

No. 11-88

IN THE
Supreme Court of the United States

ASID MOHAMAD ET AL.,

Petitioners,

v.

PALESTINIAN AUTHORITY AND PALESTINE LIBERATION
ORGANIZATION,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PETITIONERS

Jeffrey L. Fisher
Jenny S. Martinez
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Nathaniel A. Tarnor
TARNOR, PLLC
1200 G Street, N.W.
Suite 800
Washington, D.C. 20005

Robert J. Tolchin
Counsel of Record
THE BERKMAN LAW OFFICE,
LLC
111 Livingston Street
Suite 1928
Brooklyn, NY 11201
(718) 855-3627
rtolchin@berkmanlaw.com

Thomas C. Goldstein
Kevin K. Russell
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave. N.W.
Suite 404
Washington, D.C. 20015

QUESTION PRESENTED

Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note, permits actions against defendants that are not natural persons.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
BRIEF FOR PETITIONERS.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
RELEVANT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
I. Legal Framework	2
II. Factual And Procedural Background	5
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. The Text Of The TVPA Does Not Displace The Presumption That Non-Sovereign Organizations Are Liable For Their Torts.	12
A. The Fact That The TVPA Creates A Tort Action Gives Rise To A Presumption That Organizations Are Liable For The Acts Of Their Agents.	12
B. The TVPA’s Use Of The Term “Individual” Comports With The Presumption That Organizations Are Liable For The Acts Of Their Agents.	17
C. The Dictionary Act’s Definition Of The Term “Person” Has Minimal Bearing On The Meaning Of The TVPA’s Term “Individual.”	22
II. The Overall Structure And Purpose Of The TVPA Confirm That The Act Covers Organizations.	24

- A. The Structure Of The TVPA And Other Anti-Torture And Anti-Extrajudicial Killing Laws Shows That The TVPA Must Cover Organizations..... 25
- B. The Only Way To Fulfill The Purpose Of The TVPA Is To Apply The Act To Organizations. 37
- III. The Legislative History Of The TVPA Reinforces That Congress Intended It To Reach Organizations. 42
 - A. Congress Used The Word “Individual” In The TVPA To Exclude *States*, Not Non-Sovereign Organizations..... 43
 - B. The Legislative History Expressly Assumes That Organizations Would Be Proper Defendants In A TVPA Lawsuit..... 46
 - C. Congress Intended For The TVPA To Enhance And Expand The Alien Tort Statute. 50
- CONCLUSION..... 51
- APPENDIX, The Torture Victim Protection Act.....1a

TABLE OF AUTHORITIES

Cases

<i>Agency Holding Corp. v. Malley-Duff Assocs.</i> , 483 U.S. 143 (1987)	38
<i>Aldana v. Del Monte Fresh Produce, N.A., Inc.</i> , 416 F.3d 1242 (11th Cir. 2005)	7
<i>Association contre l’Impunit� v. Anvil Mining Ltd.</i> , 2011 (Superior Court of Quebec) 500-06-000530-101	16
<i>Astoria Fed. Sav. & Loan Ass’n v. Solimino</i> , 501 U.S. 104 (1991)	13
<i>Atl. Cleaners & Dyers, Inc. v. United States</i> , 286 U.S. 427 (1932)	27
<i>Baloco ex rel. Tapia v. Drummond Co.</i> , 640 F.3d 1338 (11th Cir. 2011)	42
<i>Balt. & Potomac R.R. v. Fifth Baptist Church</i> , 108 U.S. 317 (1883)	13
<i>Biton v. Palestinian Interim Self-Gov’t Auth.</i> , 239 F.R.D. 1 (D.D.C. 2006)	32
<i>Biton v. Palestinian Interim Self-Gov’t Auth.</i> , 310 F. Supp. 2d 172 (D.D.C. 2004)	40
<i>Boim v. Holy Land Found. for Relief & Dev.</i> , 549 F.3d 685 (7th Cir. 2008) (en banc)	3, 32
<i>Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n</i> , 531 U.S. 288 (2001)	31
<i>Briscoe v. LaHue</i> , 460 U.S. 325 (1983)	13
<i>Budget Serv. Co. v. Better Homes of Va., Inc.</i> , 804 F.2d 289 (4th Cir. 1986)	20

<i>Burnham v. Superior Court</i> , 495 U.S. 604 (1990)	39
<i>Chavez v. Carranza</i> , 559 F.3d 486 (6th Cir. 2009)	26
<i>Clinton v. City of New York</i> , 524 U.S. 417 (1998)	passim
<i>Comm’r v. Brown</i> , 380 U.S. 563 (1965)	24
<i>Daniels v. Tearney</i> , 102 U.S. 415 (1880)	13
<i>Delgado v. Mukasey</i> , 508 F.3d 702 (2d Cir. 2007).....	36
<i>Doe v. Exxon Mobil Corp.</i> , 654 F.3d 11 (D.C. Cir. 2011)	15
<i>Dole Food Co. v. Patrickson</i> , 538 U.S. 468 (2003)	46
<i>Edmonds v. Dillin</i> , 485 F. Supp. 722 (N.D. Ohio 1980).....	14
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003)	44
<i>Envtl. Def. v. Duke Energy Corp.</i> , 549 U.S. 561 (2007)	27
<i>Estate of Klieman v. Palestinian Auth.</i> , 424 F. Supp. 2d 153 (D.D.C. 2006)	32
<i>Estates of Ungar ex rel. Strachman v. Palestinian Auth.</i> , 153 F. Supp. 2d 76 (D.R.I. 2001).....	40
<i>Estates of Ungar ex rel. Strachman v. Palestinian Auth.</i> , 304 F. Supp. 2d 232 (D.R.I. 2004).....	40

<i>Estates of Ungar ex rel. Strachman v. Palestinian Auth.,</i> 325 F. Supp. 2d 15 (D.R.I. 2004).....	13
<i>Estelle v. Gamble,</i> 429 U.S. 97 (1976)	30
<i>Faragher v. City of Boca Raton,</i> 524 U.S. 775 (1998)	13
<i>Filartiga v. Pena-Irala,</i> 630 F.2d 876 (2d Cir. 1980).....	34, 50
<i>First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,</i> 462 U.S. 611 (1983)	15
<i>Ford ex rel. Estate of Ford v. Garcia,</i> 289 F.3d 1283 (11th Cir. 2002)	26
<i>Garcia v. United States,</i> 469 U.S. 70 (1984)	44
<i>Gen. Dynamics Land Sys., Inc. v. Cline,</i> 540 U.S. 581 (2004)	27
<i>Gilmore v. Palestinian Interim Self-Gov't Auth.,</i> 422 F. Supp. 2d 96 (D.D.C. 2006).....	32
<i>Gonzales v. Carhart,</i> 550 U.S. 124 (2007)	24
<i>Guerrero v. Monterrico Metals PLC,</i> [2010] EWHC 3228 (QB).....	16
<i>Helvering v. Hammel,</i> 311 U.S. 504 (1941)	25
<i>Hess v. Reynolds,</i> 113 U.S. 73 (1885)	29
<i>In re Atl. Bus. & Cmty. Corp.,</i> 901 F. 2d 325 (3d Cir. 1990).....	20

<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	34
<i>Isbrandtsen Co. v. Johnson</i> , 343 U.S. 779 (1952)	13
<i>John Hancock Mut. Life Ins. Co. v. Harris</i> <i>Trust & Sav. Bank</i> , 510 U.S. 86 (1993)	24
<i>Johnson v. United States</i> , 529 U.S. 694 (2000)	24
<i>Kadic v. Karadzic</i> , 70 F.3d 232 (2d Cir. 1995).....	36
<i>Karvelis v. Constellation Lines S.A.</i> , 806 F.2d 49 (2d Cir. 1986).....	14
<i>Kiobel v. Royal Dutch Petroleum Co.</i> , 621 F.3d 111 (2d Cir. 2010), <i>cert. granted</i> , 132 S. Ct. ___ (2011) (No. 10-1491)	15, 34, 42
<i>Knox v. Palestine Liberation Org.</i> , 306 F. Supp. 2d 424 (S.D.N.Y. 2004).....	32
<i>Knox v. Palestine Liberation Org.</i> , 628 F. Supp. 2d 507 (S.D.N.Y. 2009).....	40
<i>Lyon v. Carey</i> , 533 F.2d 649 (D.C. Cir. 1976)	13
<i>Meyer v. Holley</i> , 537 U.S. 280 (2003)	9, 12, 13, 26
<i>Monell v. N.Y.C. Dep't of Soc. Servs.</i> , 436 U.S. 658 (1978)	3, 14, 17, 31
<i>Murphy v. Islamic Republic of Iran</i> , 740 F. Supp. 2d 51 (D.D.C. 2010)	33
<i>Murray v. Schooner Charming Betsy</i> , 6 U.S. (2 Cranch) 64 (1804).....	34

