

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 you 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 like
16 a separate cause of action as opposed to just
17 an expansion of the types of defendants who can
18 be held liable for this underlying conduct.

19 And so, I mean, I'm sure that your
20 friends on the other side will point to
21 evidence that even Blackstone thought that
22 aiding and abetting piracy or aiding and
23 abetting the other Blackstone-established core
24 violations was allowed under international law,
25 and I don't understand why they would be

1 precluded as an expansion somehow of those core
2 violations.

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

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

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

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

1 does not support recognition of
2 aiding-and-abetting liability across the board.

3 And Respondents are really advocating
4 for a categorical --

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

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

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

25 But I don't think you can extrapolate

1 from the smattering of historical evidence
2 concerning the three core offenses that
3 aiding-and-abetting liability was generally
4 available in civil cases at the time of the
5 ATS.

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

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

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

25 Now Respondents, to the extent that

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

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

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

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

23 JUSTICE KAGAN: I'm sorry, that there
24 should be?

25 MR. SHANMUGAM: There should be.

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

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

20 MR. SHANMUGAM: Two responses to that,
21 Justice Kagan.

22 First, if the Court accepts our
23 first-order submission that the Court should
24 shut the door that it left open in *Sosa*, then
25 the norm-by-norm analysis obviously falls out

1 of the equation. Those primary norms are not
2 actionable, a fortiori, no secondary liability.

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

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

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

1 separation of powers concerns that underlie
2 this Court's reluctance to recognize implied
3 causes of action.

4 JUSTICE SOTOMAYOR: Counsel --

5 JUSTICE BARRETT: Mr. Shanmugam -- oh,
6 go ahead.

7 JUSTICE SOTOMAYOR: I'm sorry. Go
8 ahead.

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

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

21 I think many of the same arguments
22 that we're making at step 2 could apply in that
23 context. But, again, I don't want to prejudge
24 that. I think that what we do have is a very
25 robust body of experience now with these sorts

1 of aiding-and-abetting claims.

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

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

17 JUSTICE SOTOMAYOR: Counsel, I -- I'm
18 so -- I'm a little bit lost when you answered
19 Justice Barrett because you start by saying
20 your first-line order is to say you can't
21 recognize any claim outside of Blackstone's
22 Three. And now -- and -- and you're basically
23 saying any claim, including conspiracy, is
24 always out under step 2, correct? So you're
25 asking us basically to overrule Sosa.

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

5 JUSTICE SOTOMAYOR: That would be
6 overruling.

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

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

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

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

21 There's about 300 of these cases that
22 were passed that have ever been brought.
23 That's not an enormous sum. After Kiobel, that
24 number dropped precipitously, all right?

25 So it's not as if this is such a large

1 number of cases that it's overwhelming the
2 courts below. We don't see a rush in the four
3 circuits that permit aiding-and-abetting
4 liability of new cases.

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

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

17 You say the Crimes Act only made
18 piracy aiding and abetting liable, but it also
19 said that violations of any safe conduct, which
20 is not piracy, that had to do with ambassadors,
21 "that any actions that in any other manner
22 impact the law of nations" -- I'm quoting it --
23 "and those who persecute or solicit any such
24 process that violates an ambassador's
25 immunities," and stated that those people would

1 be deemed violators of the nations of law.
2 That seems to me like an aiding-and-abetting
3 provision.

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

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

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

17 And the profusion of lower court cases
18 that have --

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

22 In terms of aiding and abetting this
23 crime, the allegation is that Cisco, knowing
24 that China was going to torture Falun Gong
25 adherents, actually promoted sales of its

1 technology not only by telling them that it
2 could do it if they bought this technology but
3 custom-making it, as it bragged to the Senate,
4 so that it could identify 90 percent of such
5 adherents. It is alleged that by its internal
6 and public statements it knew that those people
7 would be tortured.

8 So what is the problem with how that
9 fits into any conscious aiding-and-abetting
10 statute, including our own domestic one that
11 requires active inducement and active
12 participation?

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

16 CHIEF JUSTICE ROBERTS: Yes.

17 MR. SHANMUGAM: Thank you.

18 (Laughter.)

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

23 But I want to put this in the frame of
24 where you started with your question, which is
25 the experience of the lower courts. You are

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

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

16 Second, with regard to the Convention
17 Against Torture, the provision to you -- which
18 you refer is Article 4, which is a provision
19 concerning criminal liability. And, sure
20 enough, when Congress, in the wake of the
21 Convention Against Torture, enacted the federal
22 criminal prohibition on torture, it
23 incorporated 18 U.S.C. 2 and provided for
24 aiding-and-abetting liability. There was no
25 requirement in the corresponding provision of

1 the Convention Against Torture for civil
2 liability, Article 14, for aiding and abetting.

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

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

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas, anything further?

25 Justice Alito?

1 JUSTICE SOTOMAYOR: What do we do --

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

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

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

22 But, second, I think that Congress was
23 quite careful in enacting the TVPA really not
24 to take a position even in the legislative
25 history about the question that we've been

1 discussing for most of the first 20 minutes of
2 this argument, which is whether or not the ATS
3 validly can be expanded to new primary norms
4 and, a fortiori, to aiding and abetting.

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

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

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

24 JUSTICE SOTOMAYOR: Exactly. And so,
25 to the extent that Congress used the word,

1 "subjects" has an aiding-and-abetting concept
2 tied to it by definition.

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

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

20 MR. SHANMUGAM: Justice Sotomayor,
21 there's actually not a great deal of
22 disagreement about the dictionary definitions
23 of the verb "subjects." I think that the core
24 notion is to cause someone to undergo or
25 experience something or to expose someone to

1 something.

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

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

11 MR. SHANMUGAM: That person could well
12 be primarily liable in that context --

13 JUSTICE SOTOMAYOR: Why?

14 MR. SHANMUGAM: -- depending on their
15 conduct.

16 JUSTICE SOTOMAYOR: Under your theory
17 of what "causing" means?

18 MR. SHANMUGAM: I think that that
19 person could be within the realm of people who
20 participate in the primary act. And I think
21 that if you were, say, indicting that person in
22 a criminal case, I don't think you would
23 necessarily be indicting that person under 18
24 U.S.C. 2.

25 But, if you disagree with everything

1 that I've said --

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

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

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

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

24 MR. SHANMUGAM: But, Justice
25 Sotomayor, as we explain in our reply brief, we

1 think that that reference to "offender" has to
2 mean the people who would otherwise be liable.
3 So, sure, you're right, we're relying on the
4 definition of "torture." We think that
5 definition is confirmatory of our position.

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

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

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

23 MR. SHANMUGAM: I do not think, with
24 respect, that Respondent Lee plausibly could
25 allege that here. But I think that that just

1 confirms that when you're talking about someone
2 who is alleged to have facilitated the act,
3 these are people who stand at a much further
4 level of remove than your hypothetical person
5 who hands the -- the weapon to the person who
6 directly inflicts the -- the act of torture or
7 misconduct.

8 JUSTICE SOTOMAYOR: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan,
10 anything further?

11 Justice Gorsuch?

12 Justice Kavanaugh?

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

17 MR. SHANMUGAM: I believe that that is
18 monetary recoveries in court.

19 JUSTICE KAVANAUGH: And do you have
20 any statistics on settlements?

21 MR. SHANMUGAM: I don't.

22 JUSTICE KAVANAUGH: Okay. And on the
23 TVPA, I understood your argument to just be
24 Central Bank, end of story. Is that a good
25 summary?

