

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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NESTLE USA, INC., )  
                          Petitioner, )  
                          v. ) No. 19-416  
JOHN DOE I, ET AL., )  
                          Respondents. )

- - - - -  
CARGILL, INC., )  
                          Petitioner, )  
                          v. ) No. 19-453  
JOHN DOE I, ET AL., )  
                          Respondents. )

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Washington, D.C.

Tuesday, December 1, 2020

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:00 a.m.

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7 supporting the Petitioners.

8 PAUL L. HOFFMAN, ESQUIRE, Hermosa Beach, California;

9 on behalf of the Respondents.

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

2 (10:00 a.m.)

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

7 Mr. Katyal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. KATYAL: And that very case --

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

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

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



1 this case, but not others.

2 And finally --

3 CHIEF JUSTICE ROBERTS: Thank you.

4 Thank you, counsel.

5 Justice Thomas.

6 JUSTICE THOMAS: Thank you, Mr. Chief

7 Justice.

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

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

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

1 principal wrong.

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

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

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

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

1           And, here, there isn't. The only  
2 evidence they can even point to about child  
3 slavery in particular is one source, a 1930  
4 Liberia report, that says, although government  
5 officials used their authority to force labor,  
6 there's no evidence that the only corporation in  
7 the country did so.

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

14           And so, Justice Thomas --

15           JUSTICE THOMAS: Thank you.

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

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

25           Now that's so, isn't it? This statute

1 was designed, in part, to give a remedy. But  
2 suppose instead of, I think Mr. Marbois, I'm not  
3 certain which -- which of the parties he is, but  
4 suppose instead of him going up and hitting the  
5 French Secretary, he had been the president of a  
6 corporation and they all sat around and said: I  
7 have a great idea. Let's hit the French  
8 Secretary. So they pass a resolution and went  
9 out and hit the French 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 hypotheticals 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 1799 imposed criminal liability for wherever the  
6 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 we would argue --

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: Those are the  
3 substantive issues.

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 the  
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 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 you really don't  
24      --

25             JUSTICE KAGAN: -- Mr. -- sorry to

1 interrupt, Mr. Katyal. There's an amicus brief  
2 by Professor Hathaway that details the long  
3 history of imposing liability on slave ships.  
4 Those were not individuals, were they?

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

11 JUSTICE KAGAN: Thank you, Mr. Katyal.

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

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Gorsuch.

17 JUSTICE GORSUCH: Good morning,  
18 Mr. Katyal. I -- I'd actually like to pick up  
19 on -- on this questioning. I don't see anything  
20 in the language of the statute for the rationale  
21 which Justice Breyer was alluding to for the  
22 ATS. I think the brief for the United States  
23 provides a mechanism for aliens to remedy wrongs  
24 that would otherwise be held against them and  
25 perhaps be lawful causes for war against the

1 United States.

2 And on -- on -- on those two lines, on  
3 the language and on the rationale that this  
4 Court has long adopted, recognized for the ATS,  
5 why would we exempt --

6 MR. KATYAL: So --

7 JUSTICE GORSUCH: I understand your  
8 policy arguments.

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

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

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

25 And our fundamental -- or it imposes



1 lots of problems, like mens rea and the like.

2 And fundamental --

3 JUSTICE GORSUCH: I don't believe you  
4 -- okay. I -- I -- I -- I understand your  
5 responses there. I don't believe you did get a  
6 chance to fully respond to Justice Kagan on the  
7 last point. I would like an answer to that.

8 And that is we do know one thing about the ATS,  
9 is that it did permit in rem jurisdiction  
10 against things, in particular, pirate ships.

11 If in rem jurisdiction was part of the  
12 ATS's contemplation, why wouldn't corporate  
13 liability, which then didn't exist, I mean, it  
14 didn't exist in widespread form, but why  
15 wouldn't the same concept apply?

16 MR. KATYAL: For -- for the exact  
17 reasons --

18 JUSTICE GORSUCH: Briefly.

19 MR. KATYAL: -- that the Court said in  
20 *Jesner*, Justice Gorsuch, which is -- you know,  
21 the same argument was made there. And what the  
22 Court said is that doesn't come close to meeting  
23 the kind of specific universal obligatory norm,  
24 and the Court has to proceed with great caution  
25 because you're being asked to fashion a common

1 law remedy --

2 JUSTICE GORSUCH: Thank you,  
3 Mr. Katyal.

4 MR. KATYAL: -- which is not  
5 something --

6 JUSTICE GORSUCH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Kavanaugh.

9 JUSTICE KAVANAUGH: Thank you, Chief  
10 Justice.

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

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

22 MR. KATYAL: Well, I really feel like  
23 that's some overheated rhetoric. You know,  
24 after all, for 200 plus years this statute's  
25 been around, there's not a successful example of

1 a case like this ever, Justice Kavanaugh.

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

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

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

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Barrett.

25 JUSTICE BARRETT: Mr. Katyal, a lot of

1 the questions you've been asked thus far focus  
2 on whether there's a specific universal and  
3 obligatory norm here. And that, you know, as  
4 many of my colleagues have pointed out, raises  
5 some complications.

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

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

20 And this case is a perfect example of  
21 this. There's very limited U.S. conduct that is  
22 alleged in the complaint, and yet they want to  
23 make the hugest of federal cases out of it.

24 JUSTICE BARRETT: Well, if we do  
25 resolve it at Sosa step 2, when would we ever

1 recognize a cause of action? Because, you know,  
2 most cases will raise the same -- let's focus on  
3 the separation of powers prong. Most cases  
4 raise this question of the intricate policy  
5 questions that may be better left to Congress.  
6 I mean, we've been very restrained in the Bivens  
7 context about recognizing more causes of action.

8 I mean, would this just kind of halt  
9 recognition of new causes of action altogether  
10 if we adopt your position?

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

23 We don't think you --

24 JUSTICE BARRETT: It's not if a  
25 corporation was -- was the perpetrator sued in

1 any of those cases?

2 MR. KATYAL: Right. We don't think  
3 that -- that --

4 JUSTICE BARRETT: Court cases.

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

13 JUSTICE BARRETT: Thank you,  
14 Mr. Katyal. My time's expired.

15 CHIEF JUSTICE ROBERTS: A minute to  
16 wrap up, counsel.

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

25 And when there are those allegations

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

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

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

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Mr. Gannon.

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

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

25 The United States condemns child

1 slavery and trafficking. Congress has expressly  
2 provided for criminal and civil liability for  
3 forced labor in certain circumstances. And the  
4 federal government has specifically supported  
5 efforts to eliminate the worst forms of child  
6 labor at cocoa farms in Cote d'Ivoire.

7 But this Court should not extend the  
8 reach of the Alien Tort Statute to encompass  
9 Respondents' claims in this case for two  
10 principal reasons.

11 First, the ATS does not authorize  
12 liability for domestic corporations for the same  
13 reasons that the majority and the plurality in  
14 *Jesner* found that foreign corporations are not  
15 liable. As the *Jesner* majority said, a decision  
16 to extend liability from natural persons to  
17 corporations must be made by Congress rather  
18 than the judiciary.

