

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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BUDHA ISMAIL JAM, ET AL.,	)	
Petitioners,	)	
v.	)	No. 17-1011
INTERNATIONAL FINANCE CORPORATION,	)	
Respondent.	)	

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Pages: 1 through 69  
 Place: Washington, D.C.  
 Date: October 31, 2018

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5                                    v.                                    ) No. 17-1011  
6   INTERNATIONAL FINANCE CORPORATION,        )  
7                                    Respondent.                    )  
8   - - - - -

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10                                   Washington, D.C.  
11                                   Wednesday, October 31, 2018

12  
13                                   The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 11:08 a.m.

16  
17   APPEARANCES:

18   JEFFREY L. FISHER, ESQ., Stanford, California; on  
19                                   behalf of the Petitioners.

20   JONATHAN ELLIS, Assistant to the Solicitor General,  
21                                   Department of Justice, Washington, D.C.; for the  
22                                   United States as amicus curiae, supporting the  
23                                   Petitioners.

24   DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on  
25                                   behalf of the Respondent.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-1011, Jam versus International Finance Corporation.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER  
ON BEHALF OF THE PETITIONERS

MR. FISHER: Mr. Chief Justice, and may it please the Court:

The IOIA gives international organizations "the same immunity from suit as is enjoyed by foreign governments."

The plain text of this provision, coupled with the structure of the IOIA and the drafting history, make clear that the same immunity provision gives international organizations the same immunity that foreign governments are entitled to today under the Foreign Sovereign Immunity Act.

Starting with the text, my opponents do not dispute that, as a general rule, when a statutory provision refers to another body of law, especially, as here, in the present tense, that body of law is incorporated as of the

1 moment of suit in any given case.

2 And, indeed, they --

3 JUSTICE BREYER: So the --

4 MR. FISHER: Don't dispute --

5 JUSTICE BREYER: -- the hornbooks that  
6 I looked up, I mean, going back forever, don't  
7 say quite that. They say that's true as long  
8 as the changes are consistent with the purpose  
9 of the adopting statute. And, indeed, the  
10 Indian case, you know, the word was "now," was  
11 it now 1934 or now later? In the case we wrote  
12 last term that Justice Gorsuch wrote, the word  
13 was "monetary relief." Does that mean as of  
14 the past, or does it mean what we call money  
15 relief now? I mean, there are many cases like  
16 that.

17 And here the word is "is." Does the  
18 word "is" refer to the past, "is" at the moment  
19 of passage, or later? The two arguments that  
20 I'd like you to address that are opposite you  
21 are, one, states do many things, nations, many,  
22 many things, and so, if we take immunity from  
23 them for commercial things, we leave lots of  
24 immunity with them for those other things.

25 But international organizations, some

1 of them, do only one thing: lend money or the  
2 equivalent. And if we take immunity from them,  
3 that's the end of the immunity or close.  
4 That's one argument.

5 The second is this: If we decide  
6 against you, and we've made a mistake, or along  
7 comes a case where they really should have  
8 immunity, the President and the State  
9 Department can give it to them.

10 If we decide with you, well, if along  
11 comes a case where they should enjoy the  
12 immunity, no, nobody can do anything. Did I  
13 say that correctly? Have you got the  
14 argument --

15 MR. FISHER: Okay.

16 JUSTICE BREYER: -- I might have said  
17 it backwards.

18 MR. FISHER: No, no, no.

19 JUSTICE BREYER: Did I say it right?

20 MR. FISHER: So I think you gave me  
21 two things and then one before it, which was  
22 the statutory text.

23 JUSTICE BREYER: Yes. That's right.

24 MR. FISHER: So let me start with the  
25 statutory text, Justice Breyer. And the word

1 "is" in this Court's jurisprudence always,  
2 always means at the time of suit, not at the  
3 time the statute was passed. And we've cited  
4 reams of cases to that effect. My opponents  
5 cite only one case on the other side, that's an  
6 Armed Career Criminal Act case. Even there,  
7 "is" didn't mean at the time of suit; it meant  
8 at the time of the prior conviction. So "is"  
9 is on our side of this case.

10 But, in *Carcieri*, which is the "now"  
11 case, the Indian case, the Court went out of  
12 its way in that opinion to say the insertion of  
13 the word "now" takes us out of the ordinary  
14 situation, which is when the referenced law  
15 applies at the time of suit. And so you can  
16 look at the Sutherland treatise, which dates  
17 back to 1904, on this principle.

18 And look at its -- in -- in your own  
19 case, Justice Breyer, I think if I was going to  
20 give you one case, it would be the *Steamboat*  
21 versus *Chase* case we cite in our reply brief.  
22 That's interpreting the Judiciary Act, which  
23 goes all the way back to the founding, of  
24 course, and says where the common law is  
25 competent to give a remedy, such and such a

1 remedy is permissible.

2           And in Steamboat, the Court rejected  
3 the exact argument the other side makes here,  
4 which is, first of all, that the law had to be  
5 incorporated at the time of suit and, second of  
6 all, that there was something different about  
7 the common law as to a statute at the time of  
8 the enactment. So all of the textual stuff is  
9 in our favor.

10           Now you've also asked me two other  
11 questions and let me address them. So starting  
12 with the commercial activity exception as  
13 applied to a group like the IFC, when you  
14 answer -- when you think of that question, it's  
15 a question of how close you -- you put the lens  
16 into what's going on here.

17           So if you just take a foreign state as  
18 the -- as the comparator here, a foreign state  
19 itself does all kinds of things. Like you  
20 said, Justice Breyer, they are not commercial  
21 activity. But a foreign state might have a  
22 bank, for example, that does almost all  
23 commercial activity.

24           And so the same thing is true with  
25 international organizations, and let me answer



1 that in a few different steps. So, first of  
2 all, look at the sweep of international  
3 organizations. Many do things like regulation,  
4 for example, managing fisheries. They do  
5 things like dispute resolution, law  
6 enforcement, Interpol. They do scientific  
7 research and agricultural research. All of  
8 those things are non-commercial activities on  
9 the other side.

10 Then you have the category, the  
11 special category, of lending banks, but even  
12 within lending banks, not all the things that  
13 lending banks do are commercial activity. The  
14 IFC itself on its website talks about how it  
15 gives advice to foreign governments about  
16 legislation that ought to be passed regulating  
17 financial transactions with the private sector.  
18 That is not probably commercial activity.

19 And then, even within lending  
20 activities, Justice Breyer, just take the World  
21 Bank, it has five separate institutions. Now  
22 the IFC is on one side. What the IFC does is  
23 -- is loan money at market rates for profit for  
24 private sector projects. There are other  
25 components of the World Bank and there are

1 other lending institutions that are  
2 international organizations that give grants  
3 for public works programs or that do the kind  
4 of spending that governments do. And the  
5 government's argued in past cases, and we think  
6 they're probably right, that that is not  
7 commercial activity either.

8           So, when the other side says, well,  
9 everything is commercial activity, it's no  
10 different than the foreign state coming to this  
11 and saying, well, if the Bank of Switzerland  
12 does commercial activity, then we're -- we're  
13 stuck. Well, no, no, no, it's just how closely  
14 you look at the problem.

15           JUSTICE BREYER: What about -- the  
16 third was if we -- if we decide with you -- if  
17 we decide against you, see, that would mean  
18 there is sovereign immunity. But there  
19 shouldn't be in a particular case, the State  
20 Department can waive it and they have to be --  
21 response.

22           But if we decide for you, and then  
23 there's a case where there really shouldn't be  
24 sovereign immunity or, rather -- rather, there  
25 really should be, I guess -- see, that's what

1 I'm getting mixed up. You see, if we decide  
2 against you and they really should have  
3 sovereign immunity in this case, nobody can do  
4 anything. So, knowing nothing about the  
5 future, it seems a little safer, the first,  
6 than the second.

7 MR. FISHER: Well, I'm going to turn  
8 back in a moment to the law and why that just  
9 can't fit within the law, but as to just the  
10 policy question you're asking me --

11 JUSTICE BREYER: If you look --

12 MR. FISHER: -- even there --

13 JUSTICE BREYER: -- at the reason I  
14 ask policy questions is because the hornbook  
15 said, yes, apply it as of now as long as it's  
16 consistent with the purpose of the statute.  
17 And the purpose of the statute, going back to  
18 1945 and the U.N. and everything, was to get  
19 these organizations to locate here.

