

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 CISCO SYSTEMS, INC., ET AL.,)
4 Petitioners,)
5 v.) No. 24-856
6 DOE I, ET AL.,)
7 Respondents.)
8 - - - - -

9
10 Washington, D.C.
11 Tuesday, April 28, 2026

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.

16
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24-856, Cisco Systems versus Doe.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONERS

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

Aiding-and-abetting liability constitutes a significant expansion of a civil cause of action. For that reason, this Court has made clear that it is generally not available absent clear congressional direction. The ATS contains no express cause of action at all, and the TVPA's cause of action contains no language that provides for aiding and abetting.

And recognizing such a cause of action would raise substantial foreign policy concerns, as in this case, which involves serious allegations of wrongdoing in a foreign country by a foreign government. It is for Congress, not for this Court, to provide for aiding-and-abetting liability under these

1 statutes, and it has not done so.

2 As to the ATS, Respondents primarily
3 rely on *Sosa*, which left open the possibility
4 that courts could recognize new causes of
5 action drawn from modern international law
6 under the ATS.

7 In light of this Court's most recent
8 cases concerning implied causes of action, the
9 Court should take this opportunity to clarify
10 that implying new causes of action under the
11 ATS is impermissible. But even under *Sosa*, it
12 would not be a proper exercise of judicial
13 discretion to recognize a categorical cause of
14 action for aiding and abetting.

15 Under *Central Bank*, Congress's silence
16 is sufficient to foreclose that cause of
17 action. And such a cause of action would pose
18 grave harms to foreign policy and the
19 separation of powers, as the government's brief
20 confirms. The Court has never created a new
21 cause of action under the ATS, and this should
22 not be the first.

23 As to the TVPA, the analysis is
24 straightforward. The statute contains no
25 language mentioning aiding, abetting,

1 assisting, facilitating, or otherwise
2 participating in another's conduct. To be
3 sure, the statute imposes liability on a person
4 who subjects the victim to torture, but that
5 verb recognizes one specific type of secondary
6 liability, command liability for an officer
7 responsible for the individual who inflicts the
8 torture.

9 As a matter of plain text but
10 especially under Central Bank, the TVPA does
11 not provide for aiding-and-abetting liability
12 either. Accordingly, the judgment of the court
13 of appeals should be reversed.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Can you think of any
16 cause of action that Sosa would permit?

17 MR. SHANMUGAM: We believe that Sosa
18 permits two types of causes of action, first, a
19 cause of action for the three core offenses
20 contemplated by the First Congress. I think
21 that that is common ground, and that was common
22 ground even in Sosa itself.

23 Second, and importantly, any cause of
24 action subsequently recognized by Congress, and
25 we know from the TVPA that Congress can

1 recognize causes of action for additional norms
2 if it chooses to do so. Congress did so for
3 two additional norms, torture and extrajudicial
4 killing in the TVPA.

5 In our view, that understanding of
6 Sosa respects the intent of the Congress that
7 enacted the Alien Tort Statute. After all, in
8 Sosa itself, the Court recognized that the ATS
9 in terms is only a jurisdictional statute, but
10 to avoid it being a dead letter, the Court
11 recognized these two additional categories.

12 JUSTICE JACKSON: Mr. Shanmugam, can I
13 just invite you to think about whether or not
14 aiding-and-abetting liability is actually a
15 significant expansion, as you said in your
16 opening statement?

17 What -- what is your view as to
18 whether or not aiding-and-abetting liability is
19 available for the Blackstone three that I think
20 you agree are in the ATS?

21 MR. SHANMUGAM: Yeah. So our view is
22 that there is insufficient historical evidence
23 even as to those three. And I won't belabor it
24 unless you would like me to. We go through in
25 the reply brief the sources relied upon by my

1 friend on the other side.

2 But I think, beyond that, we think
3 that the right way to think about those three
4 core offenses is that you would still need to
5 conduct the analysis at step 2 of Sosa, and I
6 think that under that analysis, many, if not
7 all, of the arguments that we're making as to
8 why it would be an improper exercise of
9 judicial discretion would apply in that context
10 as well.

11 JUSTICE JACKSON: But wouldn't we be
12 doing it in that case on a case-by-case basis?
13 I mean, I -- I'm wondering about your argument
14 insofar as it does seem to be grounded in the
15 view that aiding-and-abetting liability is,
16 like, a separate cause of action as opposed to
17 just an expansion of the types of defendants
18 who can be held liable for this underlying
19 conduct.

20 And so, I mean, I'm sure that your
21 friends on the other side will point to
22 evidence that even Blackstone thought that
23 aiding and abetting piracy or aiding and
24 abetting the other Blackstone established core
25 violations was allowed under international law,

1 and I don't understand why they would be
2 precluded as an expansion somehow of those core
3 violations.

4 MR. SHANMUGAM: Two points in response
5 to that, Justice Jackson.

6 First, I think it's a -- a fair point
7 that you could conceptualize this not as a
8 separate cause of action but as a question
9 concerning the scope of the cause of action. I
10 don't think anything really depends on that. I
11 think that we think that the analysis should be
12 the same either way.

13 And, indeed, I think Justice
14 Sotomayor's dissent in *Jesner* supports our view
15 because, to the extent that she construed
16 Footnote 20 of *Sosa* to suggest that you still
17 take domestic law into account when analyzing
18 these questions about the available defendants,
19 we would obviously point to *Central Bank*.

20 But, second -- and I think that this
21 is directly responsive to the question of what
22 to do about the three core offenses -- I think
23 that the Court could, if it so chose, simply
24 draw a line around those three core offenses
25 and say that whatever the historical evidence

1 on those three core offenses, that evidence
2 does not support recognition of
3 aiding-and-abetting liability across the board.
4 And Respondents are really advocating for a
5 categorical --

6 JUSTICE JACKSON: But why would we do
7 that? I guess what I -- my -- my point is why?
8 Why draw the line between the core offenses and
9 aiding and abetting as opposed to the core
10 offenses and other types of -- of offenses? I
11 don't understand the line that you would have
12 us draw.

13 MR. SHANMUGAM: I -- I think because
14 the approach that you're hinting toward would
15 run directly into Central Bank, and let me
16 explain why.

17 We think the right way to think about
18 the first step -- and, of course, we're not
19 really disputing the first step here, but let
20 me engage on that directly. We think that if
21 you're analyzing this under the first step, you
22 would have to engage in a norm-by-norm
23 analysis; namely, you would have to look to
24 whether or not, for any particular norm,
25 aiding-and-abetting liability is available.

1 But I don't think you can extrapolate
2 from the smattering of historical evidence
3 concerning the three core offenses that
4 aiding-and-abetting liability was generally
5 available in civil cases at the time of the
6 ATS.

7 JUSTICE KAGAN: Well, maybe not,
8 Mr. Shanmugam, but I guess the question is, why
9 might it not be available sometimes? In other
10 words, there's -- neither categorical rule is
11 right, but instead, it's a norm-by-norm inquiry
12 in much the way that Judge Bumatay suggested in
13 his Ninth Circuit opinion.

14 Why wouldn't that be the right way to
15 look at it? And it could -- you know, as he
16 suggested, even within the three Blackstone
17 offenses, the evidence for aiding-and-abetting
18 liability is quite different, maybe strongest
19 in piracy and then there is some questions
20 about the other two.

21 MR. SHANMUGAM: So, as you will be
22 aware, Justice Kagan, if you take a look at the
23 complaint, pages 100 to 101 of the Joint
24 Appendix, there are seven separate primary
25 norms on which Respondents are relying here.

1 Now Respondents, to the extent that
2 they make an argument under step 1, make no
3 effort to disaggregate those norms and engage
4 in the sort of norm-by-norm analysis that you
5 suggest. They've gone all or nothing, and
6 they've done that throughout this litigation.

7 So I don't think that they should be
8 given a second bite at the apple. Their
9 argument is for a categorical norm of
10 aiding-and-abetting liability.

11 And I do think that the best evidence
12 as to why this Court should be precise about
13 this is actually a law that was enacted a year
14 after the ATS, the Crimes Act of 1790, when
15 Congress, when it was defining criminal
16 liability, made aiding and abetting available
17 for piracy but not for the other two of the
18 three core offenses.

19 And so all of which is to say that
20 there should be norm-by-norm rigor in our view
21 in this analysis. But I would say one further
22 thing that I think is very important
23 conceptually.

24 JUSTICE KAGAN: I'm sorry, that there
25 should be.

1 MR. SHANMUGAM: There should be.

2 JUSTICE KAGAN: Because I was planning
3 on asking your friend the same question because
4 it seems to me that both of you fall into this,
5 you know, he urges one categorical rule, you
6 urge another categorical rule. And what I
7 might be suggesting is that neither of those
8 categorical rules is appropriate, that you have
9 to look norm by norm.

10 Of course, this case is quite odd
11 because -- because you're not contesting
12 whether any of these seven things that are
13 listed in the complaint are norms under the
14 ATS. And we're being referred only to this
15 broad aiding-and-abetting question, when the
16 more natural way of thinking about these
17 questions are, like, take a look at the norm,
18 is the norm covered first? And if the norm is
19 covered, what's the scope of liability,
20 secondary liability, that's attached to that
21 norm?

22 MR. SHANMUGAM: Two responses to that,
23 Justice Kagan.

24 First, if the Court accepts our first
25 order submission that the Court should shut the

1 door that it left open in Sosa, then the
2 norm-by-norm analysis obviously falls out of
3 the equation. Those primary norms are not
4 actionable, a fortiori, no secondary liability.

5 But, second, and I think importantly,
6 if you don't agree with that and we are in Sosa
7 world, at the second step of the analysis, I
8 actually don't think that the second step
9 requires a norm-by-norm analysis here because
10 the foreign policy concerns that I discussed at
11 the outset would be equally applicable
12 regardless of the norm that is at issue.

13 In each of these cases, you're talking
14 about a claim that would require a federal
15 court to find a primary violation of
16 international law based on the conduct of a
17 foreign sovereign on its own soil, and that's
18 true regardless of which of the seven norms is
19 at issue.

20 So, if you were looking for a
21 straight-line way to write an opinion in this
22 case, one way to do that would be simply to say
23 at the second step, much as in *Jesner*, that
24 these sorts of claims, these sorts of
25 aiding-and-abetting claims as a categorical

1 matter are likely to raise these sorts of
2 foreign policy concerns, as well as the broader
3 separation of powers concerns that underlie
4 this Court's reluctance to recognize implied
5 causes of action.

6 JUSTICE SOTOMAYOR: Counsel --

7 JUSTICE BARRETT: Mr. Shanmugam -- oh,
8 go ahead.

9 JUSTICE SOTOMAYOR: I'm sorry. Go
10 ahead.

11 JUSTICE BARRETT: I was just going to
12 ask you if your argument is restricted just to
13 aiding and abetting, or would it extend to
14 other forms of secondary liability, like civil
15 conspiracy as well? And if not, why not? If
16 yes, why?

17 MR. SHANMUGAM: It could potentially.
18 And I don't want to prejudge an issue that
19 could be coming to the Court because there is a
20 case recently decided by one of the courts of
21 appeals that involves a question of conspiracy
22 liability.

23 I think many of the same arguments
24 that we're making at step 2 could apply in that
25 context, but, again, I don't want to prejudge

1 that. I think that what we do have is a very
2 robust body of experience now with these sorts
3 of aiding-and-abetting claims.

4 And I do think that it is clear, and
5 the government sets this out at some length in
6 its brief, that this category of claims is
7 especially likely to raise these sorts of
8 foreign policy concerns.

9 And this Court in its most recent ATS
10 cases has looked to that body of case law, the
11 broader body of case law concerning implied
12 causes of action. And there, under Egbert, the
13 question is whether there is any sound reason
14 to believe that Congress might not want to
15 recognize this type of liability, and the fact
16 that these concerns arise so frequently in
17 these sorts of cases is sufficient to satisfy
18 that standard.

19 JUSTICE SOTOMAYOR: Counsel, I -- I'm
20 so -- I'm a little bit lost when you answered
21 Justice Barrett because you start by saying
22 your first-line order is to say you can't
23 recognize any claim outside of Blackstone's
24 three. And now -- and -- and you're basically
25 saying any claim including conspiracy is always

1 out under step 2, correct? So you're asking us
2 basically to overrule Sosa.

3 MR. SHANMUGAM: So, with regard to our
4 first-order submission, which is that the Court
5 should shut the door that it left open in Sosa,
6 we --

7 JUSTICE SOTOMAYOR: That would be
8 overruling.

9 MR. SHANMUGAM: -- we don't think that
10 that was a holding in Sosa. It was not
11 essential --

12 JUSTICE SOTOMAYOR: Assuming I
13 don't -- I don't agree with you because, in
14 Kiobel and Jesner, we called it a ruling, but
15 putting aside that that's what we called it,
16 you are basically saying, if it's a holding,
17 overrule it, correct?

18 MR. SHANMUGAM: If it is a holding, we
19 don't think that stare decisis justifies
20 retaining it. And -- and I'm happy to --

21 JUSTICE SOTOMAYOR: All right. Now
22 let -- let's go to that, okay?

23 There's about 300 of these cases that
24 were passed that have ever been brought.
25 That's not an enormous sum. After Kiobel, that

1 number dropped precipitously, all right?

2 So it's not as if this is such a large
3 number of cases that it's overwhelming the
4 courts below. We don't see a rush in the four
5 circuits that permit aiding-and-abetting
6 liability of new cases.

7 So I'm not sure why this has become
8 unworkable in the stare decisis sense. But we
9 have the Convention Against Torture, of which
10 we're a member and China is a member and Russia
11 and a whole bunch of other countries, and that
12 does require nations to ensure that people who
13 are complicit in violations of international
14 law are held responsible. So we'd be reading
15 out of the ATS and probably the TVVA -- TVPA
16 our obligation under the convention.

17 And, finally, what do we do with the
18 thing you rely on, the -- the Crimes Act, okay?

19 You say the Crimes Act only made
20 piracy aiding and abetting liable, but it also
21 said that violations of any safe conduct, which
22 is not piracy, that had to do with ambassadors,
23 that any actions that in any other manner
24 impact the Law of Nations -- I'm quoting it --
25 and those who persecute or solicit any such

1 process that violates an ambassador's
2 immunities, and stated that those people would
3 be deemed violators of the nations of law.
4 That seems to me like an aiding-and-abetting
5 provision.

6 So it goes back to Justice Kagan's
7 point that what aids and abets an international
8 law is specific to each one, but -- and it may
9 not be identical for all, but the Law of
10 Nations does have forms of aiding and abetting.

