



1           IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -  
3   BUDHA ISMAIL JAM, ET AL.,                                 )  
4                                 Petitioners,                                 )  
5                                 v.   ) No. 17-1011  
6   INTERNATIONAL FINANCE CORPORATION,                     )  
7                                 Respondent.                                 )  
8   - - - - -

9  
10                                 Washington, D.C.  
11                                 Wednesday, October 31, 2018

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

16  
17   APPEARANCES:  
18   JEFFREY L. FISHER, ESQ., Stanford, California; on  
19                 behalf of the Petitioners.  
20   JONATHAN ELLIS, Assistant to the Solicitor General,  
21                 Department of Justice, Washington, D.C.; for the  
22                 United States as amicus curiae, supporting the  
23                 Petitioners.  
24   DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on  
25                 behalf of the Respondent.

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

2 (11:08 a.m.)

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

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY L. FISHER

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

1 moment of suit in any given case.

2 And, indeed, they don't dispute --

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

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

22 But international organizations, some  
23 of them, do only one thing: lend money or the  
24 equivalent. And if we take immunity from them,  
25 that's the end of the immunity or close.

1 That's one argument.

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

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

12 MR. FISHER: Okay.

13 JUSTICE BREYER: -- or have I said it  
14 backwards?

15 MR. FISHER: No, no, no.

16 JUSTICE BREYER: Did I say it right?

17 MR. FISHER: So I think you gave me  
18 two things and then one before it, which was  
19 the statutory text.

20 JUSTICE BREYER: Yes. That's right.

21 MR. FISHER: So let me start with the  
22 statutory text, Justice Breyer. And the word  
23 "is" in this Court's jurisprudence always,  
24 always means at the time of suit, not at the  
25 time the statute was passed. And we've cited

1 reams of cases to that effect. My opponents  
2 cite only one case on the other side, that's an  
3 Armed Career Criminal Act case. Even there,  
4 "is" didn't mean at the time of suit; it meant  
5 at the time of the prior conviction. So "is"  
6 is on our side of this case.

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

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

24 And in *Steamboat*, the Court rejected  
25 the exact argument the other side makes here,

1 which is, first of all, that the law had to be  
2 incorporated at the time of suit and, second of  
3 all, that there was something different about  
4 the common law as to a statute at the time of  
5 the enactment. So all of the textual stuff is  
6 in our favor.

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

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

21 And so the same thing is true with  
22 international organizations, and let me answer  
23 that in a few different steps. So, first of  
24 all, look at the sweep of international  
25 organizations. Many do things like regulation,

1 for example, managing fisheries. They do  
2 things like dispute resolution, law  
3 enforcement, Interpol. They do scientific  
4 research and agricultural research. All of  
5 those things are non-commercial activities on  
6 the other side.

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

16 And then, even within lending  
17 activities, Justice Breyer, just take the World  
18 Bank, it has five separate institutions. Now  
19 the IFC is on one side. What the IFC does is  
20 -- is loan money at market rates for profit for  
21 private sector projects. There are other  
22 components of the World Bank and there are  
23 other lending institutions that are  
24 international organizations that give grants  
25 for public works programs or that do the kind

1 of spending that governments do. And the  
2 government's argued in past cases, and we think  
3 they're probably right, that that is not  
4 commercial activity either.

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

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

19 But if we decide for you, and then  
20 there's a case where there really shouldn't be  
21 sovereign immunity or, rather -- rather, there  
22 really should be, I guess -- see, that's what  
23 I'm getting mixed up. You see, if we decide  
24 against you and they really should have  
25 sovereign immunity in this case, nobody can do

1 anything. So, knowing nothing about the  
2 future, it seems a little safer, the first,  
3 than the second.

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

8 JUSTICE BREYER: Well, you can look --  
9 the reason I ask policy questions is because  
10 the hornbook said, yes, apply it as of now as  
11 long as it's consistent with the purpose of the  
12 statute. And the purpose of the statute, going  
13 back to 1945 and the U.N. and everything, was  
14 to get these organizations to locate here.

15 So it's not just policy for policy.  
16 It's policy for purpose. And purpose is tied  
17 into how you interpret the language.

18 MR. FISHER: So let me give you the  
19 practical answer and then the purpose answer.

20 On the practical answer,  
21 organizations, especially if they want a  
22 headquarter here or are headquartered here, are  
23 fully able to -- to lobby Congress or the  
24 executive branch for special immunity. And  
25 there are many examples across international

1 organizations.

2 Take the Organization of American  
3 States, OAS. And the solicitor general  
4 discusses this in -- the organization in its  
5 brief. In 1994, it negotiated a special  
6 immunity provision for itself to get more than  
7 the ordinary restrictive form of immunity that  
8 was available under the IOIA.

9 So there are -- there are pathways  
10 available, and they have been used even more  
11 so.

12 Remember, the United States, as you  
13 say, has a -- has a sometimes principal  
14 interest in these organizations. So it is  
15 quite responsive to them when they come and  
16 say: We need more than the IOIA gives us.

17 But, Justice Breyer, let me turn back  
18 to the -- the original purpose, which was the  
19 legislative history is quite clear on what the  
20 purpose was. As you say, this was partly to  
21 create a form of immunity to give some comfort  
22 to these organizations. But the question is,  
23 what form of immunity did they ask for and what  
24 did they get?