20 So it's not just policy for policy.  
21 It's policy for purpose. And purpose is tied  
22 into how you interpret the language.

23 MR. FISHER: So let me give you the  
24 practical answer and then the purpose answer.

25 On the practical answer,

1 organizations, especially if they want a  
2 headquarter here or are headquartered here, are  
3 fully able to -- to lobby Congress or the  
4 executive branch for special immunity. And  
5 there are many examples across international  
6 organizations.

7           Take the Organization of American  
8 States, OAS. And the Solicitor General  
9 discusses this in -- the organization in its  
10 brief. In 1994, it negotiated a special  
11 immunity provision for itself to get more than  
12 the ordinary restrictive form of immunity that  
13 was available under the IOIA.

14           So there are -- there are pathways  
15 available, and they have been used even more  
16 so.

17           Remember, the United States, as you  
18 say, has a -- has a sometimes principal  
19 interest in these organizations. So it is  
20 quite responsive to them when they come and  
21 say: We need more than the IOIA gives us.

22           But, Justice Breyer, let me turn back  
23 to the -- the original purpose, which was the  
24 legislative history is quite clear on what the  
25 purpose was. As you say, this was partly to

1 create a form of immunity to give some comfort  
2 to these organizations. But the question is,  
3 what form of immunity did they ask for and what  
4 did they get?

5 What they did is they came to Congress  
6 and said treat us like foreign governments.  
7 Give us immunity, as Congress put it in the  
8 Senate report, of a governmental nature. And  
9 so what did Congress do? It gave them exactly  
10 what they asked for. It said we're going to  
11 treat you as a default measure like a foreign  
12 government.

13 And, remember, the words of the  
14 statute are "same immunity." "Same immunity"  
15 as is enjoyed by federal governments. So we're  
16 going to give you the same immunity, subject to  
17 the President's ability to in just -- adjust it  
18 and subject to your own ability in your own  
19 treaty to negotiate for more, and subject,  
20 thirdly, to Congress's ability to give you some  
21 immunity that you don't have even by way of  
22 your own treaty.

23 JUSTICE SOTOMAYOR: Can we go to that  
24 issue raised in part? The special immunity, I  
25 know, was even negotiated by the U.N., I think,

1 in the 1990s, and OAS and others, but assume  
2 that we're in your regiment, and Justice Breyer  
3 made the assumption that if a lawsuit came to  
4 us now under your theory, and it was limited  
5 immunity, that the President or Congress could  
6 give immunity to the other side.

7 I don't think so.

8 JUSTICE BREYER: No, it's the  
9 opposite.

10 JUSTICE SOTOMAYOR: The opposite. The  
11 President can't decrease it, correct?

12 JUSTICE BREYER: Yes.

13 JUSTICE SOTOMAYOR: So that problem  
14 still remains with your --

15 MR. FISHER: Well --

16 JUSTICE SOTOMAYOR: Yeah.

17 MR. FISHER: -- I think it -- it may  
18 or may not remain, Justice Sotomayor.

19 JUSTICE SOTOMAYOR: That's my  
20 question.

21 MR. FISHER: Certainly, we could -- we  
22 would say we can go forward on this suit  
23 because -- because there is no such law.

24 If that law were passed, you'd have  
25 two questions. One is, did Congress make it

1 retroactive? And you look to Altmann to -- to  
2 think about how to judge the retroactivity of  
3 immunity provisions. And then, if it were  
4 retroactive, whether that were permissible.

5 But, you know, we're a long way from  
6 -- from that sort of a situation. I think the  
7 important thing going forward -- and this is, I  
8 think, what the concern is on the other side,  
9 is not so much about this case but about  
10 incentives and policies going forward -- they  
11 have every opportunity to negotiate in one form  
12 or another or to procure a heightened form of  
13 immunity.

14 And, Justice Sotomayor, let me say one  
15 more thing to you and Justice Breyer about, you  
16 know, the idea of the executive branch getting  
17 involved. This is one of the problems, I  
18 submit, with the other side's argument.

19 Remember, part of the goal of the FSIA  
20 in the first section of the Act in Section 1602  
21 is to get -- is to get the executive branch out  
22 of the immunity business.

23 The -- the -- Congress made the  
24 determination that it was a bad idea to have  
25 every case turning on individualized

1 suggestions of immunity and executive branch  
2 political policy. And so the other side, by  
3 importing the common law of 1945, would  
4 reintroduce that problem into international  
5 organization immunity in a way that we don't  
6 think would be very good politically or very  
7 workable in the courts.

8           And I'd hasten to add that even under  
9 the rule of 1945, if the question were what is  
10 the executive branch think about any given  
11 lawsuit or any given immunity for any given  
12 type of suit, that would just lead you right  
13 back to the FSIA, and it would lead you back to  
14 the same conclusion that we submit to you here.

15           So either pathway, whether, Justice  
16 Breyer, you start with the way you've always  
17 looked at cases, with the word "is" and the  
18 word "same" and the reference canon that I've  
19 described and say all of those things lead you  
20 to a time of suit rule, or if you start with  
21 the law of 1945 and say, what was the law in  
22 1945?

23           Well, Hoffman and -- in Ex Parte Peru  
24 were clear that the law of 1945 was the  
25 executive branch decides, and it's not for the



1 Court -- this is -- I'm going to give you the  
2 Court's own language -- it's not for the Court  
3 to give immunity where the executive branch has  
4 not seen fit to give it.

5 And if that were the test, you'd come  
6 right back to where you -- where I started  
7 here, which is that the FSIA would control or,  
8 at the bare minimum, the executive branch  
9 position in this lawsuit on the type of  
10 immunity that ought to apply in this situation  
11 would control.

12 JUSTICE GORSUCH: Mr. Fisher --

13 MR. FISHER: So --

14 JUSTICE GORSUCH: -- if I can pick up  
15 on Justice Breyer's question. The reference  
16 canon, I take all -- all of your points, but  
17 sometimes, let's say we have a statute that --  
18 that refers to another statute.

19 Usually, we would look at the second  
20 statute that's being incorporated as of the  
21 time of -- of -- of the adoption of -- of the  
22 first statute. Right? So if -- if -- if this  
23 statute were to say go look at Section 5 --

24 MR. FISHER: Right.

25 JUSTICE GORSUCH: -- we wouldn't look

1 at it the way it's been subsequently amended.  
2 We'd look at it as it was originally enacted in  
3 1945.

4 Why isn't that -- that idea pertinent  
5 here, you know, when we refer to a specific  
6 law, we don't take it to evolve over time?

7 MR. FISHER: So for two reasons,  
8 Justice Gorsuch, and one of them, you'll  
9 forgive me, is going to be something you said  
10 in the Alan Contoe opinion.

11 JUSTICE GORSUCH: I was afraid of  
12 that.

13 (Laughter.)

14 MR. FISHER: But for two reasons. One  
15 is Congress has a choice to make when it writes  
16 legislation. It can lock in a given rule by  
17 setting a specific statutory provision and says  
18 that's the rule we want, just like if Congress  
19 uses a particular word, the time of the  
20 enactment, the meaning of that word at the time  
21 of enactment would be what Congress -- we'd  
22 assume Congress wanted.

23 Or Congress can do something  
24 different, which is to say, look, we're not  
25 sure exactly the metes and bounds of the -- of

1 the law. We're just going to tie it to this  
2 other area of law as a general matter. And  
3 that's what Congress did here. It did the  
4 latter.

5 So it took an area of law as a point  
6 of reference and said: Just use that as the  
7 default rule and then adjust as necessary. And  
8 those are just two different pathways Congress  
9 can go down.

10 And they date, as I said, all the way  
11 back to the First Judiciary Act there, in the  
12 Sutherland treatise, all the way back to 1904,  
13 and so there's just two different pathways  
14 Congress can go down.

15 And it makes perfect sense, I think,  
16 in a situation like this, especially where you  
17 have a common law doctrine being referenced, at  
18 least a common law at the time, and one that  
19 was, in -- indeed, not just any old common law  
20 doctrine but one that was in a great deal of  
21 flux at the time. So it made every reason --  
22 it made every good reason for Congress to have  
23 a general reference, not a specific one.

24 And then the second reason, Justice  
25 Gorsuch, is the one you mentioned sitting on

1 the Tenth Circuit, which is that, as time goes  
2 by, it becomes all the more stilted or  
3 antiquated or even foolish sometimes to try to  
4 answer questions in the modern day according to  
5 what some bygone era doctrine would have  
6 required, and especially a bygone era doctrine  
7 like this.