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

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

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

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

22 But I'm not sure that's right. I
23 mean, Professors Bellia and Clark have done
24 research to suggest that, in fact, at the time
25 that the ATS was enacted, the law of nations

1 did recognize causes of action for the violence
2 committed by an American citizen against a
3 foreign national.

4 Do you want to address that?

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

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

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

24 I'm just saying that the -- the
25 front-line rule that you want of just freezing

1 those -- freezing the line at those three,
2 that's part of my cause -- that -- that's part
3 of the concern that I have with respect to that
4 one.

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

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

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

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

8 JUSTICE BARRETT: Unless there was
9 evidence that at the time the ATS was enacted,
10 there was aiding-and-abetting liability for a
11 particular offense against the law of nations,
12 correct?

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

20 JUSTICE BARRETT: So perhaps you might
21 be satisfied with a rule that said there's no
22 categorical availability of aiding and --
23 aiding-and-abetting liability, but it doesn't
24 exist with respect to the seven offenses with
25 which Cisco was charged?

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

10 JUSTICE BARRETT: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

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

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

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

25 I think that the Court should make

1 clear, again, that there is no categorical
2 cause of action for aiding-and-abetting
3 liability.

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

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

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

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

24 And what I'm positing and what other
25 Justices have pointed to is that

1 aiding-and-abetting liability could instead be
2 construed as secondary to some underlying cause
3 of action. And so, to the extent that an
4 underlying cause of action meets the Sosa test,
5 then you might have aiding-and-abetting
6 liability depending upon the historical
7 circumstances of aiding and abetting with
8 relationship to that norm.

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

14 MR. SHANMUGAM: Justice Jackson, I
15 think I understand the question, so let me give
16 you my best effort at an answer.

17 JUSTICE JACKSON: Yes, yes, thank you.

18 MR. SHANMUGAM: First, I think that to
19 the extent that we say that a norm-by-norm
20 analysis is required, that would be at step 1
21 of the Sosa analysis. But I do think that at
22 step 2, regardless of whether you conceive of
23 this as a separate cause of action or a
24 question concerning the scope of the cause of
25 action, the analysis at step 2 is the same with

1 regard to any of these norms.

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

3 JUSTICE JACKSON: But why is that?

4 Can I -- can I -- that's the second part of my
5 question.

6 MR. SHANMUGAM: Yes.

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

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

19 In other words, what's creating the
20 foreign policy concern is the underlying claim,
21 and to the extent that, say, China says we
22 don't care about the underlying claim being
23 brought here, what additional work from a
24 foreign policy concern standpoint is attaching
25 or having an aiding-and-abetting liability

1 claim?

2 MR. SHANMUGAM: So three quick points
3 in response to that.

4 JUSTICE JACKSON: Yeah.

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

15 Second, with regard to how the step 2
16 analysis works, I want to bracket for the
17 minute the three core offenses. I think, with
18 regard to any of these other offenses, you have
19 the same fundamental problem that raises
20 foreign policy concerns and the broader
21 separation of powers concerns, which is no
22 matter what the norm is, you're talking about a
23 primary violation of international law, in this
24 case, by a foreign sovereign against its own
25 citizens, and that is by far the mine-run of

1 these cases.

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

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

22 That is precisely how this Court
23 decided *Jesner*, and it would make this Court's
24 ATS cases congruent with its cases concerning
25 applied causes of action more generally.

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

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

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 MR. SHANMUGAM: Thank you.

21 CHIEF JUSTICE ROBERTS: Mr. Gannon.

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

25 MR. GANNON: Mr. Chief Justice, and

1 may it please the Court:

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

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

19 With regard to the TVPA, the statutory
20 text and context do not impose
21 aiding-and-abetting liability, especially in
22 light of the background assumption reflected in
23 *Central Bank of Denver* that in the civil
24 context, Congress should do that expressly.

25 I welcome the Court's questions.

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

3 MR. GANNON: The original three would
4 still be there under Sosa --

5 JUSTICE THOMAS: And that --

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

15 But, if you were going to rule out
16 recognizing any additional norms, I think you
17 would just be sort of grandfathering the
18 original three and potentially other things
19 that the First Congress would have recognized.
20 You would be saying that the door isn't open to
21 recognizing what we would decide today under
22 modern international law or analogous in some
23 way.

24 The second mode of analysis that --
25 that -- that we're talking about under Sosa

1 step 2 is the one that the Court employed in
2 both Kiobel and in Jesner. And so my friend
3 was just talking about all the ways in which
4 Jesner required a step 2 analysis to be done in
5 a categorical level. This responded to
6 questions from several of you. The same thing
7 was true of Kiobel.

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

18 And -- and in Jesner, the Court said
19 that it was looking at a categorical matter at
20 a scope of liability question. Even though it
21 wasn't about the norm, it was saying that the
22 question of is this category of defendant going
23 to be held liable, said we're going to consider
24 that on a categorical basis. And the fact that
25 it's going to present foreign policy concerns

1 in many cases, not necessarily all cases but in
2 many cases, was sufficient to say you're going
3 to categorically rule out foreign corporations
4 as defendants.

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

18 JUSTICE JACKSON: To -- to -- to --

19 JUSTICE KAGAN: But, if we take
20 away --

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

23 JUSTICE KAGAN: Mr. Gannon, if we --
24 if we sort of took away that aspect of this
25 case, which I understand you to have

1 fundamental disagreements with, but just focus
2 more on what's presented to us here, which is
3 this aiding-and-abetting question, and I guess
4 one way to think about this, about how we
5 should think about aiding and abetting, is if
6 you take the three original of Blackstone, why
7 it is -- suppose that this were -- this were a
8 case only about that, you know, and then the
9 question is does that also include
10 aiding-and-abetting offenses, what would you
11 say? How should we analyze that question?

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

22 JUSTICE KAGAN: Yeah.

23 MR. GANNON: And so I -- I do think
24 that if you're going to look at this from the
25 other side and sort of try to say are there

1 place -- are there pieces of
2 aiding-and-abetting liability that would pose
3 fewer threats, I think the ones that -- where
4 the primary violation is not in a foreign
5 country is a good place to start.

6 I wouldn't just limit it to cases that
7 involve foreign governmental officials.

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

14 MR. GANNON: I would say two other
15 things with -- we still have two other main
16 reasons why we think that, under step 2, that
17 the Court should be cautious about recognizing
18 aiding-and-abetting liability. One is to
19 say --

20 JUSTICE KAGAN: I mean, one question
21 is whether step 2, Sosa, applies if the
22 question is the original Blackstone Three. And
23 then the question --

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

25 JUSTICE KAGAN: And then the question

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

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

22 And so, in both of those instances, I
23 think that Sosa itself is recognizing that
24 just -- just acknowledging the norm isn't
25 enough to say that you're going to get home.

1 And I think that, like, Sosa didn't decide a
2 lot. They left open that there's going to need
3 to be a lot more analysis if we're ever
4 actually going to get to yes. Sosa got off the
5 train at the first stop. And so -- but there
6 were -- it recognized that there are going to
7 be additional stops.

8 And we think that that's why, for
9 aiding and abetting, as the significant
10 recognized category of secondary liability,
11 Central Bank tells us that we expect Congress
12 should speak to that expressly before it does
13 that. And we do think of that as a significant
14 expansion of liability.

