

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH JESNER, et al., )  
                                ) Petitioners, )  
                                ) v. ) No. 16-499  
ARAB BANK, PLC, )  
                                ) Respondent. )  
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3       JOSEPH JESNER, et al.,                                 )  
4                                Petitioners,                         )  
5                                v.   ) No. 16-499  
6       ARAB BANK, PLC,   )  
7                                Respondent.                         )  
8       - - - - -

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10                               Washington, D.C.  
11                               Wednesday, October 11, 2017

12  
13                               The above-entitled matter came on for oral  
14       argument before the Supreme Court of the United States  
15       at 11:03 a.m.

16  
17       APPEARANCES:  
18       JEFFREY L. FISHER, Stanford, California; on behalf  
19                               of the Petitioners.  
20       BRIAN H. FLETCHER, Assistant to the Solicitor General,  
21                               Department of Justice, Washington, D.C.; on behalf  
22                               of the United States, as amicus curiae, in support  
23                               of neither party.  
24       PAUL D. CLEMENT, Washington, D.C.; on behalf of the  
25                               Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

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

Mr. Fisher.

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

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

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

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

Now, the bank's principal response is to say that the ATS sometimes can create formulations issues when cases are brought against corporations. But for two reasons, that objection does not overcome the strong 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 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  
18 lawsuits like this be brought? At pages 43 and  
19 44 of our blue brief and at pages 15 through I  
20 believe it's about 19 of the comparative law  
21 scholars' brief, there's a survey of other  
22 jurisdictions in the world that are similar  
23 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, just going back to Justice Sotomayor's  
23 point, so here we have --

24 JUSTICE SOTOMAYOR: I'm sorry. What  
25 amicus 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 should recognize a federal common  
17 law claim under particular circumstances,  
18 should we, in effect, balance the international  
19 repercussions of deciding the issue one way or  
20 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 will have equally serious foreign  
10 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 that more directly deal with  
22 those concerns.

23 JUSTICE GINSBURG: Which would --  
24 which would apply the same as an individual or  
25 a corporation. I thought Sosa was saying

1 international law starts out being the law  
2 governing relations between states, but now it  
3 has gone beyond that and there can be private  
4 actors who are governed by the law of nations,  
5 international -- international law.

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

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

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

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

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

14           You have to ask yourself --

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

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

24           JUSTICE ALITO: What if you have a  
25 foreign -- if you have a foreign plaintiff

1 suing an American corporation, that could be  
2 brought in federal court, could it not?

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

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

8 MR. FISHER: Some of those cases might  
9 -- I'm sorry.

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

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

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

24 Now, would -- would the first Congress  
25 have wanted that to be heard in federal court

1 where you would put us in exactly the situation  
2 between these two super powers that we wanted  
3 to avoid?

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

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

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

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

24 JUSTICE GORSUCH: Mr. Fisher --

25 MR. FISHER: I mean, you have to --



1     yeah.

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

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

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

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

23                   JUSTICE GORSUCH:  Well, you've got the  
24    ambassador provision as well, which is a  
25    separate part of the Constitution.  And the ATS

1 was arguably meant to do more than cover  
2 ambassadors.

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

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

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

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

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

24 MR. FISHER: I think the --

25 JUSTICE GORSUCH: -- Sosa tells us

1 should govern our review of the statute.

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

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

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

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

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

23 Justice Gorsuch, I think those were  
24 hashed out in Sosa. And so I think that that  
25 position in Sosa didn't carry the day.

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

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

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

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

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

1 --

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

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

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

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

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

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

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

11           So I would -- I would --

12           JUSTICE KAGAN: I -- I am --

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

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

23           MR. FISHER: So, Justice Kagan, if I  
24 may say one more thing to Justice Alito and  
25 then turn to that question, which is also,

1 remember, we have the money laundering  
2 allegations using the bank -- using the  
3 charitable front in Texas.

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

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

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

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

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

6           JUSTICE GINSBURG:   What --

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

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

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

22          JUSTICE GINSBURG:   Yes, the  
23          exhaustion.

24          MR. FISHER:   Yes, I think in Footnote  
25          21 in *Sosa*, the Court suggested that that may



1 well be a requirement for a cause of action  
2 like this.

