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

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 16-499, Jesner versus
5 Arab Bank.

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 This Court made clear in Kiobel that
12 the ATS should be construed first and foremost
13 according to the ordinary rules of statutory
14 construction.

15 And applying those tools here yields a
16 straightforward result. The traditional
17 presumption that corporations can be held
18 liable in civil actions for torts controls
19 here.

20 Now, the bank's principal response is
21 to say that the ATS sometimes can create
22 formulations issues when cases are brought
23 against corporations. But for two reasons,
24 that objection does not overcome the strong
25 presumption of tort liability here.

1 First, some ATS cases do not involve
2 foreign relations at all. Take piracy, for
3 example. So a foreign relations argument
4 cannot justify the categorical rule the Second
5 Circuit has laid down in this area. And,
6 indeed, a categorical bar against corporate
7 liability would itself create foreign relations
8 problems along the lines the ATS was designed
9 to put -- to solve.

10 And second, even when there are
11 foreign relations issues, and perhaps this is
12 an even more important point, there are many
13 other doctrines readily available to courts to
14 directly and effectively deal with those
15 issues.

16 There's no need to use the mismatched
17 theory of -- of no corporate liability when you
18 have tools available under the common law to
19 address the arguments when they arise.

20 Take the extraterritoriality holding
21 of *Kiobel* first and foremost. As the Court
22 stressed in that case, the theory of the
23 extraterritoriality presumption --
24 anti-extraterritoriality presumption is to keep
25 the U.S. out of foreign relations friction by

1 applying its law overly aggressively to
2 incidents elsewhere in the world.

3 Now, after Kiobel, I would suggest
4 that that extraterritoriality holding has had
5 its intended effect. There are many statistics
6 cited on the other side about the number of ATS
7 suits that have been brought over the past
8 couple of decades, but the relevant question
9 for this Court is, what does the landscape look
10 like now in the post-Kiobel world?

11 And the Chamber of Commerce has
12 actually done a study on this, and that study
13 noted that, at the time of Kiobel, there were
14 40 cases pending against corporations. In the
15 two years after Kiobel, over 70 percent of
16 those cases were dismissed on
17 extraterritoriality grounds and another
18 10 percent were dismissed for other reasons.
19 So what you have --

20 JUSTICE SOTOMAYOR: How about Daimler?
21 Would Daimler --

22 MR. FISHER: Pardon me?

23 JUSTICE SOTOMAYOR: -- apply here?
24 Daimler, our personal jurisdiction case about
25 corporations.

1 MR. FISHER: Yes, we think that --

2 JUSTICE SOTOMAYOR: You can only sue
3 them at their corporate headquarters or
4 principal place of business. Will that take
5 care of most of the next 30 percent?

6 MR. FISHER: Well, that would take
7 care of general jurisdiction claims. Of
8 course, here we have a specific jurisdiction
9 claim, and the bank, because of its presence in
10 New York, has never even made a personal
11 jurisdiction argument, but, yes, Justice
12 Sotomayor, that would be another tool available
13 to district courts.

14 And so now what you have is a very,
15 very small universe of cases, a manageable
16 universe of cases, one that makes the U.S.
17 position in this respect very much like other
18 courts' in the world, particularly our close
19 allies in Europe and in -- otherwise in North
20 America, as the Comparative Law Scholars' brief
21 points out. And there's no reason whatsoever
22 to have this corporate liability bar that has
23 no basis --

24 CHIEF JUSTICE ROBERTS: Where --

25 MR. FISHER: -- in the text --

1 CHIEF JUSTICE ROBERTS: I'm -- I'm
2 sorry. Where else in the world would this type
3 of action be brought against -- against --
4 against a corporation or almost really against
5 anyone?

6 I'm -- I'm concerned about the foreign
7 entanglement issue. I mean, we passed this
8 statute to avoid foreign entanglements because
9 we wanted to provide a forum for someone like
10 the French ambassador in the Longchamps Affair,
11 but I'm wondering if extending it to corporate
12 liability is, in fact, going to have the same
13 problematic result of increasing our
14 entanglements, as it obviously has here with
15 respect to the government of Jordan.

16 MR. FISHER: Well, I think you asked
17 -- the first question is, where else could law
18 -- lawsuits like this be brought? At pages 43
19 and 44 of our blue brief and at pages 15
20 through I believe it's about 19 of the
21 Comparative Law Scholars' brief, there's a
22 survey of other jurisdictions in the world that
23 are similar lawsuits.

24 CHIEF JUSTICE ROBERTS: I'm not
25 talking about jurisdictions that allow suit

1 against corporate defendants. I'm talking
2 about a case like this one, foreign activity, a
3 foreign defendant brought in a jurisdiction
4 against a corporation seeking monetary relief
5 like that.

6 MR. FISHER: No --

7 CHIEF JUSTICE ROBERTS: It's my
8 understanding that the availability of this
9 sort of relief is pretty unique here.

10 MR. FISHER: Yes and no, Mr. Chief
11 Justice. I want to be clear the more refined
12 question you just asked me was the one I was
13 answering. So those examples I gave you are
14 examples like this with corporate defendants
15 for international law violations conducted in
16 other parts of the world besides the forum
17 being brought. So those cases are brought --

18 CHIEF JUSTICE ROBERTS: Foreign --
19 foreign corporate defendants?

20 MR. FISHER: Sometimes, yes;
21 sometimes, no. But here, you know, of course,
22 again, this brings me back to Justice
23 Sotomayor's point, so here we have --

24 JUSTICE SOTOMAYOR: I'm sorry. What
25 amici brief was that you mentioned?

1 MR. FISHER: Pardon me?

2 JUSTICE SOTOMAYOR: I'm sorry to cut
3 you off.

4 MR. FISHER: The Comparative Law
5 Scholars' brief. This is -- this is a case
6 where Arab Bank itself had a branch in the
7 United States. And so it's sort of an -- it's
8 sort of in between a totally foreign defendant
9 and something inside the country.

10 But to turn back to your point about
11 the ATS being unique, the answer to that is yes
12 and no. It's unique in the sense of the way
13 U.S. law effectuates this availability of
14 relief for international law violations.

15 It's not unique in the fact that that
16 availability exists. So what you have in other
17 parts of the world is you have just regular
18 tort claims that can be brought or, in the
19 Netherlands, you can bring a claim directly
20 under a -- under a treaty. In other cases --
21 in other countries in Europe, you can bring an
22 attendant civil claim attached to criminal
23 prosecutions for violations of the law of
24 nations.

25 And it brings me back to what is

1 unusual about the ATS, and it ties into our
2 history with the First Congress. Remember --
3 this brings me again back to the purpose of the
4 ATS -- Congress did not want these cases to be
5 brought in state court. They didn't want --
6 more precisely, they didn't want to leave it up
7 to the states as to whether to allow these
8 claims in the first place.

9 And so it's a feature of our unique
10 federalism that we have this statute and a
11 statutory way that it allows these claims to be
12 brought.

13 JUSTICE ALITO: Well, if we look at
14 that purpose, when we are dealing with what
15 I'll call step 2 of Sosa, so the question of
16 whether we in -- should recognize a federal
17 common law claim under particular
18 circumstances, should we, in effect, balance
19 the international repercussions of deciding the
20 issue one way or the other?

21 So if we hold that corporations can be
22 sued under the -- under the Alien Tort Statute,
23 we have a fair idea that there are going to --
24 there are going to be cases like this one and
25 like Kiobel that do raise foreign relations

1 concerns.

2 Now, there are some that you can
3 hypothesize on the other side, but are they at
4 all comparable?

5 MR. FISHER: Well, Justice Alito,
6 first of all --

7 JUSTICE ALITO: Where denying a forum
8 in the United States for a case against a
9 corporation is -- will -- will have equally
10 serious foreign policy consequences.

11 MR. FISHER: Well, let me start by
12 agreeing with you that, yes, as a matter of
13 your step 2 Sosa authority, you can and should
14 look in part to international implications of
15 having a cause of action like this.

16 But my first answer to your question
17 is that, insofar as you have those concerns,
18 you should deal with it with other doctrines
19 like extraterritoriality, like forum
20 non-convenience, political question, other
21 kinds of doctrines --

22 JUSTICE GINSBURG: Which would --

23 MR. FISHER: -- more directly deal
24 with those concerns.

25 JUSTICE GINSBURG: Which would apply

1 the same as an individual or a corporation. I
2 thought Sosa was saying international law
3 starts out being the law governing relations
4 between states, but now it has gone beyond that
5 and there can be private actors who are
6 governed by the law of nations,
7 international -- international law.

