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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 in -- otherwise in North  
20 America, as the Comparative Law Scholars' brief  
21 points out. And there's no reason whatsoever  
22 to have this corporate liability bar that has  
23 no basis --

24 CHIEF JUSTICE ROBERTS: Where --

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

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

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

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

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



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

6 MR. FISHER: No --

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

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

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

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

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

1 MR. FISHER: Pardon me?

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

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

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

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

25 And it brings me back to what is

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

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

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

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

1 concerns.

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

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

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

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

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

22 JUSTICE GINSBURG: Which would --

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

25 JUSTICE GINSBURG: Which would apply

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

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

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

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

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

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

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

16 You have to ask yourself --

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

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

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

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

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

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

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

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

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

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

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

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

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

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



1 JUSTICE GORSUCH: Mr. Fisher --

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. FISHER: I think the --

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

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

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

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

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

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

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

1 position in Sosa didn't carry the day.

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

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

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

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

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

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

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

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

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

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

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

1 of finance.

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

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

12 So I would -- I would --

13 JUSTICE KAGAN: I -- I am --

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

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

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

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

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

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

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

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

1 the law of nations.

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

7 JUSTICE GINSBURG: What --

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

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

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

23 JUSTICE GINSBURG: Yes, the  
24 exhaustion.

25 MR. FISHER: Yes, I think in Footnote



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

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

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

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

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

1 that norm.

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

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

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

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

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

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

15 I'll reserve --

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

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

22 JUSTICE KAGAN: Is that the basic  
23 point?

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

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Fletcher.

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

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

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

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

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

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

5             MR FLETCHER:  Because --

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

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

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE ALITO: So if we --

25 JUSTICE KAGAN: So in what --

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

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

11 JUSTICE ALITO: Yes.

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

16 JUSTICE ALITO: At what point?

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

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



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

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

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

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

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

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

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

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

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

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

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

20 JUSTICE GORSUCH: Well --

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

25 JUSTICE GORSUCH: You have the

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

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

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

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

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

1 this specific theory of the ATS.

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

7 JUSTICE GORSUCH: Okay.

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

10 JUSTICE GORSUCH: Right.

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

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

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

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

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

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

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

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

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

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

20 JUSTICE GORSUCH: Ambassadorial --

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

24 JUSTICE GORSUCH: Ambassadors.

25 JUSTICE SOTOMAYOR: I don't think that

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

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

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

11 MR. FLETCHER: No, please.

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

16 MR. FLETCHER: That's right.

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

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

1 corporation did.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Did he -- did



1 he cite legal authority for that proposition?

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

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

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

1 trial. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Mr. Clement.

5 ORAL ARGUMENT OF PAUL D. CLEMENT

6 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

8             MR. CLEMENT: But just --

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

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

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

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

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

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

12 MR. CLEMENT: Yeah.

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

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

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

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

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

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

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

1 international law at that time.

2 Now, what is your response?

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

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

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

17 (Laughter.)

18 JUSTICE KAGAN: Why would France have  
19 cared?

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

25 And, of course, Congress had a

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

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

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

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

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

25 JUSTICE KAGAN: I don't agree.

1 (Laughter.)

2 JUSTICE KAGAN: But --

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

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

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

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

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



1 countries --

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

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

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

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

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

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

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

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

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

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

4           MR. CLEMENT: Well, I --

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

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

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

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

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

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

8           JUSTICE KAGAN: Well, I --

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

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

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

1 MR. CLEMENT: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 JUSTICE GINSBURG: How about foreign  
20 relations?

21 MR. CLEMENT: What's that?

22 JUSTICE GINSBURG: How about --

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

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

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

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

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

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

25 And on that, it's not just Judge



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

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

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

20           JUSTICE BREYER: Is this --

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

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

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

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

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

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

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

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

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

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

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

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

3 JUSTICE GINSBURG: Yes.

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

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

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

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

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

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

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

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

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

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

7 MR. CLEMENT: Okay, but --

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

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

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

23 JUSTICE KAGAN: But --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 JUSTICE ALITO: Now, Mr. Clement --

23 JUSTICE KAGAN: It is the question.

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



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

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

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

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

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

25 And that might be right. But the

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

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

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

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

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

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

16                 JUSTICE GINSBURG:   There was --

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

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

22                 MR. CLEMENT:   There was.

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

25                 MR. CLEMENT:   There was, which just

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

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

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Four minutes, Mr. Fisher.

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

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

25 First of all, the Bormes case, which

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

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

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

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

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

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

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

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

1 more deadly, make the funding more effective.

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

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

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

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

15 JUSTICE GORSUCH: But why is that?

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

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

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

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

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

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

11 JUSTICE GORSUCH: As plaintiffs, yes.

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

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

20 MR. FISHER: Yeah.

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

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



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

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

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

15 MR. FISHER: Yeah.

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

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

1 enforcement.

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

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

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