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

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 19-416,
5 Nestle USA versus Doe, and the consolidated
6 case.

7 Mr. Katyal.

8 ORAL ARGUMENT OF NEAL K. KATYAL
9 ON BEHALF OF THE PETITIONERS

10 MR. KATYAL: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 The Alien Tort Statute has been around
13 since the earliest days of our nation, and yet
14 this Court has never accepted the type of claim
15 that the plaintiffs bring here. The claim
16 plaintiffs bring alleges something horrific,
17 that locators in Mali sold them as children to
18 Ivorian farms where overseers forced them to
19 work.

20 The defendants are not the locators,
21 not the overseers, and not the farms. Instead,
22 they are two U.S. corporations, Nestle USA and
23 Cargill. The plaintiffs do not allege that
24 these two owned or operated any farms, and they
25 do not allege that the companies bought anything

1 from farms that used child labor. Instead, the
2 companies are an afterthought, a few of 101
3 paragraphs in their complaint. They claim the
4 companies made decisions in the U.S. and that
5 they had knowledge of child slavery.

6 This lawsuit fails for two independent
7 reasons. First, it's extraterritorial. You've
8 said, when a statute gives no clear indication
9 of an extraterritorial application, it has none.

10 Here, the plaintiffs haven't alleged
11 any domestic injury or even that they've been to
12 the U.S. History and this Court's cases make
13 clear that the ATS's focus is the injury or
14 principal wrongdoing from a tort. Here, that
15 occurred halfway across the globe.

16 And, second, the ATS is about natural
17 persons. *Jesner* recognized there is no specific
18 universal and obligatory international law norm
19 of corporate liability that fully applies to
20 domestic corporations. It's not enough, as the
21 *Jesner* plurality said, to show "liability might
22 be permissible under international law in some
23 circumstances." Rather, it must be, to use
24 *Sosa*'s language, "accepted by the civilized
25 world and defined with a specificity comparable

1 to the features of the 18th century paradigm."

2 These are some of the most fraught
3 decisions government makes. To say Congress in
4 1789 made them is to read many difficult policy
5 choices into vague statutory text. This Court
6 has generally warned against doing that and
7 specifically with the ATS every single time.

8 CHIEF JUSTICE ROBERTS: Mr. Katyal, in
9 this case, no foreign country has objected to
10 the United States hailing its own citizens into
11 its own courts. And why should we be cautious
12 in terms of international relations in such a
13 case? And what objection would foreign
14 countries have to ensuring that U.S.
15 corporations follow customary international law?

16 MR. KATYAL: So, Your Honor, first of
17 all, I don't think that that's the relevant test
18 because, Nabisco, what you said was even if
19 international friction is "not necessarily the
20 result in every case," the potential for
21 friction militates against recognizing foreign
22 injury claims. And I think that's true
23 generally.

24 And then, with respect to here, I do
25 think that there's three different impacts on

1 foreign policy that would be recognized -- that
2 would -- that would occur if you were to
3 recognize corporate liability in this case.

4 One is, in *Jesner*, you talked about
5 the surrogacy problem with the injury nation.
6 The -- the plurality said that plaintiffs can
7 still use corporations as surrogate defendants
8 to challenge corporate governance and said
9 that's what was going on in *Kiobel*.

10 CHIEF JUSTICE ROBERTS: Well, we can
11 always --

12 MR. KATYAL: And that very case --

13 CHIEF JUSTICE ROBERTS: -- we can
14 always address that concern with addressing
15 aiding and abetting.

16 MR. KATYAL: I agree that that's one
17 way to do this, but I think this Court in *Jesner*
18 recognized that -- that doing it -- that if you
19 were to recognize corporate liability, you would
20 in some circumstances get this.

21 And, in addition, the *para nation*
22 concern, I think, would apply just as well,
23 because it would be an end run around *Jesner* to
24 permit foreign corporations like Nestle to be
25 sued because of their domestic subs, like in

1 this case, but not others.

2 And finally --

3 CHIEF JUSTICE ROBERTS: Thank you.

4 Thank you, counsel.

5 Justice Thomas.

6 JUSTICE THOMAS: Thank you, Mr. Chief

7 Justice.

8 Mr. Katyal, the tote -- on a slightly
9 different matter, do you agree with the D.C.
10 Circuit and the Fourth Circuit that there is a
11 universal norm on aiding and abetting liability?

12 MR. KATYAL: We do not, Your Honor.
13 We think that -- that if you were to reach that
14 question, that for the reasons the Solicitor
15 General said, there is no such norm.

16 In Hamdan at Footnote 40, you said --
17 you said something similar. The domestic
18 precedents, like Central Bank, I think, are
19 clear on this. But I think our most important
20 point, Justice Thomas, is that, here, aiding and
21 abetting would translate to aiding an amorphous
22 in this particular case because there's two axes
23 here. One is extraterritoriality, which is
24 already blinking red here because there is no
25 U.S. injury or principal wrong.

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

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

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

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

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

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

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

13 And so, Justice Thomas --

14 JUSTICE THOMAS: Thank you.

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

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

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

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

10 Why should that make a difference?

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

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

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

22 MR. KATYAL: I understand.

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

1 corporations, from this -- the scope of the
2 statute.

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

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

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

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

24 MR. KATYAL: For -- for two reasons:
25 One, because there's already a separate remedy

1 of going after the individuals, and second,
2 because corporate liability, as Congress
3 recognized in the TVPA, has any number of other
4 difficulties, such as mens rea.

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

10 JUSTICE BREYER: Oh, by the way, the
11 individual also --

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice -- Justice Alito.

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

24 You would say that the victims who
25 couldn't possibly get any recovery in the courts

1 of the country where they had been held should
2 be thrown out of court in the United States,
3 where this corporation is headquartered and does
4 business?

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

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

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

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

24 And in your hypothetical, there are
25 five different mechanisms that would prevent any

1 abuse. First is foreign law, the law of the
2 Ivory Coast. There are already criminal
3 sanctions there, and the State Department and
4 Department of Labor says those are being used.

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

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

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

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

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

1 international law and the laws of nations, I
2 would suspect that would be easy.

3 But I think implicit in --

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.

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

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor.

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

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

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

1 and abettors.

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

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

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

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

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

1 MR. KATYAL: Right. So --

2 JUSTICE SOTOMAYOR: Go to the
3 substance of the issue.

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

10 And the reason why, I think --

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

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

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

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

1 there's a remedy in the foreign country.

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

7 CHIEF JUSTICE ROBERTS: Justice Kagan.

8 MR. KATYAL: And so --

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

11 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

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

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

25 JUSTICE KAGAN: Yeah, no problem

1 extraterritorial, no problem aiding and
2 abetting, just a straight suit.

3 MR. KATYAL: Correct.

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

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

11 JUSTICE KAGAN: Okay. So if --

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

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

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

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

1 What sense does this make? You have a suit
2 against 10 slaveholders, 10 slaveholders decide
3 to form a corporation specifically to remove
4 liability from themselves, and now you're saying
5 you can't sue the corporation?

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

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

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

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

23 MR. KATYAL: -- which is difficult --

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

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

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

10 JUSTICE KAGAN: Thank you, Mr. Katyal.

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

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

16 JUSTICE GORSUCH: Good morning,
17 Mr. Katyal. I -- I'd actually like to pick up
18 on -- on this line of questioning. I don't see
19 anything in the language of the statute and I
20 don't believe you've pointed to anything that
21 distinguishes between individuals and
22 corporations. And the rationale which Justice
23 Breyer was alluding to for the ATS I think that
24 we've said many times is to ensure that the
25 United States provides a mechanism for aliens to

1 remedy wrongs that would otherwise be held
2 against the United States itself and perhaps be
3 lawful causes for war against the United States.

4 And on -- on -- on those two lines, on
5 the language and on the rationale that this
6 Court has long adopted, or recognized for the
7 ATS, why would we exempt corporations?

8 MR. KATYAL: So --

9 JUSTICE GORSUCH: I understand your
10 policy arguments.

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

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

21 And you talked about the rationale
22 about not letting things go unremedied, but as I
23 just said to Justice Kagan, there are remedies.
24 You can go after the individuals. So you don't
25 need to go after the corporations, and, indeed,

1 doing so imposes lots of liability.