11 MR. SHANMUGAM: Okay. I think that
12 there were three parts to that question. Let
13 me address them in turn.

14 First, with regard to the stare
15 decisis effect of that portion of Sosa,
16 assuming arguendo that it is a holding, I do
17 think with respect, Justice Sotomayor, this has
18 proven to be unworkable in the lower courts.

19 And the profusion of lower court cases
20 that have --

21 JUSTICE SOTOMAYOR: Can I stop you
22 there? What's unworkable about it? Let me --
23 let me just ask you something.

24 In terms of aiding and abetting this
25 crime, the allegation is that Cisco, knowing

1 that China was going to torture Falun Gong
2 adherence, actually promoted sales of its
3 technology not only by telling them that it
4 could do it if they bought this technology but
5 custom making it, as it bragged to the Senate,
6 so that it could identify 90 percent of such
7 adherents.

8 It is alleged that by its internal and
9 public statements it knew that those people
10 would be tortured. So what is the problem with
11 how that fits into any conscious
12 aiding-and-abetting statute, including our own
13 domestic one that requires active inducement
14 and active participation?

15 MR. SHANMUGAM: May I answer the
16 questions that are on the table? First, with
17 regard to the allegations --

18 CHIEF JUSTICE ROBERTS: Yes.

19 MR. SHANMUGAM: Thank you.

20 (Laughter.)

21 MR. SHANMUGAM: With regard to the
22 allegations in this case, Justice Sotomayor, it
23 will not surprise you to learn that Cisco
24 vigorously disputes those allegations here.

25 But I want to put this in the frame of

1 where you started with your question, which is
2 the experience of the lower courts. You are
3 right that there have been around 300 of these
4 cases. As we point out in our brief, there
5 have only been six cases where plaintiffs have
6 prevailed with a monetary recovery. And in the
7 meantime, we have seen the lower courts
8 struggling with this question of what norms to
9 recognize, what the scope of those norms are.

10 And our submission is that this aspect
11 of *Sosa* in a post-Erie world, recognizing new
12 causes of action, was wrong at the time, but
13 recent developments have made clear that it is
14 no longer tenable, namely, this Court's view in
15 cases involving implied causes of action that
16 this is quintessentially a legislative
17 endeavor.

18 Second, with regard to the Convention
19 Against Torture, the provision to you -- which
20 you refer is Article 4, which is a provision
21 concerning criminal liability. And, sure
22 enough, when Congress, in the wake of the
23 Convention Against Torture, enacted the federal
24 criminal prohibition on torture, it
25 incorporated 18 U.S.C. 2 and provided for

1 aiding-and-abetting liability. There was no
2 requirement in the corresponding provision of
3 the Convention Against Torture for civil
4 liability, Article 14, for aiding and abetting.

5 And, finally, with regard to the last
6 part of your question, the Crimes Act of 1790,
7 yes, it's true, for violations of safe conduct,
8 Congress did include soliciting. And as we
9 point out in our reply brief, so did
10 Blackstone. That is a form of secondary
11 liability. It's not full-fledged
12 aiding-and-abetting liability. And that just
13 underscores that when Congress acts, it often
14 acts in a reticulated fashion with regard to
15 secondary liability. We could talk about the
16 Genocide Convention Implementation Act, the War
17 Crimes Act. There are many contexts in which
18 Congress imposes broad criminal liability but
19 narrower civil liability.

20 It may very well be that the conduct
21 in some of these cases is unlawful. It's
22 simply not the subject of a civil cause of
23 action under either the ATS or the TVPA.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas, anything further?

2 Justice Alito?

3 JUSTICE SOTOMAYOR: What do we do --

4 CHIEF JUSTICE ROBERTS: Justice

5 Sotomayor?

6 JUSTICE SOTOMAYOR: What do we do with
7 the congressional statements at the passage of
8 the TVV -- TVPA where it says that they want us
9 to continue under the ATS addressing violations
10 of international law? It was either the House
11 or the Senate report that made that statement
12 explicit.

13 MR. SHANMUGAM: So, first of all, I --
14 with regard to the TVPA specifically -- and I
15 want to make sure that I address any questions
16 that the Court might have about that question
17 presented -- we obviously don't think that the
18 legislative history supports Respondents' broad
19 view of the meaning of the term "subjects," and
20 that is because the Senate report, after a
21 passing reference to aiding and abetting,
22 talked about precisely the kind of command
23 liability that I referred to at the outset.

24 But, second, I think that Congress was
25 quite careful in enacting the TVPA really not

1 to take a position even in the legislative
2 history about the question that we've been
3 discussing for most of the first 20 minutes of
4 this argument, which is whether or not the ATS
5 validly can be expanded to new primary norms
6 and, a fortiori, to aiding and abetting.

7 JUSTICE SOTOMAYOR: I'm not sure how
8 you get to your position that "subjects to"
9 can't mean aiding and abetting, because command
10 liability doesn't necessarily require
11 subjecting someone to the torture. It makes
12 someone who's in a command position who knows
13 of the torture and permits it to happen but
14 doesn't aid and abet it in the sense that we
15 have defined aiding and abetting.

16 We've defined aiding and abetting as
17 an active step in permitting and encouraging
18 the substantive act. So I'm not sure how you
19 get to limit the word "subject" in the way
20 you're suggesting, because command liability is
21 a very different concept.

22 MR. SHANMUGAM: Justice Sotomayor, it
23 is a very different concept because command
24 liability is a form of vicarious liability. By
25 contrast --

1 JUSTICE SOTOMAYOR: Exactly. And so,
2 to the extent that Congress used the word,
3 "subjects" has an aiding-and-abetting concept
4 tied to it by definition.

5 MR. SHANMUGAM: I don't think that it
6 does, and, notably, Respondents don't point to
7 a single other federal statute where "subjects
8 to" is used to connote aiding and abetting. By
9 contrast, we have nigh on a hundred statutes in
10 the appendix to our reply brief where Congress
11 does use the term "aids and abets." And, here,
12 I think --

13 JUSTICE SOTOMAYOR: Well, the
14 dictionary says "to cause to undergo or submit
15 to, to expose or to make someone liable or
16 vulnerable to something." I don't know any
17 other word to define aiding and abetting but
18 those, that you are participating in an act or
19 causing or exposing someone to it or under --
20 or -- or helping to submit someone to do it.
21 I -- I -- I don't understand.

22 MR. SHANMUGAM: Justice Sotomayor,
23 there's actually not a great deal of
24 disagreement about the dictionary definitions
25 of the verb "subjects." I think that the core

1 notion is to cause someone to undergo or
2 experience something or to expose someone to
3 something.

4 And in our view, those definitions
5 require inflicting some action on the victim.
6 So we don't actually accept the view that, say,
7 merely facilitating something to happen --

8 JUSTICE SOTOMAYOR: So that the
9 person -- that the person who's in the room
10 with the torturer and hands him the instruments
11 but doesn't actually inflict the injury is not
12 causing the injury?

13 MR. SHANMUGAM: That person could well
14 be primarily liable in that context --

15 JUSTICE SOTOMAYOR: Why?

16 MR. SHANMUGAM: -- depending on their
17 conduct.

18 JUSTICE SOTOMAYOR: Under your theory
19 of what "causing" means?

20 MR. SHANMUGAM: I think that that
21 person could be within the realm of people who
22 participate in the primary act. And I think
23 that if you were, say, indicting that person in
24 a criminal case, I don't think you would
25 necessarily be indicting that person under 18

1 U.S.C. 2.

2 But, if you disagree with everything
3 that I've said --

4 JUSTICE SOTOMAYOR: But you could do
5 it under one or the other and they would still
6 be liable, correct?

7 MR. SHANMUGAM: But, if you disagree
8 everything I've said so far in this colloquy,
9 Justice Sotomayor, I have one more card up my
10 sleeve, which is the definition of "torture,"
11 which requires the offender to have "custody or
12 physical control of the victim."

13 Now you might say in response to that,
14 well, how can it be that someone who is up the
15 chain of command would satisfy that since,
16 after all, I'm standing here saying that this
17 just covers command liability? I think that
18 that would cover people who have direct or
19 indirect custody or physical control. But,
20 again --

21 JUSTICE SOTOMAYOR: Exactly, but, I'm
22 sorry, that definition tells you what "torture"
23 means. It doesn't tell you who's liable for
24 it. What tells you who's liable for it is "any
25 person who subjects another to torture."

1 MR. SHANMUGAM: But, Justice
2 Sotomayor, as we explain in our reply brief, we
3 think that that reference to "offender" has to
4 mean the people who would otherwise be liable.
5 So, sure, you're right, we're relying on the
6 definition of "torture." We think that
7 definition is confirmatory of our position.

8 And I think that this does, with
9 respect, accord with common sense. Let's take
10 this case. There are two individual defendants
11 who are the subject of the TVPA claim, the
12 former chief executive of Cisco and the vice
13 president who was responsible for Cisco China.

14 Nowhere in the hundred-plus pages of
15 complaint in the Joint Appendix do you find a
16 statement that either of these individuals
17 subjected Mr. Lee to the alleged misconduct.
18 And I would respectfully submit that that is
19 not how you would use ordinary English.

20 JUSTICE SOTOMAYOR: Counsel --
21 counsel, that might be a failure in the
22 complaint, but that's not the issue before us.
23 Assuming it did, because that's what we have to
24 assume.

25 MR. SHANMUGAM: I do not think, with

1 respect, that Respondent Lee plausibly could
2 allege that here. But I think that that just
3 confirms that when you're talking about someone
4 who is alleged to have facilitated the act,
5 these are people who stand at a much further
6 level of remove than your hypothetical person
7 who hands the -- the weapon to the person who
8 directly inflicts the -- the act of torture or
9 misconduct.

10 JUSTICE SOTOMAYOR: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan,
12 anything further?

13 Justice Gorsuch?

14 Justice Kavanaugh?

15 JUSTICE KAVANAUGH: Two things. You
16 said six cases in which plaintiffs have
17 prevailed. Does that include settlements or
18 not include settlements?

19 MR. SHANMUGAM: I believe that that is
20 monetary recoveries in court.

21 JUSTICE KAVANAUGH: And do you have
22 any statistics on settlements?

23 MR. SHANMUGAM: I don't.

24 JUSTICE KAVANAUGH: Okay. And on the
25 TVPA, I understood your argument to just be

1 Central Bank, end of story. Is that a good
2 summary?

3 MR. SHANMUGAM: I think that that is a
4 good summary. I think, even if we didn't have
5 Central Bank, I think our view is the better
6 view of the language, but I think, in the wake
7 of Central Bank, if this Court hasn't said that
8 it's a magic words requirement, I think that
9 the Court came pretty close to that.

10 And the Court did say that even the
11 phrase "directly or indirectly" is
12 insufficient. I would say "subjects" is not
13 even close to that.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 JUSTICE BARRETT: So one difficulty or
18 question, I should say, that I have about your
19 front-line argument about freezing this with
20 the Blackstone three is that in Sosa, the Court
21 said it had little evidence to think that the
22 First Congress had in mind anything beyond the
23 Blackstone three.

24 But I'm not sure that's right. I
25 mean, Professors Bellia and Clark have done

1 research to suggest that, in fact, at the time
2 that the ATS was enacted, the Law of Nations
3 did recognize causes of action for the violence
4 committed by an American citizen against a
5 foreign national.

6 Do you want to address that?

7 MR. SHANMUGAM: I suppose that the
8 Court could -- I'm aware of the Law Review
9 article by those two distinguished professors.
10 And I think that the Court, if it so chose,
11 could leave the door slightly open to parties
12 coming forward to make the case that there were
13 other norms that would have been recognized by
14 the First Congress.

15 That is not what is at issue here.
16 And, again, the way that this case has been
17 litigated, Respondents have argued for a
18 categorical right for aiding-and-abetting
19 liability, and I don't think that you can fit
20 that into that particular box in this case.

21 JUSTICE BARRETT: Well, that, I mean,
22 this kind of goes back to Justice Kagan's
23 point. Those are all the causes of action.
24 You're talking about the scope of liability,
25 which is a slightly different point.

1 I'm just saying that the -- the
2 front-line rule that you want of just freezing
3 those -- freezing the line at those three,
4 that's part of my cause -- that -- that's part
5 of the concern that I have with respect to that
6 one.

7 But -- but let me ask you a question
8 about your argument about aiding-and-abetting
9 liability and the expanse of that. Doesn't it
10 seem a little odd if the ATS is primarily a
11 jurisdictional statute, which I take your
12 first-line position to be, to say that there's
13 a categorical rule about whether aiding and --
14 aiding-and-abetting liability can attach
15 categorically or not to a jurisdictional
16 statute?

17 Just thinking about it in the
18 categorical way Justice Kagan was pressing you
19 on, it does seem a little bit odd to conceive
20 of it that way.

21 MR. SHANMUGAM: That is the discomfort
22 that I think this Court's decision in Sosa with
23 respect created because, after all, we invoke
24 Central Bank with regard to the ATS as well as
25 the TVPA, and you might say, why is Central

1 Bank relevant here? This is just a
2 jurisdictional statute.

3 I would hope that it would follow a
4 fortiori that if the Court doesn't infer
5 aiding-and-abetting liability even when you
6 have an express cause of action, the -- the
7 Court would not infer aiding-and-abetting
8 liability when the cause of action itself is
9 entirely a judicial creation.

10 JUSTICE BARRETT: Unless there was
11 evidence that at the time the ATS was enacted,
12 there was aiding-and-abetting liability for a
13 particular offense against the Law of Nations,
14 correct?

15 MR. SHANMUGAM: Yes. But we certainly
16 don't have that here with regard to any of the
17 seven norms at issue. And so, if the Court
18 wanted, again, to just draw a line around the
19 three core offenses and whatever else might be
20 in that original 1789 bucket, that's an easy
21 enough footnote for the Court to write.

22 JUSTICE BARRETT: So perhaps you might
23 be satisfied with a rule that said there's no
24 categorical availability of aiding and --
25 aiding-and-abetting liability, but it doesn't

1 exist with respect to the seven offenses with
2 which Cisco was charged?

3 MR. SHANMUGAM: Correct, that's right.
4 And to the extent that Justice Kagan's question
5 might have had the implicit premise that this
6 could be worked out on remand, Respondents have
7 had every opportunity to make that argument,
8 and I would invite the Court to look -- go back
9 and look at the Ninth Circuit briefing, and you
10 will search that in vain for the kind of
11 norm-by-norm analysis that we're discussing.