8 So the -- what I don't comprehend is
9 why you would split individual and corporation.
10 I -- I read that footnote as saying one thing
11 is you can't sue any private person. And then
12 the other, you have to consider whether private
13 persons would be included, individuals or
14 corporations.

15 MR. FISHER: I agree with everything
16 you just said, Justice Ginsburg. Sosa holds
17 that you do not look to international -- or you
18 do look to international law for defining the
19 norm under which the cause of action is
20 proceeding.

21 But I think Justice Alito is also
22 right, that once you have gotten past that,
23 which is not in front of the Court here, as a
24 matter of the common law-making authority to
25 manage the civil action that is the cause of

1 action under the ATS, one of the touchstones
2 could be international law.

3 But if I could return to Justice
4 Alito's question, so, first of all, there's a
5 mismatch between their theory and the solution.
6 There are other doctrines more available.

7 And just imagine other situations.
8 Remember, their theory would be exactly the
9 same if it were a U.S. corporation that was a
10 defendant in this case, and, indeed, if the
11 terror attacks had occurred in the U.S. You're
12 talking about very serious foreign policy
13 implications at that point. Take also, as I
14 said, piracy, slave trading, child labor
15 practices that might occur in this country.

16 You have to ask yourself --

17 JUSTICE ALITO: If it's a U.S.
18 corporation, won't there be other grounds on
19 which the suit can be brought?

20 MR. FISHER: Well, it brings us back
21 to the purpose of the ATS. If it's a foreign
22 plaintiff, what Congress wanted was to have
23 that case brought into federal court, if it is
24 a law of nations theory for which the violation
25 --

1 JUSTICE ALITO: What if you have a
2 foreign -- if you have a foreign plaintiff
3 suing an American corporation, that could be
4 brought in federal court, could it not?

5 MR. FISHER: It could be brought in
6 federal court, but the law of nations theory
7 that we're proceeding under is available only
8 under the ATS.

9 JUSTICE ALITO: I mean, let's --

10 MR. FISHER: Some of those cases might
11 -- I'm sorry.

12 JUSTICE ALITO: No, I'm sorry. Let's
13 go back to 1789 and think of concrete examples.
14 So we know the example of the French, a French
15 citizen assaults a French diplomat in
16 Philadelphia.

17 There -- there could be foreign policy
18 repercussions for the United States if the
19 federal courts didn't provide a forum for that
20 suit. That's said to be the thinking behind
21 the ATS.

22 So suppose the French diplomat is
23 assaulted by a British subject on a ship coming
24 to the United States but still in international
25 waters at the time of the -- of the assault.

1 Now, would -- would the First Congress
2 have wanted that to be heard in federal court
3 where you have -- it would put us in exactly
4 the situation between these two superpowers
5 that we wanted to avoid?

6 MR. FISHER: Well, I think, Justice
7 Alito, the answer to that question would be an
8 application of the extraterritoriality
9 doctrine. It would not be an application of a
10 no corporate liability rule.

11 Just to return to 1789, imagine the
12 process server, which was one of the other
13 examples that gave rise to the Act, working for
14 a corporation.

15 And as the United States points out in
16 its brief, it would make no sense to have --
17 think Congress would have thought the
18 corporation for which the process server was
19 working shouldn't be subject to suit.

20 And I know you talked to the first
21 Kiobel argument about the example of piracy,
22 and unfortunately today that's an example that
23 resounds -- that -- that -- that is important
24 not just then but today, and piracy operations
25 can be in a corporate forum.

1 JUSTICE GORSUCH: Mr. Fisher --

2 MR. FISHER: And you have to -- yeah.

3 JUSTICE GORSUCH: -- looking back to
4 1789, as Sosa indicates we should, beyond
5 extraterritoriality, did it also anticipate
6 that there's an American defendant in the case?

7 Professor Bellia and Clark argue that
8 that's exactly what was in mind, was some
9 action by an American citizen that might be
10 tagged to the United States itself and be cause
11 for just war by a foreign power, and that that
12 was the purpose of the ATS.

13 So what do you say about that? And
14 then relatedly, if international law was not
15 part of the federal law itself in 1789, and I
16 think there is an argument that that's what the
17 Congress understood too, then don't you need an
18 American defendant in order to have diversity
19 jurisdiction?

20 MR. FISHER: So -- so, to take your
21 first question, remember the De Longchamps
22 example involved two Frenchmen. So that's, I
23 think, a direct refutation --

24 JUSTICE GORSUCH: Well, you've got the
25 ambassador provision as well, which is a

1 separate part of the Constitution. And the ATS
2 was arguably meant to do more than cover
3 ambassadors.

4 MR. FISHER: Well, I think that it
5 just shows you that a foreign defendant could
6 be a problem.

7 JUSTICE GORSUCH: But if you -- I
8 think we have a separate statute in -- in 1789
9 to deal with that issue too. So that's -- that
10 doesn't answer my question.

11 MR. FISHER: Well, I think that, you
12 know, there are -- there have been many, many
13 examples. Another example, the Attorney
14 General's example, of the irrigation company
15 that -- in 1907 that he said could be subject
16 to the ATS. Nobody thought that was incorrect.

17 And there have been numerable other
18 cases with foreign defendants and foreign
19 plaintiffs. And as long as it touches and
20 concerns this country, and this is the holding
21 of Kiobel, then we think it's a proper --

22 JUSTICE GORSUCH: But can you answer
23 my question about what the expectation was in
24 1789 --

25 MR. FISHER: I think the --

1 JUSTICE GORSUCH: -- Sosa tells us it
2 should govern our review of the statute.

3 MR. FISHER: The understanding I -- my
4 understanding of Congress' understanding in
5 1789 was that the international law was part of
6 U.S. law. That's the way Paquete Habana
7 described this situation years later.

8 JUSTICE GINSBURG: Isn't that what --
9 what this Court said?

10 MR. FISHER: I think that's right,
11 Justice Ginsburg. And so, therefore, it would
12 have been a proper use of Congress' powers
13 under the define and punish clause.

14 JUSTICE GORSUCH: I don't doubt that's
15 what we've -- some -- some have suggested since
16 then, but do we know that was the understanding
17 of Congress in 1789? It seems like Professor
18 Bellia, Clark, others have argued -- Goldsmith,
19 suggested maybe otherwise.

20 MR. FISHER: Well, I think there would
21 have been a revoke -- I'm sorry, a robust set
22 of arguments made about the history of the ATS
23 and how it should be interpreted.

24 Justice Gorsuch, I think those were
25 hashed out in Sosa. And so I think that that

1 position in Sosa didn't carry the day.

2 And what carried the day in Sosa was a
3 notion that international law was received into
4 this country as part of the federal common law
5 and, therefore, when the ATS says that causes
6 of action can be brought for violations of the
7 law of nations --

8 JUSTICE GORSUCH: If that's the case,
9 then -- then you've got federal question
10 jurisdiction and what's the point of the ATS?

11 MR. FISHER: You have -- the point of
12 the ATS is to direct it to a federal forum and
13 to make clear that -- that alien plaintiffs can
14 bring these cases, and to make -- to make it
15 absolutely clear as a statutory matter that the
16 federal courts had jurisdiction as part of, as
17 you know, part of the first judiciary act, the
18 same way that maritime --

19 JUSTICE GORSUCH: But today you have
20 1331, right? So --

21 MR. FISHER: The same way that
22 maritime law, maritime jurisdiction, is more
23 specifically set out in the first judiciary
24 act, Congress wanted to make absolutely clear,
25 because of the history the Court has canvassed

1 and that we have already discussed today, that
2 --

3 JUSTICE ALITO: You've -- you've --

4 MR. FISHER: -- those were able to be
5 brought in federal court.

6 JUSTICE ALITO: You have referred to
7 the extraterritoriality doctrine as one that
8 would limit the application of the ATS in cases
9 that have foreign relations problems. But I
10 don't know how much limitation that's going to
11 impose if -- if it is -- if the presumption
12 against extraterritoriality is satisfied
13 whenever a foreign financial transaction is
14 cleared through New York.