25 What they did is they came to Congress

1 and said treat us like foreign governments.  
2 Give us immunity, as Congress put it in a  
3 Senate report, of a governmental nature. And  
4 so what did Congress do? It gave them exactly  
5 what they asked for. It said we're going to  
6 treat you as a default measure like a foreign  
7 government.

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

18 JUSTICE SOTOMAYOR: Can we go to that  
19 issue raised in part? The special immunity, I  
20 know, was even negotiated by the U.N., I think,  
21 in the 1990s, and OAS and others, but assume  
22 that we're in your regiment, and Justice Breyer  
23 made the assumption that if a lawsuit came to  
24 us now under your theory, and it was limited  
25 immunity, that the President or Congress could

1 give immunity to the other side.

2 I don't think so.

3 JUSTICE BREYER: No, it's the  
4 opposite.

5 JUSTICE SOTOMAYOR: The opposite. The  
6 President can't decrease it, correct? So that  
7 problem still remains with your --

8 MR. FISHER: Well --

9 JUSTICE SOTOMAYOR: Yeah.

10 MR. FISHER: -- I think it -- it may  
11 or may not remain, Justice Sotomayor.

12 JUSTICE SOTOMAYOR: That's my --

13 MR. FISHER: Certainly, we could -- we  
14 would say we can go forward on this suit  
15 because -- because there is no such law.

16 If that law were passed, you'd have  
17 two questions. One is did Congress make it  
18 retroactive. And you look to Altmann to think  
19 about how to judge the retroactivity of  
20 immunity provisions. And then, if it were  
21 retroactive, whether that were permissible.

22 But, you know, we're a long way from  
23 -- from that sort of a situation. I think the  
24 important thing going forward, and this is, I  
25 think, what the concern is on the other side,

1 is not so much about this case but about  
2 incentives and policies going forward, they  
3 have every opportunity to negotiate in one form  
4 or another or to procure a heightened form of  
5 immunity.

6 And, Justice Sotomayor, let me say one  
7 more thing to you and Justice Breyer about, you  
8 know, the idea of the executive branch getting  
9 involved. This is one of the problems, I  
10 submit, with the other side's argument.

11 Remember, part of the goal of the FSIA  
12 in the first section of the Act in Section 1602  
13 is to get -- is to get the executive branch out  
14 of the immunity business.

15 Congress made the determination that  
16 it was a bad idea to have every case turning on  
17 individualized suggestions of immunity and  
18 executive branch political policy. And so the  
19 other side, by importing the common law of  
20 1945, would reintroduce that problem into  
21 international organization immunity in a way  
22 that we don't think would be very good  
23 politically or very workable in the courts.

24 And I'd hasten to add that even under  
25 the rule of 1945, if the question were what

1 does the executive branch think about any given  
2 lawsuit or any given immunity for any given  
3 type of suit, that would just lead you right  
4 back to the FSIA, and it would lead you back to  
5 the same conclusion that we submit to you here.

6 So either pathway, whether, Justice  
7 Breyer, you start with the way you've always  
8 looked at cases, with the word "is" and the  
9 word "same" and the reference canon that I've  
10 described and say all of those things lead you  
11 to a time of suit rule, or if you start with  
12 the law of 1945 and say what was the law in  
13 1945?

14 Well, Hoffman and -- in Ex Parte Peru  
15 were clear that the law of 1945 was the  
16 executive branch decides, and it's not for the  
17 Court -- this is -- I'm going to give you the  
18 Court's own language -- it's not for the Court  
19 to give immunity where the executive branch has  
20 not seen fit to give it.

21 And if that were the test, you'd come  
22 right back to where you -- where I started  
23 here, which is that the FSIA would control or,  
24 at the bare minimum, the executive branch  
25 position in this lawsuit on the type of

1 immunity that ought to apply in this situation  
2 would control. So --

3 JUSTICE GORSUCH: Mr. Fisher, if I can  
4 pick up on Justice Breyer's question. The  
5 reference canon, I take all -- all of your  
6 points, but sometimes, let's say we have a  
7 statute that -- that refers to another statute.

8 Usually, we would look at the second  
9 statute that's being incorporated as of the  
10 time of -- of the adoption of the first  
11 statute. Right? So if -- if this statute were  
12 to say go look at Section 5 --

13 MR. FISHER: Right.

14 JUSTICE GORSUCH: -- we wouldn't look  
15 at it the way it's been subsequently amended.  
16 We'd look at it as it was originally enacted in  
17 1945.

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

21 MR. FISHER: So for two reasons,  
22 Justice Gorsuch, and one of them, if you'll  
23 forgive me, is going to be something you said  
24 in the Alan Contoe opinion.

25 JUSTICE GORSUCH: I was afraid of

1 that.

2 (Laughter.)

3 MR. FISHER: But for two reasons. One  
4 is Congress has a choice to make when it writes  
5 legislation. It can lock in a given rule by  
6 setting a specific statutory provision and says  
7 that's the rule we want, just like if Congress  
8 uses a particular word, at the time of the  
9 enactment, the meaning of that word at the time  
10 of enactment would be what Congress -- we'd  
11 assume Congress wanted.