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

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

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

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

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

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

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

21           MR. FISHER: Justice Kennedy, I think  
22 there are other things that might influence the  
23 way a corporation acts. Limitations periods,  
24 rules of evidence that will apply in any course  
25 of action. So just the mere fact that it's

1 going to influence corporate behavior does not  
2 make it a norm question under step 1 of Sosa.

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

14 And I'll reserve --

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

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

21 JUSTICE KAGAN: Is that the basic  
22 point?

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Counsel.

2 Mr. Fletcher.

3 ORAL ARGUMENT OF BRIAN H. FLETCHER

4 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

5 IN SUPPORT OF NEITHER PARTY

6 MR. FLETCHER: Thank you, Mr. Chief

7 Justice, and may it please the Court:

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

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

23 JUSTICE SOTOMAYOR: Mr. Fletcher,  
24 could you answer the beginning question on the  
25 implications of a holding in this case in the

1 Petitioners' favor? Why are you less worried  
2 about the international -- the impact on  
3 international relations?

4 MR FLETCHER: Because --

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

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

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

1 officers and employees.

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

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

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

19 CHIEF JUSTICE ROBERTS: I think this  
20 might be a question along the same lines. On  
21 page 7 of your brief, if I could just read one  
22 sentence, you say that "the function of the ATS  
23 is to ensure private damages remedies in  
24 circumstances where other nations might hold  
25 the United States accountable if it did not

1 provide a remedy."

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

5 MR. FLETCHER: Well, I think there's  
6 -- we don't see a reason then to get --

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

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

23 JUSTICE ALITO: So if we --

24 JUSTICE KAGAN: So in what --

25 JUSTICE ALITO: If we follow your

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

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

10 JUSTICE ALITO: Yes.

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

15 JUSTICE ALITO: At what point?

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

23 But I also -- I think your point about  
24 Second Circuit precedent speaks to the case  
25 that Mr. Clement cites at the end of his brief,



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

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

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

22 MR. FLETCHER: I think the classic  
23 ones are the ones that this Court suggested in  
24 Kiobel, or sort of the heartland of what  
25 Congress had in mind when it enacted the

1 statute, which was foreign officials injured in  
2 the United States.

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

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

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

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

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

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

19 JUSTICE GORSUCH: Well --

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

24 JUSTICE GORSUCH: You have the  
25 ambassador clause there that's separate and

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

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

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

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

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

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

6 JUSTICE GORSUCH: Okay.

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

9 JUSTICE GORSUCH: Right.

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

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

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

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

23 MR. FLETCHER: Well, I think this  
24 Court has certainly understood the Marbois  
25 incident as a key to interpreting what Congress

1 was trying to accomplish in the Alien Tort  
2 Statute.

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

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

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

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

19 JUSTICE GORSUCH: Ambassadorial --

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

23 JUSTICE GORSUCH: Ambassadors.

24 JUSTICE SOTOMAYOR: I don't think that  
25 the -- the Congress would have been worried

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

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

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

10 MR. FLETCHER: No, please.

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

15 MR. FLETCHER: That's right.

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

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

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

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

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

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

24          CHIEF JUSTICE ROBERTS: Did he -- did  
25          he cite legal authority for that proposition?



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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 Counsel.

3 Mr. Clement?

4 ORAL ARGUMENT OF PAUL D. CLEMENT  
5 ON BEHALF OF THE RESPONDENT

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

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

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

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

22 JUSTICE SOTOMAYOR: There's no  
23 international norm that makes people civilly  
24 liable for international torts. There's never  
25 been an international court that has held an

1 individual responsible.

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

7 MR. CLEMENT: But just --

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

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

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

21 MR. CLEMENT: Or you the artificial  
22 juridical entity. And there is a body of  
23 international law that speaks specifically to  
24 that both in the criminal context and the civil  
25 liability context. And in neither context is

1     there anything approaching a universal  
2     obligatory norm.