15 MR. FISHER: Well, Justice Alito, of
16 course, that issue is in front of you and
17 nobody's -- and so we're not asking you to
18 resolve it and neither is the United States.

19 But I'd say two things in respect to
20 that: if you want to think about that issue
21 for purposes of this case, the -- the amicus
22 brief on our side by former financial
23 regulators and financial regulation scholars
24 explain that dollar clearing, as the -- as the
25 function is called, is actually a core function

1 of finance.

2 And it's so important that the federal
3 government itself exercises jurisdiction over
4 any bank that does it and it holds it liable
5 under the Bank Secrecy Act, the Foreign Corrupt
6 Practices Act.

7 In this very case, or -- and the facts
8 giving rise to this very case, we know the
9 federal government imposed a very heavy
10 sanction on Arab Bank for using its New York
11 branch in the way it did.

12 So I would -- I would --

13 JUSTICE KAGAN: I -- I am --

14 MR. FISHER: -- I would push back a
15 little bit.

16 JUSTICE KAGAN: I take your point that
17 that's not in this case. But if it were in
18 this case, that what you just said does raise
19 Mr. Clement's argument that there are many
20 better ways, perhaps, dealing with, you know,
21 financial regulation generally, than allowing
22 private suits to deal with those sorts of
23 issues.

24 MR. FISHER: So, Justice Kagan, if I
25 may say one more thing to Justice Alito and

1 then turn to that question, which is also,
2 remember, we have the money laundering
3 allegations using the bank -- using the
4 charitable front in Texas.

5 And as the United States points out,
6 that also satisfies touchy concern if that gets
7 litigated on remand.

8 Now, Justice Kagan, to turn to your
9 question, we just don't think -- it's just a
10 red herring to point to all of the various
11 banking regulations that exist in the world.
12 We're not proceeding under any banking
13 regulations.

14 You know, the bank would like to tell
15 a story to this Court about it being a
16 negligent and innocent actor in this -- in this
17 scenario, but that's not what the factual
18 allegations are and it's not even what the
19 district court has found that we proved in the
20 ATA part of this case.

21 What we allege is knowing and
22 purposeful financing of terrorism with the
23 expectation that it will make those terrorism
24 attacks more successful and more lucrative for
25 the perpetrators, and that is a violation of

1 the law of nations.

2 The Court does not need to worry that
3 there is going to be a flood of lawsuits
4 against banks or any other financial actors if
5 we are allowed to go forward in this case
6 eventually on our substantive claims --

7 JUSTICE GINSBURG: What --

8 MR. FISHER: -- because you have to
9 allege a violation of the law of nations, not
10 of mere banking regulations.

11 JUSTICE GINSBURG: What -- what about
12 another limitation that has been suggested,
13 extraterritoriality, that's what this Court has
14 declared. As there's a suggestion that perhaps
15 there should be an exhaustion requirement, that
16 is, you sue first in the country most
17 concerned. You sue where this happened. And
18 then, if you -- if you don't have a remedy in
19 that most natural forum, then you can come
20 here.

21 MR. FISHER: Are you asking me whether
22 that's an acceptable doctrine?

23 JUSTICE GINSBURG: Yes, the
24 exhaustion.

25 MR. FISHER: Yes, I think in Footnote

1 21 in *Sosa*, the Court suggested that that may
2 well be a requirement for a cause of action
3 like this.

4 It doesn't apply in this case, Justice
5 Ginsburg, because the bank argued in the
6 district court only that we should have brought
7 this case in Jordan, and we responded to that
8 argument with many, many problems with that
9 suggestion. The district court rejected it.
10 And the bank did not appeal that finding.

11 So there was no adequate forum
12 available to us.

13 And, secondly, Justice Ginsburg, it's
14 worth remembering that this case began as a
15 combined cause of action for the alien
16 plaintiffs under the ATS and for the U.S.
17 national plaintiffs under the ATA. So it made
18 every bit of sense for efficiency concerns to
19 bring, in a single forum with a single judge,
20 these joint claims that deal with the same core
21 factual allegations.

22 JUSTICE KENNEDY: Your -- your -- the
23 theory of your case is that *Sosa* step 1, where
24 we ask if there's a specific universal norm, is
25 different from saying what parties are bound by

1 that norm.

2 But isn't it true that with respect to
3 corporate liability, which can be strict
4 liability, vicarious liability, respondeat
5 superior, Monell, that this does impose a norm
6 in the sense that it tells corporations what
7 they must do, how they must run their business?
8 That seems to me a norm.

9 MR. FISHER: No, I think, Justice
10 Kennedy, it's not in the -- in the Sosa sense
11 because the U.S. rule here is respondeat
12 superior and that's the rule shared by the vast
13 majority of civilized legal systems. And then
14 all that rule then tells you to ask is, who's
15 responsible for the bad acts here? So it's a
16 matter of --

17 JUSTICE KENNEDY: No, but -- but norms
18 control behavior. And we're saying that
19 corporations with this extensive liability
20 under respondeat superior now must conform
21 their behavior. That seems to me to be a norm.

22 MR. FISHER: Justice Kennedy, I think
23 there are other things that might influence the
24 way a corporation acts. Limitations periods,
25 rules of evidence that will apply in any course

1 of action. So just the mere fact that it's
2 going to influence corporate behavior does not
3 make it a norm question under step 1 of Sosa.

4 And let me say one other thing which I
5 think also responds to Justice Alito's
6 question. Another place the Court has looked
7 to understand how to apply international law is
8 to what the government says. And the last two
9 administrations and the last two State
10 Departments have agreed that this is not a Sosa
11 step 1 question. This is a question simply of
12 remedies that international law leaves to local
13 jurisdictions. And we think that deserves some
14 weight and, indeed, it's correct.

15 I'll reserve --

16 JUSTICE KAGAN: If I could understand
17 what you're saying, you're saying that a norm
18 is just a standard of conduct and doesn't have
19 anything to with the enforcement of that
20 standard?

21 MR. FISHER: That's right, Justice --

22 JUSTICE KAGAN: Is that the basic
23 point?

24 MR. FISHER: Yes, Justice Kagan. So
25 I'll reserve the rest of my time.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Fletcher.

4 ORAL ARGUMENT OF BRIAN H. FLETCHER
5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
6 IN SUPPORT OF NEITHER PARTY

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

9 In the government's view, for some of
10 the reasons that Justice Alito alluded to
11 earlier, there's a serious question whether the
12 claims in this case have a sufficient
13 connection to the United States to proceed in
14 U.S. court under the Alien Tort Statute. But
15 the court of appeals did not reach that
16 important extraterritoriality question because
17 it -- because it relied on its rule that a
18 corporation can never be a defendant in an
19 Alien Tort Statute case.

20 And in our view, that categorical rule
21 is wrong, and the Second Circuit reached the
22 wrong result because it looked to the wrong
23 source of law.

24 JUSTICE SOTOMAYOR: Mr. Fletcher,
25 could you answer the beginning question on the

1 implications of a holding in this case in the
2 Petitioners' favor? Why are you less worried
3 about the international -- the impact on
4 international relations?

5 MR FLETCHER: Because --

6 JUSTICE SOTOMAYOR: Your adversaries
7 are telling us that we should be worried.

8 MR. FLETCHER: They are right, and I
9 think they are absolutely correct that ATS
10 litigation in recent decades has raised
11 international friction, indeed as this case has
12 raised international friction. But in our
13 view, the way to deal with that friction is
14 with a doctrine that speaks directly to the
15 international entanglement,
16 extraterritoriality, as this Court did in
17 Kiobel and as it can further do as those -- as
18 those questions arise.

19 But I think one way to illustrate that
20 point is to ask whether this case would produce
21 less international friction if it had been
22 brought against the high-ranking officers and
23 employees of the bank rather than against the
24 bank itself. And I think the answer is you
25 would still have some degree of international

1 friction if you had suits against corporate
2 officers and employees.

3 And what that tells you is that the
4 way to deal with international friction is by
5 carefully defining, as this Court had begun to
6 do already in *Kiobel*, the types of violations
7 that are remediable, but I think once you have
8 a remediable violation, that's really the way
9 we view the question here, that however --

10 CHIEF JUSTICE ROBERTS: If it -- I'm
11 sorry. Please finish.

12 MR. FLETCHER: I was just going to say
13 we answer the question here by saying, once
14 you've carefully defined those violations of
15 the law of nations that ought to give rise to a
16 remedy in U.S. courts, what should the scope of
17 that remedy be, and when you view it in that
18 lens, we don't see a sound reason to
19 categorically exclude corporate liability.