12 Or Congress could do something  
13 different, which is to say, look, we're not  
14 sure exactly of the metes and bounds of the  
15 law. We're just going to tie it to this other  
16 area of law as a general matter. And that's  
17 what Congress did here. It did the latter.

18 So it took an area of law as a point  
19 of reference and said: Just use that as the  
20 default rule and then adjust as necessary. And  
21 those are just two different pathways Congress  
22 can go down.

23 And they date, as I said, all the way  
24 back to the First Judiciary Act there, in the  
25 Sutherland treatise, all the way back to 1904,

1 and so there's just two different pathways  
2 Congress can go down.

3 And it makes perfect sense, I think,  
4 in a situation like this, especially where you  
5 have a common law doctrine being referenced, at  
6 least a common law at the time, and one that  
7 was, indeed, not just any old common law  
8 doctrine but one that was in a great deal of  
9 flux at the time. So it made every reason --  
10 it made every good reason for Congress to have  
11 a general reference, not a specific one.

12 And then the second reason, Justice  
13 Gorsuch, is the one you mentioned sitting on  
14 the Tenth Circuit, which is that, as time goes  
15 by, it becomes all the more stilted or  
16 antiquated or even foolish sometimes to try to  
17 answer questions in the modern day according to  
18 what some bygone era doctrine would have  
19 required, and especially a bygone era doctrine  
20 like this.

21 If I understand the other side's  
22 position correctly, basically the question  
23 they're having -- they would want every federal  
24 court to ask in these cases is what would the  
25 Truman Administration's State Department have

1 wanted to do in this case?

2           And when you have things like this,  
3 which didn't even -- an organization that  
4 didn't even exist at the time, sometimes doing  
5 activities that weren't even contemplated at  
6 the time, things like sovereign wealth funds,  
7 which foreign sovereigns now engage in, for  
8 example, who knows what the State Department  
9 would have thought then.

10           I think there's every reason then to  
11 fall back on the reference canon. And if I can  
12 say one more thing before reserving my time, if  
13 you have any doubt about just the plain text  
14 argument I've given you, I would urge you to  
15 compare the text in Section 288a to the text --  
16 Section 288d, which has the exact dichotomy  
17 that -- that I've been discussing today.

18           One subsection, subsection (a), says  
19 that the same immunity rules apply, and  
20 subsection (b) says that foreign officials --  
21 I'm sorry, international organization officials  
22 are entitled to absolute immunity.

23           So this is yet another reason why if  
24 the other side were correct and if Congress had  
25 wanted to lay down the rule they did, why would

1 they not have just used the absolute immunity  
2 language in subsection (b) of subsection (d)  
3 and that, indeed, was the original draft of  
4 this act that was discarded.

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

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Mr. Ellis.

10 ORAL ARGUMENT OF JONATHAN ELLIS FOR  
11 THE UNITED STATES, AS AMICUS  
12 CURIAE, SUPPORTING THE PETITIONERS

13 MR. ELLIS: Mr. Chief Justice, and may  
14 it please the Court:

15 If I could, I'd just like to pick up  
16 right where my friend left off. There's been a  
17 lot of discussion so far this morning on the  
18 text of Section 288a. We agree that the  
19 Petitioners have the far better reading of that  
20 phrase in isolation, but I think it really  
21 settles the deal when you look at the entire  
22 structure of the Act.

23 The -- the IOIA doesn't just grant  
24 immunity in Section 288a(b), but it provides a  
25 whole host of immunities and it does it in two

1 different ways. In several different  
2 provisions, the Act sets a fixed rule of  
3 immunity. So archives are inviolable and  
4 officers and employees of the organizations are  
5 immune from suit with respect to their official  
6 acts.

7 And then there are a -- a host, a  
8 collection of three provisions that set the  
9 immunity by reference to foreign governments.  
10 They're Section 288a(d), Section 288d(a), and  
11 there's Section 288a(b), the one at issue here.

12 Respondents concede that the  
13 referential language in those other two  
14 provisions do refer to the state of the law as  
15 it is today.

16 It's only the one that's at issue in  
17 this case that they say was frozen. We don't  
18 see how that can be, and that's particularly  
19 true when you look at the drafting history that  
20 my friend referred to.

21 JUSTICE KAGAN: Mr. Ellis, before you  
22 get to that, another part of the structure is  
23 this provision that deals with presidential  
24 authority, and that's essentially a roll-back  
25 authority of immunity.

1           Doesn't that make a lot more sense,  
2           that provision, if you assume that Congress  
3           meant for there to be absolute immunity? In  
4           other words, the presidential authority is a  
5           one-way ratchet. The President can only under  
6           this provision roll it back. It can't increase  
7           it.

8           So, to me, if I -- if -- if -- if --  
9           if the immunity -- if the immunity is less than  
10          absolute, you would think that they would have  
11          given the presidential authority both ways.

12          MR. ELLIS: Sure. The reason that  
13          argument doesn't work is because Section 288,  
14          the President's authority under that provision,  
15          doesn't just apply to Section 288a(b). It  
16          applies to all of the immunities provided by  
17          the IOIA.