19 And, second, the aiding and abetting  
20 conduct alleged against defendants does not  
21 overcome the bar against extraterritorial  
22 application of the ATS.

23 CHIEF JUSTICE ROBERTS: Counsel, I  
24 want to ask you the same question I asked Mr.  
25 Katyal. We don't have objections from foreign



1 countries in this case. As far as we can tell,  
2 they're perfectly comfortable having U.S.  
3 citizens, U.S. corporations hailed into their U  
4 -- in U.S. courts.

5 What should we make of that, and  
6 doesn't that suggest we ought to be a little  
7 more -- a little less cautious about finding a  
8 cause of action here?

9 MR. GANNON: Well, in general, you  
10 recognize correctly, I think, that you should be  
11 cautious about extending the cause of action.

12 In previous cases, you've recognized  
13 that this is a question about whether there's a  
14 general threat posed by these types of cases,  
15 and whether or not there's a threat posed by  
16 this specific case, cases against domestic  
17 corporations can, indeed, be used as proxy  
18 challenges to foreign governments or to foreign  
19 parent or subsidiary corporations.

20 And the United States has raised  
21 specific foreign policy concerns in cases  
22 involving U.S. corporations, including Doe  
23 against Exxon, Polimeni and American Isuzu,  
24 other cases.

25 But even in this case, the allegations

1 are somewhat inchoate even though the case is 15  
2 years old, but there are ways, as Mr. Katyal  
3 pointed out, that this case could still threaten  
4 foreign affairs interests if it comes to  
5 fruition because --

6 CHIEF JUSTICE ROBERTS: Counsel, if --  
7 if the United States corporation sent domestic  
8 employees to the Ivory Coast for the express  
9 purpose of setting up a cocoa farm that uses  
10 child slavery, would that conduct touch and  
11 concern the United States as we use those terms  
12 in Kiobel?

13 MR. GANNON: Well, I think that it --  
14 it depends on how much conduct happens in the  
15 United States and how much conduct happens  
16 overseas. We think that the Court has clarified  
17 that the way Kiobel is talking about that, it's  
18 whether the -- whether the conduct touches the  
19 territory of the United States. And we think  
20 that it's the conduct in question, not the --  
21 not the citizenship of the parties, and --

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Justice Thomas.

25 JUSTICE THOMAS: Thank you, Mr. Chief

1 Justice.

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

10 I'd like you to -- if you can, to  
11 respond to some of the concerns raised by my  
12 colleagues with respect to the corporate form  
13 and to at least explain or correct me if I'm  
14 wrong about your prior positions, the  
15 government's prior positions, as to the coverage  
16 of the corporate form.

17 MR. GANNON: Justice Thomas, we did  
18 previously not urge the Court to adopt a  
19 categorical rule eliminating corporate liability  
20 under the ATS. But we're trying to be  
21 consistent with the Court's precedents here, and  
22 *Jesner* rejected key parts of our argument there  
23 and key parts of our reasoning, and it  
24 reinforced a connection between the ATS caution  
25 that the Court should have about recognizing new

1 forms of liability and extensions of liability  
2 in other areas such as Bivens. It reinforced  
3 that connection in Hernandez.

4 And we've consistently opposed  
5 corporate liability in the context of Bivens,  
6 and under that rubric, we think that the same  
7 answer applies here.

8 And we -- the question that the Court  
9 is asking is whether there is reason to doubt  
10 whether Congress would want this damages remedy  
11 to be available for artificial persons.

12 And we know that there are times when  
13 Congress makes that decision. It did so in the  
14 Torture Victim Protection Act. This Court did  
15 so in Malesko.

16 And now that Jesner has made foreign  
17 corporations not liable, it would be especially  
18 incongruous to discriminate on the basis of the  
19 defendant's nationality in the corporate context  
20 because we know that that's not happening in the  
21 context of natural persons.

22 The Marbois incident that Justice  
23 Breyer brought up has been discussed by Sosa and  
24 Kiobel, and in both cases, the Court assumed  
25 that both the Frenchman and the New York

1 constable who assaulted an ambassador in the  
2 United States would be liable.

3 So, if both foreign and U.S. natural  
4 persons are liable, we think that Congress  
5 should be the one that makes the decision that  
6 U.S. corporations would be discriminated against  
7 in a way that foreign corporations are not.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Breyer.

11 JUSTICE BREYER: I'd like to hear, if  
12 you would, the government's answer to the same  
13 question that I think Justice Thomas --  
14 everybody's been asking, use Justice Kagan's  
15 example if you want or my example, of what's new  
16 about suing corporations?

17 When I looked it up once, there were  
18 180 ATS lawsuits against corporations. Most of  
19 them lost but on other grounds. So why not sue  
20 a domestic corporation?

21 You can't sue the individual because,  
22 in my hypothetical, the individuals have all  
23 moved to Lithuania. All you have is the  
24 corporate assets in the bank and minutes that  
25 prove it was a corporate decision.

1           What's new about it? Why is it  
2           creating a form of action? What's the reason it  
3           shouldn't be there? In -- I -- I don't see --  
4           is it a different rule again for partnership?  
5           Different rule again for, I don't know, limited  
6           liability companies or -- I mean, there are many  
7           forms of doing business. Why?

8           MR. GANNON: Well, we think that in  
9           Jesner and in Malesko the Court recognized that  
10          extending liability to a corporate --  
11          corporation is a marked extension of liability.

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

19          MR. GANNON: Yes. But many of those  
20          suits now need to be thrown out under Jesner  
21          because they were foreign corporations.

22          JUSTICE BREYER: Yeah, yeah.

23          MR. GANNON: And Malesko demonstrated  
24          that merely having an underlying form of civil  
25          liability for individuals doesn't necessarily

1 mean that it should be extended to corporations.  
2 And you're right, there may be a background rule  
3 that corporations are generally liable for the  
4 torts of their agents.

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

18           Now Congress did take a different  
19 route in the Trafficking Victims Protection Act  
20 where they ultimately recognized a civil remedy,  
21 but it departs from the ATS in multiple ways.  
22 It didn't make the civil provision retroactive.  
23 It doesn't discriminate between a U.S.  
24 corporation and a foreign corporation found in  
25 the United States. It's arguably

1 extraterritorial at Morrison step 1 in a way  
2 that the ATS is not. And it provides a specific  
3 cause of action with details that are tailored  
4 to the particular violations at issue. So --

5 CHIEF JUSTICE ROBERTS: Justice Alito.

6 JUSTICE ALITO: Are you aware of ATS  
7 suits based on conduct that occurred in the  
8 United States? Why would someone bring such a  
9 claim?

10 MR. GANNON: Well, if the -- I think  
11 that the canonical example would have been  
12 something like the Marbois incident. If the  
13 only cause of action was something that needed  
14 to be brought under the law of nations, then the  
15 ATS would have provided jurisdiction for that.

16 JUSTICE ALITO: Yeah, that -- I mean,  
17 that was -- that was necessary under domestic  
18 law as it existed at the time. But, under  
19 current circumstances, have there been ATS suits  
20 based on conduct in the United States?