8           If I understand the other side's  
9 position correctly, basically, the question  
10 they're having -- they would want every federal  
11 court to ask in these cases is, what would the  
12 Truman Administration's State Department have  
13 wanted to do in this case?

14           And when you have things like this,  
15 which didn't even -- an organization that  
16 didn't even exist at the time, sometimes doing  
17 activities that weren't even contemplated at  
18 the time, things like sovereign wealth funds,  
19 which foreign sovereigns now engage in, for  
20 example, who knows what the State Department  
21 would have thought then.

22           I think there's every reason then to  
23 fall back on the reference canon. And if I can  
24 say one more thing before reserving my time, if  
25 you have any doubt about just the plain text

1 argument I -- I've given you, I would urge you  
2 to compare the text in Section 288a to the text  
3 -- Section 288d, which has the exact dichotomy  
4 that -- that I've been discussing today.

5 One subsection, subsection (a), says  
6 that the same immunity rules apply, and  
7 subsection (b) says that foreign officials --  
8 I'm sorry, international organization officials  
9 are entitled to absolute immunity.

10 So this is yet another reason why if  
11 the other side were correct and if Congress had  
12 wanted to lay down the rule they did, why would  
13 they not have just used the absolute immunity  
14 language in subsection (b) of subsection (d)  
15 and that, indeed, was the original draft of  
16 this act that was discarded.

17 So I could go on, but I'd rather save  
18 the rest of my time for rebuttal.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Mr. Ellis.

22 ORAL ARGUMENT OF JONATHAN ELLIS FOR

23 THE UNITED STATES, AS AMICUS

24 CURIAE, SUPPORTING THE PETITIONERS

25 MR. ELLIS: Mr. Chief Justice, and may

1 it please the Court:

2 If I could, I'd just like to pick up  
3 right where my -- my friend left off. There's  
4 been a lot of discussion so far this morning on  
5 the text of Section 288a. We agree that the --  
6 the Petitioners have the far better reading of  
7 that phrase in isolation, but I think it really  
8 settles the deal when you look at the entire  
9 structure of the Act.

10 The -- the IOIA doesn't just grant  
11 immunity in Section 288a(b), but it provides a  
12 whole host of immunities and it does it in two  
13 different ways. In several different  
14 provisions, the Act sets a fixed rule of  
15 immunity. So archives are inviolable and --  
16 and officers and employees of the organizations  
17 are immune from suit in -- with respect to  
18 their official acts.

19 And then there are a -- a host, a  
20 collection of three provisions that set the  
21 immunity by reference to foreign governments.  
22 There's Section 288a(d), Section 288d(a), and  
23 there's Section 288a(b), the one at issue here.

24 Respondents concede that the  
25 referential language in those other two

1 provisions do refer to the state of the law as  
2 it is today.

3 It's only the one that's at issue in  
4 this case that they say was frozen. We don't  
5 see how that can be, and that's particularly  
6 true when you look at the drafting history that  
7 my friend referred to.

8 JUSTICE KAGAN: Mr. Ellis, before you  
9 get to that, another part of the structure is  
10 this provision that deals with presidential  
11 authority, and -- and that's essentially a  
12 roll-back authority of immunity.

13 And -- doesn't that make a lot more  
14 sense, that provision, if you assume that  
15 Congress meant for there to be absolute  
16 immunity? In other words, the presidential  
17 authority is a one-way ratchet. The President  
18 can only under this provision roll it back. It  
19 can't increase it.

20 So, to me, if I -- if -- if -- if --  
21 if the immunity -- if the immunity is less than  
22 absolute, you would think that they would have  
23 given the presidential authority both ways.

24 MR. ELLIS: Sure. The -- the reason  
25 that argument doesn't work is because

1 Section 288, the President's authority under  
2 that provision, doesn't just apply to  
3 Section 288a(b). It applies to all of the  
4 immunities provided by the IOIA.

5 And as I was just describing, some of  
6 those are fixed immunity rules that are not  
7 absolute. And so, for instance, the officers  
8 and employees of international organizations do  
9 not receive diplomatic immunity. That was a  
10 big deal at the time.

11 And -- and yet the President can't --  
12 couldn't grant that up. I think what that  
13 provision shows is that Congress wanted to  
14 provide international organizations at most the  
15 immunity from suit and other privileges and  
16 immunities that foreign governments received  
17 and not more so.

18 And yet Respondents are here today  
19 asking you for exactly that, more immunity --

20 JUSTICE BREYER: But on that it's --

21 MR. ELLIS: -- than foreign  
22 governments receive.

23 JUSTICE BREYER: But look, whatever  
24 other things it refers to, the provision allows  
25 the President to waive immunity, not to grant



1 immunity. And your argument is they have  
2 immunity. Right?

3 Do I have -- I get this backwards.  
4 This is the third time I've got it backwards.

5 (Laughter.)

6 JUSTICE BREYER: Sorry. The provision  
7 allows the person to be sued. Is that right?

8 MR. ELLIS: It -- it does allow them  
9 to be sued.

10 JUSTICE BREYER: Okay. So I was  
11 right. I had it backwards the first time but  
12 not the second, not the third.

13 (Laughter.)

14 JUSTICE BREYER: All right. It allows  
15 the President to waive the immunity.

16 MR. ELLIS: That's right.

17 JUSTICE BREYER: Okay. It doesn't  
18 allow him to grant the immunity.

19 MR. ELLIS: It does in a sense. I  
20 mean --

21 JUSTICE BREYER: But the power to  
22 waive the immunity, at least in this section,  
23 amounts to nothing if they have no immunity  
24 because, for example, all they do is lend  
25 money.

1 MR. ELLIS: So -- so a couple --

2 JUSTICE BREYER: That's -- that's --  
3 and the other way, it seems to work itself out.

4 MR. ELLIS: Understood.

5 JUSTICE BREYER: Okay.

6 MR. ELLIS: A couple responses to  
7 that, Your Honor.

8 JUSTICE BREYER: That's the question,  
9 I think, vis-a-vis.

10 MR. ELLIS: Glad to be able to address  
11 that. Number -- number one, just to be clear,  
12 we -- they do have a great deal of immunity. I  
13 mean, foreign -- international organizations  
14 and foreign states are presumptively immune.  
15 And I would agree with almost everything  
16 that -- maybe everything that -- that my friend  
17 said about why the commercial activity  
18 exception, even with regard to IFC and -- and  
19 most -- more importantly, with regard to the  
20 vast sweep of these organizations, is not going  
21 to eliminate immunity.

22 I would add one more, is that even a  
23 case like this, we have serious doubts, and  
24 think -- we think, in fact, from what we know,  
25 this suit isn't going to be able to go forward

1 regardless of the answer to the question  
2 presented, because in addition to having -- to  
3 being connected in some way to commercial  
4 activity, there must be a much stronger nexus.  
5 It must be based on commercial activity that  
6 occurs in the United States.

7           We think the Court's decision in OBB  
8 makes clear that the way you apply that is to  
9 ask: What's the gravamen of this suit? It's  
10 not enough to have some attenuated connection,  
11 but what's the gravamen?

12           And the gravamen of this suit as we  
13 understand it is -- is tortious conduct that  
14 occurred in India, injuries that occurred in  
15 India. And we don't think -- we have serious  
16 doubts that this is going to be able to go  
17 forward even under restrictive immunity.

18           And so we do not think that what we're  
19 doing is opening the floodgates here; rather,  
20 that the sort of concerns that would be barred  
21 -- cases that would be barred by Respondent's  
22 absolute rule of immunity and would be allowed  
23 by ours are -- are sort of quintessential  
24 domestic disputes, contract disputes with your  
25 contractor who renovated the building, the slip

1 and fall at the -- at the organization's  
2 headquarters, or the driving accident on the  
3 streets of New York and D.C.

4 JUSTICE SOTOMAYOR: Do you have -- do  
5 you have any idea about how many of these kinds  
6 of organizations are headquartered in the  
7 United States?

8 MR. ELLIS: I think the numbers are in  
9 the 20 to 30 range. There's about -- somewhere  
10 80-some organizations that have been designated  
11 for protection under IOIA and 20-some that have  
12 -- I think are headquartered in the United  
13 States.