18          And as I was just describing, some of  
19          those are fixed immunity rules that are not  
20          absolute. And so, for instance, the officers  
21          and employees of international organizations do  
22          not receive diplomatic immunity. That was a  
23          big deal at the time.

24          And -- and yet the President can't --  
25          couldn't grant that up. I think what that

1 provision shows is that Congress wanted to  
2 provide international organizations at most the  
3 immunity from suit and other privileges of  
4 immunities that foreign governments received  
5 and not more so.

6 And yet Respondents are here today  
7 asking you for exactly that, more immunity --

8 JUSTICE BREYER: But on that --

9 MR. ELLIS: -- than foreign  
10 governments receive.

11 JUSTICE BREYER: But look, whatever  
12 other things it refers to, the provision allows  
13 the President to waive immunity, not to grant  
14 immunity. And your argument is they have  
15 immunity. Right?

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

18 (Laughter.)

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

21 MR. ELLIS: It does allow them to be  
22 sued.

23 JUSTICE BREYER: Okay. So I was  
24 right. I had it backwards the first time but  
25 not the second, not the third, all right.

1 (Laughter.)

2 JUSTICE BREYER: It allows the  
3 President to waive the immunity.

4 MR. ELLIS: That's right.

5 JUSTICE BREYER: Okay. It doesn't  
6 allow him to grant the immunity.

7 MR. ELLIS: It does in a sense. I  
8 mean --

9 JUSTICE BREYER: But the power to  
10 waive the immunity, at least in this section,  
11 amounts to nothing if they have no immunity  
12 because, for example, all they do is lend  
13 money.

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

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

17 MR. ELLIS: Understood.

18 JUSTICE BREYER: Okay.

19 MR. ELLIS: A couple responses to  
20 that, Your Honor.

21 JUSTICE BREYER: That's the question,  
22 I think.

23 MR. ELLIS: Glad to be able to address  
24 that. Number -- number one, just to be clear,  
25 we -- they do have a great deal of immunity. I

1 mean, foreign -- international organizations  
2 and foreign states are presumptively immune.  
3 And I would agree with almost everything  
4 that -- maybe everything that -- that my friend  
5 said about why the commercial activity  
6 exception, even with regard to IFC and -- and  
7 most -- more importantly, with regard to the  
8 vast sweep of these organizations, is not going  
9 to eliminate immunity.

10 I would add one more, is that even a  
11 case like this, we have serious doubts, I  
12 think -- we think, in fact, from what we know,  
13 this suit isn't going to be able to go forward  
14 regardless of the answer to the question  
15 presented, because in addition to having -- to  
16 being connected in some way to commercial  
17 activity, there must be a much stronger nexus.  
18 It must be based on commercial activity that  
19 occurs in the United States.

20 We think the Court's decision in OBB  
21 makes clear that the way you apply that is to  
22 ask: What's the gravamen of this suit? It's  
23 not enough to have some attenuated connection,  
24 but what's the gravamen?

25 And the gravamen of this suit as we

1 understand it is -- is tortious conduct that  
2 occurred in India, injuries that occurred in  
3 India. And we don't think -- we have serious  
4 doubts that this is going to be able to go  
5 forward even under restrictive immunity.

6 And so we do not think that what we're  
7 doing is opening the floodgates here; rather,  
8 that the sort of concerns that would be barred  
9 -- cases that would be barred by Respondent's  
10 absolute rule of immunity and would be allowed  
11 by ours, are -- are sort of quintessential  
12 domestic disputes, contract disputes with your  
13 contractor who renovated the building, the slip  
14 and fall at the -- at the organization's  
15 headquarters, or the driving accident on the  
16 streets of New York and D.C.

17 JUSTICE SOTOMAYOR: Do you have -- do  
18 you have any idea about how many of these kinds  
19 of organizations are headquartered in the  
20 United States?

21 MR. ELLIS: I think the numbers are in  
22 the 20 to 30 range. There's about -- somewhere  
23 80-some organizations that have been designated  
24 for protection under IOIA and 20-some that have  
25 -- I think are headquartered in the United

1 States.

2 JUSTICE SOTOMAYOR: That are  
3 commercial like this one?

4 MR. ELLIS: No, no, no. No, I did  
5 not -- no.

6 JUSTICE SOTOMAYOR: We're --  
7 everybody's assuming --

8 MR. ELLIS: Right.

9 JUSTICE SOTOMAYOR: -- a floodgate.

10 MR. ELLIS: Sure, no. There are --

11 JUSTICE SOTOMAYOR: Including Justice  
12 Breyer.

13 MR. ELLIS: -- there are a number of  
14 development banks, but even then, even -- even  
15 the development banks, even if you talk about  
16 the World Bank, it's not clear that those  
17 commercial activities are the sorts that the --  
18 the FSIA captures with the commercial activity  
19 exception. Lending there is to sovereign  
20 governments.

21 And -- and as the Court has been -- as  
22 lower courts have explained, that sort of  
23 commercial activity is not the sort that a  
24 private party could engage in. So it's not the  
25 sort that the commercial activity exception

1 picks up.