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

11            MR. CLEMENT:  Yeah.

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

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

23            Now, when you look at this case, what  
24    they've cited is, for example, the  
25    international convention for the suppression of

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

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

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

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

1                   Now, what is your response?

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

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

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

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

22                  And, of course, Congress had a  
23 provision for the judgment proof tort-feasor,  
24 which they also in the Crimes Act of 1790 made  
25 it a criminal act. And I think it's important

1 to recognize --

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

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

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

19 JUSTICE BREYER: Exactly right. I  
20 completely agree. I agree. Now, given that,  
21 what are --

22 JUSTICE KAGAN: I don't agree.

23 (Laughter.)

24 JUSTICE KAGAN: But --

25 JUSTICE BREYER: I just want to be

1 sure I get an answer to the second part.

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

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

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

20 And Article V is different. It  
21 doesn't impose any direct international law  
22 obligation on the legal entity. It tells the  
23 countries --

24 JUSTICE GINSBURG: That's not -- Mr.  
25 Clement, but you -- you are asserting that



1 international law doesn't operate against  
2 corporations, but neither does it operate  
3 against individuals. It's the national law  
4 that supplies the remedy.

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

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

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

20 JUSTICE GINSBURG: Yes. That has --  
21 that's thinking of a torture, like the  
22 Filartiga case.

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

25 JUSTICE GINSBURG: But you said that

1 international law doesn't recognize corporate  
2 liability. And so not the United States, a  
3 specific statute, Congress can make an  
4 individual corporation, whatever it likes, but  
5 in -- elsewhere in the world, is there a  
6 distinction made between individuals and  
7 corporations when the international norm  
8 applies to private persons?

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

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

23 So where do we find international  
24 norms, if not in the behavior of international  
25 companies -- of international countries?

1 MR. CLEMENT: Well, I --

2 JUSTICE SOTOMAYOR: Don't they show us  
3 what the norm is?

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

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

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

23 What is so telling about those six  
24 treaties is that the United States has signed  
25 exactly none of them.

1           And so I think when you are looking  
2           under Sosa for a universal obligatory and  
3           specific norm, one of the first things you look  
4           to is whether this is so well established that  
5           the United States signs some of the treaties  
6           and the idea -- I mean, six treaties that the  
7           United States hasn't signed doesn't get it  
8           done.

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

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

22          MR. CLEMENT: Well --

23          JUSTICE KAGAN: As far as I understood  
24          your brief, you're only getting it from that  
25          Sosa Footnote 20, which really does not make

1 that point at all.

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

12 So I do think the logic of what got  
13 the Court to where it did extends here, but I  
14 have other answers too, which is I think that  
15 it's --

16 JUSTICE KAGAN: Look, I agree that  
17 there should be some understanding -- some  
18 notions of, you know, what do other countries  
19 do and is this likely to get us into trouble  
20 with other countries or not. I mean, that  
21 should come into play at some point when we're  
22 trying to figure out what kind of claims to  
23 accept. And I think even Mr. Fisher agrees  
24 with that.

25 I don't think we have to ask about,

1 you know, is it a uniform norm that every  
2 country accepts, but, rather, we have a set of  
3 rules under our domestic system which does hold  
4 corporations accountable.

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

12 MR. CLEMENT: See, and I would  
13 disagree with you there. And I don't want to  
14 sound sort of Chevronesque here, but I think  
15 the question is, do you look at that at step 1  
16 or do you look at it at step 2?

17 JUSTICE KAGAN: Yes, I think that  
18 that's the question.

19 MR. CLEMENT: And I think it's  
20 important, because I think it's pretty clear,  
21 and this is presumably why you disagreed with  
22 me, but I think it's pretty clear that at step  
23 1 the burden is on my friends to show that it's  
24 a universal, specific, obligatory norm of  
25 international law.

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

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

9 If you look at what they cite in their  
10 brief, they don't cite the restatement of  
11 remedies. They cite the restatement of agency  
12 and torts.

13 So it's certainly substantive law. I  
14 don't --

15 JUSTICE GINSBURG: How about foreign  
16 relations?

17 MR. CLEMENT: What's that?

18 JUSTICE GINSBURG: How about --

19 MR. CLEMENT: And foreign relations,  
20 sure, but not -- but not remedies. It's not a  
21 remedial question.

22 JUSTICE GINSBURG: But doesn't that --  
23 doesn't -- doesn't that restatement recognize  
24 that there can be corporate liability for a  
25 violation -- for engaging in conduct that

1 violates international law?