12 JUSTICE BARRETT: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Jackson?

15 JUSTICE JACKSON: Can I just pick up
16 on that because I just want to be sure I
17 understand.

18 So you would be okay with a rule that
19 says there's no categorical preclusion of
20 aiding-and-abetting liability?

21 MR. SHANMUGAM: I -- I think that the
22 Court should go further than that. Obviously,
23 with our first-order argument, that would
24 implicitly shut the door to anything other than
25 the norms that I was just discussing with

1 Justice Barrett.

2 I think that the Court should make
3 clear, again, that there is no categorical
4 cause of action for aiding-and-abetting
5 liability.

6 JUSTICE JACKSON: No, but that's the
7 opposite of what I'm saying. That is what
8 you're asking for. And I understood Justice
9 Kagan to be positing that there might be, there
10 might be in any circumstance in which the norm
11 would be included under Sosa.

12 MR. SHANMUGAM: No, no. I mean, I
13 think our step 2 argument would apply to any
14 norm beyond potentially the three core offenses
15 because, as I said to Justice Kagan --

16 JUSTICE JACKSON: No, can I just --
17 I -- I'm sorry. I'm just trying to understand
18 what aiding-and-abetting liability your
19 position is with respect to that.

20 And I had understood -- and maybe I
21 was mistaken -- that you were asking us to
22 categorically preclude recognition of
23 aiding-and-abetting liability as if it was a
24 separate cause of action that was being brought
25 to the table for inclusion under Sosa.

1 And what I'm positing and what other
2 Justices have pointed to is that
3 aiding-and-abetting liability could instead be
4 construed as secondary to some other underlying
5 cause of action.

6 And so, to the extent that an
7 underlying cause of action meets the Sosa test,
8 then you might have aiding-and-abetting
9 liability depending upon the historical
10 circumstances of aiding and abetting with
11 relationship to that norm.

12 But it's not as though, I think, you
13 are looking at aiding-and-abetting liability as
14 if it is a completely separate cause of action
15 that we're just applying Sosa to as though
16 there was no underlying cause of action.

17 MR. SHANMUGAM: Justice Jackson, I
18 think I understand the question, so let me give
19 you my best effort at an answer.

20 JUSTICE JACKSON: Yes, yes, thank you.

21 MR. SHANMUGAM: First, I think that to
22 the extent that we say that a norm-by-norm
23 analysis is required, that would be at step 1
24 of the Sosa analysis. But I do think that at
25 step 2, regardless of whether you conceive of

1 this as a separate cause of action or a
2 question concerning the scope of the cause of
3 action, the analysis at step 2 is the same with
4 regard to any of these norms.

5 So I don't think it would be --

6 JUSTICE JACKSON: But why is that?
7 Can I -- can I -- that's the second part of my
8 question.

9 MR. SHANMUGAM: Yes.

10 JUSTICE JACKSON: All right. So let's
11 say we have an underlying piracy claim, which
12 we are, just for the purpose of this question,
13 are saying is included in ATS. I had
14 understood your argument to be that regardless,
15 no -- no aiding and abetting.

16 But, with respect to step 2, to the
17 extent that you're talking about the foreign
18 policy concerns, couldn't there be a
19 circumstance in which the foreign policy
20 concern would not care whether or not there's
21 aiding-and-abetting liability?

22 In other words, what's creating the
23 foreign policy concern is the underlying claim,
24 and to the extent that, say, China says we
25 don't care about the underlying claim being

1 brought here, what additional work from a
2 foreign policy concern standpoint is attaching
3 or having an aiding-and-abetting liability
4 claim?

5 MR. SHANMUGAM: So three quick points
6 in response to that.

7 JUSTICE JACKSON: Yeah.

8 MR. SHANMUGAM: And then I'll sit
9 down. First, I think that this is, in terms of
10 the paradigm, very similar to *Jesner*. You
11 could have made the same argument in *Jesner*
12 that, well, it's not really a question
13 concerning a cause of action. It's a question
14 concerning the available defendants, namely,
15 whether foreign corporations could be
16 defendants. And the Court nevertheless
17 conducted the step 2 analysis.

18 Second, with regard to how the step 2
19 analysis works, I want to bracket for the
20 minute the three core offenses. I think, with
21 regard to any of these other offenses, you have
22 the same fundamental problem that raises
23 foreign policy concerns and the broader
24 separation of powers concerns, which is no
25 matter what the norm is, you're talking about a

1 primary violation of international law, in this
2 case, by a foreign sovereign against its own
3 citizens, and that is by far the mine-run of
4 these cases.

5 JUSTICE JACKSON: But that's in this
6 case. What if we have a -- a primary violation
7 of international law that doesn't involve the
8 underlying country, and for ATS purposes,
9 wouldn't the point of that statute be that the
10 United States is making its courts available
11 for the adjudication of that claim in a way
12 that actually supports foreign policy, right?
13 The country would -- the other country would
14 want its nationals to have a forum.

15 MR. SHANMUGAM: My friend,
16 Mr. Hoffman, I suspect, may get up here and
17 say, well, you can posit such a case. And I
18 think our response to that is: No, this Court
19 made clear in *Jesner* that this is a categorical
20 analysis, and where you have a category of
21 cases where it is likely that you're going to
22 have these concerns, you therefore have a sound
23 reason to believe that Congress might not want
24 to extend liability to that category.

25 That is precisely how this Court

1 decided *Jesner*, and it would make this Court's
2 ATS cases congruent with its cases concerning
3 applied causes of action more generally.

4 And I said I would have one last
5 point, which is that the government has a
6 footnote in its brief where it makes the point
7 that with regard to these three core offenses,
8 what is different about those offenses is that
9 they involved either conduct that took place in
10 the United States, such as the famous *Marbois*
11 incident, or conduct that takes place in the
12 high seas.

13 And we would acknowledge that the
14 foreign policy concerns might not be as great
15 in that context even if the separation of
16 powers concerns are equal, and that's a reason
17 why the Court might want to leave open the
18 possibility of aiding-and-abetting liability as
19 to those offenses.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 MR. SHANMUGAM: Thank you.

24

25

1 CHIEF JUSTICE ROBERTS: Mr. Gannon.

2 ORAL ARGUMENT OF CURTIS E. GANNON

3 FOR THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE PETITIONERS

5 MR. GANNON: Mr. Chief Justice, and

6 may it please the Court:

7 Respondents allege that Petitioners
8 aided and abetted international law violations
9 committed abroad by foreign officials. Such
10 allegations should not be cognizable under
11 either the Alien Tort Statute or the Torture
12 Victim Protection Act until Congress actually
13 says that they are.

14 With regard to the ATS, that follows
15 from two separate modes of analysis. First,
16 under the second step of *Sosa*, his own test,
17 separation of powers concerns should readily
18 prevent the Court from creating a private of
19 right of action for aiding and abetting.
20 Second, the Court might wish to conclude more
21 generally that it should not recognize any new
22 norms under the ATS, notwithstanding *Sosa*'s
23 decision to leave the door ajar to that.

24 With regard to the TVPA, the statutory
25 text and context do not impose

1 aiding-and-abetting liability, especially in
2 light of the background assumption reflected in
3 Central Bank of Denver that in the civil
4 context, Congress should do that expressly.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: So, if we adopt that
7 approach, what would be left of Sosa?

8 MR. GANNON: The original three would
9 still be there under Sosa --

10 JUSTICE THOMAS: And that --

11 MR. GANNON: -- so the statute would
12 not be a dead letter. As my friend pointed
13 out, the TVPA recognized causes of action
14 for -- for torture and extrajudicial killings,
15 but, otherwise, I think you would be going
16 through the Sosa two steps, so I'm not sure
17 which question you're -- you're -- you're --
18 you're talking about the first mode of analysis
19 or the second mode of analysis.

20 But, if you were going to rule out
21 recognizing any additional norms, I think you
22 would just be sort of grandfathering the
23 original three and potentially other things
24 that the First Congress would have recognized.
25 You would be saying that the door isn't open to

1 recognizing what we would decide today under
2 modern international law or analogous in some
3 way.

4 The second mode of analysis that --
5 that -- that we're talking about under Sosa
6 step 2 is the one that the Court employed in
7 both Kiobel and in Jesner. And so my friend
8 was just talking about all the ways in which
9 Jesner required a step 2 analysis to be done in
10 a categorical level. This responded to
11 questions from several of you. The same thing
12 was true of Kiobel.

13 In both of those cases, the Court
14 essentially skipped over the question of
15 whether there was a norm that was established
16 and said that going to step 2 concerns -- in
17 Kiobel, it was the idea that principles
18 underlying the presumption against
19 extraterritorial application of statutes would
20 be applicable. We think the same thing should
21 also be true here of the Central Bank
22 principle.

23 And -- and in Jesner, the Court said
24 that it was looking at a categorical matter at
25 a scope of liability question. Even though it

1 wasn't about the norm, it was saying that the
2 question of is this category of defendant going
3 to be held liable, said we're going to consider
4 that on a categorical basis. And the fact that
5 it's going to present foreign policy concerns
6 in many cases, not necessarily all cases but in
7 many cases, was sufficient to say you're going
8 to categorically rule out foreign corporations
9 as defendants.

10 And we think that the same thing
11 should be true for aiding-and-abetting claims
12 because the mine-run of those claims thus far
13 has involved cases like this, has been
14 allegations that somebody has aided and abetted
15 a primary violation that was happening in a
16 foreign country often by state actors because
17 many of the norms -- many but not all the norms
18 need to be done by state actors. And,
19 therefore, the entire case is parasitic on
20 having to prove that foreign government
21 officials engaged in serious human rights
22 violations in their own countries, and that --

23 JUSTICE JACKSON: To -- to -- to --

24 JUSTICE KAGAN: But, if we take
25 away --

1 MR. GANNON: -- is necessarily going
2 to raise foreign policy concerns in many cases.

3 JUSTICE KAGAN: Mr. Gannon, if we --
4 if we sort of took away that aspect of this
5 case, which I understand you to have
6 fundamental disagreements with, but just focus
7 more on what's presented to us here, which is
8 this aiding-and-abetting question, and I guess
9 one way to think about this, about how we
10 should think about aiding and abetting, is if
11 you take the three original of Blackstone, why
12 it is -- suppose that this were -- this were a
13 case only about that, you know, and then the
14 question is does that also include
15 aiding-and-abetting offenses, what would you
16 say? How should we analyze that question?

17 MR. GANNON: Well, as -- as my friend
18 just pointed out, I do think that the foreign
19 policy concerns are reduced in the context of
20 those -- those three norms because of what we
21 point out in our brief, and I think that the
22 Court understood this in Kiobel, that -- that
23 those cases, the primary violation is generally
24 going to be occurring in the United States or
25 on the high seas, not in the territory of a

1 foreign country.

2 JUSTICE KAGAN: Yeah.

3 MR. GANNON: And so I -- I do think
4 that if you're going to look at this from the
5 other side and sort of try to say are there
6 place -- are there pieces of
7 aiding-and-abetting liability that would pose
8 fewer threats, I think the ones that -- where
9 the primary violation is not in a foreign
10 country is a good place to start.

11 I wouldn't just limit it to cases that
12 involve foreign governmental officials.

13 JUSTICE KAGAN: But then I take it
14 what you're saying is, because those foreign
15 policy concerns are less, our analysis would be
16 different. You might come out with a rule that
17 said, okay, as to piracy, aiding and abetting
18 goes along with it, is that correct?

19 MR. GANNON: I would say two other
20 things with -- we still have two other main
21 reasons why we think that, under step 2, that
22 the Court should be cautious about recognizing
23 aiding-and-abetting liability. One is to
24 say --

25 JUSTICE KAGAN: I mean, one question

1 is whether step 2, Sosa, applies if the
2 question is the original Blackstone three. And
3 then the question --

4 MR. GANNON: Oh, I think very much so.

5 JUSTICE KAGAN: And then the question
6 whether there's secondary liability that comes
7 along with it. You could say, well, Sosa
8 doesn't apply sort of for two reasons. First,
9 it's not a separate cause of action. Sosa was
10 designed with the question of new causes of
11 action in mind. Aiding and abetting is not a
12 cause of action, and it's also not new. I
13 mean, if the -- if the idea is, back then, when
14 there was an accepted norm of piracy, was there
15 also an accepted norm of aiding and abetting
16 piracy. It doesn't sound like a question that
17 one would naturally apply Sosa to.

18 MR. GANNON: Well, I -- I don't think
19 that's true in light of the way the Court
20 approached its analysis in Kiobel and Jesner,
21 because I think that foreign corporations are
22 not liable for -- for piracy. And I think that
23 an attack on an ambassador that happens in a
24 foreign country is not going to touch and
25 concern the United States in the sense that it

1 was probably going to survive Kiobel.

2 And so, in both of those instances, I
3 think that Sosa itself is recognizing that
4 just -- just acknowledging the norm isn't
5 enough to say that you're going to get home.
6 And I think that, like, Sosa didn't decide a
7 lot. They left open -- there's going to need
8 to be a lot more analysis if we're ever
9 actually going to get to yes. Sosa got off the
10 train at the first stop. And so -- but there
11 were -- it recognized that there are going to
12 be additional stops.

13 And we think that that's why, for
14 aiding and abetting, as the significant
15 recognized category of secondary liability,
16 Central Bank tells us that we expect Congress
17 should speak to that expressly before it does
18 that. And we do think of that as a significant
19 expansion of liability.

20 And then the third reason that we have
21 is the analogy of the TVPA. There hasn't been
22 much talk about it, as much talk about that
23 this morning, but that's the second question
24 presented. If you agree with our position that
25 aiding-and-abetting liability is not included

1 within "subjects" under the TVPA, then we think
2 it is relevant that the one time --

3 JUSTICE KAGAN: If --

4 MR. GANNON: -- Congress has tried to
5 codify a cause of action that is --

6 JUSTICE KAGAN: Yeah, I got -- I got
7 that argument from the briefs. But if -- if --
8 if -- so one question that we just talked about
9 was whether Sosa applies at all to this
10 question of whether aiding and abetting comes
11 along with it. You say yes.

12 Even if you're right, what I took from
13 the first part of your answer was that you
14 think that there is a -- I mean, tell me if
15 I've gotten this wrong -- but a separate
16 analysis as to each particular norm that has
17 been recognized. In other words, you would go
18 through the question with respect to piracy or
19 you would go through the question with respect
20 to ambassadorial rights or something like that.

