
21 This case isn't about that. It's about whether
22 this old statute applies extraterritorially and
23 who can be sued.

24 When asked by Justices Alito and
25 Sotomayor where in the complaint is there any

1 knowledge of slavery by the defendants, my
2 friend couldn't answer. Zilch.

3 This case is an easy one on
4 extraterritoriality where there is no U.S.
5 injury and little U.S. conduct. Accepting the
6 complaint would create the Craven Watchdog
7 problem of Morrison.

8 Indeed, a breathtaking kennel of
9 problems, as my friend's opening line admitted,
10 that lawsuits "without limitation on defendants
11 or theories of tort liability."

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

20 Second, my friend suggests our view
21 guts human rights law. But ours was a law for
22 at least the first 200 years with no practice of
23 ATS liability. Indeed, Congress knows how to
24 fashion specific remedies for the extreme
25 hypotheticals, and already has.

1 I heard no answer from my friend to
2 the five mechanisms to prevent abuse.

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

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

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

22 The fact that there are two reasonable
23 choices shows you should defer to Congress.

24 Same with extraterritoriality.
25 Sometimes Congress extends a statute that way,

1 like genocide, other times it doesn't. Nothing
2 in the ATS says it reaches an injury halfway
3 across the globe.

4 And the new Jefferson and Randolph
5 letters are about U.S. conduct, bringing people
6 to the U.S. as slaves, and they are about alien
7 jurisdiction under Article III. Neither says
8 the ATS overcomes the extraterritoriality bar.

9 Justice Breyer, you asked do we want a
10 judge deciding this? This thin and accusatory
11 complaint, and my friend 'admission of just how
12 open-ended and transformative his liability
13 would be, answers that question.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 11:28 a.m., the case
17 was submitted.)

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