2 JUSTICE BREYER: Well, I -- I have the  
3 IFC, the IMF, the World Bank, the  
4 Inter-American Development Bank, the Asian  
5 Development Bank, the African Development Bank,  
6 the International Development Association. So  
7 I --

8 MR. ELLIS: Sure. I --

9 JUSTICE BREYER: -- I've got -- that's  
10 only half of them.

11 MR. ELLIS: That's -- that -- I'm not  
12 sure what percentage that is. I want to point  
13 out that some of those organizations --

14 JUSTICE BREYER: There are a lot.

15 MR. ELLIS: -- have their own immunity  
16 provision in the -- in their charter. And so  
17 that's what we think -- if you look at the  
18 history, that's what -- that's how it has been  
19 dealt with for organizations that require  
20 absolute immunity. We've entered into  
21 agreements.

22 I would point again to the OAS  
23 agreement, where the State Department is just  
24 crystal-clear that what OAS did in that  
25 agreement was to negotiate absolute immunity

1 because they thought that's what they needed in  
2 order to put their headquarters here.

3 JUSTICE KAGAN: But Mister --

4 MR. ELLIS: We agreed to that and we  
5 said: But, hey, this is not our usual  
6 practice. Ordinarily, we -- we afford only  
7 restrictive immunity. We point to the FSIA.

8 JUSTICE KAGAN: Mr. Ellis, I -- I  
9 guess I'm not sure I -- I quite understood what  
10 you meant. As to the core lending activities  
11 of these multinational development banks, in  
12 other words, making loans where private actors  
13 would not make loans, do you have a view as to  
14 whether that counts as a commercial activity or  
15 not?

16 Did you say that that would not count  
17 as a commercial activity because they're making  
18 loans that the -- that the private market would  
19 not make?

20 MR. ELLIS: No. I'm -- I'm not saying  
21 that it's -- that it's enough that they're  
22 making loans that a -- that a private -- they  
23 couldn't find a private party to provide. I'm  
24 saying if the nature of the loan is such that  
25 it's -- it's not the sort of transaction that a

1 private party would enter into, so think about  
2 the IMF that grants -- that lends to sovereigns  
3 and they do so on the requirement that the  
4 sovereign enact certain restrictions --  
5 regulations and change their -- their -- their  
6 laws in order to assure that they don't need  
7 the money again.

8 That is the sort of thing that's been  
9 held by lower courts, and we've advocated, is  
10 not a commercial activity. That's just not the  
11 sort of transaction that a private party can  
12 enter -- enter into. It's not just that a  
13 private party didn't. It's that -- that no one  
14 -- that's not something that you can do.  
15 That's a sovereign act.

16 JUSTICE BREYER: But can you give  
17 me --

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

19 JUSTICE BREYER: -- anything to assure  
20 me, because when I looked through this list, I  
21 thought that there were development banks like  
22 the World Bank, which is a pretty big deal, as  
23 well as in Asia, in Africa, we're trying to  
24 encourage development all over the world, and  
25 suddenly by removing the sovereign immunity

1 because the plaintiff will claim this is a  
2 commercial activity.

3 MR. ELLIS: So -- so --

4 JUSTICE BREYER: And you're not  
5 denying it.

6 MR. ELLIS: And so --

7 JUSTICE BREYER: So what is the  
8 assurance that the government can give us that  
9 this isn't going to lead to a lot of lawsuits  
10 and this isn't going to interfere with perhaps  
11 activity that the United States traditionally  
12 has been very much in favor of?

13 MR. ELLIS: Absolutely. Let me -- let  
14 me give you a couple things. I think we've  
15 given you a number of -- of points already this  
16 morning as to why we don't think the floodgates  
17 are going to open.

18 If -- if there's one more, I'll say  
19 just look at the -- the charter of these  
20 organizations. Look at the IFC's charter.  
21 They already waive suit, waive immunity for  
22 suits going directly to their core activities.  
23 They -- they, in fact, indicate that they --  
24 they need to waive suit in these suits.

25 And so I -- I think when you're

1 talking about what are the suits that are going  
2 to come up under commercial activity, many of  
3 them are already going forward because the IFC  
4 and the World Bank and others have waived their  
5 immunity.

6 JUSTICE GINSBURG: And they need to  
7 because?

8 MR. ELLIS: They need to because no  
9 one's going to enter into a financial  
10 transaction with them if they -- they know they  
11 can't sue if it -- if it goes south.

12 The other thing -- I want to also  
13 focus the Court on the -- on the suits that we  
14 know are not going to go forward on the  
15 absolute immunity side. We're talking about  
16 suits by -- by U.S. citizens and residents  
17 about domestic conduct and they're seeking  
18 redress in U.S. courts.

19 These are the suits that foreign  
20 governments are -- are able to be sued on and  
21 don't have immunity. And we don't see any  
22 reason why international organizations should  
23 not also be subject to suit in those  
24 circumstances, and we think that's exactly what  
25 the Congress was trying to do when it enacted

1 Section 288 in 1945.

2 If there are no -- no further  
3 questions, we ask the Court to reverse.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Mr. Verrilli.