14 JUSTICE SOTOMAYOR: That are  
15 commercial --

16 MR. ELLIS: No, no, no --

17 JUSTICE SOTOMAYOR: -- like this one?

18 MR. ELLIS: No, no, I did not -- no.

19 JUSTICE SOTOMAYOR: We're --  
20 everybody's assuming --

21 MR. ELLIS: Right.

22 JUSTICE SOTOMAYOR: -- a floodgate.

23 MR. ELLIS: Sure. No, there are --

24 JUSTICE SOTOMAYOR: Including Justice  
25 Breyer.

1           MR. ELLIS: -- there are a number of  
2     development banks, but even then, even -- even  
3     the development banks, even if you talk about  
4     the World Bank, it -- it's not clear that those  
5     commercial activities are the sorts that the --  
6     the FSIA captures with the commercial activity  
7     exception. Lending there is to sovereign  
8     governments.

9           And -- and as the Court has been -- as  
10    lower courts have explained, that sort of  
11    commercial activity is not the sort that a  
12    private party could engage in. So it's not the  
13    sort that the commercial activity exception  
14    picks up.

15           JUSTICE BREYER: Well, I -- I have the  
16    IFC, the IMF, the World Bank, the  
17    Inter-American Development Bank, the Asian  
18    Development Bank, the African Development Bank,  
19    the International Development Association. The  
20    -- so I --

21           MR. ELLIS: Sure. I --

22           JUSTICE BREYER: -- I've got -- that's  
23    only half of them.

24           MR. ELLIS: That -- that's -- that --  
25    I'm not sure what percentage that is. I want

1 to point out that some of those  
2 organizations --

3 JUSTICE BREYER: There are a lot.

4 MR. ELLIS: -- have their own immunity  
5 provision in the -- in their charter. And so  
6 that's what we think -- if you look at the  
7 history, that's what -- that's how it has been  
8 dealt with. For organizations that require  
9 absolute immunity, we've entered into  
10 agreements.

11 I would point again to the OAS  
12 agreement, where the State Department is just  
13 crystal-clear that what OAS did in that  
14 agreement was to negotiate absolute immunity  
15 because they thought that's what they needed in  
16 order to put their headquarters here.

17 JUSTICE KAGAN: But Mister --

18 MR. ELLIS: We agreed to that and we  
19 said: But, hey, this is not our usual  
20 practice. Ordinarily, we -- we afford only  
21 restrictive immunity. We point to the FSIA.

22 JUSTICE KAGAN: Mr. Ellis, I -- I  
23 guess I'm not sure I -- I quite understood what  
24 you meant. As to the core lending activities  
25 of these multinational development banks, in

1 other words, making loans where private actors  
2 would not make loans, do you have a view as to  
3 whether that counts as a commercial activity or  
4 not?

5 Did you say that that would not count  
6 as a commercial activity because they're making  
7 loans that the -- that the private market would  
8 not make?

9 MR. ELLIS: No. I'm -- I'm not saying  
10 that it's -- that it's enough that they're  
11 making loans that a -- that a private -- they  
12 couldn't find a private party to provide. I'm  
13 saying if the nature of the loan is such that  
14 it's -- it's not the sort of transaction that a  
15 private party would enter into, so think about  
16 the IMF that grants -- that lends to sovereigns  
17 and they do so on the requirement that the  
18 sovereign enact certain restrictions --  
19 regulations and change their -- their -- their  
20 laws in order to assure that they don't need  
21 the money again.

22 That is the sort of thing that's been  
23 held by lower courts, and we've advocated, is  
24 not a commercial activity. That's just not the  
25 sort of transaction that a private party can

1 enter -- enter into. It's not just that a  
2 private party didn't. It's that -- that no one  
3 -- that's not something that you can do.  
4 That's a sovereign act.

5 JUSTICE BREYER: But can you give  
6 me --

7 MR. ELLIS: Or a quasi-sovereign act.

8 JUSTICE BREYER: -- anything to assure  
9 me? Because when I looked through this list, I  
10 thought that there were development banks like  
11 the World Bank, which is a pretty big deal, as  
12 well as in Asia, in Africa, we're trying to  
13 encourage development all over the world, and  
14 suddenly by removing the sovereign immunity  
15 because the plaintiff will claim this is a  
16 commercial activity.

17 MR. ELLIS: So -- so --

18 JUSTICE BREYER: And you're not  
19 denying it.

20 MR. ELLIS: And so --

21 JUSTICE BREYER: So what -- what is  
22 the assurance that the government can give us  
23 that this isn't going to lead to a lot of  
24 lawsuits and this isn't going to interfere with  
25 perhaps activity that the United States



1 traditionally has been very much in favor of?

2 MR. ELLIS: Absolutely. Let me -- let  
3 me give you a couple things. I think we've  
4 given you a number of -- of points already this  
5 morning as to why we don't think the floodgates  
6 are going to open.

7 If -- if there's one more, I'll say  
8 just look at the -- the charter of these  
9 organizations. Look at the IFC's charter.  
10 They already waive suit, waive immunity for  
11 suits going directly to their core activities.  
12 They -- they, in fact, indicate that they --  
13 they need to waive suit in these suits.

14 And so I -- I think when you're  
15 talking about what are the suits that are going  
16 to come up under commercial activity, many of  
17 them are already going forward because the --  
18 the IFC and the World Bank and others have  
19 waived their immunity.

20 JUSTICE GINSBURG: And they need to  
21 because?

22 MR. ELLIS: They need to because no  
23 one's going to enter into a financial  
24 transaction with them if they -- they know they  
25 can't sue if it -- if it goes south.

1           The other thing -- I want to also  
2 focus the Court on the -- on the suits that we  
3 know are not going to -- to go forward on the  
4 absolute immunity side. We're talking about  
5 suits by -- by U.S. citizens and residents  
6 about domestic conduct and they're seeking  
7 redress in U.S. courts.

8           These are the suits that foreign  
9 governments are -- are able to be sued on and  
10 don't have immunity. And we don't see any  
11 reason why international organizations should  
12 not also be subject to suit in those  
13 circumstances, and we think that's exactly what  
14 the Congress was trying to do when it enacted  
15 Section 288 in 1945.

16           If there are no -- no further  
17 questions, we ask the Court to reverse.

18           CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20           Mr. Verrilli.

21           ORAL ARGUMENT OF DONALD B. VERRILLI

22           ON BEHALF OF THE RESPONDENT

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

25           The IOIA prescribes a standard of

1 virtual absolute immunity that is fixed and not  
2 evolving. We know that because the text  
3 incorporated common law terms that had a  
4 settled meaning of virtually absolute immunity  
5 and because a fixed standard makes the most  
6 sense in light of the statutory context and  
7 purpose.

8           Now the reason that Congress enacted  
9 the IOIA was to fulfill treaty obligations that  
10 committed us to provide virtually absolute  
11 immunity. Those treaty obligations did not  
12 commit us to treat international organizations  
13 the same as foreign states were treated. They  
14 committed us to the substantive standard of  
15 virtually absolute immunity.

16           And, therefore, if -- if -- if the  
17 language in Section 288b is interpreted in the  
18 way my friends on the other side suggest --

19           JUSTICE SOTOMAYOR: So why didn't  
20 Congress say that the way it did in the other  
21 provisions of this Act? And if it intended  
22 that in no change, it could have said it and  
23 given the very exception it gave, which is that  
24 the President or the executive could reduce  
25 immunity, which was the standard at the time.

1           MR. VERRILLI: So let me start with  
2 the basic question. We think if the Court  
3 applies the normal rules of construction that  
4 it applies in statutory interpretation cases,  
5 that Congress did say that it was providing  
6 virtually absolute immunity.

7           And I think a case in particular that  
8 I would point the Court to is the Neder  
9 decision, 527 U.S., and in particular to page  
10 21 of the Neder decision. That's a case --  
11 that case, of course, was about whether mail  
12 fraud and wire fraud incorporated a materiality  
13 standard. This is an opinion by Chief Justice  
14 Rehnquist, unanimous for the Court on this  
15 point. The Court said first we look to the  
16 text, of course, and when looking to the text,  
17 if we -- if -- and in looking to the text,  
18 based solely on a natural reading of the full  
19 text, materiality wouldn't be an element of the  
20 fraud statute.