15 And then the third reason that we have
16 is the analogy to the TVPA. There hasn't been
17 much talk about it, as much talk about that
18 this morning, but that's the second question
19 presented. If you agree with our position that
20 aiding-and-abetting liability is not included
21 within "subjects" under the TVPA, then we think
22 it is relevant that the one time Congress --

23 JUSTICE KAGAN: If --

24 MR. GANNON: -- has tried to codify a
25 cause of action that is --

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

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

16 MR. GANNON: I -- I -- I think you
17 could do it that way. I think that -- that the
18 fact that the Court didn't do that for foreign
19 corporations and extraterritoriality would be a
20 reason to say that because, in the vast
21 majority of -- of any potential norms and the
22 cases that are being brought, frankly, aren't
23 piracy and assaults on ambassador cases,
24 that -- that ruling out that particular
25 potentially theoretical category isn't going

1 to -- to -- to make a big difference.

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

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

18 MR. GANNON: Yeah. I -- I -- I do
19 think that -- that there was -- there was
20 supposed to be vigilant door-keeping. And I --
21 and I -- and I -- I would say that our view is
22 that the lower courts have been too permissive
23 about acknowledging additional norms and what
24 we would consider to be expansions of the
25 norms, especially including aiding and

1 abetting.

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

14 And, therefore, here we are. We're --
15 we're -- we're still litigating about an
16 allegation where the primary violation that
17 needs to be proved is the thing that generally
18 is going to present foreign policy concerns
19 because it is an allegation that a serious
20 human rights abuse happened in a foreign
21 country in this case and many cases by the way
22 the foreign government --

23 JUSTICE KAVANAUGH: Can you -- can
24 you --

25 MR. GANNON: -- treated mostly its own

1 citizens.

2 JUSTICE KAVANAUGH: Go ahead.

3 JUSTICE GORSUCH: Well, and -- and
4 what lessons should we take from cases like
5 Egbert in the Bivens context and -- and -- and
6 our decisions on Teague about these doors that
7 have been left open?

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

20 And -- and so we have drawn the
21 analogy from Edwards. And -- and I would say
22 that because this involves common law
23 methodology, by definition, Sosa was saying the
24 Court has been invited by Congress to appeal to
25 the common law in order to recognize individual

1 norms beyond the original three because that --
2 it requires the Court to exercise common
3 law-making powers.

4 We don't think it requires full-bore
5 statutory stare decisis types of
6 considerations. And there isn't that much
7 reliance, I don't think, when this Court has
8 repeatedly said no to each new question that
9 has been brought to it under the ATS.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 It seems to me that you have a serious
13 conceptual challenge, because we've held that
14 the First Congress wanted courts to, you know,
15 look and find the rights of action that are
16 available under -- under common law and -- and
17 Sosa.

18 And now, because the Court has
19 departed from that general approach to
20 statutory interpretation, it -- it is like, you
21 know, a dinosaur that is still on -- on the
22 horizon.

23 And I wonder, you're certainly not
24 being, I would say certainly not being faithful
25 to the First Congress's intent at least as it

1 was interpreted in Sosa. And -- and it seems
2 to me that maybe you can just talk a little bit
3 about how we're supposed to reconcile that --
4 that challenge.

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

12 And I think that they both agreed on
13 the idea that at least those things that the
14 First Congress would have expected to be
15 recognized would be fine, and, therefore,
16 that's why we're grandfathering in the --
17 the -- what -- what have been called the
18 Blackstone Three torts.

19 And -- but, because the Court now
20 understands better than the First Congress
21 did -- and I understand the uncomfot --
22 discomfort with that, that it -- that
23 recognizing a cause of action is a legislative
24 endeavor that it's going to do only
25 cautiously -- the Court has repeatedly said in

1 these ATS cases and in the -- and in the Bivens
2 cases that it's not going to extend any further
3 if there's any reason counseling hesitation.

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

13 And Congress knows that it's supposed
14 to do that. And that's why Congress enacted
15 the TVPA, because it was codifying *Filartiga*.

16 CHIEF JUSTICE ROBERTS: Well, but I
17 still --

18 MR. GANNON: The TVPA actually isn't
19 about torture that happens in the United States
20 and it isn't about aiders and abettors. It's
21 about the actual perpetrator acting under color
22 of foreign law.

23 And so Congress did codify that result
24 after it was questioned whether the ATS even
25 allowed *Filartiga*.

1 CHIEF JUSTICE ROBERTS: Yeah. In
2 terms of your request, though, that we overrule
3 Sosa, usually, when we overrule a past
4 decision, it's because we think it was wrong.
5 And yet you're not really saying that either
6 when you say, well, we should preserve these --
7 these three.

8 MR. GANNON: Well --

9 CHIEF JUSTICE ROBERTS: And I'm not
10 quite sure whether overruling is an appropriate
11 response when we don't think -- I mean, we're
12 not saying that the Sosa decision was wrong
13 when it interpreted the intent of the First
14 Congress. I mean, is that what you want us to
15 say?

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

24 So I understand that -- that in the
25 abstract, Congress might have expected that the

1 law of nations would evolve. That's one way to
2 talk about it. You know, I'm not sure that's
3 what they would have expected.

4 I think, at the -- in the pre-Erie
5 sense, there was an understanding that it was
6 out there. It was the brooding omnipresence.
7 Maybe you discovered new bits of it. But this
8 is all they thought that existed.

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

17 It expected that we'd be careful about
18 the norms. It expected that there could be
19 other defenses that could be relevant. It
20 expected that there could be case-specific
21 foreign policy concerns that -- that -- we
22 don't think that that's necessary in every
23 case.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas?

2 Justice Alito?

3 Justice Sotomayor?

4 JUSTICE SOTOMAYOR: I -- I -- ATS is a
5 cause of action, correct?

6 MR. GANNON: ATS is a jurisdictional
7 statute.

8 JUSTICE SOTOMAYOR: Jurisdictional
9 statute, all right. It's a cause of action?

10 MR. GANNON: I mean --

11 JUSTICE SOTOMAYOR: They can bring a
12 lawsuit on the Blackstone Three according to
13 you.

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

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

23 MR. GANNON: No. We are not asking
24 you to overrule Sosa. We are asking you to say
25 that the --

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

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

7 JUSTICE SOTOMAYOR: All right.

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

12 JUSTICE SOTOMAYOR: All right. Now --
13 so that -- that --

14 MR. GANNON: -- and -- and that -- and
15 that -- that those three were -- were -- would
16 have been inferable at the time and, therefore,
17 at least those would be recognized.

18 JUSTICE SOTOMAYOR: All right. So
19 Bivens and -- Bivens and Egbert don't help us
20 because, whether it's express or implied causes
21 of action, they've been created for the
22 Blackstone Three, correct? And you're saying
23 don't add a fourth? Don't add torts or --

24 MR. GANNON: We're saying not to
25 expand -- extend it any further.

1 JUSTICE SOTOMAYOR: All right.

2 MR. GANNON: And that's why we think
3 Egbert is relevant.

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

13 MR. GANNON: Yes, it expands the
14 category of plaintiffs.

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

24 MR. GANNON: I -- I'm not saying that
25 that's what the First Congress would have

1 expected. I'm trying to -- to -- to be
2 faithful to Sosa's own analysis --

3 JUSTICE SOTOMAYOR: All right.

4 MR. GANNON: -- which recognized that
5 it would take account of developments that have
6 happened since the First Congress.

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

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

13 MR. GANNON: We think that there have
14 been subsequent developments in this --

15 JUSTICE SOTOMAYOR: If we --

16 MR. GANNON: -- Court's case law.

17 JUSTICE SOTOMAYOR: -- if we disagree
18 with you that under step 1 of Sosa torture and
19 extrajudicial killings are recognizable under
20 step 1 and we go to step 2, step 2 requires us
21 to look at what the -- what -- whether
22 recognizing that cause of action for torture
23 and extrajudicial killing have foreign policy
24 implications.