7 ORAL ARGUMENT OF DONALD B. VERRILLI  
8 ON BEHALF OF THE RESPONDENT

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

11 The IOIA prescribes a standard of  
12 virtual absolute immunity that is fixed and not  
13 evolving. We know that because the text  
14 incorporated common law terms that had a  
15 settled meaning of virtually absolute immunity  
16 and because a fixed standard makes the most  
17 sense in light of the statutory context and  
18 purpose.

19 Now the reason that Congress enacted  
20 the IOIA was to fulfill treaty obligations that  
21 committed us to provide virtually absolute  
22 immunity. Those treaty obligations did not  
23 commit us to treat international organizations  
24 the same as foreign states were treated. They  
25 committed us to the substantive standard of

1 virtually absolute immunity.

2           And, therefore, if -- if -- if the  
3 language in section 288b is interpreted in the  
4 way my friends on the other side suggest --

5           JUSTICE SOTOMAYOR: So why didn't  
6 Congress say that the way it did in the other  
7 provisions of this Act? And if it intended  
8 that in no change, it could have said it and  
9 given the very exception it gave, which is that  
10 the President or the executive could reduce  
11 immunity, which was the standard at the time.

12           MR. VERRILLI: So let me start with  
13 the basic question. We think if the Court  
14 applies the normal rules of construction that  
15 it applies in statutory interpretation cases,  
16 that Congress did say that it was providing  
17 virtually absolute immunity.

18           And I think a case in particular that  
19 I would point the Court to is the Nader  
20 decision, 527 U.S., and in particular to page  
21 21 of the Nader decision. That's a case --  
22 that case, of course, was about whether mail  
23 fraud and wire fraud incorporated a materiality  
24 standard. This is an opinion by Chief Justice  
25 Rehnquist, unanimous for the Court on this

1 point. The Court said first we look to the  
2 text, of course, and when looking to the text,  
3 if we -- if -- and in looking to the text,  
4 based solely on a natural reading of the full  
5 text, materiality wouldn't be an element of the  
6 fraud statute.

7           And then the Court says: But that  
8 does not end the inquiry because, in  
9 interpreting statutory language, there's a  
10 necessary second step. And this is -- I'm  
11 coming to the point that I think governs here,  
12 which is that it is a well-established rule of  
13 construction, a rule of construction, that  
14 where Congress uses terms that have accumulated  
15 settled meaning under the common law, a court  
16 must infer, must infer, unless the statute  
17 dictates otherwise, that Congress means to  
18 incorporate the established meaning of those  
19 terms. Now the --

20           JUSTICE GINSBURG: What about the  
21 argument that there wasn't an established  
22 meaning in -- what was it -- 1945, that it --  
23 the -- the status of the immunity was in flux?  
24 It had been absolute, but then we were going  
25 over -- the State Department was advising the

1 court whether immunity should be given in a  
2 particular case.

3 MR. VERRILLI: There's a bit of a  
4 suggestion to that effect in the brief of the  
5 United States, Your Honor, but I would  
6 respectfully suggest that is not a fair  
7 characterization of where things stood in 1945  
8 at all.

9 It is true that some people within the  
10 State Department in 1945 thought that immunity  
11 should move to a more restrictive standard, but  
12 the Justice Department would not even advance  
13 that standard in this Court, at the request of  
14 the State Department, and this Court did not  
15 describe the immunity as being in flux. This  
16 Court said the standard was virtually absolute  
17 immunity.

18 If one looks even in 1952 at the Tate  
19 Letter, the Tate Letter didn't say the law was  
20 in flux in the United States. It said the  
21 United States was hewing to the standard of  
22 virtually absolute immunity, but other  
23 countries were moving towards a standard of  
24 restrictive immunity and, therefore, we ought  
25 to reconsider what we're doing.

1           So I just -- I mean, the Court can  
2 read these materials for -- for itself, but I  
3 just respectfully do not think it's a fair  
4 consideration of where things stood in 1945 at  
5 all.

6           And then, if I could, I'd like to pick  
7 up on a related point that came up in the brief  
8 of the United States. It's another statement  
9 in the brief of the United States, and it came  
10 up in argument today that, look, this really  
11 isn't a problem because for those organizations  
12 that need immunity that goes beyond the -- the  
13 restrictive immunity, we've always understood  
14 that they get -- they can go get a special  
15 statute and they've gone and gotten special  
16 statutes.

17           The United States says on page 27 of  
18 its brief precisely because the IOIA didn't  
19 provide that level of immunity, they give these  
20 three examples, IMF, World Trade Organization,  
21 and Organization of American States.

22           I'd like to take a minute and go  
23 through each of them because it doesn't hold up  
24 with respect to each of them. With respect to  
25 the IMF, for example, it is true the IMF, you

1 know, it has a -- has a treaty. There was a  
2 statute that gave that treaty effect under U.S.  
3 law, which ended up providing for absolute  
4 immunity.

5 But it can't possibly be that that was  
6 undertaken based on any sense that the IOIA  
7 didn't provide that level of immunity because  
8 the IMF statute was enacted in July of 1945,  
9 and the IOIA wasn't enacted until five months  
10 later. So it can't possibly substantiate what  
11 the government was saying.

12 If one looks at the WTO treaty, it is  
13 true with respect to that treaty that it  
14 committed us to a very wide scope of  
15 immunities. It said that the United -- that  
16 the United States will commit to providing all  
17 or virtually all of the immunities provided  
18 under a whole different U.N. convention, the  
19 U.N. convention on specialized agencies.