21           And then the Court says: But that  
22 does not end the inquiry because, in  
23 interpreting statutory language, there's a  
24 necessary second step. And this is -- I'm  
25 coming to the point that I think governs here,

1     which is that it is a well-established rule of  
2     construction, a rule of construction, that  
3     where Congress uses terms that have accumulated  
4     settled meaning under the common law, a court  
5     must infer, must infer, unless the statute  
6     dictates otherwise, that Congress means to  
7     incorporate the established meaning of those  
8     terms. Now the --

9             JUSTICE GINSBURG: What about the  
10     argument that there wasn't an established  
11     meaning in -- what was it -- 1945, that it --  
12     the -- the status of the immunity was in flux?  
13     It had been absolute, but then we were going  
14     over -- the State Department was advising the  
15     court whether immunity should be given in a  
16     particular case.

17             MR. VERRILLI: There's a bit of a  
18     suggestion to that effect in the brief of the  
19     United States, Your Honor, but I would  
20     respectfully suggest that is not a fair  
21     characterization of where things stood in 1945  
22     at all.

23             It is true that some people within the  
24     State Department in 1945 thought that immunity  
25     should move to a more restrictive standard, but

1 the Justice Department would not even advance  
2 that standard in this Court, at the request of  
3 -- of the State Department, and this Court did  
4 not describe the immunity as being in flux.  
5 This Court said the standard was virtually  
6 absolute immunity.

7           If one looks even in 1952 at the Tate  
8 Letter, the Tate Letter didn't say the law was  
9 in flux in the United States. It said the  
10 United States was hewing to the standard of  
11 virtually absolute immunity, but other  
12 countries were moving towards a standard of  
13 restrictive immunity and, therefore, we ought  
14 to reconsider what we're doing.

15           So I just -- I mean, the Court can  
16 read these materials for -- for -- for itself,  
17 but I just respectfully do not think it's a  
18 fair consideration of where things stood in  
19 1945 at all.

20           And then, if I could, I'd like to pick  
21 up on a related point that came up in the brief  
22 of the United States. It's another statement  
23 in the brief of the United States, and it came  
24 up in argument today that, look, this really  
25 isn't a problem because for those organizations

1 that need immunity that goes beyond the -- the  
2 restrictive immunity, we've always understood  
3 that they get -- they can go get a special  
4 statute and they've gone and gotten special  
5 statutes.

6 The United States says on page 27 of  
7 its brief, precisely because the IOIA didn't  
8 provide that level of immunity, they give these  
9 three examples: IMF, World Trade Organization,  
10 and Organization of American States.

11 I'd like to take a minute and go  
12 through each of them because it doesn't hold up  
13 with respect to each of them. With respect to  
14 the IMF, for example, it is true the IMF, you  
15 know, it has a -- has a treaty. There was a  
16 statute that gave that treaty effect under U.S.  
17 law, which ended up providing for absolute  
18 immunity.

19 But it can't possibly be that that was  
20 undertaken based on any sense that the IOIA  
21 didn't provide that level of immunity because  
22 the IMF statute was enacted in July of 1945,  
23 and the IOIA wasn't enacted until five months  
24 later. So it can't possibly substantiate what  
25 the government was saying.

1           If one looks at the WTO treaty, it is  
2 true with respect to that treaty that it  
3 committed us to a very wide scope of  
4 immunities. It said that the United -- that  
5 the United States will commit to providing all  
6 or virtually all of the immunities provided  
7 under a whole different U.N. convention, the  
8 U.N. convention on specialized agencies.

9           Now that convention has all kinds of  
10 tax immunities and property immunities that go  
11 way beyond what the IOIA provides. So, of  
12 course, they needed another statute in order to  
13 make those treaty commitments. That doesn't  
14 prove anything about whether anybody thought  
15 that the IOIA failed to provide virtually  
16 absolute immunity.

17           In fact, the historical evidence, I  
18 think, really, to the extent it points in any  
19 direction, it points very much more in our  
20 direction. And the best way to see that is  
21 with respect to the way the United Nations was  
22 treated under -- by -- by the executive branch  
23 in this country.

24           Now we signed the U.N. charter in  
25 1945, committed us to provide what the charter



1 describes as the necessary immunities. Then  
2 the U.N. Convention on Immunities was  
3 negotiated in 1946, which said that the U.N.  
4 should get virtually absolute immunity. Not  
5 the same immunity as foreign states, virtually  
6 absolute immunity.

7 Now the United States did not ratify  
8 that convention until 1970. So, on the theory  
9 that my friends on the other side have, from  
10 the moment of the Tate Letter in 1952 when  
11 foreign state immunity became restrictive and  
12 not virtually absolute anymore, we were in  
13 violation of the commitment we made in the U.N.  
14 charter.

15 Now, if that was true, you would  
16 certainly expect the State Department, A, to  
17 address it in the Tate Letter, but there's  
18 nothing in there. So it's a classic case of  
19 the dog that didn't bark. And, B, you would  
20 expect them to try to do something about it,  
21 like get the U.N. convention ratified  
22 immediately, because, otherwise, we were going  
23 to be out of -- out of compliance with our  
24 obligations to the granddaddy of all  
25 international organizations, the -- the United

1 Nations.

2 But there's not a -- from 1952 until  
3 the ratification of the convention in 1970, you  
4 can't find one word by anybody in the executive  
5 branch ever saying that. What you do find --

6 JUSTICE SOTOMAYOR: What commercial  
7 activities was the U.N. doing at that time?

8 MR. VERRILLI: Well --

9 JUSTICE SOTOMAYOR: I know today it's  
10 a very different organization, but it's not  
11 clear to me that there was much going on that  
12 was commercial --

13 MR. VERRILLI: Yeah.

14 JUSTICE SOTOMAYOR: -- at its initial  
15 stages.

16 MR. VERRILLI: I -- I take that point,  
17 Your Honor, but what I would say in response is  
18 that there was a very great deal of sensitivity  
19 about the -- the whole package of -- of  
20 immunities that were available to the U.N. and  
21 its diplomats and its -- and its workers.

22 And there was concern all along from  
23 1952 to 1970 that -- that -- where the  
24 executive was urging Congress to ratify the  
25 convention, but the only things ever mentioned

1 were the diplomats -- immunities for diplomatic  
2 individuals.

3           And then, when you get to 1970 and you  
4 actually look at the Senate report accompanying  
5 the ratification, this was not in our brief,  
6 but it's at page 31 of the brief of the -- of  
7 the scholars who filed the brief in support of  
8 us. It quotes the Senate report from 1970, and  
9 what the Senate report says is we're not  
10 granting the U.N. any -- the U.N. as an  
11 organization any immunity it didn't already  
12 have under the IOIA.

13           So, as late as 1970, it was just quite  
14 clear that everybody understood the IOIA  
15 conferred virtually absolute immunity. And, of  
16 course, that's because it was -- it was enacted  
17 to comply with our treaty obligations.

18           It wasn't enacted to make sure that no  
19 -- that come what may, that international  
20 organizations would get treated the same as  
21 foreign states. That is -- you know, that's  
22 the best way to think about it, is it's just a  
23 completely anachronistic way of thinking about  
24 the body of materials in front of you.

25           JUSTICE KAGAN: But even what you just

1 said, Mr. Verrilli, it wasn't enacted to make  
2 sure that foreign organizations would get  
3 treated the same as foreign states.

4 I mean, that's exactly what the  
5 language of the thing says.

6 MR. VERRILLI: Well, so I -- I -- I  
7 guess a couple of things about that. I think  
8 the right way to think about the language,  
9 Justice Kagan, is that it was a means to an end  
10 in 1945 when it was enacted.

11 It was not the end in itself to assure  
12 equivalence of treatment come what may. It was  
13 the means by which Congress ensured that it  
14 would fulfill its treaty commitments which were  
15 -- and those treaty commitments were to provide  
16 virtually absolute immunity.

17 And we know, the Senate report says  
18 we're enacting this provision to fulfill our  
19 treaty commitments. And our treaty  
20 commitments, again, were not to treat them the  
21 same. They were to provide virtually absolute  
22 immunity. So --

23 JUSTICE KAGAN: Do you think it was --  
24 you answered Justice Ginsburg's questions about  
25 how far we were from the Tate Letter in 1945,

1 but do you think it was inconceivable to  
2 Congress that the common law of immunity would  
3 change?

4 MR. VERRILLI: Well, I -- I -- I can't  
5 say that it would be inconceivable to anybody,  
6 but what I can say is if one looks at the  
7 debates surrounding the passage of the IOIA,  
8 is, once again, it's a dog that didn't bark.