2 MR. CLEMENT: I don't think that the  
3 restatement says that certainly at the level of  
4 specificity and universality -- universality  
5 required by Sosa.

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

10 MR. CLEMENT: I don't know that it  
11 would, because I think the concept of joint and  
12 several liability might get you closer to a  
13 remedial question.

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

21 And on that, it's not just Judge  
22 Posner, if you look at the financing  
23 convention, this is the other thing that's very  
24 interesting about Article V of the financing  
25 convention, and the relevant part is on page 31



1 of the red brief, but it actually addresses the  
2 circumstances in which a corporation could be  
3 liable under domestic law for a terrorist  
4 financed violation and it does not apply the  
5 American concept of respondeat superior, such  
6 that the master is responsible for every act of  
7 the agent within the scope of agency.

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

14           So that's not an American conception  
15 of corporate liability. It does show that  
16 international obligations speak to these  
17 questions. They just don't speak to them with  
18 anything like the kind of universality and  
19 specificity that I thought this Court required.

20           JUSTICE BREYER: Well, all right. I  
21 quite agree with you. I looked at the  
22 footnote. And you can't get very far by  
23 pointing to six treaties that we didn't, nor  
24 others didn't sign.

25           But let's look at what we did sign.

1 And what we did sign were the two I mentioned.  
2 And not only -- well, there are three things.  
3 One, we signed those. Two, we've implemented  
4 those. We've implemented those by saying that  
5 it is unlawful for corporations to finance  
6 terrorism. And, three, if you had a rule of  
7 international law that said you cannot finance  
8 terrorists, who do you think it would apply to?

9 I mean, maybe it applies to a few  
10 billionaires, but, I mean, other than that, if  
11 it doesn't apply to corporations, who does it  
12 apply to?

13 So, I mean, you have those three  
14 things that I think argue that in this case,  
15 this provision of international law does seem  
16 -- and you want to say no, that's wrong,  
17 because --

18 MR. CLEMENT: Because you start with  
19 the fact that the convention itself doesn't  
20 impose the international law obligation itself.  
21 It leaves it to domestic law.

22 Now, you're right, we passed a statute  
23 that provides a remedy, the ATA. We went out  
24 of our way to limit the scope of plaintiffs  
25 under the ATA to U.S. nationals. And that

1 helps eliminate friction with other countries  
2 because it's an understandable norm of  
3 international law that we have a special  
4 relationship with our own nationals, so, of  
5 course, we want to provide a remedy to them  
6 when they're victims of terrorism, even if  
7 they're injured abroad, we want to do that.

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

11 JUSTICE GINSBURG: Are you -- are you  
12 -- are you saying that under the ATS, a U.S.  
13 corporation would be liable? I thought you  
14 were taking the position that categorically  
15 corporations are out, it's only individuals.

16 MR. CLEMENT: No, I may have misspoken  
17 in my acronyms. U.S. corporations are proper  
18 defendants under the ATA, the statute that was  
19 provided. The ATA remedy, though, is  
20 specifically limited to U.S. national  
21 plaintiffs.

22 JUSTICE GINSBURG: Yes.

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

25 JUSTICE GINSBURG: Not a U.S.

1 corporation?

2 MR. CLEMENT: Not a U.S. corporation.

3 And we would say that actually makes sense

4 because if there are agents of the U.S.

5 corporation here, they will be --

6 JUSTICE SOTOMAYOR: So Jordan is going

7 to be okay --

8 MR. CLEMENT: -- liable and won't be

9 dragging --

10 JUSTICE SOTOMAYOR: Jordan is going to

11 be okay being called a financier of terrorism

12 merely because it's a U.S. citizen who brought

13 this suit? I thought it was objecting to the

14 fact of the label of being a terrorist

15 financier.

16 Does it matter to it who the plaintiff

17 is?