21 MR. GANNON: It -- it -- I'm not aware  
22 of suits that are -- that are entirely  
23 U.S.-based, Justice Alito.

24 JUSTICE ALITO: Won't your arguments  
25 about aiding and abetting and



1 extraterritoriality all lead to essentially the  
2 same result as holding that a domestic  
3 corporation cannot be sued under the ATS?  
4 Corporations always act through natural persons,  
5 so if a corporation can't aid and abet, there --  
6 there will be only a sliver of activity where  
7 they could be responsible under respondeat  
8 superior, isn't that true?

9 MR. GANNON: Well, I think, whether or  
10 not the Court recognizes aiding and abetting  
11 liability, there will be a separate question  
12 about whether respondeat superior type of  
13 liability should apply.

14 I think Sosa and -- and in other  
15 cases, the Court has suggested that there could  
16 be other limits. And, obviously, Congress knows  
17 how to impose those sorts of limits. And in the  
18 civil action it provided in 1595 for -- for  
19 crimes associated with slavery and forced labor,  
20 it specifically extended that action to whoever  
21 knowingly benefits financially or receiving  
22 anything of value from a venture that engaged in  
23 that underlying conduct.

24 And so I think part of the question is  
25 going to be whether you recognize aiding and

1 abetting liability or whether you're going to  
2 require the corporation to commit the actual  
3 tort or its agents to commit the actual  
4 underlying tort.

5 JUSTICE ALITO: All right. Yeah.  
6 Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Sotomayor.

9 JUSTICE SOTOMAYOR: Counsel, I -- I'm  
10 -- I think I'm reading your brief right, that  
11 you don't think there's an aiding and abetting  
12 liability at all under international law.

13 But both Blackstone and the first  
14 Congress recognized that facilitating piracy was  
15 a crime, and this Court reaffirmed that in nine  
16 -- 1795 in the Talbot case. Post-World War II,  
17 military tribunals held individuals liable for  
18 assisting the German government's war crimes.  
19 The international criminal tribunals for the  
20 former Yugoslavia and for Rwanda, the Special  
21 Court of Sierra Leone all have imposed aiding  
22 and abetting liability.

23 So I'm having a very hard time  
24 accepting that if an individual aided and  
25 abetted in the United States or anywhere else

1 that we couldn't hold that individual liable.

2           Could you explain to me why -- I'm  
3 going to set aside the corporate for a moment.  
4 Could you set aside for me why you think  
5 international law -- there's not an  
6 international law against aiding and abetting  
7 something as hideous as child slavery?

8           MR. GANNON: We -- we are not  
9 disputing the international law level of this  
10 analysis, Justice Sotomayor. Just as with the  
11 question about corporate liability, we think  
12 that this is something that a court, if it wants  
13 to reach the question, could do entirely at step  
14 2 of Sosa.

15           And so even assuming that there's a  
16 sufficiently defined norm at international law  
17 at step 1, the question is still going to be  
18 whether the Court would recognize an extension  
19 of --

20           JUSTICE SOTOMAYOR: All right. Now --

21           MR. GANNON: -- liability for aiding  
22 and abetting that --

23           JUSTICE SOTOMAYOR: -- now let me stop  
24 at Sosa step 2. I'm -- I -- I don't know if I  
25 misread your brief or it's become more nuanced

1 now, but however, your answer's more nuanced  
2 now.

3 MR. GANNON: Okay.

4 JUSTICE SOTOMAYOR: It doesn't make  
5 sense to me -- it might make sense to me in  
6 accordance with our rule in *Jesner* that we  
7 shouldn't hold corporations liable for --  
8 foreign corporations liable for conduct that  
9 they conduct in foreign countries. I see all of  
10 the foreign and domestic conflicts that could  
11 occur there.

12 I do not see the same conflict with  
13 holding an American corporation liable for the  
14 acts -- for acts it commits here, putting aside  
15 that -- the allegations and their sufficiency in  
16 this case, taking the hypothetical that Justice  
17 Alito set forth where most of the conduct was --  
18 aiding and abetting conduct occurred here, it  
19 just -- I do not understand why international  
20 law would not have seen that as proper exercise  
21 of our power to say that our domestic  
22 corporations cannot aid and abet in the United  
23 States and be held liable under the ATS.

24 CHIEF JUSTICE ROBERTS: Briefly,  
25 counsel.

1           MR. GANNON: Yes, briefly, our reason  
2 is not one of international law. It is that  
3 under Central Bank of Denver, the Court has  
4 recognized that when Congress recognizes primary  
5 civil liability, that doesn't incorporate the  
6 expansion associated with aiding and abetting  
7 liability, unless Congress separately provides  
8 for that.

9           CHIEF JUSTICE ROBERTS: Justice Kagan.

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

19          MR. GANNON: Well, I'm not sure about  
20 other countries, but I do think that one point  
21 is that they are doing that as a matter of  
22 domestic law and not always with an analogy that  
23 is like the ATS.

24          And, here, the United States Congress  
25 has actually provided for liability, civil

1 liability, for many violations of international  
2 law.

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

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

20 MR. GANNON: One reason is because we  
21 don't think that civil liability under the ATS  
22 is the only way that Congress has to ensure that  
23 we are holding U.S. persons accountable for  
24 violations of human rights.

25 Under the Torture Victim Protection

1 Act, Congress didn't think that corporations  
2 needed to be held liable in order for us to  
3 effectuate our obligations to prevent torture.

4 And, similarly, Congress has provided  
5 for other remedies besides the TV -- besides the  
6 ATS. It has criminal consequences, the types of  
7 things that Justice Sotomayor was talking about  
8 for piracy, those were originally  
9 criminal cases.

10 JUSTICE KAGAN: Thank you, Mr. Gannon.  
11 Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Gorsuch.

14 JUSTICE GORSUCH: I have no questions.  
15 Thank you, Chief.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Kavanaugh.

18 JUSTICE KAVANAUGH: Thank you, Chief  
19 Justice.

20 And good morning, Mr. Gannon.

21 Footnote 21 in Sosa instructs the  
22 courts to pay attention or give serious weight  
23 to the executive branch's view of the case's  
24 impact on foreign policy.

25 In your view, are you -- does this

1 case have an impact on foreign policy, or are  
2 you making a more general argument about the  
3 ATS?

4 MR. GANNON: We're primarily making a  
5 more general argument about the ATS under step 2  
6 of the Sosa analysis.

7 JUSTICE KAVANAUGH: Okay. So are you  
8 making any Footnote 21 argument at all about  
9 this particular case having an impact on foreign  
10 policy?

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

19 And separately we do say that there is  
20 a potential interaction here between the  
21 allegations of liability here and efforts that  
22 the executive branch, Congress, other  
23 governments are making in order to help solve  
24 and ameliorate the human rights situation in  
25 forced labor chains, that the Harkin-Engel



1 protocol is used by plaintiffs here as evidence  
2 of liability rather than an instance where a  
3 U.S. corporation is in -- is engaging in good  
4 faith in efforts to try to ameliorate human  
5 rights abuses.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett.

