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P R O C E E D I N G S

(11:04 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 is 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 We have to ask yourself --

15 JUSTICE ALITO: If it is 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 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: Yeah.

1 JUSTICE GORSUCH: Looking back to
2 1789, as Sosa indicates we should, beyond
3 extraterritoriality, did it also anticipate
4 that there is an American defendant in the
5 case.

6 Professor Blea 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
17 an American defendant in order to have
18 diversity 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 have got
24 the 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: Well, but if you --
7 I think we have a separate statute in -- in
8 1789 to deal with that issue, too. So, that's
9 -- that 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've 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 is 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.

6 That's the way Paquete Habana
7 described this situation years later.

8 JUSTICE GINSBURG: Isn't that what
9 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 have suggested since then,
16 but do we know that was the understanding of
17 Congress in 1789? It seems like Professor Blea
18 and Clark, others, Goldsmith, suggested maybe
19 otherwise.

20 MR. FISHER: I think there would have
21 been a revoke -- I'm sorry, a robust set of
22 arguments made about the history of the ATS and
23 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 -- if that's the
9 case, 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: -- you are 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 nobody
17 -- and so we're not asking you to resolve it
18 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 is so important that the
3 federal government itself exercises
4 jurisdiction over any bank that does it and it
5 holds it liable under the Bank Secrecy Act, the
6 Foreign Corrupt 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 is 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 -- 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 about another
12 limitation that has been suggested,
13 extraterritoriality, that's what this Court has
14 declared, as there is 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.

18 And then if you -- if you don't have a
19 remedy in that most natural forum, then you can
20 come here.

21 MR. FISHER: Are you asking me whether
22 -- whether 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 last two State Departments
10 have agreed that this is not a Sosa step 1
11 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 And I'll

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 in -- to the United States to
14 proceed in U.S. court under the Alien Tort
15 Statute. But the court of appeals did not
16 reach that important extraterritoriality
17 question because it -- because it relied on its
18 rule that a corporation can never be a
19 defendant in an 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 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 then to get --

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 SOLITO: 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 a 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 fresh.

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, the
6 1787 incident involving the Dutch ambassador,
7 that those sorts of violations could give rise
8 to international friction and that the purpose,
9 as this Court said, was to provide an adequate
10 remedy, a federal forum and an adequate remedy
11 for those individuals, to avoid the possibility
12 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 in alien versus alien causes of action
15 aren't within the statute?

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

21 JUSTICE GORSUCH: Well --

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

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

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

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

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

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

1 sure, but I'm not sure it's -- it's addressed
2 this specific theory of the ATS.

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

8 JUSTICE GORSUCH: Okay.

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

11 JUSTICE GORSUCH: Right.

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

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

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

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

25 MR. FLETCHER: Well, I think this

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

4 I think it illustrates even if that
5 particular assault on ambassadors might have
6 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 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 be appropriate in large
13 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

1 civil liability context.

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

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

13 MR. CLEMENT: Yeah.

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

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

25 Now, when you look at this case, what

1 they've cited is, for example, the
2 international convention for the suppression of
3 the financing of terrorism, which we've
4 ratified, which says that states must take
5 necessary measures to enable a legal entity
6 located in its territory or organized under its
7 laws to be held liable.

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

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

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

1 struck the French ambassador and the
2 international law at that time.

3 Now, what is your response?

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

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

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

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

24 And, of course, Congress had a
25 provision for the judgment proof tort-feasor,

1 which they also in the Crimes Act of 1790 made
2 it a criminal act. And I think it's important
3 to recognise --

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

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

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

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

24 JUSTICE KAGAN: I don't agree.

25 (Laughter.)

1 JUSTICE KAGAN: But --

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

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

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

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

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

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

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

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

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

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

25 MR. CLEMENT: Absolutely it is. But

1 that's an example of where this nation --

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

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

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

25 So where do we find international

1 norms, if not in the behavior of international
2 companies -- of international countries?

3 MR. CLEMENT: Well, I --

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

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

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

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

25 What is so telling about those six

1 treaties is that the United States has signed
2 exactly none of them.

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

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

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

24 MR. CLEMENT: Well --

25 JUSTICE KAGAN: As far as I understood

1 your brief, you're only getting it from that
2 Sosa Footnote 20, which really does not make
3 that point at all.

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

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

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

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

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

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

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

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

1 international law.

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

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

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

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

16 JUSTICE GINSBURG: How about foreign
17 relations?

18 MR. CLEMENT: What's that?

19 JUSTICE GINSBURG: How about --

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

23 JUSTICE GINSBURG: But doesn't that --
24 doesn't -- doesn't that restatement recognize
25 that that there can be corporate liability for

1 a violation -- for engaging in conduct that
2 violates international law?