20 CHIEF JUSTICE ROBERTS: I think this
21 might be a question along the same lines. On
22 page 7 of your brief, if I could just read one
23 sentence, you say that "the function of the ATS
24 is to ensure private damages remedies in
25 circumstances where other nations might hold

1 the United States accountable if it did not
2 provide a remedy."

3 Who's going to hold us accountable,
4 what other nations, in this case, if we didn't
5 provide a remedy?

6 MR. FLETCHER: Well, I think there's
7 -- we don't see a reason, and again --

8 CHIEF JUSTICE ROBERTS: It seems to me
9 the other nations are holding us accountable
10 for providing a remedy.

11 MR. FLETCHER: And that's why we say
12 at the tail end of our brief that we have
13 serious questions about whether or not this
14 case belongs in U.S. court precisely because it
15 is extraterritorial potentially. Again, we
16 haven't expressed a definitive view on that
17 because parts of the record are sealed. But we
18 understand the principal connection to the U.S.
19 to be the clearing of dollar-denominated
20 transactions through New York, and we've taken
21 the view that that's not sufficient to displace
22 the presumption against extraterritoriality
23 here.

24 JUSTICE ALITO: So if we --

25 JUSTICE KAGAN: So in what --

1 JUSTICE ALITO: If we follow your
2 recommendation and we remand this to the Second
3 Circuit, and the Second Circuit holds, as it
4 may very well in light of its precedents, that
5 there is no extraterritoriality problem here,
6 then what happens? Then there has to be a
7 trial before the -- the issue can be brought
8 here again?

9 MR. FLETCHER: Can I say two things
10 about that?

11 JUSTICE ALITO: Yes.

12 MR. FLETCHER: I think the first one
13 would be if the Second Circuit did that, there
14 would be another opportunity for review in this
15 Court. And also to your point about --

16 JUSTICE ALITO: At what point?

17 MR. FLETCHER: I would think, if on
18 remand the Second Circuit issues another
19 decision deciding the extraterritoriality
20 issue, Mr. Clement would be back here with
21 another cert petition asking for review of that
22 question once it had been decided by the Second
23 Circuit.

24 But I also -- I think your point about
25 Second Circuit precedent speaks to the case

1 that Mr. Clement cites at the end of his brief,
2 the Licci decision. But the observation I make
3 about that is that that also involved
4 allegations about clearing transactions through
5 New York and the Second Circuit, a panel of it,
6 stated that that was sufficient to overcome the
7 presumption against extraterritoriality.

8 I think everyone, though, agrees that
9 that was dicta because the case was ultimately
10 dismissed on corporate liability grounds. And
11 I think also it's important to remember that
12 there's a petition for certiorari pending in
13 that case, and if this Court were to agree with
14 us that the corporate liability rule is wrong
15 and remand, it would presumably vacate that
16 decision and clear the way for the panel in
17 this case to consider the issue afresh.

18 JUSTICE KAGAN: If I could go back to
19 the Chief Justice's question, so in what kind
20 of case involving a corporate defendant would
21 another country hold us accountable if we
22 didn't provide a remedy?

23 MR. FLETCHER: I think the classic
24 ones are the ones that this Court suggested in
25 Kiobel, or sort of the heartland of what

1 Congress had in mind when it enacted the
2 statute, which was foreign officials injured in
3 the United States.

4 We know from the history that led up
5 to the enactment of the statute, Marbois, in
6 the 1787 incident involving the Dutch
7 ambassador, that those sorts of violations
8 could give rise to international friction and
9 that the purpose, as this Court said, was to
10 provide an adequate remedy, a federal forum and
11 an adequate remedy for those individuals, to
12 avoid the possibility of friction.

13 JUSTICE KAGAN: So what you're saying
14 is that in those sorts of classic cases, why
15 would the foreign government care that the
16 perpetrator was a corporation rather than an
17 individual?

18 MR. FLETCHER: And, if anything, I
19 think it cuts the other way because I think
20 because, as we point out, tort remedies always
21 in virtually all circumstances include the
22 possibility of recovering from the corporate
23 employer when a corporation commits the tort.
24 We think actually there's the possibility of
25 friction or at least defeating the purpose of

1 providing an adequate remedy if you say, in
2 this class of tort cases, you do not get that
3 normal tort remedy. We think, in fact, it
4 would be very odd to say that when the whole
5 point of the statute, at least as we understand
6 it and as the Court has understood it, is to
7 provide an additional forum.

8 JUSTICE GORSUCH: And, counsel, might
9 that be because it's a -- an American defendant
10 against whom the United States might be
11 chargeable for a just war? Wasn't -- what do
12 you say to that scholarship that suggests that
13 that's the key to the idea of -- of what causes
14 friction and alien versus alien causes of
15 action aren't within the statute?

16 MR. FLETCHER: I think that I'd give
17 at least to the first line the same answer that
18 Mr. Fisher did, which is that that's a little
19 tough to reconcile with the Marbois incident --

20 JUSTICE GORSUCH: Well --

21 MR. FLETCHER: -- which involved a
22 tort by an alien and which certainly did give
23 rise -- it was a notorious incident that gave
24 rise to quite a lot of international --

25 JUSTICE GORSUCH: You have the

1 ambassador clause there that's separate and
2 that -- you had a separate statute to deal with
3 that exact problem in 1789. And this was to
4 deal with something else, an additional beyond
5 the ambassadorial problem.

6 MR. FLETCHER: Well, I'm not sure --
7 the Court has suggested that actually --

8 JUSTICE GORSUCH: You've got -- you've
9 got Professor Bellia, Professor Clark, a whole
10 bunch of really interesting scholarship on this
11 point, and I'm just wondering what -- what the
12 government's point of view is on it.

13 MR. FLETCHER: I think the
14 government's point of view is that that is not
15 the understanding of the statute that we
16 understand this Court to have taken in Sosa or
17 Kiobel in part because, in both of those cases,
18 you had aliens on both sides. That was also
19 true in the Marbois incident --

20 JUSTICE GORSUCH: It wasn't addressed,
21 though, and -- and I don't think it's been
22 foreclosed necessarily either. I mean, it's
23 certainly true we took the view that courts in
24 America can apply general international law,
25 sure, but I'm not sure it's -- it's addressed

1 this specific theory of the ATS.

2 MR. FLETCHER: Well, I -- there's sort
3 of two different theories that are alluded to
4 in the scholarship that you're referring to. I
5 agree with you that Sosa didn't consider the
6 specific argument.

7 JUSTICE GORSUCH: Okay.

8 MR. FLETCHER: That it's only alien --
9 or U.S. defendants.

10 JUSTICE GORSUCH: Right.

11 MR. FLETCHER: That wasn't addressed.
12 Sosa did, though, address what I think is the
13 other strand, which is what is the --

14 JUSTICE GORSUCH: Well, if it didn't
15 address that one, what do you say to it?

16 MR. FLETCHER: Well, I say to it, I
17 think, where I started, which is under that
18 theory, the ATS would not have provided a
19 remedy for the Marbois incident or for another
20 similar incident. And I take your point
21 that --

22 JUSTICE GORSUCH: But there's another
23 statute that does. So -- so what?

24 MR. FLETCHER: Well, I think this
25 Court has certainly understood the Marbois

1 incident as a key to interpreting what Congress
2 was trying to accomplish in the Alien Tort
3 Statute.

4 I think it illustrates even if that
5 particular assault in -- on ambassadors might
6 have been remediable under another statute, it
7 illustrates the point that foreign nations
8 didn't observe the limitation that Your Honor
9 is suggesting.

10 They didn't only hold us accountable
11 when bad things were done to their nationals or
12 their officials that are U.S. citizens.

13 JUSTICE GORSUCH: But it might explain
14 why this statute exists in addition to that
15 other one.

16 MR. FLETCHER: Well, I guess the other
17 one involves all, I think -- I don't remember
18 exactly how the Judiciary Act of 1789 was
19 worded, but --

20 JUSTICE GORSUCH: Ambassadorial --

21 MR. FLETCHER: -- certainly there's
22 some jurisdiction over all causes involving
23 ambassadors.

24 JUSTICE GORSUCH: Ambassadors.

25 JUSTICE SOTOMAYOR: I don't think that

1 the -- the Congress would have been worried
2 about an alien defendant if it had been a
3 pirate. If an American ship was pirated, I
4 don't think they would have not thought that
5 the ATS was only available for suits against
6 U.S. citizens.