9 You can't find a single person  
10 anywhere saying anything remotely like the  
11 proposition that we need to adopt a standard  
12 that will evolve over time because we have a  
13 concern that foreign sovereign immunity law  
14 will evolve over time.

15 That just was not any part of  
16 anybody's thinking at that time. They were  
17 trying -- you have to remember this is coming  
18 out of the Bretten Woods system. We have  
19 Bretten Woods. We set up all these  
20 organizations.

21 They have a -- they have a desperate  
22 mission in front of them to try to rebuild the  
23 world -- the world after the carnage of World  
24 War II. There's a lot of pressure on Congress  
25 to get these organizations up and going and

1 give them the immunity we promised them so they  
2 can go out and do their work. And that's what  
3 led to the enactment of the IOIA.

4           It was none of these other things, as  
5 I said. I really think if you look at the  
6 historical materials, the -- it's the -- the  
7 gloss that my friends on the other side are  
8 trying to put on it is completely  
9 anachronistic. They're taking a different  
10 concept that they've come up with now and  
11 trying to retrofit the historical facts to  
12 match it, and it just isn't right.

13           JUSTICE BREYER: Is that -- is that --  
14 the Russians at that time, '45 and so forth,  
15 that were putting all these businesses into  
16 state entities. So my guess is there were --  
17 there were a number of cases, and what I  
18 thought I heard Mr. Fisher say is, if we really  
19 go back and look at this, we'll see that the  
20 status quo before this passed was not absolute  
21 immunity, but the status quo was a kind of  
22 mess, where sometimes the State Department  
23 would say give them immunity and sometimes the  
24 State Department would say not.

25           Now what -- what is the actual

1 situation as far as you've been able to find  
2 it?

3 MR. VERRILLI: So I don't --  
4 respectfully, with respect to my friends on the  
5 other side, I don't think that's a fair  
6 characterization of the historical materials.  
7 We --

8 JUSTICE GINSBURG: That's the same --  
9 the answer you gave to me --

10 JUSTICE BREYER: Yeah.

11 JUSTICE GINSBURG: -- is the answer  
12 you would give to Justice Breyer?

13 MR. VERRILLI: Yes.

14 JUSTICE BREYER: Yeah.

15 JUSTICE GINSBURG: Same question?

16 MR. VERRILLI: Yes. I mean, it's just  
17 not there. I mean, look at what this Court's  
18 cases said. This Court's cases didn't say  
19 anything like that.

20 The -- the -- the government's briefs  
21 to this Court didn't say anything like that.  
22 When this Court has looked back on the law in  
23 Verlinden and in Samantar, it hadn't said  
24 anything like that. It said the standard was a  
25 common law standard of virtually absolute

1 immunity.

2 And that's, in fact, how the Tate  
3 Letter describes it too. And then, as a  
4 process matter --

5 JUSTICE BREYER: Okay, I got it.

6 MR. VERRILLI: -- my friends on the  
7 other side have made this argument that, well,  
8 our position would also require you to go back  
9 to the process of the State Department making  
10 an ad hoc case-by-case determination, but  
11 that's wrong too.

12 And that's clear on the face of the  
13 statute that it's wrong. And the reason -- and  
14 -- and -- and that's right in Section 288.  
15 This creates an entirely different mechanism.

16 What the -- what the IOIA says is that  
17 -- that the President shall have the authority  
18 under executive order, once Congress has  
19 enacted a statute, to grant an international  
20 organization the privileges and immunities.

21 And if you look at the face of the  
22 statute, it's obvious that they are granted on  
23 a categorical basis in gross by an executive  
24 order, not on a case-by-case basis by the State  
25 Department when law -- when a lawsuit is --



1 when a -- when a lawsuit is filed.

2 And then, similarly, in terms of the  
3 President's authority as to an executive order  
4 to reduce or eliminate the -- the immunity of  
5 an international organization, that -- it's --  
6 again, it's completely different than the  
7 situation that -- than the common law process  
8 at work. So, obviously, Congress made a  
9 judgment that it was going to put a different  
10 structure and system in place.

11 And the fact that Congress did that, I  
12 do say -- I do think quite clearly presupposes  
13 that there's a -- the existence of a  
14 substantive standard being prescribed. And the  
15 substantive standard, as I said, is virtually  
16 absolute immunity.

17 And then, in terms of the structural  
18 indicators in the statutory text, going back to  
19 a question you asked, Justice Sotomayor, I  
20 really think the most telling one, to -- to --  
21 to show you I think why my friends on the other  
22 side's case is completely anachronistic and  
23 we're correct -- is Section 288f, which you can  
24 find at page 6a of the appendix to the blue  
25 brief.

1           That provision says that the  
2           privileges, exemptions, and immunities of  
3           international organizations and then of -- of  
4           members and employees, et cetera, shall be  
5           granted notwithstanding the fact that similar  
6           privileges, exemptions, and immunities granted  
7           to a foreign government, et cetera, et cetera,  
8           may be conditioned upon the existence of  
9           reciprocity by that foreign government.

10           So right there in the text it  
11           decouples the treatment of international  
12           organizations from the treatment of foreign  
13           states. Even in a situation in which the  
14           United States would not grant the full range of  
15           virtually absolute immunity because it wasn't  
16           being -- receiving reciprocal treatment, this  
17           statute says the international organization  
18           gets it. So --

19           JUSTICE GINSBURG: How do you deal  
20           with the argument that we just heard, that we  
21           can compare 288a on the one hand, which --  
22           which keeps the international organizations in  
23           tune with foreign sovereigns, and 288 -- was it  
24           b and d?

25           MR. VERRILLI: Yes. I do think that

1 the -- the differences break down into two  
2 categories, Your Honor. The -- there -- some  
3 of the provisions do prescribe fixed standards.  
4 That's true. But those fixed standards, as we  
5 explained in our brief or at least tried to,  
6 are always situations in which the IOIA is  
7 conferring a narrower set of immunities on --  
8 on diplomats and individuals than the common  
9 law would have at the time.

10 So incorporation of the standard in  
11 the way this 288a(b) did wouldn't accomplish  
12 the objective there because there was -- they  
13 were quite consciously trying to narrow the  
14 overall scope of immunities and not give the  
15 individuals who worked at these organizations  
16 the same full treatment that diplomats got who  
17 were from foreign states.

18 Now the second subcategory there are  
19 the provisions where the -- the statute says  
20 that their -- the treatment shall be the same.  
21 But there's two things about that that are  
22 significant.

23 One is it says they shall be the same  
24 as under another statutory provision. And as  
25 we said, we think that's vitally important

1 here. We think it's quite clear that, in  
2 addition to Justice Breyer's points about the  
3 reference canon, that the reference canon  
4 applies when one statute incorporates another.  
5 It doesn't apply when one statute incorporates  
6 the common law. And, here, they were  
7 incorporating statutes.

8           And if you look at those provisions  
9 anyway, they're basically just instructions to  
10 the executive branch, when do you fingerprint  
11 the people when they're coming in? What do you  
12 do about that -- this detail or that detail?

13           They don't go to the heart of the  
14 matter at all. And the heart of the matter  
15 here is the immunity being conferred on these  
16 international organizations.

17           I just want to make a point about that  
18 and then, if I could, talk about the  
19 consequences that will ensue, I think, if we go  
20 down the path that my friends on the other side  
21 are suggesting.

22           I think this is a critical point. I  
23 just want to make sure it's clear. Another  
24 reason why you shouldn't draw this equivalence  
25 -- and we -- it can't be that Congress really

1 intended to draw the equivalence between  
2 foreign states and international organizations  
3 such that they would just move in tandem no  
4 matter what -- is that immunity is granted for  
5 different reasons.

6 The reason you give an international  
7 organization immunity is a functional reason,  
8 not a status reason. It's not about according  
9 the appropriate respect to the sovereigns,  
10 because international organizations aren't  
11 sovereigns. They're separate juridical  
12 persons.

13 And what's quite clear -- it's clear  
14 from the U -- the San Francisco report on the  
15 foundation of the U.N., it's clear from the  
16 Senate report in 1945, it's clear from all the  
17 commentators that we discussed in our brief,  
18 it's clear from the Restatement of Foreign  
19 Relations, which we've cited in our brief, that  
20 you grant immunity to international  
21 organizations so that they can carry out their  
22 functions effectively. And -- and just take --  
23 let me take a minute and kind of elaborate on  
24 that because I think it's critical.