25 By the very nature of torture and

1 extra -- extrajudicial killings, a foreign
2 state is involved, correct, because "torture"
3 defined -- is defined by official state action,
4 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 -- I would -- I would
10 not expect my friends to agree to that under
11 the ATS. I --

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

14 MR. GANNON: But yes.

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

17 MR. GANNON: Yes with respect to the
18 way it's been defined in the TVPA. And -- 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
17 perpetrator --

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 adherents and where he
8 states that he stands by the principle that
9 American technology should not be used to
10 further that persecution? What do we do with
11 that? How do we find that there's potential
12 embarrassment from that? How do we find that
13 there's potential foreign embarrassment from
14 complicity in torture which the Convention
15 Against Torture 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
2 have 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
7 action that is brought by federal
8 prosecutors --

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

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

1 lawsuits filed by lawyers that -- that don't
2 have to necessarily comply with all of the
3 concerns that we have about a -- a -- our
4 relationship with any particular foreign
5 country at the time.

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

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

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

23 And it's not just the foreign policy
24 concerns. It's also the Central Bank idea that
25 we know that Congress is aware that there's no

1 presumption of aiding-and-abetting liability in
2 civil cases, unlike criminal cases.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?
4 Justice Gorsuch?

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

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

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

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

1 account of the things that the Sosa Court said
2 could be taken account of.

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

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

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

20 JUSTICE GORSUCH: Well --

21 MR. GANNON: -- you -- you -- you
22 rejected some aspect that -- that -- that --
23 that was being disputed in that case here.
24 That's -- that would -- that's effectively the
25 second argument here. If you go for aiding and

1 abetting, you'd be doing the same thing with
2 respect to that category that you did in Kiobel
3 with respect to extraterritorial applications
4 and --

5 JUSTICE GORSUCH: Jesner.

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

12 JUSTICE GORSUCH: Yeah. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh?

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

23 In your -- from your perspective, are
24 lower courts sufficiently paying attention to
25 executive branch statements, as dictated by

1 Footnote 21?

2 MR. GANNON: Well, I think that in the
3 early to mid-2000s, we filed statements in
4 individual cases, and in some of this Court's
5 cases, we filed -- we made statements in briefs
6 that this particular case presents foreign
7 policy concerns. We said that in *Jesner*. We
8 said that the Jordanian government was
9 concerned about it. They filed their own
10 amicus brief.

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

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

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

1 the potential interference.

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

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

17 JUSTICE KAVANAUGH: Oh, just --

18 MR. GANNON: -- at the hands of the
19 Chinese government.

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

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

2 JUSTICE KAVANAUGH: So --

3 MR. GANNON: -- the federal criminal
4 prosecution that applies extraterritorially --

5 JUSTICE KAVANAUGH: Yes.

6 MR. GANNON: -- which is -- is the --
7 is what Congress enacted in order to implement
8 Article 4 of the Convention Against Torture.

9 JUSTICE KAVANAUGH: Can you just spell
10 out generically what are the foreign policy
11 concerns in some of these cases --

12 MR. GANNON: I -- I -- I mean --

13 JUSTICE KAVANAUGH: -- in a little
14 more detail instead of kind of the bumper
15 sticker? What --

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

1 courts in order to vindicate them.

2 In the South Africa cases, we
3 expressed concern --

4 JUSTICE KAVANAUGH: But how does that
5 harm the United States because -- to allow
6 proof of this human rights violation by foreign
7 officials or foreign governments?

8 MR. GANNON: Well, I -- I -- I mean --

9 JUSTICE KAVANAUGH: Because I think
10 that's what you're saying.

11 MR. GANNON: I -- I am saying that, by
12 definition, foreign countries are often
13 concerned about the fact that these lawsuits
14 are being litigated here. And I was mentioning
15 the South Africa cases in the 2000s, and in
16 American Isuzu, where we filed an amicus brief
17 about aiding-and-abetting liability, the South
18 African government expressed concerns that
19 having these cases litigated in the United
20 States about apartheid and -- and grievous
21 things that happened under apartheid was
22 inconsistent with the Truth and Reconciliation
23 Commission. They had their own process that
24 they wanted to operate, and they thought that
25 having plaintiffs' lawyers making their cases

1 involving 50 large corporations about all sorts
2 of things that had happened over decades to
3 lots of people in South Africa, that U.S.
4 courts weren't the appropriate forum to be
5 hashing that out.

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

17 But, frankly, that's a policy judgment
18 that should be made by Congress. And -- and to
19 the -- to the extent that the executive branch
20 can bring criminal prosecutions when it wants
21 to, when it thinks that that's appropriate, can
22 file individual case-specific objections if it
23 needs to, and Congress can provide for specific
24 causes of action, as it did with the TVPA,
25 where it has already said, you know, we're

1 going to -- we're going to take the costs
2 associated with allowing Filartiga to be
3 litigated, where, you know, a Paraguayan
4 governmental official who tortured somebody
5 to -- is alleged to have been tortured somebody
6 to death is going to be held liable in a U.S.
7 court for those actions.

8 Congress said that it wanted that
9 action against the perpetrator to be available,
10 but we've continually said that we think that
11 it shouldn't be expanded to aiders and
12 abettors.

13 JUSTICE KAVANAUGH: On that last point
14 about Congress, this is my last question, and
15 this is picking up on the Chief Justice's and
16 Justice Gorsuch's question.

17 By leaving the door somewhat ajar but
18 never quite getting there, we've maybe misled
19 Congress into thinking: Oh, we don't need to
20 do anything about these human rights things,
21 the courts are taking care of it.

22 And -- and I'm concerned at a
23 separation of powers level that we're not
24 really allowing suits to go forward, but
25 Congress thinks we are because of a lack of

1 clarity in our case law.

2 And I just -- that's just an
3 observation I have after 20 years of dealing
4 with these cases, and I'm -- I just want to get
5 your reaction to it.

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

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

25 JUSTICE KAVANAUGH: And people put

1 their resources into a court suit rather than
2 lobbying Congress, arguably. But I'll leave it
3 there. Thanks.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett, if I could just pause for a moment.

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

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: Well, Mr. Gannon,
16 I'll try to get my question out quickly before
17 the ruckus comes.

18 MR. GANNON: More dialogue between the
19 branches.

20 JUSTICE BARRETT: Mr. Shanmugam said
21 that there were several cases pending in the
22 lower courts or maybe -- maybe one about civil
23 conspiracy and that sort of secondary
24 liability.

25 Has the United States taken a position

1 in those cases?

2 MR. GANNON: No. I think -- I think
3 my friend was talking about a Fourth Circuit
4 decision. We were actually a third-party
5 defendant in that case, and we didn't address
6 those issues in that case, and we haven't taken
7 a position about conspiracy there.

8 JUSTICE BARRETT: Do you have one
9 here?

10 MR. GANNON: No.

11 JUSTICE BARRETT: Okay.

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

22 We -- we just haven't engaged in that
23 analysis yet.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: So I guess I'm still
3 struggling with why the concerns that you've
4 raised aren't best addressed on a case-by-case
5 basis. I understand that you'd like to do this
6 categorically, but it seems to me that you've
7 mentioned other circumstances, other cases
8 where these claims have been raised and the
9 foreign nation has filed a brief and the
10 government has filed a statement that actually
11 talks about the foreign policy concerns with
12 respect to that particular case.

13 So why isn't that the better way to
14 address Sosa step 2 and the concerns that the
15 United States is talking about?