18 MR. CLEMENT: Well, it does matter in

19 the sense that Jordan is even more vexed that

20 this corporation that is a cornerstone of their

21 economy is being called a -- not just a

22 terrorist financier under the statute, but, you

23 know, almost --

24 JUSTICE SOTOMAYOR: This is a

25 consolidated suit under the ATS and the ATA.

1 MR. CLEMENT: Okay, but --

2 JUSTICE SOTOMAYOR: You can get rid of  
3 the suit. You are not getting rid of the ATA  
4 suit until the extraterritoriality question  
5 is --

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

14 So, as much as my clients would not  
15 like to be an ATA defendant, they would really,  
16 really, really not like to be --

17 JUSTICE KAGAN: But --

18 Mr. Clement: -- labeled an enemy of  
19 mankind. There is a second --

20 JUSTICE KAGAN: But let's talk about a  
21 -- but let's talk about a crime like that, Mr.  
22 Clement. You know, there's a lot in this  
23 lawsuit, which I think you have plenty of  
24 things to gripe about in this lawsuit.

25 I think the question is, do you have

1 something to gripe about as to this particular  
2 point, which is corporate versus individual  
3 liability? And so just -- just assume a  
4 different lawsuit.

5           So there is an American corporation.  
6 So the defendant is an American corporation,  
7 and it uses slave labor, and it uses slave  
8 labor of people in the United States, all the  
9 work is done in the United States, the activity  
10 is in the United States, of a particular  
11 nationality. And -- and the country from which  
12 these people come thinks that this is a pretty  
13 awful thing.

14           And -- and you're saying that there  
15 shouldn't be ATS liability against the  
16 corporation in that circumstance even though  
17 they are using slave labor, clearly violating  
18 an international norm, even though in our  
19 domestic system, the manner of -- the method of  
20 enforcement we usually use is corporate  
21 liability, and even though this is a case in  
22 which the other country thinks who cares if  
23 it's a corporation. We want our people to be  
24 able to recover.

25           MR. CLEMENT: Justice Kagan, of

1 course, that's a tough hypo, but the answer to  
2 the tough hypo is there's absolutely no  
3 obstacle to use the ATS to sue all of the  
4 individuals that took the action, and if you  
5 sue the individuals, you are certainly going to  
6 make us accountable to the foreign government  
7 --

8 JUSTICE KAGAN: They happen not to  
9 have very much money.

10 MR. CLEMENT: But -- well, actually,  
11 people who work, especially in management  
12 positions in corporations, tend to have a fair  
13 amount of money. And so I think you are, in  
14 that scenario, in your hypothetical, you're  
15 going to find plenty of deep-pocketed  
16 defendants.

17 You're not going to have the mens rea  
18 requirement problems, which is why all of these  
19 corporate entities have been left out of the  
20 international criminal tribunals, and those  
21 same mens rea problems apply absolutely the  
22 same in an intentional tort like this.

23 So you're going to -- my humble point  
24 to you is, yeah, at first blush it might seem a  
25 little weird that the U.S. corporation is not a

1 defendant, but there are plenty of other  
2 potential U.S. defendants that will avoid the  
3 diplomatic friction.

4 And then the costs on the other side  
5 of allowing the foreign corporations to be  
6 sued, if you applied the same logic here, this  
7 suit wouldn't happen.

8 If you actually limited this to the  
9 people who are actually liable under -- under  
10 Article V of the financing convention, people  
11 in management or control positions, all of  
12 those people are in Jordan. So the corporate  
13 forum here is the question presented. It's  
14 also integral to all of these problems.

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

16 JUSTICE KAGAN: It is the question.

17 JUSTICE ALITO: Mr. Clement, in the --  
18 in the slavery hypothetical, wouldn't that be a  
19 felony under federal law? Wouldn't the  
20 individuals who were victimized have numerous  
21 other opportunities, numerous other ways to sue  
22 this American corporation for these torts?

23 MR. CLEMENT: Absolutely, Justice  
24 Alito. But they would also --

25 JUSTICE KAGAN: Well, the individuals



1 don't care if it's a felony. They would like a  
2 little bit of compensation.