9 JUSTICE BARRETT: Counsel, I have a  
10 question about aiding and abetting liability and  
11 extraterritoriality. You say that the focus of  
12 the tort should be the primary conduct, so,  
13 here, what was happening in Cote d'Ivoire,  
14 rather than the aiding and abetting, which you  
15 characterize as secondary.

16 But why should that be so? I mean,  
17 let's imagine you have a U.S. corporation or  
18 even a U.S. individual that is making plans to  
19 facilitate the use of child slaves, you know,  
20 making phone calls, sending money specifically  
21 for that purpose, writing e-mails to that  
22 effect. Why isn't that conduct that occurs in  
23 the United States something that touches and  
24 concerns, you know, or should be the focus of  
25 conduct, however you want to state the test?

1                   MR. GANNON: Well, I -- I think that  
2                   there are two different ways of looking at that.  
3                   We do think that the focus test requires us to  
4                   look at the object of the statute's solicitude,  
5                   including the conduct that the statute seeks to  
6                   regulate.

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

16                  Now, if you just want to focus on the  
17                  aiding and abetting allegations or just say  
18                  we're only going to look at the -- at the  
19                  conduct by the U.S. corporation instead of the  
20                  people on the ground who are engaging in the  
21                  underlying tort, we still think that the  
22                  allegations in this case don't specifically  
23                  state enough in order to state a claim that  
24                  would not be extraterritorial.

25                  JUSTICE BARRETT: Thank you.

1 CHIEF JUSTICE ROBERTS: A minute to  
2 wrap up, Mr. Gannon.

3 MR. GANNON: Thank you, Mr. Chief  
4 Justice.

5 Concerns that the political branches  
6 have not moved quickly enough to resolve forced  
7 labor problems in corporate supply chains in  
8 this industry or elsewhere are not a license for  
9 this Court to expand tort liability under the  
10 ATS.

11 Having already ruled out ATS liability  
12 for foreign corporations, the Court should not  
13 adopt a different rule for U.S. corporations.  
14 The contrast between the Torture Victim  
15 Protection Act and the Trafficking Victims  
16 Protection Act show that is a policy choice that  
17 could go either way and the decision should be  
18 made by Congress.

19 And if the Court reaches the question  
20 of extraterritoriality, then even assuming that  
21 aiding and abetting is actionable, the focus of  
22 any forced labor tort here was overseas. That's  
23 where the injury happened and where any  
24 substantial assistance was provided.

25 So plaintiffs' claims call for an

1 impermissibly extraterritorial application of  
2 the ATS. We urge the Court to reverse.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Mr. Hoffman.

6 ORAL ARGUMENT OF PAUL L. HOFFMAN

7 ON BEHALF OF THE RESPONDENTS

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

10 The first Congress in the Alien Tort  
11 Statute provided a federal forum for foreign  
12 citizens to bring cases for law of nations  
13 violations without limitation as to defendants  
14 for a series of tort liability.

15 Plaintiffs are former child slaves  
16 seeking compensation from two U.S. corporations  
17 which maintain a system of child slavery and  
18 forced labor in their Ivory Coast supply chain  
19 as a matter of corporate policy to gain a  
20 competitive advantage in the U.S. market.

21 International norms prohibiting child  
22 slavery and forced labor are indisputably  
23 specific, universal, and obligatory. The norms  
24 apply directly to private parties, including  
25 corporations.

1                   Unlike Kiobel and Jesner, this case  
2 does not seek to assert U.S. jurisdiction over  
3 foreign corporations for actions against other  
4 foreign citizens they took on foreign soil.  
5 This case alleges violations of long-established  
6 norms prohibiting child slavery and forced labor  
7 by U.S. corporations from the United States.

8                   The founders were particularly  
9 concerned about actions of U.S. citizens that  
10 might lead to foreign entanglements, and their  
11 response was to provide for a federal judicial  
12 forum to resolve such disputes based on the rule  
13 of law.

14                   The recent discovery of legal opinions  
15 written by Thomas Jefferson and Edmund Randolph  
16 in the 1790s make it clear that the ATS applied  
17 when U.S. citizens violated the law of nations  
18 on foreign soil and that the ATS's broad  
19 language applied to violations beyond the  
20 Blackstone norms without any need for further  
21 congressional action.

22                   These claims fit comfortably within  
23 the text, history, and purpose of the ATS and  
24 this Court's holding in Sosa, and it should be  
25 allowed to proceed.

1           CHIEF JUSTICE ROBERTS: Counsel, this  
2 case, of course, involves United States citizens  
3 and United States courts. But, in the context  
4 of that action, much of the focus is going to be  
5 on conduct overseas, and those responsible for  
6 that can be brought into court either as  
7 witnesses or for aiding and abetting.

8           So why doesn't this type of action  
9 present the same international relations  
10 concerns that we've noted in -- in the prior  
11 cases in this area?

12           MR. HOFFMAN: Well, the -- this --  
13 this case is not different in many respects from  
14 any transnational litigation. There -- there  
15 certainly have been no problem with discovery  
16 and other matters in most of these cases that  
17 have gotten to discovery.

18           The Ivory Coast has -- has not  
19 objected to the case at any point, hasn't said  
20 anything about it. I think Mr. Gannon has said  
21 that the United States has no particular  
22 objection about this particular case on foreign  
23 policy grounds within the Footnote 21 context or  
24 others. So there really is no evidence that  
25 that's true.

1           Moreover, Congress already decided in  
2           the Trafficking Victim Protection Act that  
3           forced labor and child slavery and -- or slavery  
4           generally in supply chains is something for  
5           which damage remedies are appropriate. And --  
6           and, obviously, the Congress doesn't think that  
7           those issues present any -- any of those  
8           problems.

9           CHIEF JUSTICE ROBERTS: The -- the  
10          TVPRA that you just mentioned, I think, is -- is  
11          pertinent here. Congress is addressing the sort  
12          of questions that you would have the Court  
13          resolve as a matter of, I suppose, federal  
14          common law.

15          And doesn't what Congress did in the  
16          TVPRA suggest that they are cognizant of these  
17          questions, they are active in the area, and it's  
18          -- it's time for the Court to get out of the  
19          unusual situation where it's -- it's making  
20          rather than just interpreting law?

21          MR. HOFFMAN: Well, our -- our  
22          response to that, Mr. Chief Justice, is that our  
23          case arose, at least for these six former child  
24          slaves, at a time when the TVPRA was not deemed  
25          to be explicitly extraterritorial.

1 CHIEF JUSTICE ROBERTS: So then going

2 --

3 MR. HOFFMAN: And so I think --

4 CHIEF JUSTICE ROBERTS: -- well, then  
5 -- then going forward, in other words, has --  
6 has Congress sort of take -- taken the ball down  
7 going -- going forward, whatever the precise  
8 consequence may be in your litigation?

9 MR. HOFFMAN: It -- it is certainly  
10 true that the TVPRA is broader than the ATS  
11 claims that we are making in this case and that  
12 it is -- seems very likely that any case from  
13 2008 on would use the -- the Trafficking Victim  
14 Protection Act rather than the ATS in making  
15 these kinds of claims.