2 And our fundamental -- or it imposes
3 lots of problems, like mens rea and the like.
4 And fundamental --

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

14 If in rem jurisdiction was part of the
15 ATS's contemplation, why wouldn't corporate
16 liability, which then didn't exist, I mean, in
17 serious -- in widespread form, but why wouldn't
18 the same concept apply?

19 MR. KATYAL: For -- for the exact
20 reasons --

21 JUSTICE GORSUCH: Briefly.

22 MR. KATYAL: -- that the Court said in
23 *Jesner*, Justice Gorsuch, which is -- you know,
24 the same argument was made there. And what the
25 Court said is that doesn't come close to meeting

1 the kind of specific universal obligatory norm,
2 and the Court has to proceed with great caution
3 because you're being asked to fashion a common
4 law remedy --

5 JUSTICE GORSUCH: Thank you,
6 Mr. Katyal.

7 MR. KATYAL: -- which is not
8 something --

9 JUSTICE GORSUCH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh.

12 JUSTICE KAVANAUGH: Thank you, Chief
13 Justice.

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

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

25 MR. KATYAL: Well, I really feel like

1 that's some overheated rhetoric. You know,
2 after all, for 200 plus years this statute's
3 been around, there's not a successful example of
4 a case like this ever, Justice Kavanaugh.

5 All we're suggesting is to preserve
6 the status quo as it's always been. I
7 understand there's some policy arguments for why
8 you might want something else, but that's really
9 something addressed to a different branch of
10 government.

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

19 I mean, this is an extraordinary thing
20 they're asking the Court to do in fashioning a
21 common law remedy, and that's why every decision
22 of this Court says proceed with great caution.
23 They have the highest of bars, and they haven't
24 come close to meeting it.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett.

3 JUSTICE BARRETT: Mr. Katyal, a lot of
4 the questions you've been asked thus far focus
5 on whether there's a specific universal and
6 obligatory norm here. And that, you know, as
7 many of my colleagues have pointed out, raises
8 some complications.

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

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

23 And this case is a perfect example of
24 this. There's very limited U.S. conduct that is
25 alleged in the complaint, and yet they want to

1 make the hugest of federal cases out of it.

2 JUSTICE BARRETT: Well, if we do
3 resolve it at Sosa step 2, when would we ever
4 recognize a cause of action? Because, you know,
5 most cases will raise the same -- let's focus on
6 the separation of powers prong. Most cases
7 raise this question of the intricate policy
8 questions that may be better left to Congress.
9 I mean, we've been very restrained in the Bivens
10 context about recognizing more causes of action.

11 I mean, would this just kind of halt
12 recognition of new causes of action altogether
13 if we adopt your position?

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

1 We don't think you --

2 JUSTICE BARRETT: Just not if a
3 corporation was -- was the perpetrator sued in
4 any of those cases?

5 MR. KATYAL: Right. We don't think
6 that -- that --

7 JUSTICE BARRETT: Torture.

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

16 JUSTICE BARRETT: Thank you,
17 Mr. Katyal. My time's expired.

18 CHIEF JUSTICE ROBERTS: A minute to
19 wrap up, counsel.

20 MR. KATYAL: Thank you. The hard
21 hypotheticals I think shouldn't obscure the far
22 easier task before this Court. Nestle USA and
23 Cargill are not akin to Justice Alito's
24 hypothetical of a direct enslaver or anything
25 like that. The allegations in this complaint

1 don't allege anything close to that level of
2 wrongdoing.

3 And when there are those allegations
4 of such wrongdoing, there are five different
5 parts -- paths, apart from the ATS, to protect
6 human rights. And this Court has always said
7 great caution has to be exercised when
8 recognizing a new cause of action, even in the
9 face of hard facts.

10 And our concern is that with -- even
11 with -- without such great caution, further
12 complaints like this will proliferate and go on
13 for decades, with harm to our foreign policy,
14 separation of powers, and other policy
15 objectives.

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Gannon.

23

24

25

1 ORAL ARGUMENT OF CURTIS E. GANNON
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONERS

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

6 The United States condemns child
7 slavery and trafficking. Congress has expressly
8 provided for criminal and civil liability for
9 forced labor in certain circumstances. And the
10 federal government has specifically supported
11 efforts to eliminate the worst forms of child
12 labor at cocoa farms in Cote d'Ivoire.

13 But this Court should not extend the
14 reach of the Alien Tort Statute to encompass
15 Respondents' claims in this case for two
16 principal reasons.

17 First, the ATS does not authorize
18 liability for domestic corporations for the same
19 reasons that the majority and the plurality in
20 *Jesner* found that foreign corporations are not
21 liable. As the *Jesner* majority said, a decision
22 to extend liability from natural persons to
23 corporations must be made by Congress rather
24 than the judiciary.

25 And, second, the aiding and abetting

1 conduct alleged against defendants does not
2 overcome the bar against extraterritorial
3 application of the ATS.

4 CHIEF JUSTICE ROBERTS: Counsel, I
5 want to ask you the same question I asked Mr.
6 Katyal. We don't have objections from foreign
7 countries in this case. As far as we can tell,
8 they're perfectly comfortable having U.S.
9 citizens, U.S. corporations hailed into their U
10 -- in U.S. courts.

11 What should we make of that, and
12 doesn't that suggest we ought to be a little
13 more -- a little less cautious about finding a
14 cause of action here?

15 MR. GANNON: Well, in general, you've
16 recognized correctly, I think, that you should
17 be cautious about extending the cause of action.

18 In previous cases, you've recognized
19 that this is a question about whether there's a
20 general threat posed by these types of cases,
21 and whether or not there's a threat posed by
22 this specific case, cases against domestic
23 corporations can, indeed, be used as proxy
24 challenges to foreign governments or to foreign
25 parent or subsidiary corporations.

1 And the United States has raised
2 specific foreign policy concerns in cases
3 involving U.S. corporations, including Doe
4 against Exxon, Polimeni and American Isuzu,
5 other cases.

6 But even in this case, the allegations
7 are somewhat inchoate even though the case is 15
8 years old, but there are ways, as Mr. Katyal
9 pointed out, that this case could still threaten
10 foreign affairs interests if it comes to
11 fruition because --

12 CHIEF JUSTICE ROBERTS: Counsel, if --
13 if a United States corporation sent domestic
14 employees to the Ivory Coast for the express
15 purpose of setting up a cocoa farm that uses
16 child slavery, would that conduct touch and
17 concern the United States as we use those terms
18 in Kiobel?

19 MR. GANNON: Well, I think that it --
20 it depends on how much conduct happens in the
21 United States and how much conduct happens
22 overseas. We think that the Court has clarified
23 that the way Kiobel is talking about that, it's
24 whether the -- whether the conduct touches the
25 territory of the United States. And we think

1 that it's the conduct in question, not the --
2 not the citizenship of the parties, and --

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas.

6 JUSTICE THOMAS: Thank you, Mr. Chief
7 Justice.

8 Counsel, the -- I'm intrigued by my
9 colleagues' questions on the corporate form and
10 the -- but -- and I seem to remember that in the
11 past the government has argued that the
12 corporate form shouldn't make that difference as
13 -- the difference in a case. And it's certainly
14 not quite the argument or maybe even opposite
15 argument that you're making now.

16 I'd like you to -- if you can, to
17 respond to some of the concerns raised by my
18 colleagues with respect to the corporate form
19 and to at least explain or correct me if I'm
20 wrong about your prior positions, the
21 government's prior positions, as to the coverage
22 of the corporate form.

23 MR. GANNON: Well, Justice Thomas, we
24 did previously not urge the Court to adopt a
25 categorical rule eliminating corporate liability

1 under the ATS. But we're trying to be
2 consistent with the Court's precedents here, and
3 Jesner rejected key parts of our argument there
4 and key parts of our reasoning, and it
5 reinforced a connection between the ATS caution
6 that the Court should have about recognizing new
7 forms of liability and extensions of liability
8 and other areas such as Bivens. It reinforced
9 that connection in Hernandez.