<i>O’Connell Mach. Co. v. M.V. “Americana,”</i> 734 F.2d 115 (2d Cir. 1984).....	46
<i>Offshore Logistics, Inc. v. Tallentire,</i> 477 U.S. 207 (1986)	14
<i>Owens v. Republic of Sudan,</i> ___ F. Supp. 2d ___, 2011 WL 5904614 (D.D.C. Nov. 28, 2011).....	33
<i>Perkins v. Benguet Consol. Mining Co.,</i> 342 U.S. 437 (1952)	40
<i>Pfizer, Inc. v. Gov’t of India,</i> 434 U.S. 308 (1978)	20
<i>Ramirez-Peyro v. Holder,</i> 574 F.3d 893 (8th Cir. 2009)	35
<i>Robinson v. Shell Oil Co.,</i> 519 U.S. 337 (1997)	27
<i>Rowland v. Cal. Men’s Colony, Unit II Men’s Advisory Council,</i> 506 U.S. 194 (1993).....	23
<i>Silva-Rengifo v. Attorney Gen.,</i> 473 F.3d 58 (3d Cir. 2007).....	36
<i>Skinner v. East India Co.,</i> (1666) 6 State Trials 710 (H.L.).....	16
<i>Sosa v. Alvarez-Machain,</i> 542 U.S. 692 (2004)	16, 34
<i>Staub v. Proctor Hosp.,</i> 131 S. Ct. 1186 (2011)	13
<i>Strachman v. Palestinian Auth.,</i> 901 N.Y.S.2d 582 (App. Div. 2010)	41
<i>Tachiona v. Mugabe,</i> 169 F. Supp. 2d 259 (S.D.N.Y. 2001).....	31, 38

<i>Tachiona v. United States</i> , 386 F.3d 205 (2d Cir. 2004).....	31, 38
<i>Tel-Oren v. Libyan Arab Republic</i> , 726 F.2d 774 (D.C. Cir. 1984)	passim
<i>The Malek Adhel</i> , 43 U.S. (2 How.) 210 (1844)	16
<i>The Slavers (Kate)</i> , 69 U.S. (2 Wall.) 350 (1864)	16
<i>Ungar v. Palestine Liberation Org.</i> , 402 F.3d 274 (1st Cir. 2005).....	14, 32
<i>United States v. A&P Trucking Co.</i> , 358 U.S. 121 (1958)	17
<i>United States v. Am. Trucking Ass'ns</i> , 310 U.S. 534 (1940)	25
<i>United States v. Freeman</i> , 44 U.S. (3 How.) 556 (1845)	30
<i>United States v. Middleton</i> , 231 F.3d 1207 (9th Cir. 2000)	19
<i>United States v. Perry</i> , 479 F.3d 885 (D.C. Cir. 2007)	19
<i>United States v. Stewart</i> , 311 U.S. 60 (1940)	30
<i>United States v. Tinklenberg</i> , 131 S. Ct. 2007 (2011)	24
<i>United States v. Weintraub</i> , 27 Fed. Appx. 54 (2d Cir. 2001)	28
<i>Volden v. Innovative Fin. Sys., Inc.</i> , 440 F.3d 947 (8th Cir. 2006)	14
<i>Wilson v. Garcia</i> , 471 U.S. 261 (1985)	31

Statutes

1 U.S.C. § 1.....	8, 22, 23
2 U.S.C. § 692(a)(1).....	19
7 U.S.C. § 21(b)(4).....	21
8 U.S.C. § 1101(b)(3).....	28
8 U.S.C. § 1324.....	28
11 U.S.C. § 362(h).....	20
12 U.S.C. § 611.....	21
15 U.S.C. § 1692e.....	14
15 U.S.C. § 1692k.....	14
15 U.S.C. § 1693a(5).....	21
15 U.S.C. § 6602(5).....	21
18 U.S.C. § 229A.....	28
18 U.S.C. § 229F.....	28
18 U.S.C. § 1030(a)(5)(A).....	19
18 U.S.C. § 2333.....	3, 31, 32, 40
28 U.S.C. § 1350.....	1, 3, 34
29 U.S.C. § 106.....	22
33 U.S.C. § 1319(c)(3)(A).....	28
42 U.S.C. § 1983.....	passim
42 U.S.C. § 1985.....	14
42 U.S.C. § 7413(c).....	28
46 U.S.C. § 30302.....	14
46 U.S.C. § 30104.....	14
Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 <i>et seq.</i>	passim

28 U.S.C. § 1603	32
28 U.S.C. § 1603(b).....	46
28 U.S.C. § 1605A.....	32, 33
28 U.S.C. § 1605A(a)	33
28 U.S.C. § 1605A(c).....	32, 33
Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, (1992) <i>codified at</i> 28 U.S.C. 1350 note.....	passim
Preamble.....	3, 34, 38
Sec. 2(a)	4, 12, 29

Legislative Materials

138 Cong. Rec. 4176 (Mar. 3, 1992)	45
H.R. Rep. No. 100-693 (1988).....	50
H.R. Rep. No. 102-367 (1991).....	passim
S. Rep. No. 102-249 (1991)	passim
<i>The Torture Victim Protection Act: Hearing and Markup on H.R. 1417 Before the Subcomm. on Human Rights & Int'l Orgs. of the H. Comm. on Foreign Affairs, 100th Cong. (1988)).....</i>	44, 45, 49
<i>Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration & Refugee Affairs of the S. Comm. on the Judiciary, 101st Cong. (1990).....</i>	45, 48, 50

Other Authorities

BLACK'S LAW DICTIONARY (6th ed. 1990).....	18
--	----

Bruce Campbell & Arthur Brenner, DEATH SQUADS IN GLOBAL PERSPECTIVE: MURDER WITH DENIABILITY (2000)	39
Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.	2
Art. 1	35
Art. 14	35
Declaration of Principles on Interim Self- Government Arrangements, Isr.-P.L.O., Sept. 13, 1993, 32 I.L.M. 1525. Art. I	5
Art. VIII	5
Geneva Conventions of 1949	2
Common Article 3	36
Human Rights Watch, HARSH WAR, HARSH PEACE (2010)	39
International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171	2
Art. 2(3)(a)	37
Art. 5	37
Art. 6	37
Art. 7	37
Mem. for the United States as Amicus Curiae, <i>Filartiga v. Pena-Irala</i> , 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146.	3, 30
OXFORD ENGLISH DICTIONARY (unabridged 2d ed. 1989).....	18
RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabridged 2d ed. 1987)	18

RESTATEMENT (SECOND) OF TORTS § 493 cmt. a.	29
RESTATEMENT (SECOND) OF TORTS § 901	14, 38
RESTATEMENT (THIRD) OF AGENCY § 7.03	13
<i>Sadiq Shek Elmi v. Australia</i> , U.N. Comm. Against Torture Commc'n No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999).....	35
S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000).....	16
S.C. Res. 1171, U.N. Doc. S/RES/1171 (June 5, 1998).....	16
S.C. Res. 942, U.N. Doc. S/RES/942 (Sept. 23, 1994).....	16
Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (1945).....	15
Stuart Speiser & James Rooks, RECOVERY FOR WRONGFUL DEATH § 3 (4th ed. 2005).....	29
U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000)	36
U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005)	31, 36
U.N. Comm. Against Torture, Gen. Cmt. No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (Jan. 4, 2008).....	35