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

12 JUSTICE KAGAN: I guess one of the  
13 things that I'm suggesting, Mr. Clement, and  
14 this is reflected in your brief, you spend a  
15 lot of time essentially saying that this is one  
16 of those foreign cubed cases that we dealt with  
17 in Kiobel.

18 And that might be right. But the  
19 question of corporate versus individual  
20 liability is a question that's entirely  
21 orthogonal to that, I mean, that you can come  
22 up with a very, very domestic-looking suit that  
23 raises the question of corporate versus  
24 individual liability and that that suit, when  
25 you focus on it, leads you to say, why on earth

1 would you draw a distinction of this kind?

2 MR. CLEMENT: Justice Kagan, that's a  
3 great word, but I don't think it describes the  
4 relationship between corporate liability and  
5 these extraterritorial suits.

6 I don't think it's an accident that  
7 each time you get one of these foreign cubed  
8 cases, that it's a foreign corporation, I don't  
9 think it's an accident that each time it comes  
10 up, it's really attractive to maybe duck the  
11 corporate liability question and decide the  
12 extraterritoriality question.

13 First of all, thank goodness we don't  
14 really have a lot of U.S. corporations that are  
15 violating international law right here in  
16 America, but if they did, there would be plenty  
17 of defendants under the ATS and under other  
18 provisions.

19 So the real incidence of this, the  
20 real impact of corporate liability is the  
21 ability to get a corporation like Arab Bank  
22 that's a cornerstone of the Jordanian economy,  
23 and you get them in here, you cause all sorts  
24 of diplomatic friction and then, as a bonus,  
25 you don't have to worry about whether the --

1 the mens rea of somebody in Jordan and the mens  
2 rea of somebody who processed the transaction  
3 in the United States, whether any of those  
4 actually satisfied the requirements of the  
5 tort, because you can mush them all together  
6 and say it's corporate responsibility.

7 That's why these are so attractive.

8 That's why --

9 JUSTICE GINSBURG: There was --

10 MR. CLEMENT: -- this issue has  
11 arisen.

12 JUSTICE GINSBURG: There was some  
13 substantial -- there was a substantial sanction  
14 against this bank, wasn't there?

15 MR. CLEMENT: There was.

16 JUSTICE GINSBURG: On the part of the  
17 U.S. Government?

18 MR. CLEMENT: There was, which just  
19 shows that there's only a toehold of U.S.  
20 concern here, which is the dollar clearing  
21 transactions in the United States. And there  
22 is a far, far better way for the law to address  
23 that concern than with a 33-word jurisdictional  
24 statute passed in 1789.

25 And that's really what this comes down

1 to at the end of the day. I mean, obviously  
2 Sosa left the door ajar for some kinds of ATS  
3 cases, but with respect, I do not think Sosa  
4 left the door ajar for cases like this. Thank  
5 you.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 Counsel.

8 Four minutes, Mr. Fisher.

9 REBUTTAL ARGUMENT OF JEFFREY L. FISHER  
10 ON BEHALF OF THE PETITIONER

11 MR. FISHER: Thank you. I'd like to  
12 turn to questions three Justices have asked,  
13 starting with Justice Kennedy, your question to  
14 me towards the end of my time about whether  
15 corporate liability falls on the conduct or  
16 enforcement side, and try to make two  
17 additional points about that.

18 First of all, the Bormes case, which  
19 is cited in the Solicitor General's brief  
20 dealing with the Little Tucker Act a few years  
21 ago, free and clear of all of the  
22 extraterritoriality concerns and everything  
23 else, just this Court straightforwardly said,  
24 citing the provision there that said who could  
25 be sued, that that was part of the remedial

1 structure of the Little Tucker Act.

2 And we think that makes sense because  
3 that is at the heart of the notion of corporate  
4 personhood. What the Court has said time and  
5 again is that part of the corporate bargain is  
6 that you get privileges and opportunities, but  
7 you also have burdens of being held liable in  
8 tort actions.

9 One additional thing on that, I think  
10 it's important to point you to the Anti-  
11 terrorism Act. Mr. Clement is right that the  
12 Anti-terrorism Act applies to U.S. citizens and  
13 not to aliens.