10 And we've consistently opposed
11 corporate liability in the context of Bivens,
12 and under that rubric, we think that the same
13 answer applies here.

14 And we -- the question that the Court
15 is asking is whether there is reason to doubt
16 whether Congress would want this damages remedy
17 to be available for artificial persons.

18 And we know that there are times when
19 Congress makes that decision. It did so in the
20 Torture Victim Protection Act. This Court did
21 so in Malesko.

22 And now that Jesner has made foreign
23 corporations not liable, it would be especially
24 incongruous to discriminate on the basis of the
25 defendant's nationality in the corporate context

1 because we know that that's not happening in the
2 context of natural persons.

3 The Marbois incident that Justice
4 Breyer brought up has been discussed by Sosa and
5 Kiobel, and in both cases, the Court assumed
6 that both the Frenchman and the New York
7 constable who assaulted an ambassador in the
8 United States would be liable.

9 So, if both foreign and U.S. natural
10 persons are liable, we think that Congress
11 should be the one that makes the decision that
12 U.S. corporations would be discriminated against
13 in a way that foreign corporations are not.

14 JUSTICE THOMAS: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Breyer.

17 JUSTICE BREYER: I'd like to hear, if
18 you would, the government's answer to the same
19 question that I think Justice Thomas --
20 everybody's been asking, use Justice Kagan's
21 example if you want or my example, what's new
22 about suing corporations?

23 When I looked it up once, there were
24 180 ATS lawsuits against corporations. Most of
25 them lost but on other grounds. So why not sue

1 a domestic corporation?

2 You can't sue the individual because,
3 in my hypothetical, the individuals have all
4 moved to Lithuania. All you have is the
5 corporate assets in the bank and minutes that
6 prove it was a corporate decision.

7 What's new about it? Why is it
8 creating a form of action? What's the reason it
9 shouldn't be there? I mean -- I -- I don't see
10 -- is it a different rule again for
11 partnerships? Different rule again for, I don't
12 know, limited liability companies or -- I mean,
13 there are many forms of doing business. Why?

14 MR. GANNON: Well, we think that in
15 Jesner and in Malesko the Court recognized that
16 extending liability to a corporate --
17 corporation is a marked extension of liability.

18 JUSTICE BREYER: Then you missed my
19 question unless you're going to answer it there.
20 What's extending it? As I said, there have been
21 -- there are suits abroad. I think I've seen
22 citations to them. And suits, many -- tens,
23 hundreds perhaps, 200, 180, brought against
24 corporations under the ATS.

25 MR. GANNON: Yes. But many of those

1 suits now need to be thrown out under Jesner
2 because they were foreign corporations.

3 JUSTICE BREYER: Yeah, yeah.

4 MR. GANNON: And Malesko demonstrated
5 that merely having an underlying form of civil
6 liability for individuals doesn't necessarily
7 mean that it should be extended to corporations.
8 And you're right, there may be a background rule
9 that corporations are generally liable for the
10 torts of their agents.

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

24 Now Congress did take a different
25 route in the Trafficking Victims Protection Act

1 where they ultimately recognized a civil remedy,
2 but it departs from the ATS in multiple ways.
3 It didn't make the civil provision retroactive.
4 It doesn't discriminate between a U.S.
5 corporation and a foreign corporation found in
6 the United States. It's arguably
7 extraterritorial at Morrison step 1 in a way
8 that the ATS is not. And it provides a specific
9 cause of action with details that are tailored
10 to the particular violations at issue. So --

11 CHIEF JUSTICE ROBERTS: Justice Alito.

12 JUSTICE ALITO: Are you aware of ATS
13 suits based on conduct that occurred in the
14 United States? Why would someone bring such a
15 claim?

16 MR. GANNON: Well, if the -- I think
17 that the canonical example would have been
18 something like the Marbois incident. If the
19 only cause of action was something that needed
20 to be brought under the law of nations, then the
21 ATS would have provided jurisdiction for that.

22 JUSTICE ALITO: Yeah, that -- I mean,
23 that was -- that was necessary under domestic
24 law as it existed at the time. But, under
25 current circumstances, have there been ATS suits

1 based on conduct in the United States?

2 MR. GANNON: It -- it -- I'm not aware
3 of suits that are -- that are entirely
4 U.S.-based, Justice Alito.

5 JUSTICE ALITO: Won't your arguments
6 about aiding and abetting and
7 extraterritoriality all lead to essentially the
8 same result as holding that a domestic
9 corporation cannot be sued under the ATS?
10 Corporations always act through natural persons,
11 so if a corporation can't aid and abet, there --
12 there will be only a sliver of activity where
13 they could be responsible under respondeat
14 superior, isn't that true?

15 MR. GANNON: Well, I think, whether or
16 not the Court recognizes aiding and abetting
17 liability, there will be a separate question
18 about whether respondeat superior type of
19 liability should apply.

20 I think Sosa as -- and in other cases,
21 the Court has suggested that there could be
22 other limits. And, obviously, Congress knows
23 how to impose those sorts of limits. And in the
24 civil action it provided in 1595 for -- for
25 crimes associated with slavery and forced labor,

1 it specifically extended that action to whoever
2 knowingly benefits financially or receiving
3 anything of value from a venture that engaged in
4 that underlying conduct.

5 And so I think part of the question is
6 going to be whether you recognize aiding and
7 abetting liability or whether you're going to
8 require the corporation to commit the actual
9 tort or its agents to commit the actual
10 underlying tort.

11 JUSTICE ALITO: All right. Yeah.
12 Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor.

15 JUSTICE SOTOMAYOR: Counsel, I -- I'm
16 -- I think I'm reading your brief right, that
17 you don't think there's an aiding and abetting
18 liability at all under international law.

19 But both Blackstone and the first
20 Congress recognized that facilitating piracy was
21 a crime, and this Court reaffirmed that in nine
22 -- 1795 in the Talbot case. Post-World War II,
23 military tribunals held individuals liable for
24 assisting the German government's war crimes.
25 The international criminal tribunals for the

1 former Yugoslavia and for Rwanda, the Special
2 Court for Sierra Leone all have imposed aiding
3 and abetting liability.

4 So I'm having a very hard time
5 accepting that if an individual aided and
6 abetted in the United States or anywhere else
7 that we couldn't hold that individual liable.

8 Could you explain to me why -- I'm
9 going to set aside the corporate for a moment.
10 Could you set aside for me why you think
11 international law -- there's not an
12 international law against aiding and abetting
13 something as heinous as child slavery?

14 MR. GANNON: We -- we are not
15 disputing the international law level of this
16 analysis, Justice Sotomayor. Just as with the
17 question about corporate liability, we think
18 that this is something that a court, if it wants
19 to reach the question, could do entirely at step
20 2 of Sosa.

21 And so even assuming that there's a
22 sufficiently defined norm at international law
23 at step 1, the question is still going to be
24 whether the Court would recognize an extension
25 of --

1 JUSTICE SOTOMAYOR: All right. Now --

2 MR. GANNON: -- liability for aiding
3 and abetting that --

4 JUSTICE SOTOMAYOR: -- now let me stop
5 at Sosa step 2. I'm -- I -- I don't know if I
6 misread your brief or it's become more nuanced
7 now, but however, your answer's more nuanced
8 now.

9 MR. GANNON: Okay.

10 JUSTICE SOTOMAYOR: It doesn't make
11 sense to me -- it might make sense to me in
12 accordance with our rule in Jesner that we
13 shouldn't hold corporations liable for --
14 foreign corporations liable for conduct that
15 they conduct in foreign countries. I see all of
16 the foreign and domestic conflicts that could
17 occur there.

18 I do not see the same conflict with
19 holding an American corporation liable for the
20 acts -- for acts it commits here, putting aside
21 that -- the allegations and their sufficiency in
22 this case, taking the hypothetical that Justice
23 Alito set forth where most of the conduct was --
24 aiding and abetting conduct occurred here, it
25 just -- I do not understand why international

1 law would not have seen that as proper exercise
2 of our power to say that our domestic
3 corporations cannot aid and abet in the United
4 States and be held liable under the ATS.