U.N. Comm. on Truth for El Salvador, From
Madness to Hope: The 12-Year War in El
Salvador, U.N. Doc. S/25500 (Apr. 1, 1993) 49

U.N. Human Rights Comm., Gen. Cmt. No. 31,
[80], The Nature of the General Legal
Obligation Imposed on State Parties to the
Covenant [ICCPR], U.N. Doc.
CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004)..... 37

U.N. SPECIAL RAPPORTEUR ON EXTRAJUDICIAL
EXECUTIONS HANDBOOK, ch. 3 (2010) 41

U.S. Dep’t of State,
1995 OCCUPIED TERRITORIES HUMAN RIGHTS
PRACTICES (1996) 5

U.S. Dep’t of State, 2001 HUMAN RIGHTS
REPORT: AFGHANISTAN (2002) 42

U.S. Dep’t of State, 2008 HUMAN RIGHTS
REPORT: AFGHANISTAN (2009) 41

U.S. Dep’t of State, 2008 HUMAN RIGHTS
REPORT: ZIMBABWE (2009) 42

U.S. Dep’t of State, 2010 HUMAN RIGHTS
REPORT: SOMALIA (2011) 41

WEBSTER’S NEW TWENTIETH CENTURY
DICTIONARY (unabridged 2d ed. 1979)..... 18

WEBSTER’S THIRD NEW INTERNATIONAL
DICTIONARY (unabridged ed. 1986)..... 18

BRIEF FOR PETITIONERS

Petitioners Asid Mohamad, individually and for the estate of Azzam Rahim, deceased *et al.* respectfully request that this Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a) is reported at 634 F.3d 604. The order of the United States District Court for the District of Columbia (Pet. App. 14a) is reported at 664 F. Supp. 2d 20.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 2011. Pet. App. 1a. On June 17, 2011, the Chief Justice extended the time in which to file a petition for certiorari to July 15, 2011. No. 10A1244. Petitioners then filed a petition for a writ of certiorari on July 15, 2011, which this Court granted on October 17, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Torture Victim Protection Act, codified as a note to Section 1350 of Title 28 of the United States Code, is reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

Scarcely any acts are more reprehensible and universally condemned by all civilized nations than torture and extrajudicial killing. The Torture Victim Protection Act (TVPA) creates a tort action for victims of these heinous acts. The question presented here is whether the TVPA – in stark contrast to all of the other provisions in the U.S. Code creating tort actions, including those specifically relating to torture and extrajudicial killing – exempts from liability non-sovereign organizations responsible for such acts.

I. Legal Framework

The Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, is designed to provide meaningful remedies, as well as accountability and deterrence, with respect to the deplorable acts of torture and extrajudicial killing.

1. A fundamental precept of the law of nations is the prohibition against torture and extrajudicial killing. As is most relevant here, the United States is a party to the Geneva Conventions of 1949; the International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171; and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85. The Geneva Conventions and ICCPR proscribe (among other things) torture and extrajudicial killing, and the CAT strengthens the prohibitions against the former.

Several U.S. statutes implement these internationally recognized norms and obligations. For instance, 42 U.S.C. § 1983 provides a tort action

for American citizens tortured or extrajudicially killed under color of U.S. law. *See, e.g.*, Mem. for the United States as Amicus Curiae at 19, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146. In addition, the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333, permits victims of torture or extrajudicial killing perpetrated as acts of “international terrorism” (conducted on U.S. soil or abroad) to recover treble damages in tort actions. Both of these statutes allow plaintiffs to sue not only natural persons but also responsible organizations. *See Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (Section 1983); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 701 (7th Cir. 2008) (en banc) (ATA).

2. The TVPA provides a similar tort action for American citizens and other victims, allowing them to recover damages for such acts perpetrated under color of foreign law. As the Act’s preamble explains, this statute is designed “to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights.” Pub. L. No. 102-256, 106 Stat. 73 (1992).

Congress recognized that it was particularly important to reinforce these commitments to international human rights after the D.C. Circuit’s decision in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). *See* S. Rep. No. 102-249, at 4-5 (1991). In that case, plaintiffs had sued the Palestine Liberation Organization (PLO), along with other organizations and the state of Libya, under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, for torture and extrajudicial killings perpetrated abroad.

Tel-Oren, 726 F.2d at 775. The *Tel-Oren* court did not question that non-sovereign organizations acting under color of law could be held liable for violations of the ATS. The court, however, refused on various other grounds (none of which commanded a majority) to allow the suit to proceed – most notably, on the ground that the ATS did not explicitly create a cause of action for torture or extrajudicial killing. See *Tel-Oren*, 726 F.2d at 799 (Bork, J., concurring).

Congress designed the TVPA to “provide [the explicit] grant” of a private right of action that Judge Bork said was lacking in *Tel-Oren*. S. Rep. No. 102-249, at 4-5; H.R. Rep. No. 102-367, at 4 (1991). In its liability provision, the TVPA states:

An individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture . . . or (2) subjects an individual to extrajudicial killing shall [be liable] in a civil action.

28 U.S.C. § 1350 note sec. 2(a). The statute defines “torture” and “extrajudicial killing” in the same terms as the international instruments barring such conduct. *Id.*

Congress did not, however, go so far in the TVPA as to create a new exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* Thus, as the Senate Report on the bill explained – in a section entitled “Who can be sued” – the TVPA refers to a defendant as an “individual” in order “to make crystal clear that foreign states or their entities cannot be sued under this bill.” S. Rep. No. 102-249, at 7.

II. Factual And Procedural Background

1. Azzam Rahim was born in the West Bank village of Ein Yabroud, near Ramallah, and immigrated to the United States in the 1970s. He subsequently married in this country and had six U.S.-citizen children. Rahim also became an American citizen and was a successful businessman in the Dallas area.

In 1993, the Oslo Accords established the Palestinian Interim Self-Government Authority (now often known simply as the Palestinian Authority, or the PA). The Accords assigned the PA various functions akin to a municipal government, including police authority over parts of the West Bank. Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., arts. I, VIII, Sept. 13, 1993, 32 I.L.M. 1525. Two years later, Rahim returned to the West Bank for an extended visit to his boyhood village.

About a month after his arrival, a group of men later identified as PA/PLO security police arrested Rahim at a coffee shop and forced him into an unmarked car. Two days later, an ambulance delivered Rahim's body to his family. The corpse was badly bruised, burned with cigarettes, and bore other marks of torture, including several broken bones.

The PA claimed that Rahim died of a heart attack. But the U.S. State Department issued a report on the incident, describing Rahim's death in a section entitled "Political and Other Extrajudicial Killing" and confirming that Rahim had died "in the custody of PA intelligence officers in Jericho." U.S. Dep't of State, 1995 OCCUPIED TERRITORIES HUMAN RIGHTS PRACTICES (1996).

2. Rahim's son Asid Mohamad, individually and as the representative of the Rahim estate, as well as other relatives, filed suit against the PLO and the PA in the U.S. District Court for the Southern District of New York, alleging that they were responsible for the torture and extrajudicial killing of Rahim.¹ These plaintiffs (petitioners in this Court) sought relief under the TVPA, in addition to other claims not at issue here.

After the PLO and the PA failed to answer the complaint, the district court entered a default judgment against them. Shortly thereafter, the PLO and the PA moved to vacate the entry of default and to dismiss the complaint for lack of personal jurisdiction, among other grounds.

In response, petitioners successfully moved to transfer the case to the U.S. District Court for the District of Columbia, which had previously exercised personal jurisdiction over respondents in other matters, and which did so again here. Respondents then moved to dismiss petitioners' TVPA claim on two non-jurisdictional grounds: (1) that the TVPA does not apply to organizational defendants; and (2) that, even if the TVPA applies to organizations, the particular organizations here did not act, as the TVPA requires, under apparent authority or color of law of a foreign nation.