16 So our case is really an exceptional  
17 case that arises before that. And I think that  
18 the TVPRA answers the Sosa step 2 problems that  
19 have been raised by the defendants and by -- by  
20 the United States in its submissions to date.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Justice Thomas.

24 JUSTICE THOMAS: Thank you, Mr. Chief  
25 Justice.



1           But the -- but the TVPA seems to  
2 suggest that Congress does not see the ATS the  
3 way you do. Obviously, there, you don't have  
4 corporate liability and you don't have aiding  
5 and abetting liability. So why shouldn't we  
6 take that as an indication that Congress sought  
7 limitations on -- on the ATS jurisdiction?

8           MR. HOFFMAN: Well, for one, the  
9 Congress made it very clear when it passed the  
10 TVPA that it was complementary to the Alien Tort  
11 Statute and was not meant to displace it in any  
12 way. And the language of the TVPA is different  
13 from the ATS both in terms of its language, its  
14 history, and its purpose.

15           It's not clear that -- that aiding and  
16 abetting is not available under the TVPA, but --  
17 but this Court certainly decided in Mohamad that  
18 corporate liability is not available.

19           But the Court has said that it looks  
20 to the most analogous statute. And what we  
21 contend is that the Trafficking Victim  
22 Protection Act, which deals specifically with  
23 forced labor and slavery in supply chains, is  
24 the most analogous.

25           And so whatever Congress thought about

1 corporate liability for claims of torture or  
2 extrajudicial execution, Congress has made it  
3 very clear that they believe that there should  
4 be corporate liability when it comes to  
5 knowingly benefiting from forced labor and  
6 slavery in -- in the supply chain.

7 JUSTICE THOMAS: Are you -- just as a  
8 matter of curiosity, you bring this under the  
9 ATS, but could you have brought the same cause  
10 of action or a similar cause of action under  
11 different provisions or a different law or the  
12 -- I'm -- I'm just thinking of whether or not  
13 you could -- this could have been in diversity  
14 or something else.

15 MR. HOFFMAN: I -- I -- I think that  
16 this particular case in the way that it was  
17 originally framed could not have been brought  
18 under diversity jurisdiction because it -- it --  
19 it included both citizens and non-citizens on  
20 the other side. So diversity was not available,  
21 but -- but the ATS directly applied --

22 JUSTICE THOMAS: Yeah.

23 MR. HOFFMAN: -- under the terms.

24 JUSTICE THOMAS: On a separate matter,  
25 there seems to be some suggestion in the

1 arguments, the -- in some of the other arguments  
2 that there's no new -- even though there's no  
3 universal norm for aiding and abetting in the  
4 civil context, it may well be in the criminal  
5 context. What's your reaction to that?

6 MR. HOFFMAN: Well, I think, first of  
7 all, our position is that aiding and abetting or  
8 accessory liability in tort was widely available  
9 at the time --

10 JUSTICE THOMAS: Yeah.

11 MR. HOFFMAN: -- it was passed. But  
12 -- but, on the international level, it is our  
13 position that the international community has  
14 come up with specific universal and obligatory  
15 norms with respect to aiding and abetting  
16 serious violations of international human rights  
17 law, which would include these norms for sure.

18 And, in fact, that's -- all the  
19 circuits that have decided this question have  
20 found that there is aiding and abetting  
21 liability in ATS claims. They have differed  
22 sometimes about the standards, sometimes adding  
23 requirements that don't appear to be in the  
24 customary international law norm, but they all  
25 have recognized that there's -- that there are

1 aiding -- that there is aiding and abetting  
2 under international law.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Breyer.

6 JUSTICE BREYER: I'd like your views  
7 on the following: Assume that there is  
8 corporate liability for domestic corporations.  
9 Assume that there is aiding and abetting  
10 liability.

11 Now what counts as aiding and abetting  
12 for purposes of this statute? When I read  
13 through your complaint, it seemed to me that all  
14 or virtually all of your complaint amount to  
15 doing business with these people. They help pay  
16 for the farm. And that's about it. And they  
17 knowingly do it.

18 Well, unfortunately, child labor, it's  
19 terrible, but it exists throughout the world in  
20 many, many places. And if we take this as the  
21 norm, particularly when Congress is now working  
22 in the area, that will mean throughout the world  
23 this is the norm.

24 And I don't know, but I have concern  
25 that treating this allegation, the six that you

1 make here, as aiding and abetting falling within  
2 that term for purposes of this statute, if other  
3 nations do the same, and we do the same, could  
4 have very, very significant effects.

5 I'm just saying I'm worried about  
6 that. And I -- I want you to explain to me how  
7 this should work.

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

19 JUSTICE BREYER: Yes, that sounds like  
20 a business, a business that does business  
21 blinking their eyes or open eyes with farmers  
22 and others throughout the world who use child  
23 labor.

24 MR. HOFFMAN: But -- but --

25 JUSTICE BREYER: Now, in this case, do

1 we want a judge to say you can't do that  
2 anymore?

3 MR. HOFFMAN: Well, what -- what we're  
4 saying is that a court should decide based on  
5 the international principles of aiding and  
6 abetting whether the -- these corporate  
7 defendants have crossed the line between merely  
8 doing business and facilitating that system.

9 The -- the amicus brief filed for  
10 Tony's Chocolonely and the small and mid-sized  
11 chocolate companies indicate exactly how  
12 companies do business without facilitating child  
13 slave labor in the Ivory Coast. It can be done.  
14 There are requirements by -- by our allies in  
15 Europe about how it should be done.

16 Who is doing it and not imposing  
17 aiding and abetting liability for this  
18 high-level kind of corporate decision-making and  
19 policy would give these companies an unfair  
20 competitive advantage on child labor that  
21 violates these fundamental norms in ways that --  
22 that our allies and others urge to eliminate.

23 JUSTICE BREYER: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Alito.

25 JUSTICE ALITO: Mr. Hoffman, I'm

1 interested in what your complaint alleges about  
2 the mens rea of these particular defendants  
3 regarding forced child labor.

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

11           So even putting aside the question of  
12 which defendants you're referring to, you don't  
13 even allege that they actually knew about forced  
14 child labor.

15           Do you go further any place in the  
16 complaint? And, if not, is "should have known,"  
17 which is basically recklessness, enough for  
18 aiding and abetting liability under either  
19 international law or U.S. law?

20           MR. HOFFMAN: Your Honor, I don't  
21 think that "should have known" would -- would  
22 satisfy, but knowledge would satisfy the  
23 international standards for aiding and abetting,  
24 and we do -- we do contend that these defendants  
25 knew exactly what they were doing in that supply

1 chain.

2 JUSTICE ALITO: Yeah, where -- where  
3 do you -- where do I look in the complaint to  
4 find that?

5 MR. HOFFMAN: Well, Your Honor, we --  
6 we have alleged knowledge. The Ninth Circuit  
7 interpreted our complaint as satisfying both  
8 knowledge and purpose standard in terms of the  
9 -- our aiding and abetting allegations.