5 CHIEF JUSTICE ROBERTS: Briefly,
6 counsel.

7 MR. GANNON: Yes, briefly, our reason
8 is not one of international law. It is that
9 under Central Bank of Denver, the Court has
10 recognized that when Congress recognizes primary
11 civil liability, that doesn't incorporate the
12 expansion associated with aiding and abetting
13 liability, unless Congress separately provides
14 for that.

15 CHIEF JUSTICE ROBERTS: Justice Kagan.

16 JUSTICE KAGAN: Mr. Gannon, one of the
17 amicus briefs in this case says that many of the
18 countries around the world with the strongest
19 rule of law systems do hold their own
20 corporations civilly liable for the kinds of
21 actions at issue here. And the amicus brief
22 says that's true of the United Kingdom, France,
23 Germany, Japan, Canada. Do you know of anything
24 that suggests otherwise?

25 MR. GANNON: Well, I'm not sure about

1 other countries, but I do think that one point
2 is that they are doing that as a matter of
3 domestic law and not always with an analogy that
4 is like the ATS.

5 And, here, the United States Congress
6 has actually provided for liability, civil
7 liability, for many violations of international
8 law.

9 JUSTICE KAGAN: I guess the point I'm
10 making here, Mr. Gannon, is -- you know, the
11 Chief Justice started out by saying that other
12 countries have not objected here. And that's
13 true, but one might make a broader point, that
14 the first Congress enacted the ATS in response
15 to its concerns about other nations being
16 offended by our failure to remedy international
17 law violations.

18 And one might ask why one would think
19 that another country would be less offended by
20 leaving a foreign victim without a remedy when
21 that victim is injured by a U.S. corporation
22 rather than by a U.S. -- a U.S. individual and,
23 indeed, that most of the countries around the
24 world with which we're usually associated as a
25 rule of law nation do not make that distinction.

1 MR. GANNON: One reason is because we
2 don't think that civil liability under the ATS
3 is the only way that Congress has to ensure that
4 we are holding U.S. persons accountable for
5 violations of human rights.

6 Under the Torture Victim Protection
7 Act, Congress didn't think that corporations
8 needed to be held liable in order for us to
9 effectuate our obligations to prevent torture.

10 And, similarly, Congress has provided
11 for other remedies besides the TV -- besides the
12 ATS. It has criminal consequences, the types of
13 things that Justice Sotomayor was talking about
14 for piracy, those were originally
15 criminal cases.

16 JUSTICE KAGAN: Thank you, Mr. Gannon.
17 Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch.

20 JUSTICE GORSUCH: I have no questions.
21 Thank you, Chief.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Chief
25 Justice.

1 And good morning, Mr. Gannon.

2 Footnote 21 in Sosa instructs the
3 courts to pay attention or give serious weight
4 to the executive branch's view of the case's
5 impact on foreign policy.

6 In your view, are you -- does this
7 case have an impact on foreign policy, or are
8 you making a more general argument about the
9 ATS?

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

13 JUSTICE KAVANAUGH: Okay. So are you
14 making any Footnote 21 argument at all about
15 this particular case having an impact on foreign
16 policy?

17 MR. GANNON: Not specifically. We are
18 saying that there are allegations in the
19 complaint that if this case were ultimately
20 brought to fruition, that, like the other types
21 of cases that have previously presented
22 concerns, may well point up a particular foreign
23 relations problem because they implicate the
24 actions of foreign officials potentially.

25 And separately we do say that there is

1 a potential interaction here between the
2 allegations of liability here and efforts that
3 the executive branch, Congress, other
4 governments are making in order to help solve
5 and ameliorate the human rights situation in
6 forced labor chains, that the Harkin-Engel
7 protocol is used by plaintiffs here as evidence
8 of liability rather than an instance where a
9 U.S. corporation is in -- is engaging in good
10 faith in efforts to try to ameliorate human
11 rights abuses.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett.

15 JUSTICE BARRETT: Counsel, I have a
16 question about aiding and abetting liability and
17 extraterritoriality. You say that the focus of
18 the tort should be the primary conduct, so,
19 here, what was happening in Cote d'Ivoire,
20 rather than the aiding and abetting, which you
21 characterize as secondary.

22 But why should that be so? I mean,
23 let's imagine you have a U.S. corporation or
24 even a U.S. individual that is making plans to
25 facilitate the use of child slaves, you know,

1 making phone calls, sending money specifically
2 for that purpose, writing e-mails to that
3 effect. Why isn't that conduct that occurs in
4 the United States something that touches and
5 concerns, you know, or should be the focus of
6 conduct, however you want to state the test?

7 MR. GANNON: Well, I -- I think that
8 there are two different ways of looking at that.
9 We do think that the focus test requires us to
10 look at the object of the statute's solicitude,
11 including the conduct that the statute seeks to
12 regulate.

13 And to the extent that the U.S.
14 corporation in your hypothetical is going to
15 engage in all of this conduct overseas, even
16 though some planning efforts -- activities
17 happen in the United States, if the actual tort
18 and the victims are happening and are located in
19 Cote d'Ivoire, then we think that that's where
20 the focus of the conduct associated with the --
21 with the tort is.

22 Now, if you just want to focus on the
23 aiding and abetting allegations or just say
24 we're only going to look at the -- at the
25 conduct by the U.S. corporation instead of the

1 people on the ground who are engaging in the
2 underlying tort, we still think that the
3 allegations in this case don't specifically
4 state enough in order to state a claim that
5 would not be extraterritorial.

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: A minute to
8 wrap up, Mr. Gannon.

9 MR. GANNON: Thank you, Mr. Chief
10 Justice.

11 Concerns that the political branches
12 have not moved quickly enough to resolve forced
13 labor problems in corporate supply chains in
14 this industry or elsewhere are not a license for
15 this Court to expand tort liability under the
16 ATS.

17 Having already ruled out ATS liability
18 for foreign corporations, the Court should not
19 adopt a different rule for U.S. corporations.
20 The contrast between the Torture Victim
21 Protection Act and the Trafficking Victims
22 Protection Act show that is a policy choice that
23 could go either way and the decision should be
24 made by Congress.

25 And if the Court reaches the question

1 of extraterritoriality, then even assuming that
2 aiding and abetting is actionable, the focus of
3 any forced labor tort here was overseas. That's
4 where the injury happened and where any
5 substantial assistance was provided.

6 So plaintiffs' claims call for an
7 impermissibly extraterritorial application of
8 the ATS. We urge the Court to reverse.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Hoffman.

12 ORAL ARGUMENT OF PAUL L. HOFFMAN

13 ON BEHALF OF THE RESPONDENTS

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

16 The first Congress in the Alien Tort
17 Statute provided a federal forum for foreign
18 citizens to bring cases for law of nations
19 violations without limitation as to defendants
20 for a series of tort liability.

21 Plaintiffs are former child slaves
22 seeking compensation from two U.S. corporations
23 which maintain a system of child slavery and
24 forced labor in their Ivory Coast supply chain
25 as a matter of corporate policy to gain a

1 competitive advantage in the U.S. market.

2 The international norms prohibiting
3 child slavery and forced labor are indisputably
4 specific, universal, and obligatory. The norms
5 apply directly to private parties, including
6 corporations.

7 Unlike *Kiobel* and *Jesner*, this case
8 does not seek to assert U.S. jurisdiction over
9 foreign corporations for actions against other
10 foreign citizens they took on foreign soil.
11 This case alleges violations of long-established
12 norms prohibiting child slavery and forced labor
13 by U.S. corporations from the United States.

14 The founders were particularly
15 concerned about actions of U.S. citizens that
16 might lead to foreign entanglements, and their
17 response was to provide for a federal judicial
18 forum to resolve such disputes based on the rule
19 of law.

20 The recent discovery of legal opinions
21 written by Thomas Jefferson and Edmund Randolph
22 in the 1790s make it clear that the ATS applied
23 when U.S. citizens violated the law of nations
24 on foreign soil and that the ATS's broad
25 language applied to violations beyond the

1 Blackstone norms without any need for further
2 congressional action.

3 These claims fit comfortably within
4 the text, history, and purpose of the ATS and
5 this Court's holding in *Sosa*, and it should be
6 allowed to proceed.