¹ Petitioners also named several natural persons as defendants. Due largely to difficulties in serving process, petitioners later voluntarily dismissed these defendants from the case.

The district court vacated the entry of default and dismissed the case. Expressly disagreeing with the only federal court of appeals to have addressed the subject at that time, *see Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1265 (11th Cir. 2005), the district court held that petitioners could not sue respondents under the TVPA because the term “individual” – which the TVPA uses to refer to a violator of the Act – “includes only human beings, and does not encompass” organizations. Pet. App. 17a-18a. (The court did not reach respondents’ alternative “color of law” argument, which is not at issue here.)

3. The D.C. Circuit affirmed. It started from the assumption that the “ordinary meaning” of the term “individual” “typically encompasses only natural persons.” Pet. App. 7a (quotation marks and citations omitted). At the same time, the court of appeals acknowledged that, where context and policy have rendered it appropriate, this Court and others have construed “individual” in other statutes to include organizations. Pet. App. 6a-7a (citing cases). Accordingly, the court of appeals looked beyond the language of the TVPA’s liability provision. Citing other subsections of the TVPA and the Dictionary Act’s definition of a different statutory term (the word “person”), the court of appeals concluded that these provisions “confirm[ed]” that the TVPA exempted organizations from liability. Pet. App. 8a.

The court of appeals did not attempt to explain how this construction of the TVPA was consistent with the statute’s purpose. Nor did it offer any reason why Congress would have wanted the TVPA to have a more limited reach than other statutes

creating tort remedies for torture or extrajudicial killing – in fact, seemingly more limited than any other tort statute in the U.S. Code. Indeed, the court of appeals never mentioned the TVPA’s legislative history or considered the Act’s placement in the overall statutory and international scheme prohibiting torture and extrajudicial killing. Instead, in the court of appeals’ view, the selected parts of the U.S. Code that it cited independently resolved the potential ambiguity in the TVPA’s use of the word “individual[s]” to describe defendants. Pet. App. 8a-9a.

4. This Court granted certiorari. 132 S. Ct. ____ (2011).

SUMMARY OF ARGUMENT

The TVPA applies not only to natural persons but also to non-sovereign organizations responsible for torture and extrajudicial killings.

I. The text of the TVPA does not displace the ordinary presumption – otherwise apparently unbroken in the U.S. Code – that organizations are liable for the torts of their agents. The TVPA uses the word “individual” to describe violators of the Act – a term that, in ordinary usage, often refers to a human being. But as with the word “person,” this Court and others have held that when used in legal parlance, the statutory term “individual” can include organizational entities. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 428 (1998). Dictionaries confirm the point, and nothing in the Dictionary Act, 1 U.S.C. § 1, which does not even define the term “individual,” rebuts it. If Congress had really wished to depart from the default rule of organizational liability, it would have limited the TVPA’s reach to

“natural persons” or explicitly exempted organizational entities.

II. The context supplied by the structure and purpose of the TVPA confirms that the Act applies to organizations.

The TVPA incorporates ordinary principles of supervisory liability, under which a natural person may be held liable for torture or killings conducted by his subordinates. This shows that the TVPA’s liability provision does not “specif[y]” any “intent” to depart from traditional agency principles. *See Meyer v. Holley*, 537 U.S. 280, 287 (2003). Instead, it embraces such principles. Nor, contrary to the court of appeals’ supposition, does any other language in the TVPA evince a desire to abandon organizational liability. The TVPA’s use of the word “individual” to refer to victims is unremarkable in light of the fact that many statutes use the same word to refer to plaintiffs and defendants where only one can be an entity. And the TVPA’s use of the word “person” to refer to certain plaintiffs in extrajudicial killing cases does not create any useful contrast with the word “individual.”

The TVPA’s close relationship to other federal and international laws that proscribe, and provide remedies for, torture and extrajudicial killing reinforces that the Act incorporates the traditional rule of organizational liability. Every other federal statute proscribing torture or extrajudicial killing applies to organizations, and there is no reason for uniquely limiting the TVPA. International treaties that the TVPA implement are in accord. Each prohibits torture or extrajudicial killing by human beings and organizations alike. The TVPA would not

operate in harmony with those instruments if it exempted organizations from liability.

Limiting TVPA liability to natural persons also would thwart the Act's purposes. The Act, like other tort statutes, is designed to provide meaningful remedies to victims, as well as to deter the acts it proscribes and to hold perpetrators accountable. As a practical matter, those goals may be attained only if victims can sue organizations responsible for torture or extrajudicial killing. Organizations that perpetrate such reprehensible acts can be identified; U.S. court judgments can be enforced against them; and those judgments can affect their behavior and public standing. By contrast, it is extremely unlikely that victims will be able to identify specific people who tortured them abroad, obtain jurisdiction over them or their supervisors, and collect judgments from such people. The odds that the TVPA can achieve deterrence and accountability through lawsuits only against specific people are longer still. Even more so than with respect to a typical tort statute, therefore, only by reaching organizations can Congress's goals for the TVPA ever hope to be realized.

III. The TVPA's legislative history removes any remaining doubt that the Act applies to organizations. In a section entitled "Who can be sued," the Senate Report on the bill explains exactly why Congress used the word "individual" to refer to a violator of the Act: "The legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances." S. Rep. No. 102-249, at 7 (1991). The House Report includes the same explanation. H.R. Rep. No. 102-367, at 4 (1991).

Obviously, this explanation contains no trace of any desire to depart from traditional liability principles. To the contrary, numerous other statements in these reports and throughout the proceedings leading up to the TVPA's enactment make plain that Congress fully expected the Act to apply to "organizations," "groups," and "death squads." Congress even noted that it was creating a cause of action that had been deemed missing in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). The primary defendant in that case was one of the very respondents in this one: the PLO.

In short, there may be instances in which the meaning of a statutory term is so clear that only one outcome is possible. But this case is not one of them. And once one considers the language of the TVPA in context, and in light of Congress's explicit explanation of its word choice, the imperative of applying the Act not just to natural persons but also to non-sovereign organizations is inescapable.

ARGUMENT

The court of appeals construed the TVPA to do something seemingly unprecedented in federal law: create a tort action that categorically exempts organizations from liability for the acts of their agents. The text of the TVPA, however, does not dictate such a novel result. To the contrary, the TVPA, when read in the context of the statute's purpose and legislative history, compels the conclusion that the Act applies not only to natural persons but also to non-sovereign organizations.

I. The Text Of The TVPA Does Not Displace The Presumption That Non-Sovereign Organizations Are Liable For Their Torts.

The TVPA provides that “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture . . . or (2) subjects an individual to extrajudicial killing shall [be liable] in a civil action.” 28 U.S.C. § 1350 note sec. 2(a). The court of appeals acknowledged that while “[i]n common usage, ‘individual’ describes a natural person,” Pet. App. 7a (quotation marks and citation omitted), this Court and others have construed that term in various statutes to encompass organizations, *id.* at 6a-7a (citing *Clinton v. City of New York*, 524 U.S. 417 (1998), and other cases). Yet the court of appeals still understated the degree to which the law presumes that the word “individual” in the context of a tort action can and should include organizations.

A. The Fact That The TVPA Creates A Tort Action Gives Rise To A Presumption That Organizations Are Liable For The Acts Of Their Agents.

The first critical aspect of the text of the TVPA is that it creates a tort action. As this Court has explained, “when Congress creates a tort action, it legislates against a legal background of ordinary tort-related . . . liability rules and consequently intends its legislation to incorporate those rules.” *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Thus, “where a common law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the

contrary is evident.” *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (quotation marks and citations omitted); *accord Briscoe v. LaHue*, 460 U.S. 325, 330 (1983); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see also Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011) (in construing the scope of liability, “we consult general principles of law, agency law, which form the background against which federal tort laws are enacted”); *Meyer*, 537 U.S. at 286 (elaborating the presumption against finding “unusual modification[s]” of “ordinary background tort principles”).