7 MR. FLETCHER: I think that's another
8 fair response. And I --

9 JUSTICE KAGAN: Mr. Fletcher, can --
10 unless you're --

11 MR. FLETCHER: No, please.

12 JUSTICE KAGAN: Just a different kind
13 of question, which is you are here saying there
14 shouldn't be an automatic bar against corporate
15 liability.

16 MR. FLETCHER: That's right.

17 JUSTICE KAGAN: But I wonder if you
18 have any view -- and if not, just say no -- as
19 to what the scope of corporate liability might
20 be.

21 In other words, some folks have said,
22 well, in this context, corporate liability
23 might be only available for actions that were
24 directed at high levels of the corporation as
25 opposed to anything that any old employee of a

1 corporation did.

2 And I'm wondering whether you've
3 thought through that question.

4 MR. FLETCHER: We haven't taken a view
5 on it. I think the most prominent advocate of
6 that view that I'm aware of is Judge Posner's
7 opinion for the Seventh Circuit in Flomo where
8 he made that suggestion.

9 The one thing I would say about that
10 actually is that I understand his opinion to be
11 suggesting that that more limited version of
12 corporate liability would be appropriate in
13 large part because he assumed that this statute
14 applied extraterritorially, and he was
15 concerned about holding the corporation liable
16 for something that happened at some far-flung
17 office and wanted to make sure that there was
18 appropriately high level accountability before
19 imposing liability.

20 And, obviously, this Court's decision
21 in Kiobel cuts back on that concern because it
22 makes clear that the claims have to actually
23 touch and concern the United States, and so it
24 might alter the analysis there.

25 CHIEF JUSTICE ROBERTS: Did he -- did

1 he cite legal authority for that proposition?

2 MR. FLETCHER: I think -- I can't
3 remember whether he cited it or not. I know
4 the Court has also limited the scope of
5 respondeat superior under Section 1983 in the
6 Monell decision. So there are circumstances
7 where corporate liability has been limited.

8 But, certainly, I think for present
9 purposes, all we're asking the Court to do and
10 all the Court needs to do is say there is no
11 categorical bar on corporate liability.

12 And if I could, just before my time
13 runs, I do want to turn to what the
14 government's other important interest in this
15 case, which is that if the Court agrees with us
16 that the corporate liability bar is incorrect
17 and sends the case back down for further
18 proceedings, we think, we'd urge the Court to
19 indicate in its opinion that the Second Circuit
20 ought to address what we regard as a very
21 serious extraterritoriality issue promptly on
22 remand because this case has been a source of
23 international friction and because if that
24 important issue isn't resolved quickly, there
25 may be more international friction from a

1 trial. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Clement.

5 ORAL ARGUMENT OF PAUL D. CLEMENT

6 ON BEHALF OF THE RESPONDENT

7 MR. CLEMENT: Mr. Chief Justice, and
8 may it please the Court:

9 This case arises out of a suit by
10 Israeli nationals against a corporation
11 chartered in Jordan for injuries suffered in
12 Israel and the adjoining territories.

13 The defendant is not just chartered by
14 the Kingdom of Jordan but it's closely
15 regulated by Jordan and its central bank. Now,
16 there are a host of problems with this lawsuit,
17 not the least of which is there is nothing
18 approaching a specific universal obligatory
19 norm under international law that imposes
20 obligations directly on corporations.

21 And try as they might, the other side
22 really can't deny that basic reality.

23 JUSTICE SOTOMAYOR: There's no
24 international norm that makes people civilly
25 liable for international torts. There's never

1 been an international court that has held an
2 individual responsible.

3 The norm is the conduct, i.e., should
4 you be financing terrorists or not? Should you
5 commit piracy or not? Should you commit
6 slavery, genocide, any of the other prohibited
7 international acts against humanity?

8 MR. CLEMENT: But just --

9 JUSTICE SOTOMAYOR: So, if there's no
10 civil liability, international civil liability
11 for an individual, was the ATS a violation of
12 that norm, of the norm you're trying to create
13 that doesn't exist?

14 MR. CLEMENT: No, but, Justice
15 Sotomayor, I think it's critical that in your
16 various formulations, international law does
17 speak to who is the "you." Who is the actor
18 that can violate international law?

19 JUSTICE SOTOMAYOR: You or you or you
20 the state or you as an individual. But the
21 individual --

22 MR. CLEMENT: Or you the artificial
23 juridical entity. And there is a body of
24 international law that speaks specifically to
25 that both in the criminal context and the civil

1 liability context. And in neither context is
2 there anything approaching a universal
3 obligatory norm.

4 JUSTICE BREYER: When you say that, I
5 assumed, I take as a given, the statement in
6 Sosa, does international law extend the scope
7 of liability for a violation of a given norm to
8 the perpetrator being sued, if the defendant is
9 a private actor, such as a corporation or
10 individual? That's the question you're
11 addressing.

12 MR. CLEMENT: Yeah.

13 JUSTICE BREYER: Then I've assumed, as
14 it was brought out, that, in fact, if a private
15 person struck the French ambassador in the
16 street, as a matter to disgrace him, knocked
17 away his cane, that the statute was passed to
18 give the French ambassador a cause of action
19 against that private person.

20 So we know that sometimes the norm,
21 even though it addresses what the state's
22 supposed to do directly, is also telling the
23 private actor not to do it, it's close enough.

24 Now, when you look at this case, what
25 they've cited is, for example, the

1 International Convention for the Suppression of
2 the Financing of Terrorism, which we've
3 ratified, which says that states must take
4 necessary measures to enable a legal entity
5 located in its territory or organized under its
6 laws to be held liable.

7 That sounds like a corporation. And
8 it sounds like the relation is the same as the
9 international norm to the individual who struck
10 the French ambassador in the street.

11 And then, similarly, the U.N. Security
12 Council has required states to prohibit persons
13 and entities within their territory from
14 financing terrorism. Then we've implemented
15 those through the Anti-Terrorism Act. And
16 there are other states that have incorporated
17 it.

18 And there are other examples. So,
19 when you say there is no such example, it
20 seemed to me that the briefs are full of
21 examples that are designed to make the point
22 that the relationship between the corporation
23 and the international norm is the same as the
24 relationship between the private individual who
25 struck the French ambassador and the

1 international law at that time.

2 Now, what is your response?

3 MR. CLEMENT: Well, I have multiple
4 responses, Your Honor, Justice Breyer, starting
5 with the concern in 1789 was that some
6 individual might strike the French ambassador.

7 There wasn't a concern that some
8 artificial juridical entity would rise up and
9 strike the ambassador and then the question
10 would arise --

11 JUSTICE KAGAN: But, really, but why
12 would it have mattered? Suppose that there was
13 a corporation that had a beef about the
14 ambassador and sent one of its employees to go
15 strike the ambassador and sent a judgment-proof
16 employee to go strike the ambassador.

17 (Laughter.)

18 JUSTICE KAGAN: Why would France have
19 cared?

20 MR. CLEMENT: Well, I think France
21 would care that there would be some entity --
22 some individual, probably the actual
23 tort-feasor, which in that case would be the
24 individual who could be held responsible.

25 And, of course, Congress had a

1 provision for the judgment-proof tort-feasor,
2 which they also in the Crimes Act of 1790 made
3 it a criminal act. And I think it's important
4 to recognize --

5 JUSTICE BREYER: But this Court's
6 person -- this Court's case, which I tend to
7 think is precedent, says person or entity. And
8 the -- the norms that I read to you say person
9 or entity.

10 And if it were an American
11 corporation, I can't imagine why, if it fell
12 within the international norm, you would free
13 it of liability. So -- so how does it answer
14 the question I raised to say corporations are
15 never liable, given that precedent?

16 MR. CLEMENT: With respect, Justice
17 Breyer, I don't think under Sosa my burden is
18 to show that they're never liable. My burden
19 -- the burden is on the other side to show a
20 specific obligatory universal norm of corporate
21 liability.