7 CHIEF JUSTICE ROBERTS: Counsel, this
8 case, of course, involves United States citizens
9 and United States courts. But, in the context
10 of that action, much of the focus is going to be
11 on conduct overseas, and those responsible for
12 that can be brought into court either as
13 witnesses or for aiding and abetting.

14 So why doesn't this type of action
15 present the same international relations
16 concerns that we've noted in -- in the prior
17 cases in this area?

18 MR. HOFFMAN: Well, the -- this --
19 this case is not different in many respects from
20 any transnational litigation. There -- there
21 certainly have been no problem with discovery
22 and other matters in most of these cases that
23 have gotten to discovery.

24 The Ivory Coast has -- has not
25 objected to the case at any point, hasn't said

1 anything about it. I think Mr. Gannon has said
2 that the United States has no particular
3 objection about this particular case on foreign
4 policy grounds within the Footnote 21 context or
5 others. So there really is no evidence that
6 that's true.

7 Moreover, Congress already decided in
8 the Trafficking Victim Protection Act that
9 forced labor and child slavery and -- or slavery
10 generally in supply chains is something for
11 which damage remedies are appropriate. And --
12 and, obviously, the Congress doesn't think that
13 those issues present any -- any of those
14 problems.

15 CHIEF JUSTICE ROBERTS: The -- the
16 TVPRA that you just mentioned, I think, is -- is
17 pertinent here. Congress is addressing the sort
18 of questions that you would have the Court
19 resolve as a matter of, I suppose, federal
20 common law.

21 And doesn't what Congress did in the
22 TVPRA suggest that they are cognizant of these
23 questions, they are active in the area, and it's
24 -- it's time for the Court to get out of the
25 unusual situation where it's -- it's making

1 rather than just interpreting law?

2 MR. HOFFMAN: Well, our -- our
3 response to that, Mr. Chief Justice, is that our
4 case arose, at least for these six former child
5 slaves, at a time when the TVPRA was not deemed
6 to be explicitly extraterritorial.

7 CHIEF JUSTICE ROBERTS: So -- so going
8 --

9 MR. HOFFMAN: And so I think --

10 CHIEF JUSTICE ROBERTS: -- well, then
11 -- then going forward, in other words, has --
12 has Congress sort of take -- taken the ball down
13 going -- going forward, whatever the precise
14 consequence may be in your litigation?

15 MR. HOFFMAN: It -- it is certainly
16 true that the TVPRA is broader than the ATS
17 claims that we are making in this case and that
18 it is -- seems very likely that any case from
19 2008 on would use the -- the Trafficking Victim
20 Protection Act rather than the ATS in making
21 these kinds of claims.

22 So our case is really an exceptional
23 case that arises before that. And I think that
24 the TVPRA answers the Sosa step 2 problems that
25 have been raised by the defendants and by -- by

1 the United States in its submissions to date.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas.

5 JUSTICE THOMAS: Thank you, Mr. Chief
6 Justice.

7 But the -- but the TVPA seems to
8 suggest that Congress does not see the ATS the
9 way you do. Obviously, there, you don't have
10 corporate liability and you don't have aiding
11 and abetting liability. So why shouldn't we
12 take that as an indication that Congress sought
13 limitations on -- on the ATS jurisdiction?

14 MR. HOFFMAN: Well, for one, the
15 Congress made it very clear when it passed the
16 TVPA that it was complementary to the Alien Tort
17 Statute and was not meant to displace it in any
18 way. And the language of the TVPA is different
19 from the ATS both in terms of its language, its
20 history, and its purpose.

21 It's not clear that -- that aiding and
22 abetting is not available under the TVPA, but --
23 but this Court certainly decided in Mohamad that
24 corporate liability is not available.

25 But the Court has said that it looks

1 to the most analogous statute. And what we
2 contend is that the Trafficking Victim
3 Protection Act, which deals specifically with
4 forced labor and slavery in supply chains, is
5 the most analogous.

6 And so whatever Congress thought about
7 corporate liability for claims of torture or
8 extrajudicial execution, Congress has made it
9 very clear that they believe that there should
10 be corporate liability when it comes to
11 knowingly benefiting from forced labor and
12 slavery in -- in the supply chain.

13 JUSTICE THOMAS: Are you -- just as a
14 matter of curiosity, you bring this under the
15 ATS, but could you have brought the same cause
16 of action or a similar cause of action under
17 different provisions or a different law or the
18 -- I'm -- I'm just thinking of whether or not
19 you could -- this could have been in diversity
20 or something else.

21 MR. HOFFMAN: I -- I -- I think that
22 this particular case in the way that it was
23 originally framed could not have been brought
24 under diversity jurisdiction because it -- it --
25 it included both citizens and non-citizens on

1 the other side. So diversity was not available,
2 but -- but the ATS directly applied --

3 JUSTICE THOMAS: Yeah.

4 MR. HOFFMAN: -- under these terms.

5 JUSTICE THOMAS: On a separate matter,
6 there seems to be some suggestion in the
7 arguments, the -- in some of the other arguments
8 that there's no new -- even though there's no
9 universal norm for aiding and abetting in the
10 civil context, it may well be in the criminal
11 context. What's your reaction to that?

12 MR. HOFFMAN: Well, I think, first of
13 all, our position is that aiding and abetting or
14 accessory liability in tort was widely available
15 at the time --

16 JUSTICE THOMAS: Yeah.

17 MR. HOFFMAN: -- it was passed. But
18 -- but, on the international level, it is our
19 position that the international community has
20 come up with specific universal and obligatory
21 norms with respect to aiding and abetting
22 serious violations of international human rights
23 law, which would include these norms for sure.

24 And, in fact, that's -- all the
25 circuits that have decided this question have

1 found that there is aiding and abetting
2 liability in ATS claims. They have differed
3 sometimes about the standards, sometimes adding
4 requirements that don't appear to be in the
5 customary international law norm, but they all
6 have recognized that there's -- that there are
7 aiding -- that there is aiding and abetting
8 under international law.

9 JUSTICE THOMAS: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Breyer.

12 JUSTICE BREYER: I'd like your views
13 on the following: Assume that there is
14 corporate liability for domestic corporations.
15 Assume that there is aiding and abetting
16 liability.

17 Now what counts as aiding and abetting
18 for purposes of this statute? When I read
19 through your complaint, it seemed to me that all
20 or virtually all of your complaints amount to
21 doing business with these people. They help pay
22 for the farm. And that's about it. And they
23 knowingly do it.

24 Well, unfortunately, child labor, it's
25 terrible, but it exists throughout the world in

1 many, many places. And if we take this as the
2 norm, particularly when Congress is now working
3 in the area, that will mean throughout the world
4 this is the norm.

5 And I don't know, but I have concern
6 that treating this allegation, the six that you
7 make here, as aiding and abetting falling within
8 that term for purposes of this statute, if other
9 nations do the same, and we do the same, could
10 have very, very significant effects.

11 I'm just saying I'm worried about
12 that. And I -- I want you to explain to me how
13 this should work.

14 MR. HOFFMAN: Well, Your Honor, we are
15 not taking the position that -- we're just
16 saying cocoa beans -- did enough to satisfy
17 aiding and abetting. Our position is that
18 what's really going on here is that these
19 corporations have set up a supply chain where
20 they know where cocoa beans are being made by
21 means of child slave labor and forced labor.
22 They know that that's where the cheap beans come
23 from. They have used things like financing and
24 payment --

25 JUSTICE BREYER: Yes, that sounds like

1 a business, a business that does business
2 blinking their eyes or open eyes with farmers
3 and others throughout the world who use child
4 labor.

5 MR. HOFFMAN: But -- but --

6 JUSTICE BREYER: Now, in this case, do
7 we want a judge to say you can't do that
8 anymore?

9 MR. HOFFMAN: Well, what -- what we're
10 saying is that a court should decide based on
11 the international principles of aiding and
12 abetting whether the -- these corporate
13 defendants have crossed the line between merely
14 doing business and facilitating that system.