It is “well settled” under U.S. law that organizations are liable in tort for the acts of their agents. *Balt. & Potomac R.R. v. Fifth Baptist Church*, 108 U.S. 317, 330 (1883); *see also Meyer*, 537 U.S. at 285-86; RESTATEMENT (THIRD) OF AGENCY § 7.03. Moreover, courts have long held that organizations are liable under common law and federal statutes not only for the negligent conduct of their agents, but for foreseeable violent or malicious conduct as well. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (municipal entity liable for sexual harassment committed by its employees); *Daniels v. Tearney*, 102 U.S. 415, 420 (1880) (“A corporation is liable for negligent and malicious torts, including . . . assault and battery”); *Lyon v. Carey*, 533 F.2d 649, 654 (D.C. Cir. 1976) (company liable for rape committed by its employee); *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 325 F. Supp. 2d 15, 65-66 (D.R.I. 2004) (holding the PLO and the PA liable, as unincorporated associations, for the murder of an American citizen), *aff’d sub nom. Ungar v. Palestine*

Liberation Org., 402 F.3d 274 (1st Cir. 2005). Such liability ensures that victims can obtain meaningful remedies. It also effectuates deterrence and accountability by applying the law directly to responsible entities. See RESTATEMENT (SECOND) OF TORTS § 901.

Accordingly, even though federal statutes that create tort actions sometimes do not name organizations or other juridical entities as potential defendants, every such statute of which we are aware – from maritime tort regimes such as the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30302, and the Jones Act, 46 U.S.C. § 30104, to the action for fraud in the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692e, 1692k, to the action in 42 U.S.C. § 1985 for conspiracy to deprive someone of her civil rights – has been deemed to apply not only to natural persons but to organizations as well. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 214-15 (1986) (DOHSA); *Karvelis v. Constellation Lines S.A.*, 806 F.2d 49, 52 (2d Cir. 1986) (Jones Act); *Volden v. Innovative Fin. Sys., Inc.*, 440 F.3d 947, 950-51 (8th Cir. 2006) (FDCPA); *Edmonds v. Dillin*, 485 F. Supp. 722, 729 (N.D. Ohio 1980) (Section 1985).

To be sure, some such statutes require heightened culpability beyond mere vicarious liability to hold organizations liable for acts of their agents. See, e.g., *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (constitutional torts under 42

U.S.C. § 1983). But *none* exempts organizations entirely from liability for acts of their agents.²

Because the TVPA creates a domestic cause of action grounded in international norms, general presumptions in international law also may inform the backdrop against which the text of the statute should be read. It is a general principle of law common to nations that organizations are liable for the torts of their agents, including human rights abuses.³ Thus, “[i]legal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood.” *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 53 (D.C. Cir. 2011); *cf. First Nat’l City Bank v. Banco Para El*

² Of course, the Second Circuit held in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. ___ (2011), that the Alien Tort Statute does not apply to corporations for certain violations of the law of nations. But that decision not only conflicts with the holdings of every other court of appeals to consider the issue; it also rests on customary international law considerations not necessarily relevant here, because the TVPA itself explicitly recognizes the causes of action at issue.

³ General principles of law are a source of international law distinct from customary international law, and a background against which Congress’s legislation should be understood. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (1945); *see also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 54 (D.C. Cir. 2011) (“Unlike the manner in which customary international law is recognized through common practice or usage out of a sense of legal obligation, a general principle becomes international law by its widespread application domestically by civilized nations.”).

Comercio Exterior de Cuba, 462 U.S. 611, 628 n.20 (1983).⁴

Given the depth and force of this domestic and international presumption of organizational liability, it would be quite surprising for the TVPA to

⁴ Legal decisions holding organizations civilly liable under domestic laws that track the law of nations underscore the prevalence of this general principle. For example, from the earliest days of the common law, British courts have held whole ships, crews, and companies criminally and civilly accountable for violating the law of nations. *See, e.g., Skinner v. East India Co.*, (1666) 6 State Trials 710 (H.L.), *vacated on other grounds*. This Court similarly has held whole crews and vessels liable for piracy, *see, e.g., The Malek Adhel*, 43 U.S. (2 How.) 210 (1844), which is one of the oldest and clearest violations of the law of nations, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004). The liability rules from the piracy context were extended in the nineteenth century to slave trading, one of the first international human rights prohibitions. *See, e.g., The Slavers (Kate)*, 69 U.S. (2 Wall.) 350 (1864). Today, courts around the world continue to allow civil suits against organizations under domestic laws that are designed to track the law of nations. *See, e.g., Association Canadienne contre l'Impunité v. Anvil Mining Ltd.*, 2011 (Superior Court of Quebec) 500-06-000530-101 (allowing case to proceed against mining company accused of assisting a massacre in the Democratic Republic of Congo); *Guerrero v. Monterrico Metals PLC*, [2010] EWHC 3228 (QB) (case against mining company accused of torturing protesters in Peru). The U.N. Security Council likewise regularly imposes sanctions against groups for violations of the law of nations. *See, e.g., S.C. Res. 1333*, ¶ 5, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (imposing sanctions on the Taliban in Afghanistan); S.C. Res. 1171, ¶ 5, U.N. Doc. S/RES/1171 (June 5, 1998) (imposing sanctions on the Revolutionary United Front, a militia with de facto control over territories in Sierra Leone); S.C. Res. 942, U.N. Doc. S/RES/942 (Sept. 23, 1994) (imposing sanctions on Serbian armed groups in Bosnia).

categorically exempt organizations from liability for the egregious acts that the statute covers. One could conceivably argue that the statute implicitly requires some sort of organizational fault beyond vicarious liability in order to trigger organizational liability. *Cf. Monell*, 436 U.S. at 694. But it would be a drastic break from tradition and precedent to construe the text of the TVPA to exempt organizations from liability – as the court of appeals’ decision does – even if their agents violate the Act pursuant to an organization’s explicit instructions, or policy or practice.

B. The TVPA’s Use Of The Term “Individual” Comports With The Presumption That Organizations Are Liable For The Acts Of Their Agents.

Words that refer in common usage only to natural persons typically encompass organizational entities in the context of tort statutes. For instance, the terms “person” and “whoever” most naturally refer to human beings. But when used in the parlance of legal liability, they do not displace the presumption that organizations are liable for the acts of their agents. *See, e.g., Monell*, 436 U.S. at 690 (“persons” to whom 42 U.S.C. § 1983 applies include municipalities and other local government units); *United States v. A&P Trucking Co.*, 358 U.S. 121, 123 (1958) (“whoever” includes entities). The same is true of the term “individual.”

1. While dictionaries state that the term “individual,” like the term “person,” often denotes a human being, they also indicate that another accepted usage of the word “individual” includes non-natural entities. At the time of the TVPA’s

enactment, Black's Law Dictionary defined "individual" to mean "a private or natural person," but clarified that "this restrictive signification is not necessarily inherent in the word," and that "individual" may, "in proper cases, include artificial persons." BLACK'S LAW DICTIONARY 773 (6th ed. 1990).

Non-legal dictionaries similarly reflect this range of meanings. The edition of Webster's Dictionary in print at the time of the TVPA's enactment defined "individual" – in the first of its five listings – to mean "a single or particular being or thing or *group of beings or things*." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1152 (unabridged ed. 1986) (emphasis added). Other dictionaries contained similar guidance. *See* 7 OXFORD ENGLISH DICTIONARY 879-80 (unabridged 2d ed. 1989) (defining "individual" as "a single object or thing . . . regarded as a unit," and providing as an example of usage the sentence "[i]t makes no difference whether the individual be a numerical unit, or an aggregate unit, as a partnership, company, or corporation"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 974 (unabridged 2d ed. 1987) (defining "individual" as "a group considered as a unit"); WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 932-33 (unabridged 2d ed. 1979) (defining "individual" as "a single being or thing of any kind; a single group when taken as a unit"). All of these definitions frame the term "individual" in distinctly non-human terms, instead placing their emphases on the *oneness* of something. Accordingly, the definitions comfortably encompass distinct organizations such as the PLO and the PA.