22 JUSTICE BREYER: Exactly right. I
23 completely agree. I agree. Now, given that,
24 what are --

25 JUSTICE KAGAN: I don't agree.

1 (Laughter.)

2 JUSTICE KAGAN: But --

3 JUSTICE BREYER: I just want to be
4 sure I get an answer to the second part.

5 MR. CLEMENT: And -- and -- and what I
6 would tell you is there is nothing approaching
7 that, and I would start with, though, I would
8 like to, if I could, go through the criminal
9 provisions and the civil liability efforts
10 under other treaties, but I'd start with the
11 financing convention.

12 And I would tell you it's very
13 important to read Article II and Article V in
14 contradistinction with each other. And you
15 will see that they are very different. Section
16 2, Article II makes it unlawful as a matter of
17 international law, imposes a duty on a person.

18 It doesn't define person, but then, if
19 you look at Article V, it's crystal clear that
20 the persons in Article II do not include legal
21 entities that are addressed separately in
22 Article V.

23 And Article V is different. It
24 doesn't impose any direct international law
25 obligation on the legal entity. It tells the

1 countries --

2 JUSTICE GINSBURG: That's not -- Mr.
3 Clement, but you -- you are asserting that
4 international law doesn't operate against
5 corporations, but neither does it operate
6 against individuals. It's the national law
7 that supplies the remedy.

8 MR. CLEMENT: I disagree, Justice
9 Ginsburg. I think there's a tremendous
10 difference between how international law
11 operates on natural persons and how it operates
12 on legal entities. And --

13 JUSTICE GINSBURG: Can you give an
14 example? Is there any place in the world that
15 draws the distinction between individuals and
16 corporations as far as liability for a
17 violation of the law of nations?

18 MR. CLEMENT: Sure. One place I could
19 start with is the Torture Victim Protection
20 Act, which is the only statute this country has
21 ever passed specifically with the idea that it
22 was enforcement of 1350.

23 JUSTICE GINSBURG: Yes. That has --
24 that's thinking of a torture, like the
25 Filartiga case.

1 MR. CLEMENT: Absolutely it is. But
2 that's an example of where this nation --

3 JUSTICE GINSBURG: But, I mean, you --
4 you said that international law doesn't
5 recognize corporate liability. And so not the
6 United States, a specific statute, Congress can
7 make an individual corporation, whatever it
8 likes, but in -- elsewhere in the world, is
9 there a distinction made between individuals
10 and corporations when the international norm
11 applies to private persons?

12 MR. CLEMENT: Yes, absolutely. And, I
13 mean, you know, you could start with Nuremberg
14 and then you can go to all the international
15 criminal tribunals that have been set up,
16 whether for Yugoslavia, Rwanda, or the Rome
17 statute, all of them have made a judgment that
18 individuals --

19 JUSTICE SOTOMAYOR: Mr. Clement, there
20 were scholars here who pointed out that
21 criminal law is different than civil, and the
22 brief that was cited by Mr. Fisher points out
23 that there are many, many nations that hold
24 individuals and corporations civilly liable for
25 violations of the international norms.

1 So where do we find international
2 norms, if not in the behavior of international
3 companies -- of international countries?

4 MR. CLEMENT: Well, I --

5 JUSTICE SOTOMAYOR: Don't they show us
6 what the norm is?

7 MR. CLEMENT: I don't think there is a
8 norm to hold corporations liable for violations
9 of international law, especially under
10 jurisdictional circumstances like this where
11 the United States is a stranger to the dispute.

12 But I do want to make clear, and I
13 want to come back if I get a chance to say why
14 the criminal provisions are highly relevant.
15 But it's not like international law hasn't
16 thought about the idea of imposing civil
17 liability directly on corporations as a matter
18 of international law.

19 There are six treaties that purport to
20 do that. They're collected in Footnote 40 of
21 Judge Cabranes's opinion at 116(a) of the
22 petition appendix. All six of those treaties
23 impose corporate liability directly -- civil
24 corporate liability directly under
25 international law.

1 What is so telling about those six
2 treaties is that the United States has signed
3 exactly none of them.

4 And so I think when you are looking
5 under Sosa for a universal obligatory and
6 specific norm, one of the first things you look
7 to is whether this is so well established --

8 JUSTICE KAGAN: Well, I --

9 MR. CLEMENT: -- that the United
10 States signs some of the treaties and the idea
11 -- I mean, six treaties that the United States
12 hasn't signed doesn't get it done.

13 JUSTICE KAGAN: Mr. Clement, I think
14 the reason I said I don't agree before is
15 because, when you're talking about a standard
16 of conduct under Sosa, it's clear that you have
17 to find this universal body of law.

18 But that's different from enforcement
19 mechanisms. It's different -- you know, we
20 have the ATS. Other countries have different
21 things. Nobody requires an ATS-like provision.
22 Nobody -- so, as to enforcement, I mean,
23 where -- where do you get the understanding
24 that that's a question where all countries have
25 to agree to the same thing?

1 MR. CLEMENT: Well --

2 JUSTICE KAGAN: As far as I understood
3 your brief, you're only getting it from that
4 Sosa Footnote 20, which really does not make
5 that point at all.

6 MR. CLEMENT: No, but, Justice Kagan,
7 as you yourself pointed out in the first
8 argument in Kiobel, if the footnote does
9 specifically look to international law to
10 figure out whether non-state actors are
11 covered, it's a little odd that it wouldn't
12 also look to international law to address the
13 question of whether artificial juridical
14 individuals or entities are covered by the
15 norm.

16 So I do think the logic of what got
17 the Court to where it did extends here, but I
18 have other answers too, which is I think that
19 it's --

20 JUSTICE KAGAN: Look, I agree that
21 there should be some understanding -- some
22 notions of, you know, what do other countries
23 do and is this likely to get us into trouble
24 with other countries or not. I mean, that
25 should come into play at some point when we're

1 trying to figure out what kind of claims to
2 accept. And I think even Mr. Fisher agrees
3 with that.

4 I don't think we have to ask about,
5 you know, is it a uniform norm that every
6 country accepts, but, rather, we have a set of
7 rules under our domestic system which does hold
8 corporations accountable.

9 And if we use that as the typical
10 enforcement mechanism, is that going to get us
11 into trouble with other foreign countries? Is
12 it going to create international friction? And
13 it seems to me that that's the level at which
14 all these international/foreign relations
15 concerns come into play.

16 MR. CLEMENT: See, and I would
17 disagree with you there. And I don't want to
18 sound sort of Chevron-esque here, but I think
19 the question is, do you look at that at step 1
20 or do you look at it at step 2?

21 JUSTICE KAGAN: Yes, I think that
22 that's the question.

23 MR. CLEMENT: And I think it's
24 important, because I think it's pretty clear,
25 and this is presumably why you disagreed with

1 me, but I think it's pretty clear that at step
2 1 the burden is on my friends to show that it's
3 a universal, specific, obligatory norm of
4 international law --

5 JUSTICE KAGAN: But, see, that would
6 suggest that all enforcement mechanisms have to
7 be the same worldwide. And they just don't.

8 MR. CLEMENT: See, I would take issue
9 with the premise of your question that the
10 extent of corporate liability is just an
11 enforcement question. I don't think that's
12 actually right.

13 If you look at what they cite in their
14 brief, they don't cite the restatement of
15 remedies. They cite the restatement of agency
16 and torts.

17 So it's certainly substantive law. I
18 don't --

19 JUSTICE GINSBURG: How about foreign
20 relations?

21 MR. CLEMENT: What's that?

22 JUSTICE GINSBURG: How about --

23 MR. CLEMENT: And foreign relations,
24 sure, but not -- but not remedies. It's not a
25 remedial question.

1 JUSTICE GINSBURG: But doesn't that --
2 doesn't -- doesn't that restatement recognize
3 that there can be corporate liability for a
4 violation -- for engaging in conduct that
5 violates international law?

6 MR. CLEMENT: I don't think that the
7 restatement says that certainly at the level of
8 specificity and universality -- universality
9 required by Sosa.

10 JUSTICE KAGAN: Do you think that
11 joint and several liability -- I mean, that's
12 also an American concept, would that have to be
13 accepted by every country in the world?

14 MR. CLEMENT: I don't know that it
15 would, because I think the concept of joint and
16 several liability might get you closer to a
17 remedial question.