15 The -- the amicus brief filed for
16 Tony's Chocolonely and the small and mid-sized
17 chocolate companies indicate exactly how
18 companies do business without facilitating child
19 slave labor in the Ivory Coast. It can be done.
20 There are requirements by -- by our allies in
21 Europe about how it should be done.

22 Who is doing it and not imposing
23 aiding and abetting liability for this
24 high-level kind of corporate decision-making and
25 policy would give these companies an unfair

1 competitive advantage on child labor that
2 violates these fundamental norms in ways that --
3 that our allies and others urge to eliminate.

4 JUSTICE BREYER: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Alito.

6 JUSTICE ALITO: Mr. Hoffman, I'm
7 interested in what your complaint alleges about
8 the mens rea of these particular defendants
9 regarding forced child labor.

10 You've had 15 years now to refine your
11 complaint, and I assume you've chosen your words
12 with care. In paragraph 50 on page 319 of the
13 Joint Appendix, you allege that "Defendants" in
14 general "not only purchased cocoa from farms
15 and/or farm cooperatives which they knew or
16 should have known relied on forced child labor."

17 So even putting aside the question of
18 which defendants you're referring to, you don't
19 even allege that they actually knew about forced
20 child labor.

21 Do you go further any place in the
22 complaint? And, if not, is "should have known,"
23 which is basically recklessness, enough for
24 aiding and abetting liability under either
25 international law or U.S. law?

1 MR. HOFFMAN: Your Honor, I don't
2 think that "should have known" would -- would
3 satisfy, but knowledge would satisfy the
4 international standards for aiding and abetting,
5 and we do -- we do contend that these defendants
6 knew exactly what they were doing in that supply
7 chain.

8 JUSTICE ALITO: Yeah, where -- where
9 do you -- where do I look in the complaint to
10 find that?

11 MR. HOFFMAN: Well, Your Honor, we --
12 we have alleged knowledge. The Ninth Circuit
13 interpreted our complaint as satisfying both
14 knowledge and purpose standard in terms of the
15 -- our aiding and abetting allegations.

16 JUSTICE ALITO: Yeah. Well, I -- I
17 read the complaint. Where do I find an
18 allegation of knowledge?

19 MR. HOFFMAN: Sorry, Your Honor. I
20 have to make sure to find this for you. You
21 know, we have -- I -- I think when you -- if you
22 take the allegations -- I don't have the
23 paragraph. What we have alleged is that these
24 defendants are intimately involved in the
25 cocoa-growing area and that they're not -- they

1 have knowledge because of the reports that have
2 been issued, because they -- they -- they send
3 their own people to investigate, and -- and --
4 and they file their reports back to the
5 headquarters, that they're intimately involved
6 with what goes on in their supply chain.

7 So we have alleged knowledge. Whether
8 we, you know -- the "should have known" is
9 superfluous, I think, to that, to the -- we've
10 alleged that they actually know about these
11 things --

12 JUSTICE ALITO: See now, this is an
13 important point, and this is something you have
14 to allege even under notice pleading. And I
15 assume you're really careful -- you were careful
16 about what you alleged because you don't want to
17 incur Rule -- Rule 11 liability.

18 So, after 15 years, is it too much to
19 ask that you allege specifically that the -- the
20 defendants involved -- the defendants who are
21 before us here specifically knew that forced
22 child labor was being used on the farms or farm
23 cooperatives with which they did business? Is
24 that too much to ask?

25 MR. HOFFMAN: And -- and -- and we've

1 -- we've been given an opportunity to amend our
2 complaint, as the Ninth Circuit has given us
3 that ability to lay this out. We have more
4 information, actually, since the second amended
5 complaint based on continuing investigation and
6 trips to the region.

7 And -- and, yes, we -- we can allege
8 that they knew that they were involved with the
9 farms in the region that supply child -- that
10 supply -- that involve child slave labor,
11 including the -- the -- the six former child
12 slaves who are plaintiffs in this case.

13 JUSTICE ALITO: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: Counsel, just so I
17 understand, you believe that the aiding and
18 abetting exists if they knew -- simply if they
19 knew that child labor was being used to produce
20 the cocoa beans and they bought the product?

21 MR. HOFFMAN: No, that's -- that's not
22 our position, Your Honor.

23 JUSTICE SOTOMAYOR: All right. So
24 knowledge that child labor was being used you
25 don't claim is enough.

1 MR. HOFFMAN: That's right.

2 JUSTICE SOTOMAYOR: Your complaint, as
3 I see it, alleges that there was some
4 decision-making in the United States to buy
5 these products from these kinds of farms. I
6 presume that's knowing that they're child labor.

7 But I don't see an allegation other
8 than sending representatives to look at the
9 farms so that knowledge could be imputed that
10 there's any other actual acts of aiding and
11 abetting that you have alleged against the
12 particular U.S. corporations that you're suing.

13 MR. HOFFMAN: Well, our position is
14 that the -- these corporations from their
15 headquarters have controlled every aspect of the
16 supply chain.

17 JUSTICE SOTOMAYOR: But I don't
18 understand what "control" means.

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

20 JUSTICE SOTOMAYOR: They -- I -- have
21 you shown that they directed a foreign
22 corporation, even if it's a subsidiary?

23 MR. HOFFMAN: Well, I think it
24 actually acted directly from corporate
25 headquarters. They sent people from corporate

1 headquarters in terms of getting information on
2 the ground, setting up cooperatives,
3 providing --

4 JUSTICE SOTOMAYOR: If you were given
5 leave to amend, you could actually show that
6 they transmitted the money, that they
7 directly -- I'm not talking about their
8 subsidiaries -- that the American corporations
9 actually directed the money to go --

10 MR. HOFFMAN: Yeah, our current
11 understanding is that -- is that these are
12 controlled by the corporate defendants and that
13 we would -- and we've been -- been asked to get
14 allegations particularly, separating out the
15 foreign corporations that have to be dismissed
16 after *Jesner*, to identify exactly what we
17 contend these domestic corporations have done.

18 And we think we do have enough
19 information to -- to link the decision-making
20 and corporate policy and the issue of getting
21 these cocoa beans from farms that --

22 JUSTICE SOTOMAYOR: Counsel, you're --
23 you're -- you're equivocating on my question.
24 It's not just a decision-making because we've
25 often said that decision-making is not enough

1 aiding and abetting, that you have to follow it
2 with an affirmative act.

3 MR. HOFFMAN: Right.

4 JUSTICE SOTOMAYOR: And so -- so
5 that's what I'm trying to get out of you.

6 MR. HOFFMAN: But the decision --

7 JUSTICE SOTOMAYOR: Can you show that
8 the affirmative act was actually sending money
9 to those places, that they're the funders,
10 direct funders of the farms, et cetera?

11 MR. HOFFMAN: Yes, no, I mean, what --
12 what -- what we've said is there are exclusive
13 marketing relationships that are -- that are
14 controlled by headquarters, that people are sent
15 from headquarters, money is sent from
16 headquarters, equipment is arranged from
17 headquarters, training is arranged for by
18 headquarters.

19 Our allegation is that these U.S.
20 companies control the aspects -- all the aspects
21 of the supply chain that leads directly to harms
22 that our plaintiffs were enslaved on and where
23 many thousands of other children are enslaved.

24 JUSTICE SOTOMAYOR: Thank you,
25 counsel.

1 CHIEF JUSTICE ROBERTS: Justice Kagan.

2 JUSTICE KAGAN: Mr. -- Mr. Hoffman, on
3 the question of corporate domestic liability,
4 the government makes the argument that *Jesner*
5 changed everything. It originally took the same
6 position that you're taking now on corporate
7 domestic liability. It said that that position
8 is now untenable, that once the Court held that
9 foreign corporations weren't liable, the Court
10 really can't hold that domestic corporations
11 are. What -- what is your response to that?

12 MR. HOFFMAN: Well -- well, first of
13 all, I think that the -- the evidence that
14 justified using *Sosa* step 2 to eliminate
15 liability against foreign corporations really
16 does exist with respect to domestic corporations
17 sued under the ATS.