2. As with the terms “person” and “whoever,” courts have interpreted the term “individual” in various provisions of the U.S. Code to include artificial entities. In *Clinton v. City of New York*, 524 U.S. 417 (1998), this Court construed the term “individual” in the Line Item Veto Act to encompass artificial entities (in that case, a municipality, labor unions, and a farmers’ cooperative). Section 692(a)(1) of that Act expressly authorized “[a]ny Member of Congress or any individual adversely affected’ by the Act to bring an action for declaratory judgment or injunctive relief on the ground that any provision of the Act is unconstitutional.” *Id.* at 428 (alteration in original) (quoting 2 U.S.C. § 692(a)(1)). This Court explained that “in the context of the entire section Congress undoubtedly intended the word ‘individual’ to be construed as synonymous with the word ‘person.’” *Id.* “There is no plausible reason,” the Court went on, “why Congress would have intended to provide for such special treatment of actions filed by natural persons and to have precluded entirely jurisdiction over comparable cases brought by corporate persons.” *Id.* at 429.

Federal courts of appeals likewise have construed the term “individual” in other federal statutes to include organizations. *See United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000) (“Defendant reasons that, if Congress had intended [18 U.S.C.] § 1030(a)(5)(A) to cover damage to corporations, Congress would have used the word ‘persons,’ not ‘individuals.’ For several reasons, we are not persuaded.”); *see also United States v. Perry*, 479 F.3d 885, 893 n.10 (D.C. Cir. 2007) (same statute: “[t]he parties agreed that ‘individuals’ include ‘both natural persons and governmental agencies.’

... [B]oth ‘individual’ and ‘person’ are often defined more broadly in statutes”); *In re Atl. Bus. & Cmty. Corp.*, 901 F. 2d 325, 329 (3d Cir. 1990) (“Although [11 U.S.C.] Section 362(h) refers to an individual, the section has uniformly been held to be applicable to a corporate debtor.”); *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 292 (4th Cir. 1986) (same statute: “a narrow construction of the term [‘individual’ in 11 U.S.C. § 362(h)] would defeat much of the purpose of the section, and we construe the word ‘individual’ to include a corporate debtor”).

3. It is of no moment that the word “individual” does not have the same legal pedigree of accumulated meaning as the word “person.” In common usage, the words are employed interchangeably; if anything, the term “individual” carries even less connotation of humanness than the term “person.” And as this Court recognized in *Clinton*, these two terms can be construed synonymously in a statutory context. *See* 524 U.S. at 428.

Moreover, using the word “person” instead of “individual” in the TVPA could have created confusion – especially in light of the Act’s “color of foreign law” requirement – because this Court has held that the term “person” can include foreign states. *See Pfizer, Inc. v. Gov’t of India*, 434 U.S. 308, 320 (1978) (holding that foreign states are “persons” entitled to bring suit under the Sherman and Clayton Acts). “Individual,” on the other hand, more clearly excludes states, but still encompasses other non-natural entities. For example, in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) – the case that prompted Congress to enact the TVPA, *see supra* at 3-4 – Judge Edwards used the word

“individuals” to refer to non-sovereign “persons or groups” upon which U.S. law might impose liability for violations of international norms. *Tel-Oren*, 726 F.2d at 792 (concurring opinion). Using the term “individual” thus steers clear of potential confusion, making “crystal clear” – as the Senate Report on the bill explained – “that foreign states or their entities cannot be sued under the TVPA.” S. Rep. No. 102-249, at 7 (1991); *see also infra* at 43-44.

4. Lest there be any doubt, if Congress really had intended to depart from traditional liability rules and limit the TVPA’s reach to natural persons, it had at least two simple and clear means at its disposal.

First, Congress has often used the phrase “natural person” to exclude non-natural entities such as organizations from the terms of a statute. *See, e.g.*, 15 U.S.C. § 1693a(5) (“[T]he term ‘consumer’ means a natural person.”); 15 U.S.C. § 6602(5) (“The term ‘personal injury’ means physical injury to a natural person.”); 7 U.S.C. § 21(b)(4) (specifying that an applicant for registration as a futures association must adopt rules providing that without approval “no person shall become a member and no natural person shall become a person associated with a member”); 12 U.S.C. § 611 (“Corporations to be organized for the purpose of engaging in international or foreign banking . . . may be formed by any number of natural persons, not less in any case than five . . .”).

Second, Congress has expressly excluded organizational entities from liability under specified circumstances. For instance, the Norris-LaGuardia Act provides that “no association or organization participating or interested in a labor dispute, shall be held responsible or liable . . . for the unlawful acts of

individual officers, members, or agents,” except upon clear proof of actual participation in, or authorization or ratification of, the acts at issue. 29 U.S.C. § 106.

If Congress had wished to limit TVPA liability to natural persons and to exclude organizations from its reach, Congress could easily have taken either of these steps. Yet it took neither, implicitly reinforcing that all it meant the word “individual” to accomplish was to exclude sovereign entities.

C. The Dictionary Act’s Definition Of The Term “Person” Has Minimal Bearing On The Meaning Of The TVPA’s Term “Individual.”

The Dictionary Act, 1 U.S.C. § 1, does not define the word “individual.” The court of appeals nonetheless deemed that Act relevant because it defines the word “person” to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” *Id.* In the court’s view, this definition “strongly implies” that the word “individual” in the TVPA “does not comprise organizations.” Pet. App. 7a.

The court of appeals made far too much of this definition. There is no reason to believe that a member of Congress would have looked to the Dictionary Act’s definition of “person” to understand the meaning of a different term (“individual”) in the TVPA. Attempting to infer the scope of one word’s meaning from its usage in defining another term is an exercise in conjecture.

To the extent, however, that the Dictionary Act’s definition of “person” is relevant here, that section’s

use of the word “individual” cannot be read to imply that the word “individual” in the TVPA excludes organizations. The court of appeals seemed to assume that “individual” cannot encompass an organizational entity because the word appears in a list of terms that includes other words encompassing such entities. *See* Pet. App. 7a. But that makes little sense, for the terms in the Dictionary Act’s definition of “person” obviously overlap to a substantial degree. For example, a law firm can simultaneously be several of the things that constitute a “person”: a “corporation,” a “company,” an “association,” a “firm,” a “partnership,” and “an individual.” *See* 1 U.S.C. § 1. What is more, the Dictionary Act sometimes defines words with strings of terms whose meanings not only overlap with, but fully duplicate, the word being defined. For instance, it defines “insane person” to include “every idiot, lunatic, insane person, and person non compos mentis.” *Id.* The purpose of the Dictionary Act, in short, is to make clear that certain specified statutory terms should be construed broadly, not to restrict the scope of other words.

At any rate, even when the Dictionary Act does actually define a word, the Act itself makes clear that its definition does not apply when “context indicates otherwise.” *Id.* Thus, this Court has refused to apply the Act’s definitions when an alternate definition is more suited to the context of a statute. *See, e.g., Rowland v. Cal. Men’s Colony, Unit II Men’s Advisory Council*, 506 U.S. 194, 200-01 (1993). And this Court, as noted above, has held that the meaning of the term “individual” likewise depends on “the context of the entire section” and the statute’s

objective. *Clinton*, 524 U.S. at 428. Accordingly, we now turn to a contextual analysis of the TVPA.

II. The Overall Structure And Purpose Of The TVPA Confirm That The Act Covers Organizations.

Statutory terms derive meaning not only from typical usage but also from their relationships to other statutory provisions and congressional policy. When this Court interprets a statute, therefore, it is “guided not by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy.” *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (quotation marks omitted).

Time and again, this Court has read potentially ambiguous statutory terms in alternative – even “uncommon” – ways when “ordinary or natural meaning[s]” of the terms would have stunted “the realization of clear congressional policy.” *Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000); *see also United States v. Tinklenberg*, 131 S. Ct. 2007, 2012 (2011) (departing from the ordinary meaning of “delay” due to “the context and in light of the statute’s structure and purpose”); *Gonzales v. Carhart*, 550 U.S. 124, 152 (2007) (“ordinary meaning” does not control when “context requires a different result”); *Comm’r v. Brown*, 380 U.S. 563, 571 (1965) (departing from the “literal or usual meaning of [a statute’s] words” in favor of a less common conception of the words is appropriate “where acceptance of [the usual] meaning . . . would thwart the obvious purpose of the statute”) (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941)); *United States v. Am. Trucking Ass’ns*, 310 U.S. 534,

543-44 (1940) (courts should strive to avoid interpreting text to produce results “at variance with the policy of the legislation as a whole”).