20 Now that convention has all kinds of  
21 tax immunities and property immunities that go  
22 way beyond what the IOIA provides. So, of  
23 course, they needed another statute in order to  
24 make those treaty commitments. That doesn't  
25 prove anything about whether anybody thought

1 that the IOIA failed to provide virtually  
2 absolute immunity.

3 In fact, the historical evidence, I  
4 think, really to the extent it points in any  
5 direction, it points very much more in our  
6 direction. And the best way to see that is  
7 with respect to the way the United Nations was  
8 treated under -- by the executive branch in  
9 this country.

10 Now we signed the U.N. charter in  
11 1945, committed us to provide what the charter  
12 describes as the necessary immunities. Then  
13 the U.N. Convention on Immunities was  
14 negotiated in 1946, which said that the U.N.  
15 should get virtually absolute immunity. Not  
16 the same immunity as foreign states, virtually  
17 absolute immunity.

18 Now the United States did not ratify  
19 that convention until 1970. So, on the theory  
20 that my friends on the other side have, from  
21 the moment of the Tate Letter in 1952 when  
22 foreign state immunity became restrictive and  
23 not virtually absolute anymore, we were in  
24 violation of the commitment we made in the U.N.  
25 charter.

1           Now, if that was true, you would  
2           certainly expect the State Department, A, to  
3           address it in the Tate Letter, but there's  
4           nothing in there. It's a classic case of the  
5           dog that didn't bark. And, B, you would expect  
6           them to try to do something about it, like get  
7           the U.N. Convention ratified immediately  
8           because otherwise we were going to be out of --  
9           out of compliance with our obligations to the  
10          granddaddy of all international organizations,  
11          the United Nations.

12                 But there's not a -- from 1952 until  
13          the ratification of the Convention in 1970, you  
14          can't find one word by anybody in the executive  
15          branch ever saying that. What you do find --

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

18                 MR. VERRILLI: Well --

19                 JUSTICE SOTOMAYOR: I know today it's  
20          a very different organization, but it's not  
21          clear to me that there was much going on that  
22          was commercial at its initial stages.

23                 MR. VERRILLI: I take that point, Your  
24          Honor, but what I would say in response is that  
25          there was a very great deal of sensitivity

1 about the whole package of -- of immunities  
2 that were available to the U.N. and its  
3 diplomats and its -- and its workers.

4           And there was concern all along from  
5 1952 to 1970 that -- that -- where the  
6 executive was urging Congress to ratify the  
7 convention, but the only things ever mentioned  
8 were the diplomats -- immunities for diplomatic  
9 individuals.

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

20           So, as late as 1970, it was just quite  
21 clear that everybody understood the IOIA  
22 conferred virtually absolute immunity. And, of  
23 course, that's because it was -- it was enacted  
24 to comply with our treaty obligations.

25           It wasn't enacted to make sure that,

1     come what may, that international organizations  
2     would get treated the same as foreign states.  
3     That is -- you know, that's the best way to  
4     think about it, is it's just a completely  
5     anachronistic way of thinking about the body of  
6     materials in front of you.

7             JUSTICE KAGAN:  But even what you just  
8     said, Mr. Verrilli, it wasn't enacted to make  
9     sure that foreign organizations would get  
10    treated the same as foreign states.

11            I mean, that's exactly what the  
12    language of the thing says.

13            MR. VERRILLI:  Well, so I guess a  
14    couple of things about that.  I think the right  
15    way to think about the language, Justice Kagan,  
16    is that it was a means to an end in 1945 when  
17    it was enacted.

18            It was not the end in itself to assure  
19    equivalence of treatment come what may.  It was  
20    the means by which Congress ensured that it  
21    would fulfill its treaty commitments which were  
22    -- and those treaty commitments were to provide  
23    virtually absolute immunity.

24            And we know, the Senate report says  
25    we're enacting this provision to fulfill our

1 treaty commitments. And our treaty  
2 commitments, again, were not to treat them the  
3 same. They were to provide virtually absolute  
4 immunity. So --

5 JUSTICE KAGAN: Do you think it was --  
6 you answered Justice Ginsburg's questions about  
7 how far we were from the Tate Letter in 1945,  
8 but do you think it was inconceivable to  
9 Congress that the common law of immunity would  
10 change?

11 MR. VERRILLI: Well, I -- I -- I can't  
12 say that it would be inconceivable to anybody,  
13 but what I can say is if one looks at the  
14 debates surrounding the passage of the IOIA,  
15 is, once again, it's a dog that didn't bark.

16 You can't find a single person  
17 anywhere saying anything remotely like the  
18 proposition that we need to adopt a standard  
19 that will evolve over time because we have a  
20 concern that foreign sovereign immunity law  
21 will evolve over time.

22 That just was not any part of  
23 anybody's thinking at that time. They were  
24 trying -- you have to remember this is coming  
25 out of the Bretten Woods system. We have

1     Bretten Woods. We set up all these  
2     organizations.

3             They have a -- they have a desperate  
4     mission in front of them to try to rebuild the  
5     world -- the world after the carnage of World  
6     War II. There's a lot of pressure on Congress  
7     to get these organizations up and going and  
8     give them the immunity we promised them so they  
9     can go out and do their work. That's what led  
10    to the enactment of the IOIA.