25 Remember, these are --

1           CHIEF JUSTICE ROBERTS:  If you don't  
2   mind, I -- I'm afraid I'm about five minutes  
3   behind you here, but going -- going back to  
4   your point on 288f, you said it's there they're  
5   decoupling the international organizations and  
6   the foreign sovereigns.  But, as I go back and  
7   read it, it's simply because the -- the foreign  
8   sovereigns have the capability to use  
9   reciprocity, and the foreign -- and the  
10  multi-country organizations do not.

11           I don't -- I mean, that's the  
12  difference they're drawing there, not something  
13  between the scope of the actual immunities.

14           MR. VERRILLI:  Well, I -- well, the  
15  way I read it, Mr. Chief Justice, is what --  
16  what they're doing there is saying even in a  
17  situation in which the United States concludes  
18  that it won't afford a foreign sovereign the  
19  full virtually absolute immunity because of  
20  reciprocity -- in other words, we're not  
21  getting it back from them -- even in that  
22  situation, an international organization of --  
23  where those sovereigns are members will still  
24  receive the full level of immunity.

25           And so I think what that tells us is

1 that what Congress was trying to do in this  
2 statute overall was prescribe a fixed  
3 substantive standard, not a floating standard  
4 where the two things move in tandem. So -- and  
5 I -- I do think it supports that.

6 And if I could just go back to the  
7 functional point, remember, these are  
8 collective bodies and members come together,  
9 they make -- they -- they take resources from  
10 each of their own countries. They put them  
11 into these organizations. They make collective  
12 decisions about how to deploy those resources.

13 And the point of the immunity here is  
14 so that the courts of any country, but  
15 especially the host country, which for the most  
16 important organizations are going to be here in  
17 the United States, can't override the  
18 collective judgments that they make about how  
19 their resources would be deployed and what  
20 conditions they ought to impose, et cetera, by  
21 the intervention of domestic law in U.S. courts  
22 and can't redirect the funds that are put into  
23 these organizations to pay massive class action  
24 tort judgments because, of course, the member  
25 countries are contributing this money because

1 they believe it's going to be put to the use  
2 that the -- for example, the development bank,  
3 that the development bank decides it should be  
4 put to, not to pay massive tort judgments.

5           And I think one place you see this  
6 very clearly, if you look at the report of the  
7 San Francisco conference about the founding of  
8 the U.N., the State Department's --  
9 Department's response coming -- report coming  
10 out of that conference, specifically says this.  
11 It says, of course, the United Nations can't be  
12 subject to the jurisdiction of any one state or  
13 its courts.

14           And it's for exactly this reason. And  
15 the same thing is true generally. That's why  
16 you give it, not for functional reasons -- I  
17 mean, excuse me, not for reasons of status but  
18 for functional reasons.

19           And I think a key -- another key  
20 reason why you shouldn't be thinking about this  
21 as a standard that evolves, evolves now and  
22 over time, is that those functional reasons  
23 don't evolve now and over time.

24           CHIEF JUSTICE ROBERTS: Well, what  
25 about the point that most of the concerns you



1 have are going to be dealt with by the  
2 requirement of a nexus to activity in the  
3 United States as opposed to simply abroad,  
4 where the projects are funded?

5 MR. VERRILLI: Yes. I was gratified  
6 to hear the United States say that, but -- and  
7 -- but if I could just -- I'll answer Your  
8 Honor's question directly, but I want to  
9 broaden it out a little bit because I think  
10 what essentially the United States is saying  
11 here is, look, the statute leaves one with no  
12 choice but to apply restrictive principles of  
13 immunity. You've got to jump off that cliff,  
14 but don't worry, it will be a soft landing  
15 because the FSIA will take care of a lot of  
16 these problems.

17 And I guess what I would say about  
18 that is, in the unlikely event you don't agree  
19 with me, I --

20 (Laughter.)

21 MR. VERRILLI: -- I hope they're  
22 right. But there's no guarantee that they're  
23 right. And -- and -- and --

24 JUSTICE BREYER: Are the -- are the  
25 lending decisions, which may be fairly detailed

1 and may include dozens of conditions, made  
2 within the United States?

3 MR. VERRILLI: Well, yes, I think  
4 that's a big part of the problem and --

5 JUSTICE BREYER: Is -- is there -- are  
6 there lawsuits that could say that there was  
7 negligence in determining, in a different  
8 country, who the persons were or the conditions  
9 under which the money would be spent? Is that  
10 an American lawsuit, saying what you've done  
11 here is commit the act of negligence or failure  
12 to be a fiduciary here?

13 MR. VERRILLI: That's this lawsuit.  
14 That's this lawsuit, Justice Breyer. That's  
15 exactly what they're alleging.

16 CHIEF JUSTICE ROBERTS: Well, but, I  
17 mean, is that consistent with our opinion in  
18 the OBB case, which I think -- if the complaint  
19 is based, the gravamen of the complaint, not  
20 specific steps along the way, and that was the  
21 issue we dealt with in that case.

22 And I appreciate the fact that it's,  
23 you know, to some extent dependent on the facts  
24 and particular allegations, but it would seem  
25 to me to require a lot more than simply the

1 specific decisions. I think where -- what --  
2 where's the gravamen, or gravamen, however you  
3 say it, with what's going on here?

4 MR. VERRILLI: Well, we would  
5 certainly say it's India, of course.

6 CHIEF JUSTICE ROBERTS: Yeah.

7 MR. VERRILLI: And if -- if we have to  
8 defend ourselves on that basis, we will. But I  
9 -- but I -- I think it -- it understates the  
10 real concrete risk here. And what I'd like to  
11 do to illustrate that, if I could, is first  
12 talk about the organizations that are going to  
13 be exposed in a way that they wouldn't be under  
14 the law.

15 And as Justice Breyer indicated  
16 earlier, it's important to remember this has  
17 been the law in the D.C. Circuit for decades,  
18 and there's -- and people have ordered their  
19 affairs based on the assumption that there was  
20 virtually absolute immunity.

21 But with respect -- but with respect  
22 to the consequences and the groups affected and  
23 then the types of effects. With respect to the  
24 groups affected, you've got the entities like  
25 us, the multilateral development banks, and

1 Justice Breyer's identified many of them.

2 Now the -- the main ones are here,  
3 here in Washington, D.C., and they're making  
4 their decisions here and, I think critically  
5 too, there are billions of dollars of assets  
6 here.

7 Now we're going to make the OBB  
8 argument for sure, and I hope we win if we have  
9 to make the argument. I -- I hope we win. But  
10 who knows how courts are going to come out on  
11 that issue?

12 We're going to have a lot of fighting  
13 about that. There are probably going to be  
14 matters of degree. There's certainly going to  
15 be significant disincentives arising out of  
16 that uncertainty.

17 There's a whole another group of  
18 entities that, unlike the banks, at least have  
19 articles of agreement where we can try and fall  
20 back on those for alternative arguments of  
21 immunity, where their immunity depends entirely  
22 on the statutory grant: the International  
23 Committee of the Red Cross, the World Health  
24 Organization, the fund to fight -- the global  
25 fund to fight AIDS and tuberculosis and

1 malaria. They are all entirely dependent on  
2 the IOIA for their immunities, and those  
3 immunities are drastically different after  
4 this.

5 And then we do have the issue, I  
6 think, with some organizations that we may even  
7 actually now be out of our -- out of compliance  
8 with our treaty commitments.

9 Now what's going to happen? Here's  
10 what I think is going to happen, and I think  
11 this lawsuit helps you see it.

12 Now the way -- the basis of this  
13 lawsuit is the following: the IFC, when it  
14 loans money here, it's loaning money in -- in  
15 parts of the world where private capital won't  
16 go unless we go in there. And very often they  
17 have un-developed legal systems and they  
18 certainly don't have robust environmental  
19 protections or labor protections.

20 So what the IFC has done is lien into  
21 those, has put those kinds of environmental  
22 standards and labor standards into its  
23 agreements, saying you want this money to do  
24 this development project, these are the  
25 standards that you've got to live up to.

1           And -- and this -- this lawsuit is  
2           that -- that the entity that we loan this money  
3           to didn't live up to the standards and it's our  
4           fault, and so we're being sued here.