16 MR. GANNON: Well, I mean, I -- I
17 would say that Kiobel and Jesner basically
18 rejected and even -- and even --

19 JUSTICE JACKSON: In a different
20 context.

21 MR. GANNON: -- and even meet a middle
22 version of that.

23 JUSTICE JACKSON: In a -- in -- I
24 understand. But they were -- they were looking
25 at a different issue. They -- and here's

1 the -- the real basis of my concern, is the
2 language of the ATS itself and the extent to
3 which Congress has now said that district
4 courts shall have original jurisdiction of any
5 civil action by an alien for a tort only
6 committed in violation of the law of nations or
7 a treaty of the United States.

8 You keep suggesting that this is about
9 the Court expanding ATS or the Court implying a
10 private right of action. This is pretty clear
11 language that Congress does want civil actions
12 by aliens for torts only committed in violation
13 of the nation -- law of nations to be
14 permitted.

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

23 I mean, this is not a new thing that
24 we're coming up with. That aiding-and-abetting
25 liability was a part of the law of nations,

1 right, or is?

2 MR. GANNON: I -- I -- I wouldn't -- I
3 wouldn't quite agree with that. And I think
4 that as -- as my -- my friend pointed out, even
5 when Congress went to codify
6 aiding-and-abetting liability at the criminal
7 level for the original three torts, it only did
8 so with respect to piracy. And I think that --

9 JUSTICE JACKSON: No, I understand.
10 But -- but I'm just -- I'm going back to the
11 original language of the statute. What did
12 Congress mean to authorize here?

13 And you're asking us as a categorical
14 matter to take aiding and abetting out. I
15 could see that if aiding and abetting was
16 something that was not a part of the law of
17 nations, it would be that we were just adding
18 it. I could see that if the Congress hadn't
19 said torts only under the law of nations.

20 I mean, the statute is looking at a
21 particular kind of claim and authorizing it.
22 And now you say as a categorical matter the
23 Court should be taking that off the table.

24 MR. GANNON: I mean --

25 JUSTICE JACKSON: I could appreciate

1 in particular cases where having this
2 particular person bring this particular claim
3 against a corporation is going to raise
4 significant foreign policy issues, but the U.S.
5 hasn't filed such a statement in this case,
6 correct?

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

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

12 MR. GANNON: We -- we haven't taken
13 that position because we don't think that we
14 need to. And we think that the Court has --

15 JUSTICE JACKSON: No. That's just
16 because you're interpreting the statute that
17 way.

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

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

24 MR. GANNON: Potentially, yes, this is
25 going to require these torts to be proved, the

1 primary violations about what Chinese officials
2 did in China needs to be proved in a U.S.
3 court, and that's necessarily going to create
4 sensitivities --

5 JUSTICE JACKSON: Not necessarily.

6 MR. GANNON: -- in our relationship
7 with China, and --

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

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

1 the work, as you've said repeatedly, is the
2 underlying claim against the foreign
3 government.

4 And so you could imagine a world in
5 which some foreign government says, I don't
6 care if Cisco is being sued about this. Even
7 if Cisco presents a bunch of -- or excuse me,
8 the plaintiffs present a bunch of information
9 about the underlying torture, what difference
10 does it make? They can't do anything to me. I
11 don't care if that's going on.

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

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

25 But stepping back, we made a version

1 of this argument in *Jesner* about corporate
2 liability, and we said that corporate liability
3 was something that was recognized at the
4 founding and, therefore, you shouldn't rule it
5 out categorically. And this Court rejected
6 that argument.

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

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

21 JUSTICE JACKSON: Thank you.

22 MR. GANNON: And that's a general rule
23 that we think applies.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Hoffman.

2 ORAL ARGUMENT OF PAUL L. HOFFMAN

3 ON BEHALF OF THE RESPONDENTS

4 MR. HOFFMAN: Mr. Chief Justice, and
5 may it please the Court:

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

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

1 There's no basis in international law
2 or these statutes under either the ATS or the
3 TVPA for such an absurd result. The First
4 Congress passed the ATS to -- to fulfill this
5 nation's obligation to enforce the law of
6 nations. Then, as now, aiding and abetting law
7 of nations violations is itself a law of
8 nations violation, meeting the Sosa test.

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

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

24 This Court should not give the green
25 light to U.S. corporations acting from the

1 United States to help foreign governments
2 commit torture or extrajudicial killing.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Mr. Hoffman, how
5 available was -- were -- or common was
6 aiding-and-abetting liability in tort cases in
7 1789?

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

20 But there were other law of nations
21 violations. Even in Blackstone, there were
22 other law of nations violations at the time.
23 If you look at the Bradford opinion, for
24 example, they were talking about violations of
25 neutrality, aiding and abetting pillage. It

1 was not -- at the time, the law of nations
2 violations were not limited to those three.

3 Nor is the -- the language of the
4 statute. The statute says that -- that aliens
5 can bring a case for a tort only committed in
6 violation of the law of nations. It doesn't
7 say in violation of safe conducts or -- or
8 piracy or the norms that exist in 1789. It
9 says to -- to enforce the law of nations by
10 means of a tort action.

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

21 And Congress has never done anything
22 since 1789 --

23 JUSTICE KAGAN: Mr. Hoffman?

24 MR. HOFFMAN: -- to take away that
25 mission.

1 JUSTICE KAGAN: I mean, if we just
2 limit ourselves now to 1789, the Blackstone
3 Three, plus any more that might have existed
4 then, is it so clear to you that aiding and
5 abetting functioned the same way and was
6 recognized to the same extent with respect to
7 all of those causes of action?

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

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

24 MR. HOFFMAN: Well, I -- I think,
25 from -- from -- I don't -- I don't think we

1 have an objection to that. I think the -- the
2 issue for us -- I mean, first of all, we've
3 been criticized for asking for a categorical
4 rule. The lower courts have --

5 JUSTICE KAGAN: Everybody's doing
6 categorical rules --

7 MR. HOFFMAN: We're -- we're --
8 we're --

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

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

20 With respect to the particular norms,
21 we're happy under the ATS to accept what the
22 scope of the law of nations violation is
23 because that was the point of it. The point of
24 it for -- for the founders was, if -- if there
25 was a violation of the law of nations, this

1 Court was opening its courts, its new federal
2 courts, to handle those cases in tort.

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

17 JUSTICE GORSUCH: So on -- so on -- on
18 that, Mr. Hoffman --

19 MR. HOFFMAN: Yes.

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

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

2 JUSTICE GORSUCH: If I might just --

3 MR. HOFFMAN: Sorry.

4 JUSTICE GORSUCH: That's all right.

5 It's all right. But let me just spit it all
6 out.

7 MR. HOFFMAN: Yes.

8 JUSTICE GORSUCH: And then you can
9 have at it.

10 MR. HOFFMAN: Okay.

11 (Laughter.)

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

1 of powers concerns inherent in ATS litigation,
2 there is an argument that a proper application
3 of Sosa would preclude courts from ever
4 recognizing any new causes of action under the
5 ATS.

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

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

23 I would also point out that the Alien
24 Tort Statute was used in the German slave labor
25 cases, the Swiss bank cases, in which over

1 \$7 billion of --

2 JUSTICE GORSUCH: I don't doubt there
3 are legitimate applications.

4 MR. HOFFMAN: Well --

5 JUSTICE GORSUCH: The question is
6 whether to expand it. And -- and --

7 MR. HOFFMAN: Well --

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

10 MR. HOFFMAN: -- I guess what I'm
11 saying is that since Sosa -- before and since
12 Sosa, the courts have recognized certain
13 limited numbers of human rights norms. And
14 Sosa itself recognized that what the modern law
15 of nations was was international human rights
16 law.