10 JUSTICE ALITO: Yeah. Well, I -- I  
11 read the complaint. Where do I find an  
12 allegation of knowledge?

13 MR. HOFFMAN: Sorry, Your Honor. I  
14 have to make sure to find this for you. You  
15 know, we have -- I -- I think when you -- if you  
16 take the allegations -- I don't have the  
17 paragraph. What we have alleged is that these  
18 defendants are intimately involved in the  
19 cocoa-growing area and that they're not -- they  
20 have knowledge because of the reports that have  
21 been issued, because they -- they -- they send  
22 their own people to investigate, and -- and --  
23 and they file their reports back to the  
24 headquarters, that they're intimately involved  
25 with what goes on in their supply chain.



1                   So we have alleged knowledge. Whether  
2 we, you know -- the "should have known" is  
3 superfluous, I think, to that, to the -- we've  
4 alleged that they actually know about these  
5 things --

6                   JUSTICE ALITO: See here, this is an  
7 important point, and this is something you have  
8 to allege even under notice pleading. And I  
9 assume you're really careful -- you were careful  
10 about what you alleged because you don't want to  
11 incur Rule -- Rule 11 liability.

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

19                   MR. HOFFMAN: And -- and -- and we've  
20 -- we've been given an opportunity to amend our  
21 complaint, as the Ninth Circuit has given us  
22 that ability to lay this out. We have more  
23 information, actually, since the second amended  
24 complaint based on continuing investigation and  
25 trips to the region.

1                   And -- and, yes, we -- we can allege  
2                   that they knew that they were involved with the  
3                   farms in the region that supply child -- that  
4                   supply -- that involve child slave labor,  
5                   including the -- the -- the six former child  
6                   slaves who are plaintiffs in this case.

7                   JUSTICE ALITO: Thank you.

8                   CHIEF JUSTICE ROBERTS: Justice  
9                   Sotomayor.

10                  JUSTICE SOTOMAYOR: Counsel, just so I  
11                  understand, you believe that the aiding and  
12                  abetting exists if they knew -- simply if they  
13                  knew that child labor was being used to produce  
14                  the cocoa beans and they bought the product?

15                  MR. HOFFMAN: No, that's -- that's not  
16                  our position, Your Honor.

17                  JUSTICE SOTOMAYOR: All right. So  
18                  knowledge that child labor was being used you  
19                  don't claim is enough.

20                  MR. HOFFMAN: That's right.

21                  JUSTICE SOTOMAYOR: Your complaint, as  
22                  I see it, alleges that there was some  
23                  decision-making in the United States to buy  
24                  these products from these kinds of farms. I  
25                  presume that's knowing that they're child labor.

1                   But I don't see an allegation other  
2                   than sending representatives to look at the  
3                   farms so that knowledge could be imputed that  
4                   there's any other actual acts of aiding and  
5                   abetting that you have alleged against the  
6                   particular U.S. corporations that you're suing.

7                   MR. HOFFMAN: Well, our position is  
8                   that the -- these corporations from their  
9                   headquarters have controlled every aspect of the  
10                  supply chain.

11                  JUSTICE SOTOMAYOR: But I don't  
12                  understand what "control" means.

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

14                  JUSTICE SOTOMAYOR: I -- have you  
15                  shown that they directed a foreign corporation,  
16                  even if it's a subsidiary?

17                  MR. HOFFMAN: Well, I think it  
18                  actually acted directly from corporate  
19                  headquarters. They sent people from corporate  
20                  headquarters in terms of getting information on  
21                  the ground, setting up cooperatives,  
22                  providing --

23                  JUSTICE SOTOMAYOR: If you were given  
24                  leave to amend, you could actually show that  
25                  they transmitted the money, that they

1 directly -- I'm not talking about their  
2 subsidiaries -- that the American corporations  
3 actually directed the money to go --

4 MR. HOFFMAN: Yeah, our current  
5 understanding is that -- is that these are  
6 controlled by the corporate defendants and that  
7 we would -- and we've been -- been asked  
8 allegations particularly, separating out the  
9 foreign corporations that have to be dismissed  
10 after *Jesner*, to identify exactly what we  
11 contend these domestic corporations have done.

12 And we think we do have enough  
13 information to -- to link the decision-making  
14 and corporate policy and the issue of getting  
15 these cocoa beans from farms that --

16 JUSTICE SOTOMAYOR: Counsel, you're --  
17 you're -- you're equivocating on my question.  
18 It's not just a decision-making because we've  
19 often said that decision-making is not enough  
20 aiding and abetting, that you have to follow it  
21 with an affirmative act.

22 MR. HOFFMAN: Right.

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

25 MR. HOFFMAN: But the decision --

1 JUSTICE SOTOMAYOR: Can you show that  
2 the affirmative act was actually sending money  
3 to those places, that they're the funders,  
4 direct funders of the farms, et cetera?

5 MR. HOFFMAN: Yes, no, I mean, what --  
6 what -- what we've said is there are exclusive  
7 marketing relationships that are -- that are  
8 controlled by headquarters, that people are sent  
9 from headquarters, money is sent from  
10 headquarters, equipment is arranged from  
11 headquarters, training is arranged for by  
12 headquarters.

13 Our allegation is that these U.S.  
14 companies control the aspects -- all the aspects  
15 of the supply chain that leads directly to harms  
16 that our plaintiffs were enslaved on and where  
17 many thousands of other children are enslaved.

18 JUSTICE SOTOMAYOR: Thank you,  
19 counsel.

20 CHIEF JUSTICE ROBERTS: Justice Kagan.

21 JUSTICE KAGAN: Mr. -- Mr. Hoffman, on  
22 the question of corporate domestic liability,  
23 the government makes the argument that Jesner  
24 changed everything. It originally took the same  
25 position that you're taking now on corporate

1 domestic liability. It said that that position  
2 is now untenable, that once the Court held that  
3 foreign corporations weren't liable, the Court  
4 really can't hold that domestic corporations  
5 are. What -- what is your response to that?

6 MR. HOFFMAN: Well -- well, first of  
7 all, I think that the -- the evidence that  
8 justified using Sosa step 2 to eliminate  
9 liability against foreign corporations really  
10 does exist with respect to domestic corporations  
11 sued under the ATS.

12 And, actually, Jesner and Kiobel are  
13 of a piece in a way. What -- what this Court  
14 has said is that ATS jurisdiction should not be  
15 used to police the actions of foreign  
16 corporations, particularly when they act  
17 primarily on foreign soil, whereas our case is  
18 completely different in the sense that the  
19 United States has its own responsibilities in  
20 these provisions. That was the original plan  
21 that you found -- found in the ATS, that we were  
22 saying to the world we will enforce the law of  
23 nations.

24 And I think that the Jefferson and  
25 Randolph opinions recently underscored that,

1 that we made a commitment to the world that when  
2 our citizens violate the law of nations, even if  
3 it's outside U.S. territory, that we will  
4 provide a forum for foreign citizens to do that.

5 Both Kiobel and Jesner deal with  
6 completely different situations where there's  
7 minimal contact with the United States and where  
8 it's really the responsibility of other  
9 countries to police their own corporations.

10 In Kiobel, for example, the  
11 Netherlands has -- has allowed for a case on  
12 behalf of the Kiobel plaintiffs against the same  
13 defendants for the same allegations. So the  
14 Netherlands has stepped up to police its own  
15 corporations.