11            It was none of these other things, as  
12    I said. I really think if you look at the  
13    historical materials, it's the -- the gloss  
14    that my friends on the other side are trying to  
15    put on it is completely anachronistic.

16            They're taking a different concept  
17    that they've come up with now and trying to  
18    retrofit the historical facts to match it, and  
19    it just isn't right.

20            JUSTICE BREYER: Is that -- is that --  
21    the Russians at that time, '45 and so forth,  
22    were putting all these businesses into state  
23    entities. So my guess is there were -- there  
24    were a number of cases, and what I thought I  
25    heard Mr. Fisher say is, if we really go back

1 and look at this, we'll see that the status quo  
2 before this passed was not absolute immunity,  
3 but the status quo was a kind of mess, where  
4 sometimes the State Department would say give  
5 them immunity and sometimes the State  
6 Department would say not.

7 Now what is the actual situation as  
8 far as you've been able to find it?

9 MR. VERRILLI: Well, I don't --  
10 respectfully, with respect to my friends on the  
11 other side, I don't think that's a fair  
12 characterization of the historical materials.

13 JUSTICE GINSBURG: That's the same --  
14 the answer you gave to me is the answer you  
15 would give to Justice Breyer?

16 MR. VERRILLI: Yes.

17 JUSTICE GINSBURG: Same question?

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

22 The -- the -- the government's briefs  
23 to this Court didn't say anything like that.  
24 When this Court has looked back on the law in  
25 Verlinden and in Samantar, it hadn't said

1 anything like that. It said the standard was a  
2 common law standard of virtually absolute  
3 immunity.

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

7 JUSTICE BREYER: Okay, I got it.

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

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

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

23 And if you look at the face of the  
24 statute, it's obvious that they are granted on  
25 a categorical basis in gross by an executive

1 order, not on a case-by-case basis by the State  
2 Department when -- when a lawsuit is -- or when  
3 a -- when a lawsuit is filed.

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

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

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

1 find at page 6a of the appendix to the blue  
2 brief.

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

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

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

1 b and d?

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

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

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

25 One is it says they shall be the same

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

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

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

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

24 I think this is a critical point. I  
25 just want to make sure it's clear. Another

1 reason why you shouldn't draw this equivalence  
2 -- and it can't be that Congress really  
3 intended to draw an equivalence between foreign  
4 states and international organizations such  
5 that they would just move in tandem no matter  
6 what -- is that immunity is granted for  
7 different reasons.

8           The reason you give an international  
9 organization immunity is a functional reason,  
10 not a status reason. It's not about according  
11 the appropriate respect to the sovereigns,  
12 because international organizations aren't  
13 sovereigns. They're separate juridical  
14 persons. And what's quite clear -- it's clear  
15 from the U -- the San Francisco report on the  
16 foundation of the U.N., it's clear from the  
17 Senate report in 1945, it's clear from all the  
18 commentators that we discussed in our brief,  
19 it's clear from the Restatement of Foreign  
20 Relations, which we've cited in our brief, that  
21 you grant immunity to international  
22 organizations so that they can carry out their  
23 functions effectively. And -- and just take --  
24 let me take a minute and kind of elaborate on  
25 that because I think it's critical.

1 Remember, these are --

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

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

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, what

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

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

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

20 (Laughter.)

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

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

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

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

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

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

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

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

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

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

6 CHIEF JUSTICE ROBERTS: Yeah.

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

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

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

1 Justice Breyer's identified many of them.

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

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

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

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

1 malaria.

2           They are all entirely dependent on the  
3 IOIA for their immunities, and those immunities  
4 are drastically different after this. And then  
5 we do have the issue, I think, with some  
6 organizations that we may even actually now be  
7 out of our -- out of compliance with our treaty  
8 commitments.

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

12           Now, the way -- the basis of this  
13 lawsuit is the following: IFC when it loans  
14 money here, it's loaning money in -- in parts  
15 of the world where private capital won't go  
16 unless we go in there.

17           And very often they have un-developed  
18 legal systems and they certainly don't have  
19 robust environmental protections or labor  
20 protections. So what the IFC has done is lien  
21 into those, put those kinds of environmental  
22 standards and labor standards into its  
23 agreements, saying you want this money to do  
24 this development project, these are the  
25 standards that you've got to live up to.

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

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

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

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

24          So if they can just grab that and take  
25          it into court and make it the basis for a class

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

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

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

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

23 And I really think what you are going  
24 to see here is that this is just going to  
25 become another version of the sorts of

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

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

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

1 effectively with these organizations.

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Four minutes, Mr. Fisher.

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

23 MR. FISHER: Thank you. I'd like to  
24 make four points and I'd like to start with the  
25 text of the statute itself, and simply say when

1 Mr. Verrilli talks about the Neder Doctrine and  
2 the Common Law Doctrine, that you look at the  
3 term, a term's meaning at the time of  
4 enactment. He's mixing apples and oranges.

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

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

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

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

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

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

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

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

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

25 And it's very different because none

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24

25

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