21 MR. GANNON: I -- I -- I think you
22 could do it that way. I think that -- that the
23 fact that the Court didn't do that for foreign
24 corporations and extraterritoriality would be a
25 reason to say that because, in the vast

1 majority of -- of any potential norms and the
2 cases that are being brought, frankly, aren't
3 piracy and assaults on ambassador cases,
4 that -- that ruling out that particular
5 potentially theoretical category isn't going
6 to -- to -- to make a big difference.

7 And the Court was comfortable making
8 categorical decisions in *Kiobel* and *Jesner*.
9 And we think that that's appropriate here,
10 especially in light of how -- how unwilling the
11 lower courts have been to receive the -- what
12 we -- we took to be a general note of caution
13 in *Sosa*. And that's not the way the lower
14 courts have been applying the two-step
15 analysis, we think. And --

16 JUSTICE GORSUCH: Can you -- can you
17 talk about that for a moment? What is the need
18 for us to intervene to address? Are there
19 problems? What is the scope of the problems
20 of -- of people not respecting the admonition
21 in *Sosa* that this is a -- a door to be closely
22 guarded?

23 MR. GANNON: Yeah. I -- I -- I do
24 think that -- that there was -- there was
25 supposed to be vigilant door-keeping. And I --

1 and I -- and I -- I would say that our view is
2 that the lower courts have been too permissive
3 about acknowledging additional norms and what
4 we would consider to be expansions of the
5 norms, especially including aiding and
6 abetting.

7 We've been trying to get the Court to
8 decide the aiding-and-abetting question since
9 the mid-2000s. That's been a significant
10 category of cases. And I take my friend's
11 point that it's going -- my friend on the other
12 side's point that it's going to be a reduced
13 category after Kiobel and Jesner, but it's not
14 gone, as this case itself demonstrates. The
15 Ninth Circuit held that this -- this is -- this
16 is not -- it doesn't require enough
17 extraterritorial conduct to run afoul of
18 Kiobel, and this is a U.S. corporation.

19 And, therefore, here we are. We're --
20 we're -- we're still litigating about an
21 allegation where the primary violation that
22 needs to be proved is the thing that generally
23 is going to present foreign policy concerns
24 because it is an allegation that a serious
25 human rights abuse happened in a foreign

1 country in this case and many cases by the way
2 the foreign government --

3 JUSTICE KAVANAUGH: Can you -- can
4 you --

5 MR. GANNON: -- treated mostly its own
6 citizens.

7 JUSTICE KAVANAUGH: Go ahead.

8 JUSTICE GORSUCH: Well, and -- and
9 what lessons should we take from cases like
10 Egbert in the Bivens context and -- and -- and
11 our decisions on Teague about these doors that
12 have been left open?

13 MR. GANNON: We -- we have -- we agree
14 with Petitioners that that is an available
15 argument here to say that -- that you should
16 close the door, that -- that the door having
17 been left open has created too much mischief
18 and that, frankly, it is going to be illusory
19 to think that there's any likelihood that this
20 Court is going to recognize a new norm in which
21 there's going to be liability that isn't very
22 closely tied to one of the original three torts
23 that -- that -- or -- or something else that
24 the First Congress would have recognized.

25 And -- and so we have drawn the

1 analogy from Edwards. And -- and I would say
2 that because this involves common law
3 methodology, by definition, Sosa was saying the
4 Court has been invited by Congress to appeal to
5 the common law in order to recognize individual
6 norms beyond the original three because that --
7 it requires the Court to exercise common law
8 making powers.

9 We don't think it requires full bore
10 statutory stare decisis types of considerations
11 and there isn't that much reliance, I -- I
12 don't think, when this Court has repeatedly
13 said no to each new question that has been
14 brought to it under the ATS.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 It seems to me that you have a serious
18 conceptual challenge because we've held that
19 the First Congress wanted courts to, you know,
20 look and find the rights of action that are
21 available under -- under common law and -- and
22 Sosa.

23 And now because the court has departed
24 from that general approach to statutory
25 interpretation, it -- it is like, you know, a

1 dinosaur that is still on -- on the -- the
2 horizon.

3 And I wonder, you're certainly not
4 being, I would say certainly not being faithful
5 to the First Congress's intent, at least, as it
6 was interpreted in Sosa. And -- and it seems
7 to me that if you can just talk a little bit
8 about how we're supposed to reconcile that --
9 that challenge.

10 MR. GANNON: Well, I -- I -- I do
11 think that's a bit of a puzzle because of the
12 sort of Erie revolution. This is the thing
13 that -- that Sosa talked about. Both the
14 majority opinion and Justice Scalia's
15 concurrence wrestled with how to deal with
16 that.

17 And I think that they both agreed on
18 the idea that at least those things that the
19 First Congress would have expected to be
20 recognized would be fine, and, therefore,
21 that's why we're grandfathering in the --
22 the -- what -- what have been called the
23 Blackstone 3 torts.

24 And -- but because the Court now
25 understands better than the First Congress did,

1 and I understand the -- the discomfort with
2 that, that -- that recognizing a cause of
3 action is a legislative endeavor that it's
4 going to do only cautiously, the Court has
5 repeatedly said in these ATS cases and in the
6 -- and in the Bivens cases that it's not going
7 to extend any further if there's any reason
8 counseling hesitation.

9 And so I'm -- I think we're
10 reconciling the Court's modern understanding of
11 its appropriate role in this separation of
12 powers with the -- with the fact that the First
13 Congress only wrote a jurisdictional
14 authorization with -- with this expectation
15 that there was a possibility of causes of
16 action being recognized, but now we know
17 Congress can do that.

18 And Congress knows that it's supposed
19 to do that. And that's why Congress enacted
20 the TVPA because it was codifying *Filartiga*.

21 CHIEF JUSTICE ROBERTS: No, but I
22 still --

23 MR. GANNON: The TVPA actually isn't
24 about torture that happens in the United States
25 and it isn't about aiders and abettors, it's

1 about the actual perpetrator acting under color
2 of foreign law.

3 And so Congress did codify that result
4 after it was questioned whether the ATS even
5 allowed Filartiga.

6 CHIEF JUSTICE ROBERTS: You know, in
7 terms of your request though that we overrule
8 Sosa, usually when we overrule a past decision,
9 it's because we think it was wrong. And yet
10 you're not really saying that either when you
11 say well, we should preserve these -- these
12 three.

13 MR. GANNON: Okay.

14 CHIEF JUSTICE ROBERTS: And I'm not
15 quite sure whether overruling is an appropriate
16 response when we don't think -- and we're not
17 saying that the Sosa decision was wrong when it
18 interpreted the intent of the First Congress.
19 I mean, is that what you're saying?

20 MR. GANNON: No. I'm -- I -- I --
21 we're -- the only question is about the aspect
22 of the Sosa decision that leaves open the
23 possibility, leaves the door ajar to
24 recognizing additional causes of action that --
25 that Congress wasn't aware of, that the First

1 Congress wasn't -- what -- didn't expect and
2 wasn't aware of.

3 And so I understand that -- that in
4 the abstract, Congress might have expected that
5 the Law of Nations would evolve. That's one
6 way to talk about it. You know, I'm not sure
7 that's what they would have expected.

8 I think at the -- in the pre-Erie
9 sense there was an understanding that it was
10 out there. It was the routing omnipresence.
11 Maybe you discovered new bits of it but this is
12 all they thought that existed.

13 And so I -- I -- I do think that --
14 that the Court can draw the line there. And
15 it's not overruling *Sosa*. It's not changing
16 the holding of *Sosa*. It's changing this aspect
17 of whether we're -- we're -- we're possibly
18 leaving this open but *Sosa* still at step 2
19 expected that there would be all sorts of other
20 reasons to be cautious.

21 It expected that we'd be careful about
22 the norms. It expected that there could be
23 other defenses that could be relevant, expected
24 that there could be case-specific foreign
25 policy concerns that -- that we don't think

1 that that's necessary in every case.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 Justice Alito?

6 Justice Sotomayor?

7 JUSTICE SOTOMAYOR: I'm -- ATS is a
8 cause of action, correct?

9 MR. GANNON: ATS is a jurisdictional
10 statute.

11 JUSTICE SOTOMAYOR: Jurisdictional
12 statute, all right. It's a cause of action.

13 MR. GANNON: I mean --

14 JUSTICE SOTOMAYOR: They can bring a
15 lawsuit on the Blackstone 3, according to you.

16 MR. GANNON: Because Sosa has
17 recognized that -- that -- that it was willing
18 to infer that cause of action that Congress had
19 not expressly provided for.

20 JUSTICE SOTOMAYOR: Inferred or not,
21 Mr. Gannon, if you don't want us to overrule,
22 you want us to overrule Sosa. Do you want us
23 to overrule it to say that even the Blackstone
24 3, there's no cause of action for them?

25 MR. GANNON: No. We are not asking

1 you to overrule Sosa. We are asking you to say
2 that the --

3 JUSTICE SOTOMAYOR: So it's either a
4 cause of action or it isn't. Which is it?

5 MR. GANNON: It -- the ATS itself is
6 not a cause of action. Sosa recognized that it
7 was just a jurisdictional statute.

8 JUSTICE SOTOMAYOR: All right.

9 MR. GANNON: It recognized that it had
10 the ability, at the time when it was enacted,
11 that the courts were able to infer causes of
12 action. And --

13 JUSTICE SOTOMAYOR: All right. So now
14 that --

15 MR. GANNON: And -- and it's -- and
16 that those three were -- were -- would have
17 been -- inferable at the time and therefore at
18 least those would be recognized.

19 JUSTICE SOTOMAYOR: All right. So
20 Bivens and -- Bivens and Egbert don't help us
21 because whether it's expressed or implied
22 causes of action, they've been created for the
23 Blackstone 3, correct?

24 And you're saying don't add a fourth,
25 don't add torts or--

1 MR. GANNON: We're saying not to
2 expand it any further.

3 JUSTICE SOTOMAYOR: All right.

4 MR. GANNON: That's why we think
5 Egbert is relevant.

6 JUSTICE SOTOMAYOR: So what you're
7 basically saying, if there wasn't a torture,
8 the TVPA, there wouldn't be an actionable cause
9 of action at all for torture or extra judicial
10 killing, even though when Congress addresses
11 that, it doesn't just create a cause of action
12 under the ATS. It expands liability to include
13 the potential for U.S. citizens, not just for
14 aliens to sue, correct?

15 MR. GANNON: Yes, it expands the
16 category of plaintiffs.

17 JUSTICE SOTOMAYOR: All right. So
18 what you're basically saying is the First
19 Congress, if it had known that there would be
20 an international law -- an international and
21 current U.S. view, that torture and
22 extrajudicial killings violate international
23 norms, that that First Congress would not have
24 wanted us to recognize that as a cause of
25 action for aliens -- for aliens.

1 MR. GANNON: I -- I'm not saying that
2 that's what the First Congress would have
3 expected. I'm trying to -- to -- to be
4 faithful to Sosa's own analysis, which
5 recognized that it would take account of
6 developments that have happened since the First
7 Congress.

8 And it said at that time that it did
9 not see sufficient developments that would
10 preclude it from leaving the door ajar with
11 sufficient caution.

12 JUSTICE SOTOMAYOR: All right. If we
13 disagree --

14 MR. GANNON: -- we think that there
15 have been subsequent developments in the --

16 JUSTICE SOTOMAYOR: If we --

17 MR. GANNON: -- case law.

18 JUSTICE SOTOMAYOR: -- if we disagree
19 with you, that under step 1 of Sosa torture and
20 extrajudicial killings are recognizable under
21 step 1, and we go to step 2.

22 Step 2 requires us to look at what the
23 -- what -- whether recognizing that cause of
24 action for torture and extrajudicial killing
25 have foreign policy implications. By the very

1 nature of torture and extrajudicial killings, a
2 foreign state is involved, correct, because
3 torture defined -- is defined by official state
4 action. Isn't it?

5 MR. GANNON: As -- as it is defined in
6 the TVPA, yes.

7 JUSTICE SOTOMAYOR: Yes, all right.

8 But --

9 MR. GANNON: I would -- I would not
10 expect my friends to agree to that under the
11 ATS. I --

12 JUSTICE SOTOMAYOR: Well, they can
13 answer that. But --

14 MR. GANNON: But yes.

15 JUSTICE SOTOMAYOR: I was -- I was
16 assuming that, okay.

17 MR. GANNON: Yes -- yes with respect
18 to the way it's been defined in the TVPA. And
19 we think that --

20 JUSTICE SOTOMAYOR: But -- but if --

21 MR. GANNON: -- Congress has -- has
22 spoken to lots of specific questions in the
23 TVPA that allow actions like Filartiga to
24 proceed.

25 JUSTICE SOTOMAYOR: May you let me

1 finish, okay, with my question?

2 MR. GANNON: Of course.

3 JUSTICE SOTOMAYOR: They'll tell us.

4 I am making the assumption that torture
5 requires official state action. Then by its
6 nature, whether it's aiding-and-abetting
7 liability or primary liability, the same kind
8 of embarrassment is going to exist, correct?

9 Meaning, if we can sue someone, if we
10 can sue a Chinese agent who happens to come to
11 the United States, for torture in China, China
12 is going to be as embarrassed as if we sue
13 Cisco for that same torture, correct?

14 MR. GANNON: I -- I think that -- I
15 take the point, but I -- I think that Congress
16 in the TVPA drew a line between the perpetrator
17 --

18 JUSTICE SOTOMAYOR: We can go back to
19 whether --

20 MR. GANNON: -- and the aiders and
21 abettors.

22 JUSTICE SOTOMAYOR: Yes, we could go
23 back to whether "subjects" or doesn't.

24 MR. GANNON: And -- and --

25 JUSTICE SOTOMAYOR: But assuming that,

1 as I do, that "subjects" means some form of
2 secondary liability, if not primary liability,
3 then tell me what is the foreign policy
4 implications for this suit when President Trump
5 in 2020, when he was talking about the Chinese
6 policy, was encouraging China to respect and
7 not persecute Falun Gong adherence and where he
8 states he stands by the principle that American
9 technology should not be used to further that
10 persecution? What do we do with that? How do
11 we find that there's potential embarrassment
12 from that? How do we find that there's a
13 potential foreign embarrassment from complicity
14 in torture which the Convention against Torture
15 would not permit?

16 MR. GANNON: The Convention against
17 Torture would permit the criminal prosecution,
18 and so would our laws for complicity. And --

19 JUSTICE SOTOMAYOR: So there's less
20 embarrassment from that --

21 MR. GANNON: So --

22 JUSTICE SOTOMAYOR: -- than from civil
23 liability?

24 MR. GANNON: I'm saying that Congress
25 has already drawn the line with respect to

1 both, both halves of this, on the -- they have
2 implemented the TVPA by enacting a -- a
3 criminal statute that applies everywhere in the
4 world and includes complicity. I agree with
5 that.