16 What we're saying is that the United  
17 States has that obligation according to the  
18 founders' original promise under the Alien Tort  
19 Statute.

20 JUSTICE KAGAN: But, you know, as you  
21 note, Jesner is a -- is a fractured decision.  
22 There's a majority in some places, only a  
23 plurality in other places.

24 If you look at that decision, what do  
25 you think it tells us about the approach that we

1 need to use to answer the question of domestic  
2 corporate liability for child slavery? I mean,  
3 what is controlling, do you think, with respect  
4 to how we go about answering that question?

5 MR. HOFFMAN: I don't think that there  
6 is a controlling majority in *Jesner* about how to  
7 approach that question. The plurality does  
8 discuss the question of whether there needs to  
9 be a specific and universal and obligatory norm  
10 of corporate liability.

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

20 So we think that that's not -- that's  
21 basically what international law provides, are  
22 the prohibitive norms, in this case, child  
23 slavery and forced labor. But the means of  
24 enforcing them are up to individual states.

25 And in the ATS, our first Congress



1 said that tort liability using common law  
2 methods were something that our courts would  
3 enforce the law of nations. And there's no  
4 requirement that -- that there be mandatory  
5 corporate liability. It's up to states.

6 And many states --

7 JUSTICE KAGAN: Thank you, Mr.  
8 Hoffman. Thank you.

9 MR. HOFFMAN: Sorry.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Gorsuch.

12 JUSTICE GORSUCH: Good morning, Mr.  
13 Hoffman. I'd like to --

14 MR. HOFFMAN: Good morning.

15 JUSTICE GORSUCH: -- put aside for  
16 purposes of my question the corporate versus  
17 individual nature of the defendant and focus  
18 solely on the cause of action.

19 MR. HOFFMAN: Yes.

20 JUSTICE GORSUCH: And -- and, here,  
21 you're asking us to infer a new cause of action  
22 for aiding and abetting. And I guess I want to  
23 understand why I should be creating new causes  
24 of action as a Judge today.

25 We have abandoned federal common law

1 in every other area after Erie, or at least we  
2 proclaim to do so. And I'm not sure I  
3 understand why the ATS should be different,  
4 especially when Congress stands able and ready  
5 to create new causes of action, as the Chief  
6 Justice has pointed out it's done elsewhere.

7 That would be the appropriate -- more  
8 appropriate place to create new legislation, it  
9 would seem, and in every respect, what you're  
10 asking us to do is a form of legislation.

11 And then finally I throw into the mix  
12 Central Bank, which underscores that aiding and  
13 abetting liability is a different thing and that  
14 often there are good reasons not to have aiding  
15 and abetting liability even when there's primary  
16 liability.

17 So whatever I think about the  
18 question, I have to at least acknowledge there  
19 are good arguments for a lawmaker to consider on  
20 both sides of that question, which, again, takes  
21 me back to my question wondering whether I'm the  
22 right person to be making this pitch to rather  
23 than a legislator.

24 Can you help me with that?

25 MR. HOFFMAN: Sure, Your Honor.

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

15           And -- and, basically, the -- the  
16    norms about child slavery and forced labor are  
17    as -- as quintessential *Sosa* qualifying norms as  
18    could possibly be imagined.

19           Now, with respect to aiding and  
20    abetting liability, for one, I think that if the  
21    Court wants to reach that issue, I think it  
22    would benefit from full briefing and argument on  
23    that issue specifically because those were not  
24    exactly in the questions presented, but -- but  
25    our position on aiding and abetting liability is

1 that, in fact, the founders understood aiding  
2 and abetting liability. There was aiding and  
3 abetting liability in British common law that  
4 was received in our law.

5 The Bradford opinion talks about U.S.  
6 defendants -- U.S. nationals aiding and abetting  
7 French -- the French in terms of their attack on  
8 Sierra Leone. The Talbot decision, I think, as  
9 Justice Sotomayor noticed, deals with aiding and  
10 abetting liability.

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

22 JUSTICE GORSUCH: That's all for now.  
23 I'm afraid my -- my time's expired. Thank you  
24 very much.

25 MR. HOFFMAN: I'm sorry.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Kavanaugh.

4 JUSTICE KAVANAUGH: Thank you, Chief  
5 Justice.

6 And good morning and welcome,  
7 Mr. Hoffman.

8 MR. HOFFMAN: Good morning.

9 JUSTICE KAVANAUGH: I have a different  
10 flavor of Justice Gorsuch's broader question  
11 about separation of powers. And this case  
12 really is a case, I think, about the proper role  
13 of the judiciary as compared to the proper role  
14 of Congress here in fleshing out the Alien Tort  
15 Statute.

16 As you know, Sosa and Jesner and our  
17 other cases have said the court -- the courts  
18 should not be out in front in fleshing out the  
19 cause of action here. It didn't go -- it didn't  
20 reject it entirely. It didn't take Justice  
21 Scalia's position, but it shouldn't be out in  
22 front.

23 And two sources in particular the  
24 Court has said to look to to constrain the cause  
25 of action to make sure, as Justice Gorsuch said,

1 we're not creating it ourselves, and one is, of  
2 course, making sure the norm is sufficiently  
3 rooted in international law, as you know.

4           And my concern on that is the language  
5 of Sosa doesn't just talk about the norm, as you  
6 know, but Footnote 20 specifically directs us to  
7 look at the particular perpetrator being sued  
8 and the category of perpetrator, whether it's a  
9 corporation or individual.

10           And I've looked at this before, as you  
11 know, and looked at it again, and I think it's  
12 hard to argue that corporate liability in  
13 international law is a specific universal and  
14 obligatory -- or specific and universal.

15           Foreign law is different. Justice  
16 Kagan rightly points that out. And there may be  
17 debatable policy reasons for drawing a line  
18 between individual and corporate liability, but  
19 it's -- but it's hard to argue that it's there  
20 in international law.

21           That's my concern in this case, stems  
22 -- the question presented on corporate liability  
23 stems from Footnote 20 and the content, as I see  
24 it, of international law. So I'll give you an  
25 opportunity to respond to that.

1                   MR. HOFFMAN: Well, Your Honor, I  
2 think that the -- the -- the question I think we  
3 would argue at Footnote 20 was addressed to the  
4 distinction between norms that applied directly  
5 to private parties, including corporations,  
6 versus norms that required some connection to  
7 state action. I think that the citations there  
8 make that fairly clear.

9                   I don't think it was saying that  
10 corporate liability had to be a specific  
11 universal and obligatory norm because that's  
12 really not the way the international system  
13 works. Many governments do impose corporate  
14 liability for violations of international law.  
15 For example, in a --

16                   JUSTICE KAVANAUGH: That's a -- I  
17 think that's a different question, though, and  
18 that gets to Justice Kagan's point, which I  
19 think is a good one, that foreign -- foreign law  
20 does impose corporate liability, of course, as  
21 does U.S. law in many circumstances, but the  
22 international law and the international  
23 tribunals have not seemed to do so.