17 JUSTICE GORSUCH: But this Court's
18 never actually gone beyond the three.

19 MR. HOFFMAN: But you've never --
20 you've never considered beyond the three.

21 JUSTICE GORSUCH: Well, we've had
22 Jesner, we've had Kiobel --

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

24 JUSTICE GORSUCH: -- we've had
25 Nestle --

1 MR. HOFFMAN: -- I think --

2 JUSTICE GORSUCH: -- you know, just
3 since -- I mean, that's just in the last decade
4 or so.

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

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

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

24 And that's, in fact, what happened
25 in -- in the Footnote 21 in the apartheid

1 cases. The South African government was
2 complaining because three of its corporations
3 were being sued.

4 As soon as those were dismissed,
5 the -- the South African government filed
6 something with the Court saying we don't have
7 any problem with you, you know, considering the
8 liability of your own corporations. That's
9 exactly what the British and the Dutch said
10 in -- in -- in Kiobel.

11 If -- if you want to apply the law of
12 nations to your citizens, which is actually
13 what the Alien Tort Statute was meant to do to
14 begin with, that's fine. But, if you try to
15 apply it extraterritorially, then you run into
16 some international law questions of your own
17 about your own jurisdiction to do that.

18 And so I think you -- and -- and
19 Jesner -- Jesner is a good example --

20 JUSTICE GORSUCH: Are -- are you
21 saying there are no foreign policy implications
22 in this case that are -- that might be weighed
23 by policymakers rather than by judges?

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

1 JUSTICE GORSUCH: I mean, I don't
2 think that's -- I mean, that would be hard to
3 say, right?

4 MR. HOFFMAN: The -- the -- the
5 government has never -- the United States
6 Government, nor the Chinese government, has
7 ever raised any objection in these cases ever.

8 JUSTICE GORSUCH: Well, we have
9 the United -- we have the United States
10 Government here before us, Mr. Hoffman.

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

13 JUSTICE GORSUCH: Well, the --

14 MR. HOFFMAN: What they've said is
15 they don't like the --

16 JUSTICE GORSUCH: So you don't
17 think -- okay. So you don't think there are
18 any foreign policy implications that maybe
19 belong to policymakers rather than judges?

20 MR. HOFFMAN: Well, I think -- I think
21 what -- I think the founders, in passing the
22 Alien Tort Statute, understood very well that
23 handling law of nations issues raises some
24 foreign policy-related questions.

25 And I would also say that those

1 questions were much more extreme and much more
2 fraught in 1789 than they are in 2026. In
3 1789 -- the Bradford case is a perfect example.
4 In that case, Attorney General Bradford said to
5 the -- to the -- the British plaintiffs or
6 claimants: You have a -- you have -- I have no
7 doubt that there's a -- there's a claim that
8 you can bring under the Alien Tort Statute for
9 what happened in Sierra Leone in the middle of
10 a war between France and England.

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

18 Their answer to that -- and it's an
19 answer that's -- that's -- hasn't changed yet,
20 is you apply the rule of law. You decide the
21 law of nations decision. In all the pirate
22 cases --

23 JUSTICE BARRETT: Mr. Hoffman, can
24 I --

25 JUSTICE KAGAN: When, though --

1 JUSTICE BARRETT: -- can I ask you a
2 question?

3 MR. HOFFMAN: Yes.

4 JUSTICE BARRETT: I want to ask you a
5 version of the question that the Chief Justice
6 asked Mr. Gannon, and that has to do with the
7 puzzle of this case, which is the post-Erie
8 world when the Alien Tort Statute was enacted
9 in the pre-Erie world. So we have a
10 jurisdictional statute that presupposes the
11 ability of federal courts to recognize common
12 law actions that come from the general law.

13 At the time, I mean, so I think this
14 is the rationale for recognizing those that
15 were recognized by courts at the time the ATS
16 was enacted, at the time, you know, there were
17 these, you know, the Blackstone Three and
18 maybe, you know, something else.

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

25 So, if the ATS is a jurisdictional

1 statute that presupposes jurisdiction over
2 causes of action that at the time we recognized
3 courts had the power to recognize, what do we
4 make of that now that it's a jurisdictional
5 statute giving federal courts jurisdiction over
6 something that we say courts generally lack the
7 power to do?

8 MR. HOFFMAN: Well, first of all, I
9 think that if the -- if Congress gives you the
10 power to do that, then you have the power to do
11 that. In other words, if --

12 JUSTICE BARRETT: So are you saying
13 the ATS is a grant of authority and not just a
14 jurisdictional statute?

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

24 I think what Sosa said almost in so
25 many words is that the federal courts have not

1 lost their -- their capacity to handle tort
2 cases for violations of the law of nations.

3 And that's what -- that's what this
4 statute says the courts can do. And it was not
5 merely a jurisdictional statute in the way we
6 understand it in the sense that you have to
7 wait for further --

8 JUSTICE BARRETT: But Sosa didn't
9 extend beyond the Blackstone Three.

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

18 I don't -- I think there's no doubt
19 reading that opinion that torture and
20 extrajudicial killing and -- and disappearance,
21 the claims that were -- that were litigated in
22 Marcos to judgment would be among the claims
23 that would -- would fit the historical paradigm
24 test, that they clearly are supported by the
25 same level of evidence and the same

1 definiteness and the same acceptance
2 internationally as the -- as the torts that the
3 founders were talking about.

4 And so I -- I don't think there's any
5 way to read Sosa without understanding it as
6 being the -- giving the ability for courts to
7 do what they have done since, right, in terms
8 of recognizing at least certain torts.

9 JUSTICE KAVANAUGH: Mr. Hoffman, can I
10 follow up on Justice Gorsuch's question and
11 your --

12 MR. HOFFMAN: Sure.

13 JUSTICE KAVANAUGH: -- point about the
14 foreign-cubed cases?

15 MR. HOFFMAN: Yes.

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

25 Can you respond to that?

1 MR. HOFFMAN: Yes. I mean, two points
2 I would like to make. One is that the reason
3 that the Jesner Court, at least on the face of
4 it, had a categorical rule about foreign
5 corporations was a long history of actual
6 conflict, right?

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

13 And so that's the -- I think that
14 level of evidence might support a categorical
15 rule, but, generally, I think, Sosa step 2 is
16 talking about particular issues. And I think
17 as --

18 JUSTICE KAVANAUGH: But just on --
19 sorry, if I can --

20 MR. HOFFMAN: Yes.

21 JUSTICE KAVANAUGH: -- focus my
22 concern. My -- the -- the government raised
23 the point that aiding and abetting will present
24 the same kinds or very close to the
25 foreign-cubed cases. If you just have a

1 specific response to that.

2 MR. HOFFMAN: But -- but the real
3 difference to that is that -- and this case is
4 a good example of that -- we are talking in
5 this case about the actions of a United States
6 citizen, right, that has committed actions on
7 U.S. territory that have -- that have -- that
8 have led to the harms that are covered by this
9 statute.

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

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

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

4 MR. HOFFMAN: Well, I think it is. I
5 mean, I think that what -- what --

6 JUSTICE KAVANAUGH: Well, it's not
7 explicit, and Central --

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

9 JUSTICE KAVANAUGH: -- and Central --
10 Central Bank says that's a problem. So just
11 get your response to that.

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

19 I think what -- what the analysis in
20 Central Bank was they went through the text,
21 the statutory context, the fact that in other
22 securities laws, explicit causes of action did
23 not include aiding-and-abetting liability.