6 But that's a -- that's a cause of a,
7 that is brought by federal prosecutors --

8 JUSTICE SOTOMAYOR: I -- I just want
9 to get what you're -- what you're -- what
10 you're suggesting is there is less
11 embarrassment for the government from having an
12 individual pay damages -- there is more
13 embarrassment for an individual paying money
14 than from a criminal prosecution where that
15 person is put in jail for the same act of
16 torture?

17 MR. GANNON: I'm saying that we at
18 least have control over when the criminal --
19 federal criminal prosecution is going to be
20 brought. And I was -- and I say that we
21 have -- of course, we object to human rights
22 violations that are occurring in China and in
23 other countries. But we have other foreign
24 policy tools that don't require individual
25 lawsuits filed by lawyers that -- that don't

1 have to necessarily comply with all of the
2 concerns that we have about a -- a -- our
3 relationship with any particular foreign
4 country at the time.

5 And so I -- I -- I appreciate the fact
6 that Sosa would -- holds out the possibility of
7 a case-specific objection. If we said this is
8 flagrantly incompatible with our foreign policy
9 right now, I would -- I would hope that the
10 courts would listen to an objection like that,
11 but as I was saying to the Chief Justice before
12 --

13 JUSTICE SOTOMAYOR: Exactly, but you
14 haven't raised that here.

15 MR. GANNON: Because we think that, as
16 a categorical matter, the notion of civil
17 aiding-and-abetting liability goes beyond what
18 the convention requires and goes beyond what we
19 think Congress has codified in the TVPA, that
20 we think Congress should be the one making that
21 decision.

22 And it's not just the foreign policy
23 concerns. It's also the Central Bank idea that
24 we know that Congress is aware that there's no
25 presumption of aiding-and-abetting liability in

1 civil cases, unlike criminal cases.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 Justice Gorsuch?

4 JUSTICE GORSUCH: I -- I'm not sure I
5 understand why we would need to overrule
6 anything about Sosa. We said there that we had
7 no basis to suspect Congress has any examples
8 in mind beyond those three Blackstone torts.
9 And we said that future developments might
10 preclude federal courts from recognizing new
11 causes of action.

12 MR. GANNON: I think that the
13 developments, the reference to developments,
14 there hadn't been intervening developments.
15 And I agree with you, Justice Gorsuch, that
16 when you think that --

17 JUSTICE GORSUCH: And in 20 years plus
18 since those, so there have been some
19 developments.

20 MR. GANNON: There -- there have been.
21 And we -- we agree with that line of analysis.
22 And so under -- under that way of thinking
23 about it, I think you would be saying that the
24 door is no longer ajar, because you are taking
25 account of the things that the Sosa Court said

1 could be taken account of.

2 And we think that you can -- you could
3 do that with respect to, you know, individual
4 norms. At step 2, you would be -- you would be
5 applying a Sosa analysis. If you adopt the
6 broader argument and said that we think
7 intervening developments and this Court's
8 understanding of how recognition of private
9 rights of action is a legislative endeavor,
10 that is not going to engage in, it's not going
11 to extend to any farther what has already been
12 recognized, that would be consistent with what
13 the Court has been saying in both the ATS and
14 the Bivens cases in the last 20 years.

15 JUSTICE GORSUCH: And each one of
16 these that comes to us, we've -- we've rejected
17 attempts to expand beyond those three?

18 MR. GANNON: Well, I mean, you --

19 JUSTICE GORSUCH: Well --

20 MR. GANNON: -- you -- you rejected
21 some aspect that -- that -- that was being
22 disputed in that case here. That's -- that
23 would -- that's effectively the second argument
24 here. If you go for aiding and abetting, you'd
25 be doing the same thing with respect to that

1 category that you did in Kiobel with respect to
2 extraterritorial applications --

3 JUSTICE GORSUCH: And Jesner.

4 MR. GANNON: -- and in Jesner with
5 respect to foreign corporations. You'd be sort
6 of cutting out another -- another sort of
7 paradigmatic case that has arisen and is still
8 arising after -- after the -- after this
9 Court's previous cases.

10 JUSTICE GORSUCH: Yeah. Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: In footnote 21 of
14 Sosa, the Court said "there's a strong argument
15 that federal courts should give serious weight
16 to the executive branch's view of the case's
17 impact on foreign policy." And when I was on
18 the court of appeals, I took that seriously in
19 terms of executive branch statements.

20 In you -- from your perspective, are
21 lower courts sufficiently paying attention to
22 executive branch statements as dictated by
23 footnote 21?

24 MR. GANNON: Well, I think that in the
25 early to mid-2000s, we filed statements in

1 individual cases, and in some of this Court's
2 cases we filed -- we made statements in briefs
3 that this particular case presents foreign
4 policy concerns. We said that in *Jesner*. We
5 said that the Jordanian government was
6 concerned about it. They filed their own
7 amicus brief.

8 This Court took those concerns
9 seriously, but it also went beyond that to say
10 that it was concerned about the -- the threat
11 posed by the general category.

12 With respect to the lower courts, I
13 would say that I'm not aware of recent cases
14 where we've -- we've filed what I would call a
15 case-specific concern that has been disregarded
16 by the lower courts. In this case, we -- we
17 didn't file individual statements.

18 There was -- there was another *Falun*
19 *Gong* case that -- that initiated -- that was
20 initiated in the early 2000s where I think,
21 even before *Sosa*, the State Department filed a
22 letter expressing its concerns about -- about
23 the potential interference.

24 But as I -- as I've been saying, we
25 think that at step 2 of *Sosa*, you don't need to

1 approach that with -- with only case-specific
2 concerns in mind. And -- and I wouldn't think
3 lower courts did either, would need to either.
4 And that's why they could have -- the Ninth
5 Circuit here, I think, should have recognized
6 that we've been concerned about aiding and
7 abetting as a category, whether or not we've
8 objected to foreign policy concerns presented
9 by the allegations in this case.

10 But, of course, this case still does
11 require plaintiffs to prove, and they admit
12 that they're going to be proving, that -- that
13 the primary violations happened in China --

14 JUSTICE KAVANAUGH: Okay.

15 MR. GANNON: -- at the hands of the
16 Chinese government.

17 JUSTICE KAVANAUGH: I got that part.
18 And that -- that also distinguishes -- the
19 executive branch statement of interest in civil
20 cases also explains why when you bring a
21 criminal prosecution, the executive branch is
22 controlling that decision.

23 MR. GANNON: That's -- yes --

24 JUSTICE KAVANAUGH: So --

25 MR. GANNON: -- the federal criminal

1 prosecution that applies extraterritorially --

2 JUSTICE KAVANAUGH: Yes.

3 MR. GANNON: -- which is -- is the --
4 is what Congress enacted in order to implement
5 Article 4 of the Convention against Torture.

6 JUSTICE KAVANAUGH: Can you just spell
7 out generically what are the foreign policy
8 concerns in some of these cases?

9 MR. GANNON: I -- I -- I mean --

10 JUSTICE KAVANAUGH: In a little more
11 detail instead of kind of the bumper sticker.
12 What --

13 MR. GANNON: Well, they -- they can be
14 different, but they almost always are alleging
15 very serious human rights violations that
16 happened in a foreign country, either because
17 the foreign country was participating in it,
18 its officials were participating in it, they
19 were supposedly looking the other way, they are
20 not providing adequate redress for people that
21 are there, and therefore they have to come to
22 U.S. courts in order to vindicate them.

23 In the South Africa cases, we
24 expressed concern --

25 JUSTICE KAVANAUGH: How does that harm

1 the United States? Because -- to allow proof
2 of this human right -- rights violation by
3 foreign officials or foreign governments.

4 MR. GANNON: Well, I -- I -- I --

5 JUSTICE KAVANAUGH: Because I think
6 that's what you're saying.

7 MR. GANNON: I -- I am saying that, by
8 definition, foreign countries are often
9 concerned about the fact that these lawsuits
10 are being litigated here. And I was mentioning
11 the South Africa cases in the 2000s, and in
12 American Isuzu, where we filed an amicus brief
13 about aiding-and-abetting liability.

14 The South African government expressed
15 concerns that having these cases litigated in
16 the United States about Apartheid and -- and
17 grievous things that happened under Apartheid
18 was inconsistent with the Truth and
19 Reconciliation Commission. They had their own
20 process that they wanted to operate, and they
21 thought that having plaintiffs' lawyers making
22 their cases involving 50 large corporations
23 about all sorts of things that had happened
24 over decades to lots of people in South Africa,
25 that U.S. courts weren't the appropriate forum

1 to be hashing that out.

2 And in -- in the Arab Bank case,
3 Jesner, Jordan was concerned about the threat
4 posed to a mainstay of its economy. There are
5 all sorts of ways in which these lawsuits can
6 threaten the -- the relationship that we have,
7 the bilateral relationship we've had -- we have
8 with these countries. And in -- I -- I
9 understand my friends on the other side to say
10 -- there's an amicus brief that says that you
11 should internalize all of these costs. The
12 corporation should have to pay for this.

13 But, frankly, that's a policy judgment
14 that should be made by Congress. And -- and to
15 the -- to the extent that the executive branch
16 can bring criminal prosecutions when it wants
17 to, when it thinks that that's appropriate, can
18 file individual case-specific objections if it
19 needs to, and Congress can provide for specific
20 causes of action, as it did with the TVPA,
21 where it has already said, you know, we're
22 going to -- we're going to take the costs
23 associated with allowing Filartiga to be
24 litigated, where, you know, a Paraguayan
25 governmental official who tortured somebody

1 to -- is alleged to have been tortured somebody
2 to death is going to be held liable in a U.S.
3 court for those actions.

4 Congress said that it wanted that
5 action against the perpetrator to be available,
6 but we've continually said that we think that
7 it shouldn't be expanded to aiders and
8 abettors.

9 JUSTICE KAVANAUGH: On that last point
10 about Congress, this is my last question, and
11 this is picking up on the Chief Justice's and
12 Justice Gorsuch's question. By leaving the
13 door somewhat ajar but never quite getting
14 there, we've maybe misled Congress into
15 thinking: Oh, we don't need to do anything
16 about these human rights things, the courts are
17 taking care of it.

18 And -- and I'm concerned at a
19 separation of powers level that we're not
20 really allowing suits to go forward, but
21 Congress thinks we are because of a lack of
22 clarity in our case law.

23 And I just -- that's just an
24 observation I have after 20 years of dealing
25 with these cases, and I'm -- I just want to get

1 your reaction to it.

2 MR. GANNON: Well, I -- I mean, I'm --
3 I'm hesitant to -- to try to figure out exactly
4 when Congress is incentivized to act and when
5 it isn't incentivized to act in terms of the
6 dialogue between the branches, but we do think
7 that this is a legislative decision that they
8 should make and that in the Antiterrorism Act
9 the Court -- the Congress responded and said
10 that we're going to acknowledge
11 aiding-and-abetting liability for -- for -- for
12 acts of terrorism by foreign terrorist
13 organizations.

14 And -- and so that's something where
15 Congress is aware. I -- I take the point that
16 to the extent that the door is open, Congress
17 doesn't have a clear incentive to go through
18 and start saying this is the one that we think
19 ought to be codified, as it did with the TVPA
20 after Filartiga and Tel-Oren.

21 JUSTICE KAVANAUGH: And people put
22 their resources into a court suit rather than
23 lobbying Congress, arguably. But I'll leave it
24 there. Thanks.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett, if I could just pause for a moment.

2 I -- I've been notified that there
3 will be a fly-over of four planes at 11:22, and
4 I just want to announce that so people aren't
5 alarmed. We're told the noise might be --
6 might be big. I don't know why they didn't
7 check with me, but --

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: Well, Mr. Gannon,
12 I'll try to get my question out quickly before
13 the ruckus comes.

14 MR. GANNON: More dialogue between the
15 branches.

16 JUSTICE BARRETT: Mr. Shanmugam said
17 that there were several cases pending in the
18 lower courts or maybe -- maybe one about civil
19 conspiracy and that sort of secondary
20 liability.

21 Has the United States taken a position
22 in those cases?

23 MR. GANNON: No. I think -- I think
24 my friend was talking about a Fourth Circuit
25 decision. We were actually a third-party

1 defendant in that case, and we didn't address
2 those issues in that case and we haven't taken
3 a position about conspiracy there.

4 JUSTICE BARRETT: Do you have one
5 here?

6 MR. GANNON: No.

7 JUSTICE BARRETT: Okay.

8 MR. GANNON: I think that -- that
9 the -- the aiding-and-abetting analysis, we
10 think under Central Bank of Denver makes this
11 an easier case and the foreign policy concerns
12 that require the primary violation to be
13 happening abroad in the vast majority of these
14 cases, I think, make it easy to say that --
15 that they still present foreign policy concerns
16 in a way that it's possible that the conspiracy
17 analysis would be different. I'm not sure.

18 We -- we just haven't engaged in that
19 analysis yet.

20 JUSTICE BARRETT: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: So I guess I'm still
24 struggling with why the concerns that you've
25 raised aren't best addressed on a case-by-case

1 basis. I understand that you'd like to do this
2 categorically, but it seems to me that you've
3 mentioned other circumstances, other cases
4 where these claims have been raised and the
5 foreign nation has filed a brief and the
6 government has filed a statement that actually
7 talks about the foreign policy concerns with
8 respect to that particular case.

9 So why isn't that the better way to
10 address Sosa step 2 and the concerns that the
11 United States is talking about?

12 MR. GANNON: Well, I mean, I -- I
13 would say that Kiobel and Jesner basically
14 rejected and even -- and even --

15 JUSTICE JACKSON: In a different
16 context.

17 MR. GANNON: -- and even meeting a
18 middle version of that.

19 JUSTICE JACKSON: In a -- in -- I
20 understand. But they were -- they were looking
21 at a different issue. They -- and here's
22 the -- the real basis of my concern, is the
23 language of the ATS itself and the extent to
24 which Congress has now said that district
25 courts shall have original jurisdiction of any

1 civil action by an alien for a tort only
2 committed in violation of the Law of Nations or
3 a treaty of the United States.

4 You keep suggesting that this is about
5 the Court expanding ATS or the Court implying a
6 private right of action. This is pretty clear
7 language that Congress does want civil actions
8 by aliens for torts only committed in violation
9 of the nation -- Law of Nations to be
10 permitted.