18 I do think whether or not a
19 corporation is directly liable under
20 international law is a question that should be
21 answered at step 1. And I think it's important
22 to recognize that if you say corporations are
23 liable, then you sort of have to answer the
24 question of, well, how?

25 And on that, it's not just Judge

1 Posner, if you look at the financing
2 convention, this is the other thing that's very
3 interesting about Article V of the financing
4 convention, and the relevant part is on page 31
5 of the red brief, but it actually addresses the
6 circumstances in which a corporation could be
7 liable under domestic law for a terrorist
8 financed violation and it does not apply the
9 American concept of respondeat superior, such
10 that the master is responsible for every act of
11 the agent within the scope of agency.

12 Instead, it specifies that it is only
13 -- their own -- other countries are only
14 supposed to impose liability when someone in a
15 control or management position commits one of
16 the primary violations under Article II of the
17 convention.

18 So that's not an American conception
19 of corporate liability.

20 JUSTICE BREYER: Is this --

21 MR. CLEMENT: It does show that
22 international obligations speak to these
23 questions. They just don't speak to them with
24 anything like the kind of universality and
25 specificity that I thought this Court required.

1 JUSTICE BREYER: Well, all right. I
2 quite agree with you. I looked at the
3 footnote. And you can't get very far by
4 pointing to six treaties that we didn't, nor
5 others didn't sign.

6 But let's look at what we did sign.
7 And what we did sign were the two I mentioned.
8 And not only -- well, there are three things.
9 One, we signed those. Two, we've implemented
10 those. We've implemented those by saying that
11 it is unlawful for corporations to finance
12 terrorism. And, three, if you had a rule of
13 international law that said you cannot finance
14 terrorists, who do you think it would apply to?

15 I mean, maybe it applies to a few
16 billionaires, but, I mean, other than that, if
17 it doesn't apply to corporations, who does it
18 apply to?

19 So, I mean, you have those three
20 things that I think argue that in this case,
21 this provision of international law does seem
22 -- and you want to say no, that's wrong,
23 because --

24 MR. CLEMENT: Because you start with
25 the fact that the convention itself doesn't

1 impose the international law obligation itself.
2 It leaves it to domestic law.

3 Now, you're right, we passed a statute
4 that provides a remedy, the ATA. We went out
5 of our way to limit the scope of plaintiffs
6 under the ATA to U.S. nationals. And that
7 helps eliminate friction with other countries
8 because it's an understandable norm of
9 international law that we have a special
10 relationship with our own nationals, so, of
11 course, we want to provide a remedy to them
12 when they're victims of terrorism, even if
13 they're injured abroad, we want to do that.

14 So all of those are reasons that I
15 think very much cut against doing this under
16 the ATS. And let me tell you in --

17 JUSTICE GINSBURG: Are you -- are you
18 -- are you saying that under the ATS, a U.S.
19 corporation would be liable? I thought you
20 were taking the position that categorically
21 corporations are out, it's only individuals.

22 MR. CLEMENT: No, it's -- I -- I may
23 have misspoken in my acronyms. U.S.
24 corporations are proper defendants under the
25 ATA, the statute that was provided. The ATA

1 remedy, though, is specifically limited to U.S.
2 national plaintiffs.

3 JUSTICE GINSBURG: Yes.

4 MR. CLEMENT: Under the ATS, we would
5 say that no corporation is liable.

6 JUSTICE GINSBURG: Not a U.S.
7 corporation?

8 MR. CLEMENT: Not a U.S. corporation.
9 And we would say that actually makes sense
10 because if there are agents of the U.S.
11 corporation here, they will be --

12 JUSTICE SOTOMAYOR: So Jordan is going
13 to be okay --

14 MR. CLEMENT: -- liable and won't be
15 dragging --

16 JUSTICE SOTOMAYOR: Jordan is going to
17 be okay being called a financier of terrorism
18 merely because it's a U.S. citizen who brought
19 this suit? I thought it was objecting to the
20 fact of the label of being a terrorist
21 financier.

22 Does it matter to it who the plaintiff
23 is?

24 MR. CLEMENT: Well, it does matter in
25 the sense that Jordan is even more vexed that

1 this corporation that is a cornerstone of their
2 economy is being called a -- not just a
3 terrorist financier under the statute, but, you
4 know, almost --

5 JUSTICE SOTOMAYOR: This is a
6 consolidated suit under the ATS and the ATA.

7 MR. CLEMENT: Okay, but --

8 JUSTICE SOTOMAYOR: You can get rid of
9 the suit. You are not getting rid of the ATA
10 suit until the extraterritoriality question
11 is --

12 MR. CLEMENT: But two critical
13 questions, Your Honor -- points to make about
14 this: one is, I mean, as this Court said in
15 Sosa, the idea of the ATS is that not just that
16 you violated a statute but that you have
17 violated some specific universal obligatory
18 norm so you are essentially an enemy of
19 mankind.

20 So, as much as my clients would not
21 like to be an ATA defendant, they would really,
22 really, really not like to be --

23 JUSTICE KAGAN: But --

24 MR. CLEMENT: -- labeled an enemy of
25 mankind. There is a second point --

1 JUSTICE KAGAN: But let's talk about a
2 -- but let's talk about a crime like that, Mr.
3 Clement. You know, there's a lot in this
4 lawsuit, which I think you have plenty of
5 things to gripe about in this lawsuit.

6 I guess the question is, do you have
7 something to gripe about as to this particular
8 point, which is corporate versus individual
9 liability? And so just -- just assume a
10 different lawsuit.

11 So there is an American corporation.
12 So the defendant is an American corporation,
13 and it uses slave labor, and it uses slave
14 labor of people in the United States, all the
15 work is done in the United States, the activity
16 is in the United States, of a particular
17 nationality. And -- and the country from which
18 these people come thinks that this is a pretty
19 awful thing.

20 And -- and you're saying that there
21 shouldn't be ATS liability against the
22 corporation in that circumstance even though
23 they are using slave labor, clearly violating
24 an international norm, even though in our
25 domestic system, the manner of -- the method of

1 enforcement we usually use is corporate
2 liability, and even though this is a case in
3 which the other country thinks who cares if
4 it's a corporation. We want our people to be
5 able to recover.

6 MR. CLEMENT: Justice Kagan, of
7 course, that's a tough hypo, but the answer to
8 the tough hypo is there's absolutely no
9 obstacle to use the ATS to sue all of the
10 individuals that took the action, and if you
11 sue the individuals, you are certainly going to
12 make us accountable to the foreign government
13 --

14 JUSTICE KAGAN: They happen not to
15 have very much money.

16 MR. CLEMENT: But -- well, actually,
17 people who work, especially in management
18 positions in corporations, tend to have a fair
19 amount of money. And so I think you are, in
20 that scenario, in your hypothetical, you're
21 going to find plenty of deep-pocketed
22 defendants.

23 You're not going to have the mens rea
24 requirement problems, which is why all of these
25 corporate entities have been left out of the

1 international criminal tribunals, and those
2 same mens rea problems apply absolutely the
3 same in an intentional tort like this.

4 So you're going to -- my humble point
5 to you is, yeah, at first blush it might seem a
6 little weird that the U.S. corporation is not a
7 defendant, but there are plenty of other
8 potential U.S. defendants that will avoid the
9 diplomatic friction.

10 And then the costs on the other side
11 of allowing the foreign corporations to be
12 sued, if you applied the same logic here, this
13 suit wouldn't happen.

14 If you actually limited this to the
15 people who are actually liable under -- under
16 Article V of the financing convention, people
17 in management or control positions, all of
18 those people are in Jordan. So the corporate
19 forum here is the question presented. It's
20 also integral to all of these problems.

21 It's not an accident that it was --

22 JUSTICE ALITO: Now, Mr. Clement --

23 JUSTICE KAGAN: It is the question.

24 JUSTICE ALITO: -- in the -- in the
25 slavery hypothetical, wouldn't that be a felony

1 under federal law? Wouldn't the individuals
2 who were victimized have numerous other
3 opportunities, numerous other ways to sue this
4 American corporation for these torts?