24 So, if you do -- what our position is,
25 is that Central Bank says you look at the text,

1 the statutory context, the legislative history
2 if it's appropriate to look at that, and -- and
3 that gets you your answer.

4 And the real issue is, what was --
5 what is congressional intent? Now, in the
6 Senate report, the Senate report says liability
7 will extend to those who ordered, abetted, or
8 assisted torture. You can't get any plainer
9 than that from -- from Congress.

10 They didn't know about Central Bank
11 in -- in 1992 because Central Bank wasn't
12 decided until 1995.

13 JUSTICE KAGAN: I'm a little bit
14 confused. Are you saying that the TVPA
15 language itself includes aiding and abetting,
16 or are you saying that aiding and abetting
17 functions on top of the TVPA language?

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

1 Our case is a case that fits the --
2 the Nuremberg legal model, right, which is
3 identifying people for their persecution and
4 torture. The -- the Einsatzgruppen case is
5 exactly that case, where the defendant came up
6 with lists of communists for killing, right?

7 In this case, what -- what Cisco did
8 was create this elaborate surveillance system
9 to find Falun Gong members so that they could
10 be detained -- detained and tortured.

11 JUSTICE KAGAN: I guess what I don't
12 understand is, when -- when you look at this
13 language, "subjects to torture" --

14 MR. HOFFMAN: Yes.

15 JUSTICE KAGAN: -- do you think that
16 the defendants just fit that language, or do
17 you think that there's an extra step necessary
18 that has to do with aiding and -- and abetting
19 liability to get to that result?

20 MR. HOFFMAN: Well, we don't think
21 there's -- number one, we do think that the
22 language of the statute applies to the
23 allegations in this case as to this defendant.
24 So we think the TVPA on its terms, based on its
25 text, applies.

1 We also think more broadly that
2 aiding -- that aiders and abettors, under
3 international law, particularly with respect to
4 torture and extrajudicial killing, are people
5 who knowingly provide assistance that has a
6 substantial effect on the commission of the
7 crime.

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

22 And command responsibility, it's an
23 international doctrine, just like
24 aiding-and-abetting liability.
25 Aiding-and-abetting liability is as established

1 as command responsibility. And command
2 responsibility doesn't have as close a
3 connection or as -- as difficult requirements
4 for liability as aiding and abetting does.

5 And for command responsibility, you
6 have to know or should have known. You don't
7 have to have ordered anything. What you have
8 to -- have to have some knowledge that people
9 who are in the chain of -- of your command are
10 committing violations, and you don't do enough
11 about it --

12 JUSTICE ALITO: Back to the --

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

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

16 MR. HOFFMAN: Sorry.

17 JUSTICE ALITO: Do you want to finish?
18 Back to the ATS and --

19 MR. HOFFMAN: Yes.

20 JUSTICE ALITO: -- the relationship
21 between suits under that statute and the
22 foreign policy interests of the United States,
23 suppose that the United States files a
24 statement that says, on balance, we think that
25 this lawsuit is inconsistent with -- is not in

1 the best interests of the United States'
2 foreign policy. Is that the end of the matter?

3 MR. HOFFMAN: I don't know if it's the
4 end of the matter, but I think that the courts
5 have treated U.S. statements of interest in
6 these cases as -- as -- giving them great
7 weight, which is what I think this Court has
8 said they're supposed to get.

9 And -- and I think they would be given
10 great weight. I -- I've been involved in cases
11 where the case has been --

12 JUSTICE ALITO: What does it mean to
13 give it great weight? Does that mean the court
14 says, well, okay, that's too conclusory; now
15 explain exactly why?

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

24 I think what they'd have to say, as --
25 as they did -- as the --

1 JUSTICE ALITO: You want the -- do you
2 want a district judge to say, in my judgment,
3 you do not have a sound basis for concluding
4 that this would be contrary to the best
5 interests of the United States' foreign policy?

6 MR. HOFFMAN: I think there's going to
7 be very limited -- very limited circumstances
8 where a district court judge could say that. I
9 think, if -- if -- if, in fact --

10 JUSTICE ALITO: Okay. I -- I
11 understand the position.

12 You've been making two arguments that
13 are not necessarily consistent regarding the
14 meaning of the ATS, and one has to do with the
15 original meaning, the original understanding of
16 the statute. One has to do with Sosa.

17 Which one is it?

18 MR. HOFFMAN: Well, I think what -- I
19 think what Sosa did was interpret the meaning
20 of the Alien Tort Statute for the modern law of
21 nations. I think that's what Sosa did. I
22 think what it -- what -- what it tried to do --

23 JUSTICE ALITO: So that's not the
24 original meaning.

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

1 Sosa interpreted it as the original, at least
2 parts of it as the original meaning, one of
3 them being that no further action by Congress
4 was necessary for the courts to entertain
5 claims for torts committed in violation of the
6 law of nations.

7 JUSTICE ALITO: Well, it's arguably
8 inconsistent with the original understanding
9 for at least two reasons. One has to do with
10 the way the role of federal courts was
11 understood before Erie. The other is something
12 that Mr. Gannon referred to, which was the
13 understanding of the nature of the law of
14 nations at the end of the 18th century.

15 Was it the same as it is today?

16 MR. HOFFMAN: I think the law of
17 nations has evolved. I think it's now commonly
18 understood to be customary international law.
19 That's what we call it.

20 I think that the mechanism of the
21 creation of customary international law has
22 somewhat changed in terms of the more --
23 multilateral treaties and that kind of thing.
24 But I think it's the same law of nations. I
25 don't think it's a different law of nations.

1 I -- I don't think that it has changed
2 to the point where it is not the same thing
3 that the founders were talking about.

4 JUSTICE ALITO: Do you think that the
5 understanding of public international law today
6 is the same as the understanding of the -- the
7 great international law treatise writers of the
8 late -- that were influential at the end of the
9 18th century? Is it consistent with Grotius
10 and consistent with Vatell?

11 MR. HOFFMAN: Well, I think, actually,
12 the -- the -- our interpretation or this
13 Court's interpretation, really, in Sosa was
14 based on the obligations of Vatell, for
15 example, which focused on our obligation to --
16 to police our own citizens' conduct, for
17 example, or things that happened within the
18 U.S. territory that violated the law of nations
19 or not to give safe haven for people that came
20 for --

21 JUSTICE ALITO: Well, it -- it was as
22 to the torts that Blackstone singled out and
23 maybe as to some others, but as to human rights
24 violations committed by foreign nations with
25 respect to their own people on their own

1 territory, was that considered to be within the
2 scope of the law of nations at that time?

3 MR. HOFFMAN: No. No --

4 JUSTICE ALITO: Thank you.

5 MR. HOFFMAN: -- it's clear that --
6 that international law has changed. And -- and
7 as Sosa recognized, the modern law of nations
8 concerns itself with precisely those questions.

9 JUSTICE JACKSON: Mr. --

10 MR. HOFFMAN: That's the whole basis
11 for Filartiga. That's the -- that's what the
12 Congress said should continue when it passed
13 the Torture Victim Protection Act. It -- in
14 order to enforce at least two of those norms,
15 but saying at the same time that the Alien Tort
16 Statute performs many important functions and
17 should continue and -- and -- and endorsing the
18 Filartiga view of what the Alien Tort Statute
19 should be used for.

20 JUSTICE JACKSON: Mr. Hoffman, can I
21 just take you back to something you explored
22 with Justice Kavanaugh, which is whether or not
23 aiding-and-abetting liability presents the same
24 concerns as the foreign-cubed cases?