11 So I'm worried that your categorical
12 take off the table is actually narrowing the
13 statute in a way that is inconsistent with
14 Congress's intent because aiding-and-abetting
15 liability, I mean, do you dispute that
16 aiding-and-abetting liability was widely
17 recognized as part of the Law of Nations at --
18 at -- at around the time of the founding?

19 I mean, this is not a new thing that
20 we're coming up with. That aiding-and-abetting
21 liability was a part of the Law of Nations,
22 right, or is?

23 MR. GANNON: I -- I -- I wouldn't -- I
24 wouldn't quite agree with that. And I think
25 that as -- as my -- my friend pointed out, even

1 when Congress went to codify
2 aiding-and-abetting liability at the criminal
3 level for the original three torts, it only did
4 so with respect to piracy. And I think that --

5 JUSTICE JACKSON: No, I understand.
6 But -- but I'm just -- I'm going back to the
7 original language of the statute. What did
8 Congress mean to authorize here?

9 And you're asking us as a categorical
10 matter to take aiding and abetting out. I
11 could see that if aiding and abetting was
12 something that was not a part of the Law of
13 Nations, it would be that we were just adding
14 it. I could see that if the Congress hadn't
15 said torts only under the Law of Nations.

16 I mean, the statute is looking at a
17 particular kind of claim and authorizing it.
18 And now you say as a categorical matter the
19 Court should be taking that off the table.

20 MR. GANNON: I mean --

21 JUSTICE JACKSON: I could appreciate
22 in particular cases where having this
23 particular person bring this particular claim
24 against a corporation is going to raise
25 significant foreign policy issues, but the U.S.

1 hasn't filed such a statement in this case,
2 correct?

3 MR. GANNON: It's correct that we
4 haven't filed a statement in this case.

5 JUSTICE JACKSON: And is it the
6 position of the U.S. that this particular claim
7 is going to create a foreign policy problem?

8 MR. GANNON: We -- we haven't taken
9 that position because we don't think that we
10 need to. And we think that the Court has --

11 JUSTICE JACKSON: No. That's just
12 because you're interpreting the statute that
13 way.

14 MR. GANNON: No. It's --

15 JUSTICE JACKSON: If I said to you,
16 you need to. My question is, in this case, do
17 we have the kind of foreign policy issue that
18 you say justifies taking this off the table
19 categorically?

20 MR. GANNON: Potentially, yes, this is
21 going to require these torts to be proved, the
22 primary violations about what Chinese officials
23 did in China needs to be proved in a U.S.
24 court, and that's necessarily going to create
25 sensitivities --

1 JUSTICE JACKSON: Not necessarily.

2 MR. GANNON: -- in our relationship
3 with China, and --

4 JUSTICE JACKSON: Okay. But -- but --
5 but what I'm saying is we could imagine a world
6 in which China says we don't care what you all
7 do and in which the United States has not made
8 a statement about its actual impact in this
9 case, and that is weighed against a statute
10 that appears to be allowing these folks to
11 bring this kind of claim.

12 And so I -- I -- I'm just -- I'm
13 nervous about the categorical nature of this
14 because I think the United States can protect
15 its interests if it does make a statement that
16 this particular claim is a problem, but to say
17 never can a corporation be sued for aiding and
18 abetting even serious human rights
19 violations -- first of all, the aiding and
20 abetting is not doing the work there in terms
21 of the foreign policy problem. What's doing
22 the work, as you've said repeatedly, is the
23 underlying claim against the foreign
24 government.

25 And so you could imagine a world in

1 which some foreign government says I don't care
2 if Cisco is being sued about this. Even if
3 Cisco presents a bunch of -- or excuse me, the
4 plaintiffs present a bunch of information about
5 the underlying torture, what difference does it
6 make? They can't do anything to me. I don't
7 care if that's going on.

8 So why would Cisco be absolved and the
9 plaintiffs here not get a remedy on the basis
10 of some speculation about a foreign policy
11 concern that the United States is not even
12 willing to say in writing right now would
13 actually occur?

14 MR. GANNON: Sometimes having to take
15 a position about an individual case has its own
16 foreign policy consequences. And I wouldn't
17 say that we need both governments to actually
18 come and -- and have negotiations in front of a
19 district court with declarations about what is
20 the threat posed by this particular case.

21 But stepping back, we made a version
22 of this argument in *Jesner* about corporate
23 liability, and we said that corporate liability
24 was something that was recognized at the
25 founding, and, therefore, you shouldn't rule it

1 out categorically. And this Court rejected
2 that argument.

3 And so -- and -- and I think that that
4 is consistent with -- with the caution in Sosa,
5 it is consistent with the categorical way that
6 the Court approached questions like
7 extraterritorial application and -- and
8 corporate liability in Kiobel and Jesner to say
9 that we're not treating these at a granular
10 case-by-case level.

11 And we also have in addition to the
12 foreign policy concerns, we have the Central
13 Bank of Denver presumption that Congress, from
14 the beginning, has distinguished between aiding
15 and abetting for criminal liability purposes
16 and civil liability purposes.

17 JUSTICE JACKSON: Thank you.

18 MR. GANNON: And that's a general rule
19 that we think applies.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Hoffman.

23 ORAL ARGUMENT OF PAUL L. HOFFMAN

24 ON BEHALF OF THE RESPONDENTS

25 MR. HOFFMAN: Mr. Chief Justice, and

1 may it please the Court:

2 This case is about the systematic
3 persecution of a religious minority by Chinese
4 authorities and Cisco's partnership in that
5 persecution. Each of the plaintiffs were
6 tortured or killed by Chinese authorities
7 because of their religious beliefs. Cisco
8 provided substantial assistance to this
9 persecution from U.S. territory by providing a
10 customized surveillance system designed to
11 identify Falun Gong believers to Chinese
12 authorities for detention and forced conversion
13 through torture and other barbaric treatment.

14 Under Petitioners' theory, Cisco
15 cannot be held responsible for aiding and
16 abetting these violations no matter how
17 substantial and direct their contributions
18 were. Under Cisco's theory, even the corporate
19 actors who provided the poison gas for Nazi
20 crematoria would not be liable under either the
21 ATS or the TVPA.

22 There's no basis in international law
23 or these statutes under either the ATS or the
24 TVPA for such an absurd result. The First
25 Congress passed the ATS to -- to fulfill this

1 nation's obligation to enforce the Law of
2 Nations. Then, as now, aiding and abetting Law
3 of Nations violations is itself a Law of
4 Nations violation, meeting the Sosa test.

5 There are no categorical reasons for
6 excluding aiding-and-abetting liability from
7 the ATS. If any particular case raises foreign
8 relations or other issues, the federal courts
9 have many tools to address those issues on a
10 case-by-case basis.

11 Nor is there any basis to deny
12 aiding-and-abetting liability under the TVPA.
13 Congress intended the TVPA to supplement the
14 ATS for torture and extrajudicial killing
15 claims. Cisco subjected Falun Gong believers
16 to torture and extrajudicial killing by
17 identifying them and delivering them to their
18 torturers. Such conduct has violated
19 international law at least since Nuremberg.

20 This Court should not give the green
21 light to U.S. corporations acting from the
22 United States to help foreign governments
23 commit torture or extrajudicial killing.

24 I welcome the Court's questions.

25 JUSTICE THOMAS: Mr. Hoffman, how

1 available was -- were -- or common was
2 aiding-and-abetting liability in tort cases in
3 1789?

4 MR. HOFFMAN: Well, according to the
5 historians' amicus brief -- and if, Justice
6 Thomas, you recall, in *Sosa*, this Court relied
7 very heavily on the same historians and their
8 analysis -- the historians say that civil --
9 civil aiding-and-abetting liability was very
10 much available in the common law, but, more
11 importantly for this case, that
12 aiding-and-abetting liability or accessorial
13 liability was available for Law of Nations
14 violations, including the -- the three that
15 this Court identified in *Sosa*.

16 But there were other Law of Nations
17 violations. Even in Blackstone, there were
18 other Law of Nations violations at the time.
19 If you look at the Bradford opinion, for
20 example, they were talking about violations of
21 neutrality, aiding and abetting pillage. It
22 was not -- at the time, the Law of Nations
23 violations were not limited to those three.

24 Nor is the -- the language of the
25 statute. The statute says that -- that aliens

1 can bring a case for a tort only committed in
2 violation of the Law of Nations. It doesn't
3 say in violation of safe conducts or -- or
4 piracy or the norms that exist in 1789. It
5 says to -- to enforce the Law of Nations by
6 means of a tort action.

7 And I think the significance of what
8 this Court did in *Sosa*, which really did reject
9 a lot of the arguments that -- that are being
10 made, I think, by the other side, was to say
11 that based on the history, Justice Souter's
12 opinion for six members of this Court said that
13 the door was not closed, that -- that -- that
14 the federal courts had not lost their ability
15 to -- to handle tort actions for violations of
16 the Law of Nations.

17 And Congress has never done anything
18 since 1789 --

19 JUSTICE KAGAN: Mr. Hoffman?

20 MR. HOFFMAN: -- to take away that
21 mission.

22 JUSTICE KAGAN: I mean, if we just
23 limit ourselves now to 1789, the Blackstone
24 three, plus any more that might have existed
25 then, is it so clear to you that aiding and

1 abetting functioned the same way and was
2 recognized to the same extent with respect to
3 all of those causes of action?

4 I thought Judge Bumatay made a pretty
5 good case that, in fact, this -- it kind of was
6 norm by norm, that the evidence for aiding
7 and -- aiding-and-abetting liability was much
8 stronger with respect to piracy than it was
9 with respect to ambassadorial violations and
10 then maybe even a step down with respect to the
11 safe conduct violations.

12 So why shouldn't we think of this as
13 whatever the norms are, whether it's the
14 Blackstone three, whether it's other norms that
15 would have been recognized in 1789, or, as you
16 think, whether we can go beyond the 1789 norms,
17 whatever the case, that aiding-and-abetting
18 liability should be thought of norm by norm
19 rather than all in a sweep?

20 MR. HOFFMAN: Well, I -- I think,
21 from -- from -- I don't -- I don't think we
22 have an objection to that. I think the -- the
23 issue for us -- I mean, first of all, we've
24 been criticized for asking for a categorical
25 rule. The lower courts have --

1 JUSTICE KAGAN: Everybody's doing
2 categorical rules --

3 MR. HOFFMAN: We're -- we're --
4 we're --

5 JUSTICE KAGAN: -- on both sides here.
6 So you're no less than Petitioners.

7 MR. HOFFMAN: My only point is that
8 the lower courts have all accepted
9 aiding-and-abetting liability. We've been
10 litigating aiding-and-abetting cases for the
11 last 30 years. No court has said so far at the
12 circuit court level that there isn't
13 aiding-and-abetting liability, and they've done
14 that based on their analysis of customary
15 international law.

16 With respect to the particular norms,
17 we're happy under the ATS to accept what the
18 scope of the Law of Nations violation is
19 because that was the point of it. The point of
20 it for -- for the founders was, if -- if there
21 was a violation of the Law of Nations, this
22 Court was opening its courts, its new federal
23 courts, to handle those cases in tort.

24 And that -- that -- that satisfied our
25 obligation under international law as a new

1 member of the international community to -- to
2 say that to the international community. We
3 will do that. And it also helped to handle
4 situations where the United States would have
5 been responsible if they had not -- if we had
6 not acted. Marbois is a perfect example of
7 that, the Marbois incident, where the
8 Continental Congress had no means at that point
9 and -- and was left to the courts of
10 Pennsylvania to litigate that case. Marbois
11 was on their minds. And as Justice Souter
12 said --

13 JUSTICE GORSUCH: So on -- so on -- on
14 that, Mr. Hoffman --

15 MR. HOFFMAN: Yes.

16 JUSTICE GORSUCH: -- Sosa recognized
17 that -- that and said, you know, there's --
18 undoubtedly, the ATS was there to create
19 jurisdiction in federal courts to hear cases.
20 Whether it created a cause of action was more
21 ambiguous.

22 MR. HOFFMAN: Well, I think what --

23 JUSTICE GORSUCH: If I might just --

24 MR. HOFFMAN: Sorry.

25 JUSTICE GORSUCH: That's all right.

1 It's all right, but let me just spit it all
2 out.

3 MR. HOFFMAN: Yes.

4 JUSTICE GORSUCH: And then you can
5 have at it.

6 MR. HOFFMAN: Okay.

7 (Laughter.)

8 JUSTICE GORSUCH: But -- but Sosa was
9 willing to spot that there might be three
10 causes of action but recognized really the job
11 for creating causes of action, because of
12 foreign policy concerns, as sympathetic as this
13 case -- particular case certainly is, that the
14 responsibility for creating causes of action
15 generally lies not with judges but with
16 Congress, and it said, well, there -- we know
17 there are these three that we had -- they had
18 in mind, but we just don't know about anything
19 else and -- and we should be really skeptical.

20 And -- and then, in *Jesner*, we said,
21 in light of the foreign policy and
22 separation-of-powers concerns inherent in ATS
23 litigation, there is an argument that a proper
24 application of *Sosa* would preclude courts from
25 ever recognizing any new causes of action under

1 the ATS.

2 And I guess I -- I just want to throw
3 back to you Justice Kavanaugh's questions,
4 which are, if all that's true, and that's our
5 law, are we kind of creating a mousetrap for --
6 for -- for plaintiffs in cases like this where
7 you come and you bring -- you bring something
8 that expands beyond the three in some way,
9 shape, or form; every time, you lose. And are
10 we -- are we masquerading as to where the real
11 responsibility and where -- where your efforts
12 belong? Do they belong in the courts or maybe
13 across the street?

14 MR. HOFFMAN: Well, we've done both.
15 Justice Kavanaugh asked about whether there are
16 only six. I've been involved personally in
17 more cases than six where we've gotten
18 judgments.

19 I would also point out that the Alien
20 Tort Statute was used in the German slave labor
21 cases, the Swiss bank cases, in which over \$7
22 billion of --

23 JUSTICE GORSUCH: I don't doubt there
24 are legitimate applications.

25 MR. HOFFMAN: Well --

1 JUSTICE GORSUCH: The question is
2 whether to expand it. And -- and --

3 MR. HOFFMAN: Well --

4 JUSTICE GORSUCH: -- and -- and I'm
5 not sure that's responsive to the question.

6 MR. HOFFMAN: -- I guess what I'm
7 saying is that since Sosa -- before and since
8 Sosa, the courts have recognized certain
9 limited numbers of human rights norms. And
10 Sosa itself recognized that what the modern Law
11 of Nations was was international human rights
12 law.