18 And, actually, *Jesner* and *Kiobel* are
19 of a piece in a way. With what -- what this
20 Court has said is that ATS jurisdiction should
21 not be used to police the actions of foreign
22 corporations, particularly when they act
23 primarily on foreign soil, whereas our case is
24 completely different in the sense that the
25 United States has its own responsibilities in

1 these provisions. That was the original plan
2 that founded together the ATS, that we were
3 saying to the world we will enforce the law of
4 nations.

5 And I think that the Jefferson and
6 Randolph opinions recently underscored that,
7 that we made a commitment to the world that when
8 our citizens violate the law of nations, even if
9 it's outside U.S. territory, that we will
10 provide a forum for foreign citizens to do that.

11 Both Kiobel and Jesner deal with
12 completely different situations where there's
13 minimal contact with the United States and where
14 it's really the responsibility of other
15 countries to police their own corporations.

16 In Kiobel, for example, the
17 Netherlands has -- has allowed for a case on
18 behalf of the Kiobel plaintiffs against the same
19 defendants for the same allegations. So the
20 Netherlands has stepped up to police its own
21 corporations.

22 What we're saying is that the United
23 States has that obligation according to the
24 founders' original promise under the Alien Tort
25 Statute.

1 JUSTICE KAGAN: But, you know, as you
2 note, *Jesner* is a -- is a fractured decision.
3 There's a majority in some places, only a
4 plurality in other places.

5 If you look at that decision, what do
6 you think it tells us about the approach that we
7 need to use to answer the question of domestic
8 corporate liability for child slavery? I mean,
9 what is controlling, do you think, with respect
10 to how we go about answering that question?

11 MR. HOFFMAN: I don't think that there
12 is a controlling majority in *Jesner* about how to
13 approach that question. The plurality does
14 discuss the question of whether there needs to
15 be a specific and universal and obligatory norm
16 of corporate liability.

17 I think, for the reasons that the
18 Solicitor General's Office gave in the *Kiobel*
19 case and in *Jesner*, that corporate tort
20 liability is -- is well established and was
21 understood, I think, to the founders and
22 certainly has been a part of U.S. domestic
23 common law tort liability from the beginning, as
24 soon as there were corporations. And before
25 that, there were ships.

1 So we think that that's not -- that
2 basically what international law provides, are
3 the prohibitive norms, in this case, child
4 slavery and forced labor. But the means of
5 enforcing them are up to individual states.

6 And in the ATS, our first Congress
7 said that tort liability using common law
8 methods were something that our courts would
9 enforce the law of nations. And there's no
10 requirement that -- that there be mandatory
11 corporate liability. It's up to states.

12 And many states --

13 JUSTICE KAGAN: Thank you, Mr.
14 Hoffman. Thank you.

15 MR. HOFFMAN: Sorry.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch.

18 JUSTICE GORSUCH: Good morning, Mr.
19 Hoffman. I'd like to --

20 MR. HOFFMAN: Good morning.

21 JUSTICE GORSUCH: -- put aside for
22 purposes of my question the corporate versus
23 individual nature of the defendant and focus
24 solely on the cause of action.

25 MR. HOFFMAN: Yes.

1 JUSTICE GORSUCH: And -- and, here,
2 you're asking us to infer a new cause of action
3 for aiding and abetting. And I guess I want to
4 understand why I should be creating new causes
5 of action as a Judge today.

6 We have abandoned federal common law
7 in every other area after Erie, or at least we
8 proclaim to do so. And I'm not sure I
9 understand why the ATS should be different,
10 especially when Congress stands able and ready
11 to create new causes of action, as the Chief
12 Justice has pointed out it's done elsewhere.

13 That would be the appropriate -- more
14 appropriate place to create new legislation, it
15 would seem, and in every respect, what you're
16 asking us to do is a form of legislation.

17 And then finally I throw into the mix
18 Central Bank, which underscores that aiding and
19 abetting liability is a different thing and that
20 often there are good reasons not to have aiding
21 and abetting liability even when there's primary
22 liability.

23 So whatever I think about the
24 question, I have to at least acknowledge there
25 are good arguments for a lawmaker to consider on

1 both sides of that question, which, again, takes
2 me back to my question wondering whether I'm the
3 right person to be making this pitch to rather
4 than a legislator.

5 Can you help me with that?

6 MR. HOFFMAN: Sure, Your Honor.

7 The -- I think the -- the main answer
8 is that this Court in -- in *Sosa* decided that
9 the original authorization that the first
10 Congress made to the courts to enforce the law
11 of nations using common law methods was still
12 viable, notwithstanding *Erie* and notwithstanding
13 many of the arguments that -- that the
14 defendants make in this case, and that if there
15 was a specific universal and obligatory norm of
16 the same degree of definiteness and consensus as
17 the -- the norms that applied in the 18th
18 century, that it was appropriate for this Court
19 to recognize the ability to enforce those norms
20 by tort liability in our courts.

21 And -- and, basically, the -- the
22 norms about child slavery and forced labor are
23 as -- as quintessential *Sosa* qualifying norms as
24 could possibly be imagined.

25 Now, with respect to aiding and

1 abetting liability, for one, I think that if the
2 Court wants to reach that issue, I think it
3 would benefit from full briefing and argument on
4 that issue specifically because those were not
5 exactly in the questions presented, but -- but
6 our position on aiding and abetting liability is
7 that, in fact, the founders understood aiding
8 and abetting liability. There was aiding and
9 abetting liability in British common law that
10 was received in our law.

11 The Bradford opinion talks about U.S.
12 defendants -- U.S. nationals aiding and abetting
13 French -- the French in terms of their attack on
14 Sierra Leone. The Talbot decision, I think, as
15 Justice Sotomayor noticed, deals with aiding and
16 abetting liability.

17 So it's not -- the idea in the Alien
18 Tort Statute was to provide a remedy and
19 reparations when U.S. citizens violated the
20 rights of -- of foreign citizens. And the --
21 the first Congress was not looking to restrict
22 the -- the nature of liability. They were --
23 they would not want to exempt corporations and
24 give them immunity. They would not want to
25 limit the -- the decision to a place of injury.

1 What they were looking to do was to provide the
2 --

3 JUSTICE GORSUCH: Mr. Hoffman, I'm
4 afraid my -- my time's expired. Thank you very
5 much.

6 MR. HOFFMAN: I'm sorry.

7 JUSTICE GORSUCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh.

10 JUSTICE KAVANAUGH: Thank you, Chief
11 Justice.

12 And good morning and welcome,
13 Mr. Hoffman.

14 MR. HOFFMAN: Good morning.

15 JUSTICE KAVANAUGH: I have a different
16 flavor of Justice Gorsuch's broader question
17 about separation of powers. And this case
18 really is a case, I think, about the proper role
19 of the judiciary as compared to the proper role
20 of Congress here in fleshing out the Alien Tort
21 Statute.

22 As you know, Sosa and Jesner and our
23 other cases have said the court -- the courts
24 should not be out in front in fleshing out the
25 cause of action here. It didn't go -- it didn't

1 reject it entirely. It didn't take Justice
2 Scalia's position, but it shouldn't be out in
3 front.

4 And two sources in particular the
5 Court has said to look to to constrain the cause
6 of action to make sure, as Justice Gorsuch said,
7 we're not creating it ourselves, and one is, of
8 course, making sure the norm is sufficiently
9 rooted in international law, as you know.

10 And my concern on that is the language
11 of Sosa doesn't just talk about the norm, as you
12 know, but Footnote 20 specifically directs us to
13 look at the particular perpetrator being sued
14 and the category of perpetrator, whether it's a
15 corporation or individual.

16 And I've looked at this before, as you
17 know, and looked at it again, and I think it's
18 hard to argue that corporate liability in
19 international law is a specific universal and
20 obligatory -- or specific and universal.

21 Foreign law is different. Justice
22 Kagan rightly points that out. And there may be
23 debatable policy reasons for drawing a line
24 between individual and corporate liability, but
25 it's -- but it's hard to argue that it's there

1 in international law.

2 That's my concern in this case, stems
3 on the question presented on corporate liability
4 stems from Footnote 20 and the content, as I see
5 it, of international law. So I'll give you an
6 opportunity to respond to that.