25 And I've been puzzling over that, and

1 I think the government's view assumes that it
2 would because the litigation involving aiding
3 and abetting would necessarily call into
4 question the underlying violation by the
5 foreign country. You would have evidence about
6 the actual torture, et cetera.

7 And I guess what I'm wondering is
8 whether that's necessarily the case. You
9 suggest that the claim at issue here really is
10 about what Cisco did --

11 MR. HOFFMAN: Right.

12 JUSTICE JACKSON: -- about Cisco's
13 acts here in the United States with the
14 creation of this software and the extent to
15 which it did so under China's direction and to
16 facilitate whatever it was that China was
17 doing.

18 So I suppose you could have a world in
19 which Cisco even concedes for the purpose of
20 litigation that those things happened in China
21 and the whole litigation is really just about
22 its own participation. And in that case, would
23 it raise the foreign policy concerns that the
24 United States is talking about?

25 MR. HOFFMAN: We don't think so. And

1 we also think that aiding and abetting as a
2 concept doesn't necessarily implicate foreign
3 policy at all.

4 And, for example, say the Iranian
5 regime is overthrown and it turns out that an
6 American company helped the Iranian regime
7 identify protestors so that they could be
8 executed summarily, and the -- and the -- the
9 parents of those teenagers that were executed
10 come to this country and say that that
11 corporation killed our -- helped kill our
12 children.

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

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 JUSTICE THOMAS: When we had Central
2 Bank appear, the point -- of course, that is a
3 securities case, but it makes the point that
4 there was no general background common law rule
5 as to aiding and abetting -- aiding and
6 abetting in tort cases.

7 If that is the case, how does that
8 affect aiding and abetting in 1789 on the three
9 categories that we indicated in Sosa?

10 MR. HOFFMAN: Well, the -- the -- what
11 I would say to that is that as your decision in
12 Twitter laid out in terms of the long history
13 of aiding and abetting in criminal -- the
14 criminal context, there's an equally long
15 history of accessorial liability and
16 aiding-and-abetting liability in the context of
17 the law of nations, which, from our standpoint,
18 in terms of enforcing this statute is different
19 from anything that existed in terms of civil
20 aiding-and-abetting liability.

21 What we're saying is that Congress
22 said that we could have a tort action if we had
23 a violation of the law of nations. Aiding and
24 abetting, torture, and extrajudicial killing
25 and disappearance under customary international

1 law -- and I don't think it's disputed by the
2 other side that -- that it is a violation --
3 fits what Congress said we could get and that
4 Sosa said that unless there's some reason that
5 we shouldn't be able to go forward, we have
6 that claim.

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

15 JUSTICE THOMAS: So we have to
16 actually go beyond the common law itself?

17 MR. HOFFMAN: Well, no. I -- I mean,
18 the law of nations was part of the common law.
19 That was the understanding at the time. That's
20 probably part of why, you know, the -- the --
21 the Alien Tort Statute was passed the way it
22 was.

23 The -- the law of nations was
24 understood to be part of the common law that we
25 inherited from England. And -- and -- and you

1 have cases from the beginning of the republic
2 throughout the Paquete Habana and, you know,
3 dealing with the capture of fishing vessels
4 during a war, saying that courts had the
5 responsibility to identify and apply the law of
6 nations. Even in 1900, the courts were saying
7 that. And the Court has consistently said over
8 time that the law of nations and -- and also
9 customary international law is part of our law
10 to be applied.

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

20 But they never said it. And, in fact,
21 the only time Congress has said anything is
22 they've said we really like Filartiga. We
23 really think that's a good precedent. They say
24 it in the Senate report for paragraphs. And --
25 and -- and that -- and so, in terms of what

1 Congress has decided in terms of the tradeoff,
2 I think both in -- in 1789, when it was even
3 more fraught, and today, what these statutes
4 mean is that we do have a commitment to
5 enforcing international law at least in some
6 limited extent.

7 JUSTICE THOMAS: Wouldn't it actually
8 work better the other way, if Congress actually
9 added aiding and abetting?

10 MR. HOFFMAN: It would certainly mean
11 that we wouldn't have to debate that issue
12 anymore.

13 (Laughter.)

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

24 What you have to find out is what did
25 Congress intend. Congress said that it

1 intended for people who aided and abetted or at
2 least abetted and assisted to be liable under
3 the statute. And it -- and it was enforcing
4 international law, which also applied to
5 aiding -- aiders and abettors.

6 CHIEF JUSTICE ROBERTS: Thank you.

7 Justice Alito, anything further?

8 Justice Sotomayor?

9 Justice Kagan?

10 Justice Gorsuch?

11 Justice Kavanaugh?

12 Justice Barrett?

13 Justice Jackson?

14 Thank you, counsel.

15 MR. HOFFMAN: Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Rebuttal,

17 Mr. Shanmugam?

18 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

19 ON BEHALF OF THE PETITIONERS

20 MR. SHANMUGAM: Thank you, Mr. Chief

21 Justice.

22 Judge Friendly famously described the

23 ATS as a legal Lohengrin, and in Sosa, the

24 Court recognized that the ATS was

25 jurisdictional but that Congress didn't intend

1 it to be stillborn and hence, it created a
2 cause of action for the norms that the First
3 Congress expected to be recognized.

4 But, over Justice Scalia's objection,
5 the Court then went further. It went on to
6 permit judicial law-making, the recognition of
7 new causes of action as a matter of federal
8 common law for violations of modern
9 international law.

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

19 And even in the wake of this Court's
20 most recent decisions, the plaintiffs' bar has
21 been adept at taking extra -- extraterritorial
22 allegations against American companies and
23 repackaging them as allegations concerning
24 aiding-and-abetting conduct that took place in
25 the United States.

1 That methodology has proven to be
2 unworkable, and, as this Court did in *Edwards*
3 versus *Vannoy and Loper Bright*, when confronted
4 with similarly unworkable methodologies, this
5 Court should now reject it. But, even if the
6 Court doesn't go that far, it should still
7 reverse.

8 We take the point that the
9 aiding-and-abetting analysis should occur on a
10 norm-by-norm basis at least at the first step
11 of *Sosa*. But any aiding-and-abetting claim,
12 apart from the three core offenses, will
13 ultimately still fail.

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

24 But, if you think it's a question
25 concerning the scope of the cause of action,

1 then you have to look to principles of domestic
2 law. That is the teaching of Kiobel in
3 particular, and I think that is also the
4 teaching of Justice Sotomayor's dissent in
5 Jesner.

6 And if you're looking to domestic law,
7 the place to look is Central Bank and not just
8 to Central Bank as a rule of interpretation,
9 but, as Justice Thomas said, as resting on a
10 fundamental premise, namely, that
11 aiding-and-abetting liability was not available
12 at the common law.

13 In the words of the D.C. Circuit in
14 the Halberstam case, the common law largely
15 confined aiding-and-abetting liability to
16 isolated acts of adolescents in rural society.
17 There was certainly no broad norm to that
18 effect.

19 Obviously, Cisco vigorously disputes
20 the allegations in this particular case. It
21 complied with all applicable United States
22 laws, particularly with regard to the provision
23 of technology to China. But we're here on a
24 motion to dismiss. This is ultimately a legal
25 question. And Congress can, in this context,

1 as in others, create a cause of action if it
2 wishes --

3 CHIEF JUSTICE ROBERTS: Thank --

4 MR. SHANMUGAM: -- to do so. Thank
5 you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 The case is submitted.

9 (Whereupon, at 12:02 p.m., the case
10 was submitted.)

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