5           Well, it's going to create -- if that  
6           kind of a suit can go forward, and hopefully it  
7           won't be able to, Mr. Chief Justice, but if it  
8           can, it's certainly going to create an  
9           extraordinary disincentive for organizations  
10          like ours to lien into those kinds of standards  
11          because we're going to be hoisted by our own  
12          petard.

13          Now we've also got a robust internal  
14          accountability mechanism where, if people think  
15          something's gone wrong on one of our projects,  
16          they can come to us and they can say -- they  
17          can say, look, there's a problem here. And  
18          they -- and we investigate. We take internal  
19          remedial measures if we find there's a problem.

20          Well, you know, the factual basis for  
21          the lawsuit is the report of our internal  
22          accountability process.

23          So, if they can just grab that and  
24          take it into court and make it the basis for a  
25          class action tort lawsuit in which they can

1 make a claim for all this money, it's going to  
2 create a powerful disincentive for us not to  
3 engage in that kind of self-policing activity.

4           And I would submit that, you know,  
5 even if things ultimately work themselves out  
6 under the FSIA, and I hope they -- I hope we  
7 don't have to deal with that, but even if we  
8 do, it's going to take a very long time. There  
9 are going to be a lot of difficult cases at the  
10 margin. There are going to be very serious  
11 disincentives immediately.

12           And, conversely, you know, we're a big  
13 fat target here. These organizations have lots  
14 of money. And, of course, foreign plaintiffs  
15 want to sue here. They can bring a class  
16 action. They get liberal discovery. They can  
17 get punitive damages. They get all of these  
18 advantages by suing here.

19           So, instead of suing the person who  
20 actually injured them, the power plant in  
21 India, they come here and sue us.

22           And I really think what you're going  
23 to see here is that this is just going to  
24 become another version of the sorts of  
25 foreign-cubed lawsuits that the Court has been

1 concerned about under the Alien Tort Statute  
2 where the international organization is just  
3 going to be subbed in for the foreign defendant  
4 and -- and it's going to be subbed in in a  
5 situation where we're going to have a very  
6 significant pile of money.

7           And if I could just close with this  
8 thought -- I'm just going to pick up on Justice  
9 Breyer's thought -- the law in the District of  
10 Columbia, where virtually all these  
11 organizations have been housed, or are  
12 headquartered, has been virtually absent  
13 immunity under D.C. Circuit law for decades.  
14 That's the standard everybody's been operating  
15 under.

16           Nobody's suggested that anything has  
17 gone wrong under this statute, that there are  
18 any deleterious policy consequences, that the  
19 interests of the United States are adversely  
20 affected in any way. In fact, if you look at  
21 the amicus brief from the former Secretaries of  
22 Treasury and State, they -- they think that the  
23 policy of the government arguing now is going  
24 to disrupt the United States' ability to  
25 function effectively with these organizations.



1           It's all been fine and -- but they're  
2 asking you essentially, to repeat a metaphor  
3 used before, to jump off a cliff. And  
4 hopefully it'll be a soft landing. But we  
5 don't know that. And it could easily result in  
6 a lot of disruption to the good work that these  
7 organizations do.

8           And I guess what I would suggest is  
9 that, if that's going to happen, it ought to  
10 happen through legislation. Congress can look  
11 at this. Congress can change the law if it  
12 wants to. But this has been the law for a very  
13 long time. There's no evidence that it has  
14 done anything other than work well.

15           And, therefore, I think the Court  
16 should affirm the D.C. Circuit. Thank you.

17           CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19           Four minutes, Mr. Fisher.

20           REBUTTAL ARGUMENT OF JEFFREY L. FISHER  
21           ON BEHALF OF THE PETITIONERS

22           MR. FISHER: Thank you. I'd like to  
23 make four points and I'd like to start with the  
24 text of the statute itself and simply say when  
25 Mr. Verrilli talks about the Neder Doctrine and

1 the Common Law Doctrine, that you look at the  
2 term -- a term's meaning at the time of  
3 enactment, he's mixing apples and oranges.

4 And I think all the citations in our  
5 reply brief should make it absolutely clear  
6 that there's a doctrine on the one hand that  
7 talks about incorporating a body of law, and  
8 there's a doctrine on the other hand about  
9 giving meaning to a specific term. We're in  
10 the former camp here.

11 And as to the point about whether the  
12 common law was evolving at the time, two  
13 things. We'll stand on the papers as to the  
14 fact that it was somewhat in flux.

15 But the more important point is, even  
16 if it weren't in flux, it wouldn't matter one  
17 wit, because the other side is making a  
18 sweeping proposition, which is any general  
19 reference to tort -- common law is fixed in  
20 time.

21 That would disrupt any number of  
22 federal statutory regimes, from the Federal  
23 Tort Claims Act, enacted the year after this  
24 statute, the Equal Access to Justice Act, the  
25 federal government's piracy statute, Federal

1 Rule of Evidence 501. I could go on and on  
2 with federal statutory regimes that reference  
3 the common law in exactly the same way the  
4 statute does here.

5 The Civil Rights Act of 1866, if you  
6 want one more. All of those would come out the  
7 other way from this Court's jurisprudence and  
8 from all the understanding if the other side is  
9 right about statutory interpretation.

10 So I think the only thing the other  
11 side has is they have a bunch of policy points  
12 to make for this Court.

13 Now we don't think they should  
14 control, but let me answer them. So first as  
15 to our treaty obligations. So one about at the  
16 moment of enactment. My friend kept saying  
17 that there were various agreements in place  
18 that required virtually absolute immunity.

19 None of the agreements use those  
20 words. Instead, what those agreements said is  
21 that certain organizations were entitled to  
22 immunity to allow them to perform their  
23 necessary functions. That's a very different  
24 thing than absolute immunity.

25 And it's very different because none

1 of the organizations involved were performing,  
2 Justice Sotomayor, commercial activities that  
3 were essential to their core functions, not the  
4 U.N., not any of the other organizations.

5 So we weren't in breach of any treaty  
6 rights. And if you have any doubt on that, I  
7 would urge you to look to the federal  
8 government's position then and now. It's not  
9 just a brief filed in this Court.

10 It is the position that four different  
11 Presidential Administrations have taken. The  
12 Carter Administration, right after the FSIA was  
13 passed, the George H. W. Bush Administration,  
14 the Clinton Administration, and now the Trump  
15 Administration, have all consistently held that  
16 the FSIA rules are incorporated into the FSIA.

17 Next, on the floodgates concern. I've  
18 explained earlier and I hope you will think  
19 about the fact that, while the core activities  
20 of the IFC might be commercial activity, not  
21 all of the IFC's activities are, and certainly  
22 not all the activities of international  
23 organizations are.

24 But let me add one more thing. My --  
25 my friend talked about big lawsuits of ruinous

1 liability. Well, there's two very easy ways to  
2 control that.

3 One is, to the extent any claims are  
4 on contracts, they can write their own  
5 contracts and negotiate their own contracts.  
6 As the Solicitor General points out, they can  
7 even deal with third-party beneficiaries in  
8 their contracts if they choose.

9 Secondly, as to tort claims, they can  
10 and, in fact, commonly do indemnify themselves  
11 against tort lawsuits. In this very case,  
12 their agreement indemnifies them against any  
13 judgment and all legal fees.

14 So these organizations have every  
15 manner of method to deal with any potential  
16 liability. And, in fact, they are, which sort  
17 of belies the suggestion that they think  
18 they're absolutely immune from lawsuit.

19 Finally, let me say one thing about  
20 the so-called foreign cubed problem or the  
21 facts of this case. Now, obviously, we think  
22 that we would satisfy the gravamen test. They  
23 have never made that argument. And if they  
24 want to make it, we can -- we can have that  
25 conversation in the lower courts.

1           But bear in mind what you're being  
2 asked to do in this case is to announce a  
3 categorical rule for all cases dealing with  
4 international organizations.

5           So my friend in the Solicitor  
6 General's Office talked about just regular tort  
7 slip and fall cases and the like in the United  
8 States. Let me give you one other thing to  
9 think about.

10           Some international organizations  
11 actually do their work in the United States.  
12 The border cooperation -- the Border  
13 Environmental Cooperation Commission does  
14 wastewater treatment plants in Texas and  
15 California.

16           I can't think of any reason why they  
17 would be immune from those infrastructure  
18 projects in a way that no private business or  
19 public government would be.

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

22           (Whereupon, at 12:06 p.m., the case  
23 was submitted.)

24  
25

## Official

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