In light of this precedent, the court of appeals was properly open to the possibility that the “ordinary meaning” it ascribed to the word “individual” does not control the outcome here. Pet. App. 7a. But in looking beyond the word Congress used to refer to a violator of the TVPA, the court of appeals limited itself to consulting only certain internal structural aspects of the TVPA. *Id.* at 6a-9a. This analysis was incomplete and flawed on its own terms. A more comprehensive and careful examination of the TVPA reveals that it incorporates traditional agency principles, including organizational liability. Furthermore, a structural analysis of the TVPA’s relationship to other domestic and international laws, coupled with an examination of its object and policy, dictates that the Act must apply to organizations.

A. The Structure Of The TVPA And Other Anti-Torture And Anti-Extrajudicial Killing Laws Shows That The TVPA Must Cover Organizations.

1. The structure of the TVPA demonstrates that it uses agency principles to establish its sphere of liability. The TVPA’s liability provision states that an individual who “subjects” the victim to torture or extrajudicial killing shall be liable. 28 U.S.C. § 1350 note. Under this provision, it is undisputed that “a higher official need not have personally performed or ordered the abuses in order to be held liable” under the TVPA. S. Rep. No. 102-249, at 9 (1991). As the

Senate Report on the TVPA explains, and every court to confront the scenario has confirmed, “responsibility” under the Act “extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.” *Id.*; *see also, e.g., Chavez v. Carranza*, 559 F.3d 486, 499 (6th Cir. 2009) (upholding judgment against former head of Salvadoran Security Forces based on theory of “command responsibility”); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002) (similarly approving the application of “command responsibility” jurisprudence in a TVPA case).

The TVPA’s acceptance of supervisory liability shows that the TVPA’s liability provision does not “specif[y]” any “intent” to depart from traditional agency principles. *See Meyer v. Holley*, 537 U.S. 280, 287 (2003); *see also supra* at 13 (to the extent Congress is silent, ordinary background tort principles prevail). To the contrary, it embraces such principles. Accordingly, the TVPA – like every other tort statute in the U.S. Code – must be deemed to incorporate the concept of organizational liability.

The court of appeals nevertheless advanced two structural rationales for concluding that the TVPA exempts organizations. Neither, however, withstands scrutiny.

First, the court of appeals noted that the TVPA uses the term “individual” to refer not only to the perpetrator of torture or extrajudicial killing but also to the victim of the torture or killing. Because a victim “could only be a natural person,” the court of

appeals surmised that the perpetrator must likewise be a natural person. Pet. App. 8a-9a.

The court of appeals, however, read too much into the statute's multiple uses of the same word. As this Court has explained, "[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (alteration in original) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). Consequently, "[i]t is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Atl. Cleaners*, 286 U.S. at 433. Any intuition that a single word has the same meaning each time it is used "readily yields" whenever the word is "employed in different parts of the act with different intent." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (quoting *Atl. Cleaners*, 286 U.S. at 433); see also, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-43 (1997) (the term "employee" in Title VII can encompass both current and former employees despite the fact that, elsewhere in Title VII, "the term 'employee' refers unambiguously to a current employee").

Numerous statutes illustrate this principle in circumstances similar to this case. For example, many statutes in which the offender can be an organization but the victim can only be human use

the same word, “person,” to refer both to the offender and to the victim. Title 33 U.S.C. § 1319(c)(3)(A), for instance, penalizes any “person” who knows that, by violating certain provisions of that title, he places another “person” in imminent danger of death or serious bodily injury; the same subparagraph, meanwhile, provides heightened penalties for violations committed by “[a] person which is an organization.” Likewise, 18 U.S.C. § 229F defines “person” to include various non-natural entities, while Section 229A – which relies on Section 229F’s definition – provides specific penalties for violations that result in the death of a “person,” which could only be a human being. Other examples abound. *See, e.g., United States v. Weintraub*, 27 Fed. Appx. 54 (2d Cir. 2001) (affirming liability under 42 U.S.C. § 7413(c) for corporate defendants, where the statute provides that “[a]ny person who negligently [pollutes] . . . and who at the time negligently places another person in imminent danger of death or serious bodily injury” shall be punished by fine or imprisonment); *see also* 8 U.S.C. §§ 1101(b)(3), 1324 (Section 1324 sets penalties for a “person” who causes serious bodily injury to or endangers the life of “any person,” where “person” is defined in Section 1101(b)(3) to include “an organization”).

Similarly here, the fact that the TVPA uses the term “individual” to refer both to victims and perpetrators does not indicate that the term has identical meanings in both usages. Therefore, the fact that an “individual” who is a victim of torture or extrajudicial killing cannot be an organization has no bearing on whether an “individual” who is a perpetrator may be a non-natural entity.

Second, the court of appeals noted that subsection 2(a) of the TVPA uses the word “person” to refer to potential claimants besides legal representatives of the deceased who may bring wrongful death actions for extrajudicial killings. Pet. App. 9a. That being so, the court of appeals surmised (without any briefing on the subject) that the word “individual” must have a different, and narrower, meaning than “person” because “a claimant [in a wrongful death action] could be a non-natural person, such as the decedent’s estate.” *Id.*

The court of appeals’ supposition about the meaning of “person” in this context is incorrect. The only legitimate claimants other than legal representatives of the deceased in wrongful death actions are natural persons – namely, relatives of the deceased. Stuart Speiser & James Rooks, *RECOVERY FOR WRONGFUL DEATH* §§ 3:1, 3:22 (4th ed. 2005); *RESTATEMENT (SECOND) OF TORTS* § 493 cmt. a. That means that an estate itself cannot be a claimant. Indeed, it has long been established that “the estate of a decedent is neither a person nor a corporation. It can neither sue nor be sued. It consists of property, or rights to property, the title of which passes on his death, with right of possession, according to the varying laws of the States, to executors of a will, administrators of estates, heirs or devisees, as the case may be.” *Hess v. Reynolds*, 113 U.S. 73, 76 (1885). It also means that no useful contrast can be drawn between the TVPA’s uses of “individual” and “person.”

2. Other federal and international laws that proscribe, and provide remedies for, torture and extrajudicial killing all apply to organizations and

provide strong reason to conclude that the TVPA does as well.

a. It is a venerable principle of statutory construction that “if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them.” *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845); see also *United States v. Stewart*, 311 U.S. 60, 64 (1940) (when statutes are “in pari materia,” each statute “aids in ascertaining the meaning of the words as used in” the other statute). That being so, the TVPA should be read consistently with the three other federal statutes that provide civil remedies to American citizens who suffer torture or extrajudicial killing, each of which applies to organizations.

First, this Court has held that 42 U.S.C. § 1983 – which creates a tort action for torture or extrajudicial killings perpetrated under color of U.S. law,⁵ and which Congress expressly expected “courts [to] look

⁵ 42 U.S.C. § 1983 provides in pertinent part: “Every person who, under color of [law] . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured” Because the Constitution prohibits torture, e.g., *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), the Government has acknowledged that Section 1983 provides a civil remedy for torture committed on U.S. soil. See Mem. for the United States as Amicus Curiae at 19, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146; U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, at 25, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005). Section 1983 likewise provides a remedy, via the Due Process Clause, for extrajudicial killing.

to” in construing the TVPA⁶ – applies to organizations. *Monell v. N.Y.C. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978); *see also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001) (Section 1983 suit against an association). Indeed, the original intent of Section 1983 was to stop “murder[,] . . . whippings and lynchings” by an organization that operated with the approval and participation of certain state officials: the Ku Klux Klan. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (quoting debates on the Civil Rights Act of 1871).