5 MR. CLEMENT: Absolutely, Justice
6 Alito. But they would also --

7 JUSTICE KAGAN: Well, the individuals
8 also care if it's a felony. They would like a
9 little bit of compensation.

10 MR. CLEMENT: Exactly. And that's why
11 I did want to answer, Justice Kagan, even on
12 the terms of the ATS, there would still be
13 defendants here in America that could bring --
14 that could be proper defendants in those
15 actions. They would be U.S. citizens. I'm not
16 -- I don't think I'm going to get a chance to
17 say, but there is a lot to the argument that
18 alien diversity doesn't exist.

19 JUSTICE KAGAN: I guess one of the
20 things that I'm suggesting, Mr. Clement, and
21 this is reflected in your brief, you spend a
22 lot of time essentially saying that this is one
23 of those foreign cubed cases that we dealt with
24 in Kiobel.

25 And that might be right. But the

1 question of corporate versus individual
2 liability is a question that's entirely
3 orthogonal to that, I mean, that you can come
4 up with a very, very domestic-looking suit that
5 raises the question of corporate versus
6 individual liability and that that suit, when
7 you focus on it, leads you to say, why on earth
8 would you draw a distinction of this kind?

9 MR. CLEMENT: Justice Kagan, that's a
10 great word, but I don't think it describes the
11 relationship between corporate liability and
12 these extraterritorial suits.

13 I don't think it's an accident that
14 each time you get one of these foreign cubed
15 cases, that it's a foreign corporation, I don't
16 think it's an accident that each time it comes
17 up, it's really attractive to maybe duck the
18 corporate liability question and decide the
19 extraterritoriality question.

20 First of all, thank goodness we don't
21 really have a lot of U.S. corporations that are
22 violating international law right here in
23 America, but if they did, there would be plenty
24 of defendants under the ATS and under other
25 provisions.

1 So the real incidence of this, the
2 real impact of corporate liability is the
3 ability to get a company -- a corporation like
4 Arab Bank that's a cornerstone of the Jordanian
5 economy, and you get them in here, you cause
6 all sorts of diplomatic friction and then, as a
7 bonus, you don't have to worry about whether
8 the -- the mens rea of somebody in Jordan and
9 the mens rea of somebody who processed the
10 transaction in the United States, whether any
11 of those actually satisfied the requirements of
12 the tort, because you can mush them all
13 together and say it's corporate responsibility.

14 That's why these are so attractive.
15 That's why --

16 JUSTICE GINSBURG: There was --

17 MR. CLEMENT: -- this issue has
18 arisen.

19 JUSTICE GINSBURG: There was some
20 substantial -- there was a substantial sanction
21 against this bank, wasn't there?

22 MR. CLEMENT: There was.

23 JUSTICE GINSBURG: On the part of the
24 U.S. Government?

25 MR. CLEMENT: There was, which just

1 shows that there's only a toehold of U.S.
2 concern here, which is the dollar clearing
3 transactions in the United States. And there
4 is a far, far better way for the law to address
5 that concern than with a 33-word jurisdictional
6 statute passed in 1789.

7 And that's really what this comes down
8 to at the end of the day. I mean, obviously
9 Sosa left the door ajar for some kinds of ATS
10 cases, but with respect, I do not think Sosa
11 left the door ajar for cases like this. Thank
12 you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Four minutes, Mr. Fisher.

16 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
17 ON BEHALF OF THE PETITIONER

18 MR. FISHER: Thank you. I'd like to
19 turn to questions three Justices have asked,
20 starting with Justice Kennedy, your question to
21 me towards the end of my time about whether
22 corporate liability falls on the conduct or
23 enforcement side, and try to make two
24 additional points about that.

25 First of all, the Bormes case, which

1 is cited in the Solicitor General's brief
2 dealing with the Little Tucker Act a few years
3 ago, free and clear of all of the
4 extraterritoriality concerns and everything
5 else, just this Court straightforwardly said --
6 citing the provision there that said who could
7 be sued, that that was part of the remedial
8 structure of the Little Tucker Act.

9 And we think that makes sense because
10 that is at the heart of the notion of corporate
11 personhood. What the Court has said time and
12 again is that part of the corporate bargain is
13 that you get privileges and opportunities, but
14 you also have burdens of being held liable in
15 tort actions.

16 One additional thing on that, I think
17 it's important to point you to the Anti-
18 terrorism Act. Mr. Clement is right that the
19 Anti-Terrorism Act applies to U.S. citizens and
20 not to aliens.

21 But the reason why, and this is laid
22 out in the amicus brief from former
23 counter-terrorism officials, is because
24 Congress knew that aliens already had a cause
25 of action under the ATS.

1 And, indeed, Congress made clear in
2 the ATA that it was exercising its power under
3 the define and punish clause. And so the
4 Congress understood to be codifying a cause of
5 action for a violation of international law
6 and, as my opponent even concedes, in one that
7 swept in corporations.

8 Mr. Chief Justice, you asked about
9 accountability of the United States in the
10 history of the Alien Tort Statute. I just want
11 to make sure the Court remembers that piracy is
12 one of the quintessential concerns Congress had
13 in mind. And that's a little bit different
14 than simply another country taking us to war.

15 That was a notion that certain conduct
16 makes somebody an enemy of all mankind. And if
17 you take that concern of piracy historically
18 and compare it to terrorism today, we think the
19 parallels are quite obvious.

20 And even if we had to prove that this
21 is a situation where some other country would
22 be mad, imagine Israel's view if our
23 financing -- if our entire finance system could
24 be used and accessed to combat -- to commit
25 terrorist attacks, make them easier, make them

1 more deadly, make the funding more effective.

2 Israel, if the -- if suits like this
3 were taken away, Israel and countries like it
4 might well have a complaint to the United
5 States.

6 And finally, Justice Gorsuch, I wanted
7 to turn back to your question about the history
8 and make two additional points.

9 One is piracy, as Justice Sotomayor
10 pointed out, I think also is a very difficult
11 thing to account for under the theory you've
12 described.

13 Secondly, I would just bring you back
14 to the ordinary --

15 JUSTICE GORSUCH: But why is that?

16 MR. FISHER: Because pirates wouldn't
17 be -- they wouldn't be citizens of the United
18 States.

19 JUSTICE GORSUCH: Right. But if -- if
20 we're not responsible for it, it wouldn't be
21 the cause of a just war against us and,
22 therefore, not a cause of concern under the
23 ATS.

24 MR. FISHER: No, but -- but that
25 brings me back to my other point.

1 JUSTICE GORSUCH: Oh, good. So the
2 first one we can put aside.

3 MR. FISHER: No, no, no, well, I --
4 piracy is something that doesn't exactly fall
5 under the same rubric. But the second point is
6 I would just point you to the plain text of the
7 act.

8 And as we've pointed out quite clearly
9 in our brief, Congress went out of its way to
10 specify aliens as proper plaintiffs.

11 JUSTICE GORSUCH: As plaintiffs, yes.

12 MR. FISHER: Yes, yes, but if Congress
13 was so careful to do that, if it had wanted
14 only U.S. nationals to be defendants, you have
15 to ask the question why Congress wouldn't have
16 been specific on the other side.

17 JUSTICE GORSUCH: And the argument I
18 have been developing isn't mine. I can't take
19 credit for it.

20 MR. FISHER: Yeah.

21 JUSTICE GORSUCH: But it's a very
22 careful argument that has been developed that
23 that is exactly what those words meant to the
24 First Congress.

25 MR. FISHER: No, but I think that, as

1 the Court said in *Amerada Hess*, Congress did
2 not limit the scope of defendants. And, again,
3 if you look at the rest of the Judiciary Act,
4 other provisions we point out in our brief did
5 limit the scope of proper defendants.

6 So who was a proper plaintiff and who
7 was a proper defendant in the jurisdictional
8 provisions Congress was creating was very much
9 at the center of Congress's mind. And so we
10 think the plain text, if nothing else, answers
11 that.

12 JUSTICE GORSUCH: Right. But -- but
13 the plain text is the law of nations. And the
14 argument, and I'm not doing it justice --

15 MR. FISHER: Yeah.

16 JUSTICE GORSUCH: -- but is briefly
17 that a law of nations would have meant
18 something that would have been attributed to
19 the United States. And the only thing that
20 would have been attributable to the United
21 States is an act by a U.S. citizen.

22 MR. FISHER: Well, on that level, we
23 simply disagree with the concept of law of
24 nations. As has been pointed out, law of
25 nations deals with the conduct, not the

1 enforcement.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 12:03 p.m., the case
5 was submitted.)

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