14 But the reason why, and this is laid  
15 out in the amicus brief from former  
16 counter-terrorism officials, is because  
17 Congress knew that aliens already had a cause  
18 of action under the ATS.

19 And, indeed, Congress made clear in  
20 the ATA that it was exercising its power under  
21 the define and punish clause. And so the  
22 Congress understood to be codifying a cause of  
23 action for a violation of international law  
24 and, as my opponent even concedes, in one that  
25 swept in corporations.

1           Mr. Chief Justice, you asked about  
2           accountability of the United States in the  
3           history of the Alien Tort Statute. I just want  
4           to make sure the Court remembers that piracy is  
5           one of the quintessential concerns Congress had  
6           in mind. And that's a little bit different  
7           than simply another country taking us to war.

8           That was a notion that certain conduct  
9           makes somebody an enemy of all mankind. And if  
10          you take that concern of piracy historically  
11          and compare it to terrorism today, we think the  
12          parallels are quite obvious.

13          And even if we had to prove that this  
14          is a situation where some other country would  
15          be mad, imagine Israel's view if our  
16          financing -- if our entire finance system could  
17          be used and accessed to combat -- to commit  
18          terrorist attacks, make them easier, make them  
19          more deadly, make the funding more effective.

20          Israel, if the -- if suits like this  
21          were taken away, Israel and countries like it  
22          might well have a complaint to the United  
23          States.

24          And finally, Justice Gorsuch, I wanted  
25          to turn back to your question about the history

1 and make two additional points.

2 One is piracy, as Justice Sotomayor  
3 pointed out, I think also is a very difficult  
4 thing to account for under the theory you've  
5 described.

6 Secondly, I would just bring you back  
7 to the ordinary --

8 JUSTICE GORSUCH: But why is that?

9 MR. FISHER: Because pirates wouldn't  
10 be -- they wouldn't be citizens of the United  
11 States.

12 JUSTICE GORSUCH: Right. But if -- if  
13 we're not responsible for it, it wouldn't be  
14 the cause of a just war against us and,  
15 therefore, not a cause of concern under the  
16 ATS.

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

19 JUSTICE GORSUCH: Oh, good. So the  
20 first one we can put aside.

21 MR. FISHER: No, no, no, well, I --  
22 piracy is something that doesn't exactly fall  
23 under the same rubric. But the second point is  
24 I would just point you to the plain text of the  
25 act.

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

4           JUSTICE GORSUCH: As plaintiffs, yes.

5           MR. FISHER: Yes, yes, but if Congress  
6           was so careful to do that, if it had wanted  
7           only U.S. nationals to be defendants, you have  
8           to ask the question why Congress wouldn't have  
9           been specific on the other side.

10          JUSTICE GORSUCH: And the argument I  
11          have been developing isn't mine. I can't take  
12          credit for it.

13          MR. FISHER: Yeah.

14          JUSTICE GORSUCH: But it is a very  
15          careful argument that has been developed that  
16          that is exactly what those words meant to the  
17          First Congress.

18          MR. FISHER: No, but I think that, as  
19          the Court said in *Amerada Hess*, Congress did  
20          not limit the scope of defendants. And, again,  
21          if you look at the rest of the Judiciary Act,  
22          other provisions we point out in our brief did  
23          limit the scope of proper defendants.

24          So who was a proper plaintiff and who  
25          was a proper defendant in the jurisdictional



1 provisions Congress was creating was very much  
2 at the center of Congress's mind. And so we  
3 think the plain text, if nothing else, answers  
4 that.

5 JUSTICE GORSUCH: Right. But -- but  
6 the plain text is the law of nations. And the  
7 argument, and I'm not doing it justice, but is  
8 briefly that a law of nations would have meant  
9 something that would have been attributed to  
10 the United States. And the only thing that  
11 would have been attributable to the United  
12 States is an act by a U.S. citizen.

13 MR. FISHER: Well, on that level, we  
14 simply disagree with the concept of law of  
15 nations. As has been pointed out, law of  
16 nations deals with the conduct, not the  
17 enforcement.

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

20 (Whereupon, at 12:03 p.m., the case  
21 was submitted.)

22

23

24

25

## Official - Subject to Final Review

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