7 MR. HOFFMAN: Well, Your Honor, I
8 think that the -- the -- the question I think we
9 would argue at Footnote 20 was addressed to the
10 distinction between norms that applied directly
11 to private parties, including corporations,
12 versus norms that required some connection to
13 state action. I think that the citations there
14 make that fairly clear.

15 I don't think it was saying that
16 corporate liability had to be a specific
17 universal and obligatory norm because that's
18 really not the way the international system
19 works. Many governments do impose corporate
20 liability for violations of international law.
21 For example, in a --

22 JUSTICE KAVANAUGH: That's a -- I
23 think that's a different question, though, and
24 that gets to Justice Kagan's point, which I
25 think is a good one, that foreign -- foreign law

1 does impose corporate liability, of course, as
2 does U.S. law in many circumstances, but
3 international law and the international
4 tribunals have not seemed to do so.

5 MR. HOFFMAN: Yeah, it's correct that
6 in -- in certain international tribunals for --
7 for reasons specific to those tribunals, did not
8 impose liability on corporations, but the Alien
9 Tort Statute's basically a tort statute. It's a
10 civil tort statute.

11 And I think the international human
12 rights amicus indicates that corporate liability
13 is a general principle of law. It applies in
14 all legal systems. It has applied in our legal
15 system from the beginning. It applied in -- in
16 Britain before we were a nation.

17 In other words, corporate tort
18 liability is the -- is the norm. It's not the
19 exception.

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

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

1 MR. HOFFMAN: Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett.

4 JUSTICE BARRETT: Counsel, in response
5 to a question by Justice Kagan, you said that
6 the ATS was a statement by the First Congress
7 that we will enforce the law of nations and
8 provide a forum for foreign citizens to do that.

9 But, of course, the ATS also did it to
10 protect the -- you know, the -- the policy
11 interests of the United States and to protect
12 the United States from retaliation by other
13 countries in circumstances in which it failed to
14 provide such a forum.

15 So we've talked a little bit about the
16 foreign policy implications or lack thereof of
17 our recognizing a cause of action against
18 domestic corporations for violations of
19 international law norms, but could you say a
20 little bit about any foreign policy implications
21 that might be the result of our failing to
22 recognize such a cause of action?

23 MR. HOFFMAN: Well, I think that,
24 certainly, the original idea -- and -- and --
25 and this is reflected in the -- the Jefferson

1 and Randolph opinions and in the Bradford
2 opinion with respect to the attack on Sierra
3 Leone -- other countries did protest in those
4 instances acts by U.S. citizens in their
5 territory that violated the law of nations and
6 -- and that the idea of the ATS was to provide
7 that forum so to avoid that kind of protest. It
8 -- it didn't require a --

9 JUSTICE BARRETT: But -- but would we
10 -- I -- I guess my question is, do you think
11 that the United States would face such protest
12 in this circumstance, in this suit?

13 MR. HOFFMAN: Well, it hasn't. I
14 mean -- and -- and for one thing, it's not clear
15 whether there's a forum or there isn't a forum.
16 So the Ivory Coast wouldn't have reason at this
17 point to -- to protest.

18 You know, it's not clear whether, in
19 today's world, there would be protests of the
20 same nature, but it seems to me that the -- that
21 the -- the purpose of the statute was to provide
22 that kind of forum. And Sosa interpreted that
23 to -- to limit it in some respects to certain
24 fundamental international human rights norms
25 without the --

1 JUSTICE BARRETT: Let's return to the
2 question of the potential foreign policy
3 implications of extending liability to domestic
4 corporations in this circumstance.

5 So Mr. Katyal was pointing out that
6 domestic corporations often have relationships
7 with foreign subsidiaries or parent corporations
8 and, therefore, that many of the same concerns
9 that we identified in *Jesner* would be implicated
10 by the recognition of liability in this context
11 as well.

12 So what do you have to say to that?
13 Would recognizing liability here against a
14 domestic corporation with foreign -- foreign
15 relatives just permit an end run around *Jesner*?

16 MR. HOFFMAN: I think that in this
17 particular instance, Cargill and Nestle USA are
18 in different circumstances. Cargill is
19 obviously only a U.S. corporation and doesn't
20 raise those issues.

21 The issue with Nestle, I think, if --
22 if it is, in fact, the case that Nestle
23 Switzerland, the parent, is actually the one
24 controlling and that we're wrong, I think that,
25 in fact, under *Jesner*, probably there can't be a

1 viable ATS claim against Nestle USA.

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

5 JUSTICE BARRETT: Thank you.

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

8 MR. HOFFMAN: Thank you, Mr. Chief
9 Justice.

10 Few international norms are as
11 fundamental as the prohibitions against child
12 slavery and forced labor. Plaintiffs' claims
13 satisfy every Sosa requirement and fit squarely
14 within the text, history, and purpose of the
15 ATS.

16 The ATS represents a commitment to
17 enforce the law of nations in our courts, a
18 commitment Congress has never withdrawn or
19 restricted, and certainly not with respect to
20 child slavery.

21 This Court should reaffirm that
22 commitment and should allow these former child
23 slaves to have their day in court.

24 Thank you, Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Katyal, rebuttal?

3 REBUTTAL ARGUMENT OF NEAL K. KATYAL

4 ON BEHALF OF THE PETITIONERS

5 MR. KATYAL: Four points, Your Honor.

6 First, Nestle and Cargill abhor child
7 slavery. This case isn't about that. It's
8 about whether this old statute applies
9 extraterritorially and who can be sued.

10 When asked by Justices Alito and
11 Sotomayor where in the complaint is there any
12 knowledge of slavery by the defendants, my
13 friend couldn't answer. Zilch.

14 This case is an easy one on
15 extraterritoriality where there is no U.S.
16 injury and little U.S. conduct. Accepting the
17 complaint would create the craven watchdog
18 problem of Morrison. Indeed, a breathtaking
19 kennel of problems, as my friend's opening line
20 admitted that, lawsuits "without limitation on
21 defendants or theories of tort liability."

22 And even if aiding and abetting
23 liability exists, Justice Sotomayor, it doesn't
24 get around extraterritoriality. Rather, its
25 ambiguity highlights the problem, as Justice

1 Breyer's worry to my friend shows. The ATS's
2 focus is still the injury or principal
3 wrongdoing. Otherwise, it's truly aiding and
4 amorphousness.

5 Second, my friend suggests our view
6 guts human rights law. But ours was a law for
7 at least the first 200 years with no practice of
8 ATS liability. Indeed, Congress knows how to
9 fashion specific remedies for the extreme
10 hypotheticals and already has.

11 I heard no answer from my friend to
12 the five mechanisms to prevent abuse.

13 Third, my friend's arguments never
14 grapple with Justice Kavanaugh's point that in
15 every case -- that every case has said that this
16 Court shouldn't be out in front. It's his high
17 burden under *Sosa* to convince you a specific
18 universal norm exists. He doesn't.

19 Fourth and finally, for corporate
20 liability, Justice Breyer, in your query what's
21 new, this Court's majority, not the plurality,
22 Justice Kagan, in *Jesner*, said there are harms
23 to separation of powers and hard policy choices
24 about how to maximize deterrence, foreign
25 investment, and foreign policy.

1 Congress sometimes uses corporate
2 liability and sometimes doesn't, like the TVPA.
3 The queries today about how can we exempt
4 corporations, it makes no sense, could be said
5 about torture, but in the TVPA, Congress said
6 there was no liability for corporations.

7 The fact that there are two reasonable
8 choices shows you should defer to Congress.

9 Same with extraterritoriality.
10 Sometimes Congress extends a statute that way,
11 like genocide, other times it doesn't. Nothing
12 in the ATS says it reaches an injury halfway
13 across the globe.

14 And the new Jefferson and Randolph
15 letters are about U.S. conduct, bringing people
16 to the U.S. as slaves, and they're about
17 alienage jurisdiction under Article III.
18 Neither says the ATS overcomes the
19 extraterritoriality bar.

20 Justice Breyer, you asked, do we want
21 a judge deciding this? This thin and accusatory
22 complaint and my friend's admission of just how
23 open-ended and transformative his liability
24 would be answers that question.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:28 a.m., the case
3 was submitted.)

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