13 JUSTICE GORSUCH: But this Court's
14 never actually gone beyond the three.

15 MR. HOFFMAN: But you've never --
16 you've never considered beyond the three.

17 JUSTICE GORSUCH: Well, we've had
18 Jesner, we've had Kiobel --

19 MR. HOFFMAN: Well, but -- but --

20 JUSTICE GORSUCH: -- we've had
21 Nestle --

22 MR. HOFFMAN: -- I think --

23 JUSTICE GORSUCH: -- you know, just
24 since -- I mean, that's just in the last decade
25 or so.

1 MR. HOFFMAN: And can I respond on
2 those, I think? The -- the -- the Kiobel,
3 Jesner, Nestle series of cases was not about
4 either Sosa's -- was about Sosa step 2 and
5 Jesner. It was never about Sosa step 1. No
6 one ever talked about the underlying norms.

7 What -- what those cases involved in
8 the background was an issue about foreign-cubed
9 cases generally speaking. Kiobel was a
10 foreign-cube case. What I mean by that is
11 foreign plaintiffs, foreign defendants, actions
12 taking entire -- taking place entirely outside
13 the United States.

14 And I think that one of the arguments
15 in Kiobel, for example, the U.K. and
16 Netherlands filed a brief that said you should
17 not be sitting in judgment in ATS cases over
18 the conduct of our corporations outside the
19 United States, right?

20 And that's, in fact, what happened
21 in -- in the Footnote 21 in the apartheid
22 cases. The South African government was
23 complaining because three of its corporations
24 were being sued.

25 As soon as those were dismissed,

1 the -- the South African government filed
2 something with the Court saying we don't have
3 any problem with you, you know, considering the
4 liability of your own corporations. That's
5 exactly what the British and the Dutch said
6 in -- in -- in Kiobel.

7 If -- if you want to apply the Law of
8 Nations to your citizens, which is actually
9 what the Alien tort Statute was meant to do to
10 begin with, that's fine, but if you try to
11 apply it extraterritorially, then you run into
12 some international law questions of your own
13 about your own jurisdiction to do that.

14 And so I think you -- and -- and
15 Jesner -- Jesner is a good example --

16 JUSTICE GORSUCH: Are -- are you
17 saying there are no foreign policy implications
18 in this case that are -- that might be weighed
19 by policymakers rather than by judges?

20 MR. HOFFMAN: Well, I think, first of
21 all, you heard from my --

22 JUSTICE GORSUCH: I mean, I don't
23 think that's -- I mean, that would be hard to
24 say, right?

25 MR. HOFFMAN: The -- the -- the

1 government has never -- the United States
2 Government nor the Chinese government has ever
3 raised any objection to these cases ever.

4 JUSTICE GORSUCH: Well, we have
5 the United -- we have the United States
6 Government here before us, Mr. Hoffman.

7 MR. HOFFMAN: But they haven't raised
8 one case-specific foreign policy problem.

9 JUSTICE GORSUCH: Well, the --

10 MR. HOFFMAN: What they've said is
11 they don't like the --

12 JUSTICE GORSUCH: So you don't
13 think -- okay. So you don't think there are
14 any foreign policy implications that maybe
15 belong to policymakers rather than judges?

16 MR. HOFFMAN: Well, I think -- I think
17 what -- I think the founders, in passing the
18 Alien Tort Statute, understood very well that
19 handling Law of Nations issues raises some
20 foreign policy-related questions.

21 And I would also say that those
22 questions were much more extreme and much more
23 fraught in 1789 than they are in 2026. In
24 1789, the Bradford case is a perfect example.
25 In that case, Attorney General Bradford said to

1 the -- to the -- the British plaintiffs or
2 claimants: You have a -- you have -- I have no
3 doubt that there's a -- there's a claim that
4 you can bring under the Alien Tort Statute for
5 what happened in Sierra Leone in the middle of
6 a war between France and England.

7 And so what the founders understood
8 was that the way to handle that was not to
9 ignore the fact that there are problems here,
10 no matter how we decide this case, there's
11 going to be foreign policy issues, either
12 France is going to be unhappy with us or
13 England is going to be unhappy with us.

14 Their answer to that -- and it's an
15 answer that's -- that's -- hasn't changed yet,
16 is you apply the rule of law. You decide the
17 Law of Nations decision. In all the pirate
18 cases --

19 JUSTICE BARRETT: Mr. Hoffman, can
20 I --

21 JUSTICE KAGAN: When, though --

22 JUSTICE BARRETT: -- can I ask you a
23 question?

24 MR. HOFFMAN: Yes.

25 JUSTICE BARRETT: I want to ask you a

1 version of the question that the Chief Justice
2 asked Mr. Gannon, and it has to do with the
3 puzzle of this case, which is the post-Erie
4 world when the Alien Tort Statute was enacted
5 in the pre-Erie world. So we have a
6 jurisdictional statute that presupposes the
7 ability of federal courts to recognize common
8 law actions that come from the general law.

9 At the time, I mean, so I think this
10 is the rationale for recognizing those that
11 were recognized by courts at the time the ATS
12 was enacted, at the time, you know, there were
13 these, you know, the Blackstone three and
14 maybe, you know, something else.

15 But, since then, you know, we've said,
16 courts, don't do that anymore. And that's
17 partly a function of Erie. That's partly a
18 function of our recent line of cases talking
19 about the separation of powers and this being
20 Congress's job.

21 So, if the ATS is a jurisdictional
22 statute that presupposes jurisdiction over
23 causes of action that at the time we recognized
24 courts had the power to recognize, what do we
25 make of that now that it's a jurisdictional

1 statute giving federal courts jurisdiction over
2 something that we say courts generally lack the
3 power to do?

4 MR. HOFFMAN: Well, first of all, I
5 think that if the -- if Congress gives you the
6 power to do that, then you have the power to do
7 that. In other words, if --

8 JUSTICE BARRETT: So are you saying
9 the ATS is a grant of authority and not just a
10 jurisdictional statute?

11 MR. HOFFMAN: I -- I -- I do take it
12 as a grant of authority and I think that's what
13 Sosa said. Sosa said that notwithstanding the
14 exact point that you made about Erie, because
15 they discussed Erie. They discussed all of --
16 they discussed Bivens. They discussed a
17 different attitude towards implied rights of
18 action and -- and the authority of -- of -- of
19 the courts to do that.

20 I think what Sosa said almost in so
21 many words is that the federal courts have not
22 lost their -- their capacity to handle tort
23 cases for violations of the Law of Nations.

24 And that's what -- that's what this
25 statute says the courts can do. And it was not

1 merely a jurisdictional statute in the way we
2 understand it in the sense that you have to
3 wait for further --

4 JUSTICE BARRETT: But Sosa didn't
5 extend beyond the Blackstone three.

6 MR. HOFFMAN: Well, but -- but it --
7 it did in the sense that -- it didn't -- it --
8 it -- it didn't find that the particular claim
9 in Sosa was valid under its test, right, what
10 Sosa said. And, actually, Sosa cited to
11 Filartiga and Marcos and human rights cases as
12 being the kinds of cases that would be subject
13 to future claims.

14 I don't -- I think there's no doubt
15 reading that opinion that torture and
16 extrajudicial killing and -- and disappearance,
17 the claims that were -- that were litigated in
18 Marcos to judgment would be among the claims
19 that would -- would fit the historical paradigm
20 test, that they clearly are supported by the
21 same level of evidence and the same
22 definiteness and the same acceptance
23 internationally as the -- as the torts that the
24 founders were talking about.

25 And so I -- I don't think there's any

1 way to read Sosa without understanding it as
2 being the -- giving the ability for courts to
3 do what they have done since, right, in terms
4 of recognizing at least certain torts.

5 JUSTICE KAVANAUGH: Mr. Hoffman, can I
6 follow up on Justice Gorsuch's question --

7 MR. HOFFMAN: Sure.

8 JUSTICE KAVANAUGH: -- and your point
9 about the foreign-cubed cases?

10 MR. HOFFMAN: Yes.

11 JUSTICE KAVANAUGH: It seems to me
12 what the government is saying -- and I just
13 want to get your reaction to it -- is that
14 aiding-and-abetting liability presents the same
15 concerns as what you described as the
16 foreign-cubed cases because it's necessarily
17 going to require proof or get into the actions
18 of foreign officials against foreign citizens
19 in foreign countries.

20 Can you respond to that?

21 MR. HOFFMAN: Yes. I mean, two points
22 I would like to make. One is that the reason
23 that the Jesner court, at least on the face of
24 it, had a categorical rule about foreign
25 corporations was a long history of actual

1 conflict, right?

2 I mean, we had many protests. They
3 were all cases that didn't really have much of
4 a connection to the United States. In Kiobel,
5 it was the existence of a shareholder office in
6 New York. That was the basis for jurisdiction.
7 Everything else was outside the country.

8 And so that's the -- I think that
9 level of evidence might support a categorical
10 rule, but, generally, I think, Sosa step 2 is
11 talking about particular issues. And I think
12 as --

13 JUSTICE KAVANAUGH: But just on --
14 sorry, if I can --

15 MR. HOFFMAN: Yes.

16 JUSTICE KAVANAUGH: -- focus my
17 concern. My -- the -- the government raised
18 the point that aiding and abetting will present
19 the same kinds or very close to the
20 foreign-cubed cases. If you just have a
21 specific response to that.

22 MR. HOFFMAN: But -- but the real
23 difference to that is that -- and this case is
24 a good example of that -- we are talking in
25 this case about the actions of a United States

1 citizen, right, that has committed actions on
2 U.S. territory that have -- that have -- that
3 have led to the harms that are covered by this
4 statute.

5 What -- what the government is saying,
6 basically, would wipe out all international
7 human rights cases or pretty much most of them,
8 right, because all of them have to do with
9 that. And so what they're saying is that if --
10 if it's -- if the case involves human rights
11 violations by someone outside the United
12 States, well, then that raises foreign policy
13 issues.

14 I think Congress has pretty
15 conclusively rejected that argument. In the
16 Torture Victim Protection Act, not only do they
17 allow for these kind of cases, they
18 specifically make it extraterritorial and they
19 cover the human rights violations committed by
20 foreign officials on their territory.

21 JUSTICE KAVANAUGH: On -- on the TVPA,
22 what do you make of the fact that aiding and
23 abetting's not part of the TVPA?

24 MR. HOFFMAN: Well, I think it is. I
25 mean, I think that what -- what --

1 JUSTICE KAVANAUGH: Well, it's not
2 explicit, and Central --

3 MR. HOFFMAN: No, and there is --

4 JUSTICE KAVANAUGH: -- and Central --
5 Central Bank says that's a problem. So just
6 get your response to that.

7 MR. HOFFMAN: Well, I guess the -- the
8 question is what Central Bank means, right? In
9 Central Bank itself, the Court was rejecting a
10 presumption in favor of aiding-and-abetting
11 liability and rejecting it. It wasn't creating
12 a presumption against aiding-and-abetting
13 liability.

14 I think what -- what the analysis in
15 Central Bank was they went through the text,
16 the statutory context, the fact that in other
17 securities laws, explicit causes of action did
18 not include aiding-and-abetting liability.

19 So, if you do -- what our position is,
20 is that Central Bank says you look at the text,
21 the statutory context, the legislative history
22 if it's appropriate to look at that, and -- and
23 that gets you your answer.

24 And the real issue is, what was --
25 what is congressional intent? Now, in the

1 Senate report, the Senate report says liability
2 will extend to those who ordered, abetted, or
3 assisted torture. You can't get any plainer
4 than that from -- from Congress.

5 They didn't know about Central Bank
6 in -- in 1992 because Central Bank wasn't
7 decided until 1995.

8 JUSTICE KAGAN: I'm a little bit
9 confused. Are you saying that the TVPA
10 language itself includes aiding and abetting,
11 or are you saying that aiding and abetting
12 functions on top of the TVPA language?

13 MR. HOFFMAN: Well, what -- what
14 our -- what our position is -- Section 2 of the
15 TVPA says that an individual who subjects
16 another person to torture is liable under the
17 TVPA. Our position is that "subjects," under
18 the ordinary meaning of the term "subjects,"
19 applies -- first of all, applies to our case,
20 right?

21 Our case is a case that fits the --
22 the Nuremberg legal model, right, which is
23 identifying people for their persecution and
24 torture. The -- the Einsatzgruppen case is
25 exactly that case, where the defendant came up

1 with lists of communists for killing, right?

2 In this case, what -- what Cisco did
3 was create this elaborate surveillance system
4 to find Falun Gong members so that they could
5 be detained -- detained and tortured.

6 JUSTICE KAGAN: I guess what I don't
7 understand is, when -- when you look at this
8 language, "subjects to torture" --

9 MR. HOFFMAN: Yes.

10 JUSTICE KAGAN: -- do you think that
11 the defendants just fit that language, or do
12 you think that there's an extra step necessary
13 that has to do with aiding and -- and abetting
14 liability to get to that result?

15 MR. HOFFMAN: Well, we don't think
16 there's -- number one, we do think that the
17 language of the statute applies to the
18 allegations in this case as to this defendant.
19 So we think the TVPA on its terms, based on its
20 text, applies.

21 We also think more broadly that
22 aiding -- that aiders and abettors under
23 international law, particularly with respect to
24 torture and extrajudicial killing, are people
25 who knowingly provide assistance that has a

1 substantial effect on the commission of the
2 crime.

3 We think that language fits within the
4 term "subjects." And so we would say that at
5 least with respect for torture and
6 extrajudicial killing, because that's all
7 that's involved in the TVPA, that that language
8 includes the international idea of aiders and
9 abettors. And we think that's exactly what
10 Congress had in mind, that's what the
11 legislative history indicates, and -- and
12 there's nothing to indicate that -- and -- and
13 even the other side agrees that "subjects"
14 means something more than the direct torture,
15 right, because they agree that command
16 responsibility is in there.

17 And command responsibility, it's an
18 international doctrine, just like
19 aiding-and-abetting liability.
20 Aiding-and-abetting liability is as established
21 as command responsibility. And command
22 responsibility doesn't have as close a
23 connection or as -- as difficult requirements
24 for liability as aiding and abetting does.

25 And for command responsibility, you

1 have to know or should have known. You don't
2 have to have ordered anything. What you have
3 to -- have to have some knowledge that people
4 who are in the chain of -- of your command are
5 committing violations, and you don't do enough
6 about it --

7 JUSTICE ALITO: Back to the --

8 MR. HOFFMAN: -- or you don't do
9 anything about it, and --

10 JUSTICE ALITO: Back -- I'm sorry.

11 MR. HOFFMAN: Sorry.

12 JUSTICE ALITO: Do you want to finish?
13 Back to the ATS and --

14 MR. HOFFMAN: Yes.

15 JUSTICE ALITO: -- the relationship
16 between suits under that statute and the
17 foreign policy interests of the United States,
18 suppose that the United States files a
19 statement that says, on balance, we think that
20 this lawsuit is inconsistent with -- is not in
21 the best interests of the United States'
22 foreign policy. Is that the end of the matter?