24                   MR. HOFFMAN: It's correct that in --  
25 in certain international tribunals for -- for

1 reasons specific to those tribunals, did not  
2 impose liability on corporations, but the Alien  
3 Tort Statute's basically a tort statute. It's a  
4 civil tort statute.

5           And I think the international human  
6 rights amicus indicates that corporate liability  
7 is a general principle of law. It applies in  
8 all legal systems. It has applied in our legal  
9 system from the beginning. It applied in -- in  
10 Britain before we were a nation.

11           In other words, corporate tort  
12 liability is the -- is the norm. It's not the  
13 exception.

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

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

20           MR. HOFFMAN: Thank you, Your Honor.

21           CHIEF JUSTICE ROBERTS: Justice  
22 Barrett.

23           JUSTICE BARRETT: Counsel, in response  
24 to a question by Justice Kagan, you said that  
25 the ATS was a statement by the First Congress



1 that we will enforce the law of nations and  
2 provide a forum for foreign citizens to do that.

3 But, of course, the ATS also did it to  
4 protect the -- you know, the -- the policy  
5 interests of the United States and to protect  
6 the United States from retaliation by other  
7 countries in circumstances in which it failed to  
8 provide such a forum.

9 So we've talked a little bit about the  
10 foreign policy implications or lack thereof of  
11 our recognizing a cause of action against  
12 domestic corporations for violations of  
13 international law norms, but could you say a  
14 little bit about any foreign policy implications  
15 that might be the result of our failing to  
16 recognize such a cause of action?

17 MR. HOFFMAN: Well, I think that,  
18 certainly, the original idea -- and -- and --  
19 and this is reflected in the -- the Jefferson  
20 and Randolph opinions and in the Bradford  
21 opinion with respect to the attack on Sierra  
22 Leone -- other countries did protest in those  
23 instances acts by U.S. citizens in their  
24 territory that violated the law of nations and  
25 -- and that the idea of the ATS was to provide

1 that forum so to avoid that kind of protest. It  
2 -- it didn't require a --

3 JUSTICE BARRETT: But -- but would we  
4 -- I -- I guess my question is, do you think  
5 that the United States would face such protest  
6 in this circumstance, in this suit?

7 MR. HOFFMAN: Well, it hasn't. I  
8 mean -- and -- and for one thing, it's not clear  
9 whether there's a forum or there isn't a forum.  
10 So the Ivory Coast wouldn't have reason at this  
11 point to -- to protest.

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

20 JUSTICE BARRETT: Let's return to the  
21 question of the potential foreign policy  
22 implications of extending liability to domestic  
23 corporations in this circumstance.

24 So Mr. Katyal was pointing out that  
25 domestic corporations often have relationships

1 with foreign subsidiaries or parent corporations  
2 and, therefore, that many of the same concerns  
3 that we identified in Jesner would be implicated  
4 by the recognition of liability in this context  
5 as well.

6 So what do you have to say to that?  
7 Would recognizing liability here against a  
8 domestic corporation with foreign -- foreign  
9 relatives just permit an end run around Jesner?

10 MR. HOFFMAN: I think that in this  
11 particular instance, Cargill and Nestle USA are  
12 in different circumstances. Cargill is  
13 obviously only a U.S. corporation and doesn't  
14 raise those issues.

15 The issue with Nestle, I think, if --  
16 if it is, in fact, the case that Nestle  
17 Switzerland, the parent, is actually the one  
18 controlling and that we're wrong, I think that,  
19 in fact, under Jesner, probably there can't be a  
20 viable ATS claim against Nestle USA.

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

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Mr. Hoffman,

1 you can take a few minutes to wrap up.

2 MR. HOFFMAN: Thank you, Mr. Chief  
3 Justice.

4 Few international norms are as  
5 fundamental as the prohibitions against child  
6 slavery and forced labor. Plaintiffs' claims  
7 satisfy every Sosa requirement and fit squarely  
8 within the text, history, and purpose of the  
9 ATS.

10 The ATS represents a commitment to  
11 enforce the law of nations in our courts, a  
12 commitment Congress has never withdrawn or  
13 restricted, and certainly not with respect to  
14 child slavery.

15 This Court should reaffirm that  
16 commitment and should allow these former child  
17 slaves to have their day in court.

18 Thank you, Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Mr. Katyal, rebuttal?

22 REBUTTAL ARGUMENT OF NEAL K. KATYAL  
23 ON BEHALF OF THE PETITIONERS

24 MR. KATYAL: Four points, Your Honor.

25 First, Nestle and Cargill abhor child

1 slavery. This case isn't about that. It's  
2 about whether this old statute applies  
3 extraterritorially and who can be sued.

4           When asked by Justices Alito and  
5 Sotomayor where in the complaint is there any  
6 knowledge of slavery by the defendants, my  
7 friend couldn't answer. Zilch.

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

16           And even if aiding and abetting  
17 liability exists, Justice Sotomayor, it doesn't  
18 get around extraterritoriality. Rather, its  
19 ambiguity highlights the problem, as Justice  
20 Breyer's worry to my friend showed. The ATS's  
21 focus is still the injury or principal  
22 wrongdoing. Otherwise, it's truly aiding and  
23 amorphousness.

24           Second, my friend suggests our view  
25 guts human rights law. But ours was a law for

1 at least the first 200 years with no practice of  
2 ATS liability. Indeed, Congress knows how to  
3 fashion specific remedies for the extreme  
4 hypotheticals and already has.

5 I heard no answer from my friend to  
6 the five mechanisms to prevent abuse.

7 Third, my friend's arguments never  
8 grapple with Justice Kavanaugh's point that in  
9 every case -- that every case has said that this  
10 Court shouldn't be out in front. It's his high  
11 burden under *Sosa* to convince you a specific  
12 universal norm exists. He doesn't.

13 Fourth and finally, for corporate  
14 liability, Justice Breyer, in your query what's  
15 new, this Court's majority, not the plurality,  
16 Justice Kagan, in *Jesner*, said there are harms  
17 to separation of powers and hard policy choices  
18 about how to maximize deterrence, foreign  
19 investment, and foreign policy.

20 Congress sometimes uses corporate  
21 liability and sometimes doesn't, like the TVPA.  
22 The queries today about how can we exempt  
23 corporations, it makes no sense, could be said  
24 about torture, but in the TVPA, Congress said  
25 there was no liability for corporations.

1           The fact that there are two reasonable  
2 choices shows you should defer to Congress.

3           Same with extraterritoriality.  
4 Sometimes Congress extends a statute that way,  
5 like genocide, other times it doesn't. Nothing  
6 in the ATS says it reaches an injury halfway  
7 across the globe.

8           And the new Jefferson and Randolph  
9 letters are about U.S. conduct, bringing people  
10 to the U.S. as slaves, and they're about  
11 alienage jurisdiction under Article III.  
12 Neither says the ATS overcomes the  
13 extraterritoriality bar.

14           Justice Breyer, you asked, do we want  
15 a judge deciding this? This thin and accusatory  
16 complaint and my friend's admission of just how  
17 open-ended and transformative his liability  
18 would be answers that question.

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

21           (Whereupon, at 11:28 a.m., the case  
22 was submitted.)

23  
24  
25

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