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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 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 In 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 officially routed 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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