23 MR. HOFFMAN: I don't know if it's the
24 end of the matter, but I think that the courts
25 have treated U.S. statements of interest in

1 these cases as -- as -- giving them great
2 weight, which is what I think this Court has
3 said they're supposed to get.

4 And -- and I think they would be given
5 great weight. I -- I've been involved in cases
6 where the case has been --

7 JUSTICE ALITO: What does it mean to
8 give it great weight? Does that mean the court
9 says, well, okay, that's too conclusory; now
10 explain exactly why?

11 MR. HOFFMAN: I think the court has
12 within its discretion to say that your
13 statement is too conclusory. And -- and -- and
14 if -- if the statement is the reason we think
15 there are foreign policy problems is that we
16 don't like the way the courts have interpreted
17 the Alien Tort Statute, I don't think that's an
18 appropriate foreign policy point.

19 I think what they'd have to say, as --
20 as they did -- as the --

21 JUSTICE ALITO: You want the -- do you
22 want a district judge to say, in my judgment,
23 you do not have a sound basis for concluding
24 that this would be contrary to the best
25 interests of the United States' foreign policy?

1 MR. HOFFMAN: I think there's going to
2 be very limited -- very limited circumstances
3 where a district court judge could say that. I
4 think, if -- if -- if, in fact --

5 JUSTICE ALITO: Okay. I -- I
6 understand the position.

7 You've been making two arguments that
8 are not necessarily consistent regarding the
9 meaning of the ATS, and one has to do with the
10 original meaning, the original understanding of
11 the statute. One has to do with Sosa.

12 Which one is it?

13 MR. HOFFMAN: Well, I think what -- I
14 think what Sosa did was interpret the meaning
15 of the Alien Tort Statute for the modern Law of
16 Nations. I think that's what Sosa did. I
17 think what it -- what -- what it tried to do --

18 JUSTICE ALITO: So that's not the
19 original meaning.

20 MR. HOFFMAN: Well, I think what --
21 Sosa interpreted it as the original, at least
22 parts of it as the original meaning, one of
23 them being that no further action by Congress
24 was necessary for the courts to entertain
25 claims for torts committed in violation of the

1 Law of Nations.

2 JUSTICE ALITO: Well, it's arguably
3 inconsistent with the original understanding
4 for at least two reasons. One has to do with
5 the way the role of federal courts was
6 understood before Erie. The other is something
7 that Mr. Gannon referred to, which was the
8 understanding of the nature of the Law of
9 Nations at the end of the 18th century.

10 Was it the same as it is today?

11 MR. HOFFMAN: I think the Law of
12 Nations has evolved. I think it's now commonly
13 understood to be customary international law.
14 That's what we call it.

15 I think that the mechanism of the
16 creation of customary international law has
17 somewhat changed in terms of the more --
18 multilateral treaties and that kind of thing.
19 But I think it's the same Law of Nations. I
20 don't think it's a different Law of Nations.

21 I don't -- I don't think that it has
22 changed to the point where it is not the same
23 thing that the founders were talking about.

24 JUSTICE ALITO: Do you think that the
25 understanding of public international law today

1 is the same as the understanding of the -- the
2 great international law treatise writers of the
3 late -- that were influential at the end of the
4 18th century? Is it consistent with Grotius
5 and consistent with Vatell?

6 MR. HOFFMAN: Well, I think, actually,
7 the -- the -- our interpretation or this
8 Court's interpretation, really, in Sosa was
9 based on the obligations of Vatell, for
10 example, which focused on our obligation to --
11 to police our own citizens' conduct, for
12 example, or things that happened within the
13 U.S. territory that violated the Law of Nations
14 or not to give safe haven for people that came
15 into --

16 JUSTICE ALITO: Well, it -- it was as
17 to the torts that Blackstone singled out and
18 maybe as to some others, but as to human rights
19 violations committed by foreign nations with
20 respect to their own people on their own
21 territory, was that considered to be within the
22 scope of the Law of Nations at that time?

23 MR. HOFFMAN: No. No --

24 JUSTICE ALITO: Thank you.

25 MR. HOFFMAN: -- it's clear that --

1 that international law has changed. And -- and
2 as Sosa recognized, the modern Law of Nations
3 concerns itself with precisely those questions.
4 That's the whole basis for Filartiga. That's
5 the -- that's what the Congress said should
6 continue when it passed the Torture Victim
7 Protection Act. It -- in order to enforce at
8 least two of those norms, but saying at the
9 same time that the Alien Tort Statute performs
10 many important functions and should continue
11 and -- and -- and endorsing the Filartiga view
12 of what the Alien Tort Statute should be used
13 for.

14 JUSTICE JACKSON: Mr. Hoffman, can I
15 just take you back to something you explored
16 with Justice Kavanaugh, which is whether or not
17 aiding-and-abetting liability presents the same
18 concerns as the foreign-cubed cases?

19 And I've been puzzling over that, and
20 I think the government's view assumes that it
21 would because the litigation involving aiding
22 and abetting would necessarily call into
23 question the underlying violation by the
24 foreign country. You would have evidence about
25 the actual torture, et cetera.

1 And I guess what I'm wondering is
2 whether that's necessarily the case. You
3 suggest that the claim at issue here really is
4 about what Cisco did --

5 MR. HOFFMAN: Right.

6 JUSTICE JACKSON: -- about Cisco's
7 acts here in the United States with the
8 creation of this software and the extent to
9 which it did so under China's direction and to
10 facilitate whatever it was that China was
11 doing.

12 So I suppose you could have a world in
13 which Cisco even concedes for the purpose of
14 litigation that those things happened in China
15 and the whole litigation is really just about
16 its own participation. And in that case, would
17 it raise the foreign policy concerns that the
18 United States is talking about?

19 MR. HOFFMAN: We don't think so. And
20 we also think that aiding and abetting as a
21 concept doesn't necessarily implicate foreign
22 policy at all.

23 And, for example, say the Iranian
24 regime is overthrown and it turns out that an
25 American company helped the Iranian regime

1 identify protestors so that they could be
2 executed summarily, and the -- and the -- the
3 parents of those teenagers that were executed
4 come to this country and say that that
5 corporation killed our -- helped kill our
6 children.

7 Would we really say that they don't
8 have a claim here because of foreign policy?
9 There's no foreign policy implication. It's
10 completely consistent with U.S. policy. And,
11 in fact, in this case, the United States
12 Government has condemned all the things that we
13 have said about what the Chinese government
14 does to the Falun Gong, every single one of
15 them.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas?

20 JUSTICE THOMAS: When we had Central
21 Bank appear, the point -- of course, that is a
22 securities case, but it makes the point that
23 there was no general background common law rule
24 as to aiding and abetting -- aiding and
25 abetting in tort cases.

1 If that is the case, how does that
2 affect aiding and abetting in 1789 on the three
3 categories that we indicated in Sosa?

4 MR. HOFFMAN: Well, the -- the -- what
5 I would say to that is that as your decision in
6 Twitter laid out in terms of the long history
7 of aiding and abetting in criminal -- the
8 criminal context, there's an equally long
9 history of accessorial liability and
10 aiding-and-abetting liability in the context of
11 the Law of Nations, which, from our standpoint,
12 in terms of enforcing this statute is different
13 from anything that existed in terms of civil
14 aiding-and-abetting liability.

15 What we're saying is that Congress
16 said that we could have a tort action if we had
17 a violation of the Law of Nations. Aiding and
18 abetting, torture, and extrajudicial killing
19 and disappearance under customary international
20 law -- and I don't think it's disputed by the
21 other side that -- that it is a violation --
22 fits what Congress said we could get and that
23 Sosa said that unless there's some reason that
24 we shouldn't be able to go forward, we have
25 that claim.

1 And I -- and I was saying that there's
2 no -- there's no categorical reason why this
3 aiding-and-abetting claim which focuses on U.S.
4 citizens acting from U.S. territory raises the
5 kind of issues that this Court recognized in
6 *Jesner* based on a long history of protests
7 and -- and the fact that the cases didn't have
8 much to do with the United States.

9 JUSTICE THOMAS: So we have to
10 actually go beyond the common law itself?

11 MR. HOFFMAN: Well, no. I -- I mean,
12 the Law of Nations was part of the common law.
13 That was the understanding at the time. That's
14 probably part of why, you know, the -- the --
15 the Alien Tort Statute was passed the way it
16 was.

17 The -- the Law of Nations was
18 understood to be part of the common law that we
19 inherited from England. And -- and -- and you
20 have cases from the beginning of the republic
21 throughout the *Paquete Habana* and, you know,
22 dealing with the capture of fishing vessels
23 during a war, saying that courts had the
24 responsibility to identify and apply the Law of
25 Nations. Even in 1900, the courts were saying

1 that. And the Court has consistently said over
2 time that the Law of Nations and -- and also
3 customary international law is part of our law
4 to be applied.

5 Now that can be over -- Congress can
6 withdraw this authority as it was interpreted
7 by this Court anytime it wants. If Congress
8 thinks that the -- the -- the concerns that
9 have been raised by the Chamber and other amici
10 and -- and by the United States is problematic,
11 Congress can do away with it and just say no,
12 you know, we -- we're -- we're out of that
13 business.

14 But they never said it. And, in fact,
15 the only time Congress has said anything is
16 they've said we really like Filartiga. We
17 really think that's a good precedent. They say
18 it in the Senate report for paragraphs. And --
19 and -- and that -- and so, in terms of what
20 Congress has decided in terms of the tradeoff,
21 I think both in -- in 1789, when it was even
22 more fraught, and today, what these statutes
23 mean is that we do have a commitment to
24 enforcing international law at least in some
25 limited extent.

1 JUSTICE THOMAS: Wouldn't it actually
2 work better the other way, if Congress actually
3 added aiding and abetting?

4 MR. HOFFMAN: It would certainly mean
5 that we wouldn't have to debate that issue
6 anymore.

7 (Laughter.)

8 MR. HOFFMAN: But -- but I don't think
9 they have to. And I guess our point about
10 Central Bank, at -- at -- at least as it
11 applies to the TVPA, I mean, I don't know how
12 you would apply Central Bank to a 17 -- to the
13 first statute that the Congress ever passed in
14 terms of implying what they thought about it,
15 but for the TVPA, our point is that Central
16 Bank doesn't say that you have to use magic
17 words or that you have to use that word.

18 What you have to find out is what did
19 Congress intend? Congress said that it
20 intended for people who aided and abetted, or
21 at least abetted and assisted, to be liable
22 under this statute. And it -- and it was
23 enforcing international law, which also implied
24 to aiding -- aiders and abettors.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 Justice Alito, anything further?

2 Justice Sotomayor?

3 Justice Kagan?

4 Justice Gorsuch?

5 Justice Kavanaugh?

6 Justice Barrett?

7 Justice Jackson?

8 Thank you, counsel.

9 MR. HOFFMAN: Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Rebuttal,
11 Mr. Shanmugam?

12 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

13 ON BEHALF OF THE PETITIONERS

14 MR. SHANMUGAM: Thank you, Mr. Chief
15 Justice.

16 Judge Friendly famously described the
17 ATS as a legal Lohengrin and in *Sosa*, the Court
18 recognized that the ATS was jurisdictional but
19 that Congress didn't intend it to be stillborn
20 and hence it created a cause of action for the
21 norms that the First Congress expected to be
22 recognized.

23 But over Justice Scalia's objection,
24 the Court then went further. It went on to
25 permit judicial law making, the recognition of

1 new causes of action as a matter of federal
2 common law for violations of modern
3 international law.

4 And it's that methodology that we
5 believe is invalid and that the Court should
6 now reject. And that is because far from
7 engaging in strict judicial door keeping, the
8 lower courts have uncritically recognized a
9 wide range of claims to be actionable,
10 including aiding and abetting claims often over
11 the objections of foreign governments as we
12 discuss at page 35 of our brief.

13 And even in the wake of this Court's
14 most recent decisions, the plaintiffs bar has
15 been adept at taking extraterritorial
16 allegations against American companies and
17 repackaging them as allegations concerning
18 aiding and abetting conduct that took place in
19 the United States.

20 That methodology has proven to be
21 unworkable and, as this Court did in *Edwards*
22 versus *Vannoy and Loper Bright*, when confronted
23 with similarly unworkable methodologies, this
24 Court should now reject it. But even if the
25 Court doesn't go that far, it should still

1 reverse.

2 We take the point that the aiding and
3 abetting analysis should occur on a
4 norm-by-norm basis at least at the first step
5 of Sosa. But any aiding and abetting claim,
6 apart from the three core offenses, will
7 ultimately still fail.

8 And that is regardless of whether you
9 conceive of aiding and abetting as a discrete
10 cause of action or merely a question concerning
11 the scope of the cause of action. If it is the
12 former, we believe that the recognition of a
13 cause of action regardless of the norm will
14 fail at step 2 of Sosa for the reasons given by
15 Judge Christen in her dissent below, the
16 foreign policy concerns that we've discussed
17 today.

18 But if you think it's a question
19 concerning the scope of the cause of action,
20 then you have to look to principles of domestic
21 law. That is a teaching of Kiobel, in
22 particular. And I think that is also the
23 teaching of the Justice Sotomayor's dissent in
24 Jesner.

25 And if you're looking to domestic law,

1 the place to look is Central Bank. And not
2 just to Central Bank as a rule of
3 interpretation, but as Justice Thomas said, as
4 resting on a fundamental premise, namely, that
5 aiding-and-abetting liability was not available
6 at the common law.

7 In the words of the D.C. Circuit in
8 the Halberstam case, the common law largely
9 confined aiding-and-abetting liability to
10 isolated acts of adolescents in rural society,
11 there was certainly no broad norm to that
12 effect.

13 Obviously Cisco vigorously disputes
14 the allegations in this particular case. It
15 complied with all applicable United States
16 laws, particularly with regard to the provision
17 of technology to China. But we're here on a
18 motion to dismiss. This is ultimately a legal
19 question. And Congress can, in this context,
20 as in others, create a cause of action if it
21 wishes to do so.

22 CHIEF JUSTICE ROBERTS: Thank you.

23 MR. SHANMUGAM: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel, the case is submitted.

1 (Whereupon, at 12:02 p.m., the case
2 was submitted.)
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