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

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

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

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

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

1 convention and the relevant part is on page 31
2 of the red brief, but it actually addresses the
3 circumstances in which a corporation could be
4 liable under domestic law for a terrorist
5 financed violation and it does not apply the
6 American concept of respondeat superior, such
7 that the master is responsible for every act of
8 the agent within the scope of the agency.

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

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

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

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

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

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

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

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

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

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

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

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

23 JUSTICE GINSBURG: Yes.

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

1 JUSTICE GINSBURG: Not a U.S.
2 corporation?

3 MR. CLEMENT: Not a U.S. corporation.
4 And we would say that actually makes sense
5 because if there are agents of the U.S.
6 corporation here, they will be --

7 JUSTICE SOTOMAYOR: So Jordan is --

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

10 JUSTICE SOTOMAYOR: So Jordan is going
11 to be okay, Jordan is going to be okay being
12 called a financier of terrorism, merely because
13 it is a U.S. citizen who brought this suit? I
14 thought it was objecting to the fact of the
15 label of being a terrorist 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 a --

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 --

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

12 And -- and the country from which
13 these people come thinks that this is a pretty
14 awful thing.

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

25 MR. CLEMENT: Justice Kagan, of course

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

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

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

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

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

1 potential U.S. defendants that will avoid the
2 diplomatic friction.

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

7 If you actually limited this to the
8 people who are actually liable under -- under
9 Article 5 of the financing convention, people
10 in management or control positions, all of
11 those people are in Jordan. So the corporate
12 forum here is the question presented. It's
13 also integral to all of these problems.

14 It is not an accident that it was --

15 JUSTICE KAGAN: It is the question.

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

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

24 JUSTICE KAGAN: If it is a felony they
25 would like a little bit of compensation.

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

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

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

25 MR. CLEMENT: Justice Kagan, that's a

1 great word but I don't think it describes the
2 relationship between corporate liability and
3 these extraterritorial suits.

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

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

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

1 in the United States, whether any of those
2 actually satisfied the requirements of the
3 tort, because you can mush them all together
4 and say it's corporate responsibility.

5 That's why these are so attractive.

6 That's why --

7 JUSTICE GINSBURG: There was --

8 MR. CLEMENT: -- this issue has
9 arisen.

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

13 MR. CLEMENT: There was.

14 JUSTICE GINSBURG: On the part of the
15 U.S. government?

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

23 And that's really what this comes down
24 to at the end of the day. I mean, obviously
25 Sosa left the door ajar for some kinds of ATS

1 cases, but with respect, I do not think Sosa
2 left the door ajar for cases like this. Thank
3 you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Four minutes, Mr. Fisher.

7 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
8 ON BEHALF OF THE PETITIONER

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

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

25 And we think that makes sense because

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

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

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

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

24 Mr. Chief Justice, you asked about
25 accountability of the United States in the

1 history of the Alien Tort Statute. I just want
2 to make sure the Court remembers that piracy is
3 one of the quintessential concerns Congress had
4 in mind. And that's a little bit different
5 than simply another country taking us to war.

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

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

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

22 And finally, Justice Gorsuch, I wanted
23 to turn back to your question about the history
24 and make two additional points.

25 One is piracy, as Justice Sotomayor

1 pointed out, I think also is a very difficult
2 thing to account for under the theory you have
3 described.

4 Secondly, I would just bring you back
5 to the ordinary --

6 JUSTICE GORSUCH: But why is that?

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

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

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

17 JUSTICE GORSUCH: Oh, good. So the
18 first one we can put aside.

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

24 And as we have pointed out quite
25 clearly in our brief, Congress went out of its

1 way to specify aliens as proper plaintiffs.

2 JUSTICE GORSUCH: As plaintiffs, yes.

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

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

11 MR. FISHER: Yeah.

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

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

22 So who was a proper plaintiff and who
23 was a proper defendant in the jurisdictional
24 provisions Congress was creating was very much
25 at the center of Congress's mind. And so we

1 think the plain text, if nothing else, answers
2 that.

3 JUSTICE GORSUCH: Right. But -- but
4 the plain text is The Law of Nations. And the
5 argument, and I am not doing it justice, but is
6 briefly that a Law of Nations would have meant
7 something that would have been attributed to
8 the United States.

9 And the only thing that would have
10 been attributable to the United States is an
11 act by a U.S. citizen.

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

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

19 (Whereupon, at 12:03 p.m., the case
20 concluded.)

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