Second, the civil remedy provision of the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333 – which was enacted shortly after the TVPA and provides a civil cause of action for treble damages for torture or extrajudicial killing perpetrated as acts of “international terrorism”⁷ – applies to organizations.

⁶ The Senate Report explains that “[c]ourts should look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code, in construing ‘under color of law’ as well as interpretations of ‘actual or apparent authority’ derived from agency theory in order to give the fullest coverage possible.” S. Rep. No. 102-249, at 8 (1991); *see also Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 316 (S.D.N.Y. 2001) (applying Section 1983 principles to construe “color of law” under the TVPA in a case against Zimbabwean President Robert Mugabe and his political party, ZANU-PF), *aff’d in part, rev’d in part sub nom. Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

⁷ 18 U.S.C. § 2333 provides in pertinent part: “Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court for the United States and shall

See, e.g., Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 701 (7th Cir. 2008) (en banc). Indeed, courts have specifically applied the ATA to the PLO and the PA. *See Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 276 (1st Cir. 2005) (upholding ATA judgment against the PLO and the PA); *Biton v. Palestinian Interim Self-Gov't Auth.*, 239 F.R.D. 1, 5 (D.D.C. 2006) (same); *see also Estate of Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153, 168 (D.D.C. 2006) (allowing ATA suit to proceed against the PLO and the PA); *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 422 F. Supp. 2d 96, 105 (D.D.C. 2006) (same); *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 426 (S.D.N.Y. 2004) (same).

Third, 28 U.S.C. § 1605A(c) – which provides a cause of action against designated state sponsors of terrorism and their agents for torture and extrajudicial killing (and which incorporates the TVPA’s definitions of those terms) – applies not only to natural persons but also to entities.⁸ Section 1605A(c) applies, first and foremost, to designated states themselves. *See, e.g., Owens v. Republic of*

recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”

⁸ Section 1605A permits suits against a state sponsor of terrorism itself, which includes an “agency or instrumentality . . . [which] is a separate legal person, corporate or otherwise and is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state,” 28 U.S.C. § 1603; or against “any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency.” 28 U.S.C. § 1605A(c).

Sudan, ___ F. Supp. 2d ___, 2011 WL 5904614, at *4, *25 (D.D.C. Nov. 28, 2011) (entering judgment under Section 1605A against Sudan, Iran, and “the two major organizations through which Iran carries out its support of terrorism,” the Iranian Revolutionary Guards Corps and the Iranian Ministry of Information and Security). In addition, non-sovereign organizations such as Hezbollah constitute state “agents” under the statute. See *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 72 (D.D.C. 2010) (“Hezbollah, because it acted at the behest and under the operational control of defendants [Iran and its Ministry of Information and Security], acted as agents of defendants” within the meaning of Section 1605A(a)).

Construing the TVPA to exempt organizations from liability when their agents torture or extrajudicially kill people under color of foreign law would create a rift in this broader legislative framework. It would make no sense to subject organizations to liability for torture and extrajudicial killing when their agents act (1) under the color of U.S. law, (2) to further international terrorism, or (3) on behalf of terrorist states, but not when they perpetrate the same heinous actions against American citizens absent these other conditions yet under the color of foreign law.

Of course, the TVPA also is related to one more statute: the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The ATS provides a grant of jurisdiction allowing non-citizens to recover for violations of the law of nations, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004), which include torture and extrajudicial killing, see *Filartiga v. Pena-Irala*, 630

F.2d 876 (2d Cir. 1980). To the extent this Court holds (as it should) in *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. ___ (No. 10-1491) that the ATS applies to organizations, that holding would only bolster the structural imperative to construe the TVPA the same way. It would be perverse to conclude that the U.S. Code provides greater remedies to non-citizen victims of torture or extrajudicial killing than to American citizens who suffer the same fate.

b. The TVPA not only fits within a framework of U.S. law, but Congress also designed it, as its preamble explains, “to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights.” Pub. L. No. 102-256, 106 Stat. 73 (1992). That being so, this Court should interpret the TVPA consistently with these agreements. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-40 (1987); *cf. Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (statutes should be construed to avoid conflicting with international law). Like the domestic statutes discussed above, these international treaties do not themselves compel relief under the precise circumstances here. But Congress did intend the TVPA to operate in harmony with them. And none of these treaties exempts organizations from liability for torture and extrajudicial killing committed by their agents.

The TVPA is designed to “carry out the intent of the Convention Against Torture.” S. Rep. No. 102-249, at 3. Indeed, the TVPA borrows the CAT’s definition of torture nearly verbatim. *Compare*

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85, *with* 28 U.S.C. § 1350 note sec. 3(b). Article 14 of the CAT provides that “each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.” *Id.* art. 14. This language emphasizes the need for redress and draws no distinctions among potential defendants.

Furthermore, the United Nations Committee Against Torture, which is charged with authoritatively interpreting the CAT, has made it clear that the CAT’s definition of torture encompasses acts by organizations. *See Sadiq Shek Elmi v. Australia*, U.N. Comm. Against Torture Comm’n No. 120/1998, ¶ 6.8, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999) (CAT covers torture committed by controlling factions like the Hawiye “clan” in Somalia); U.N. Comm. Against Torture, Gen. Cmt. No. 2, Implementation of Article 2 by States Parties, ¶ 15, U.N. Doc. CAT/C/GC/2 (Jan. 4, 2008) (noting that the CAT governs certain “[p]rivate contractors”). The federal courts of appeals likewise have held (in immigration cases implicating the CAT) that the treaty covers organizational acts. *See Ramirez-Peyro v. Holder*, 574 F.3d 893, 904-05 (8th Cir. 2009) (torture by drug “cartel” with consent or acquiescence by the Mexican government); *Delgado v. Mukasey*, 508 F.3d 702, 704, 708-09 (2d Cir. 2007) (torture by the FARC, “an anti-government terrorist organization” in Colombia); *Silva-Rengifo v. Attorney Gen.*, 473 F.3d 58, 65, 68-69 (3d Cir. 2007) (the CAT covers “persons or groups engaging in

torturous activity,” including paramilitary groups and “certain [other] groups that engage in torture”).⁹

Common Article 3 of the Geneva Conventions, which the TVPA also implements and tracks in its definition of “extrajudicial killing,” *see* S. Rep. No. 102-249, at 6, expressly prohibits torture and extrajudicial killing “at any time and in any place whatsoever.” This prohibition applies to “each party” in non-international armed conflicts. Common Article 3’s prohibition on torture thus applies not only to states and natural persons, but also to non-sovereign organizations and armed groups. *See Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995).

Finally, the International Covenant on Civil and Political Rights (ICCPR), another treaty to which the United States is a party, reinforces that organizations are not exempt from liability for torture and extrajudicial killing committed by their agents. The Covenant provides that “[n]o one shall be arbitrarily deprived of his life,” and that “[n]o one

⁹ Before the United States ratified the CAT, the Senate issued a reservation claiming that Article 14 requires legal compensation only for torture committed within a signatory party’s territory. Yet when the United States has issued periodic compliance reports to the Committee Against Torture, the Government has regularly cited the TVPA – which deals with torture committed abroad – as one of our nation’s laws that satisfies our obligation under Article 14. *See* U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, at 26, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005); U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, at 14, 61, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000).

shall be subjected to torture.” International Covenant on Civil and Political Rights, arts. 6-7, Dec. 16, 1966, 999 U.N.T.S. 171. And the ICCPR makes clear that no “[s]tate, *group*, or person [has] any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein.” *Id.* art. 5 (emphasis added). The ICCPR further requires each party to the treaty “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” *Id.* art. 2(3)(a); *see also* U.N. Human Rights Comm., Gen. Cmt. No. 31, [80], The Nature of the General Legal Obligation Imposed on State Parties to the Covenant [ICCPR], ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) (states must “redress the harm caused by such acts by private persons or *entities*”) (emphasis added).

Given that all of these international treaties govern the conduct not only of natural persons but also of organizations, Congress logically understood that the TVPA would do the same. Otherwise, the Act would not be able to carry out its goal of furthering the intent of these treaties.

B. The Only Way To Fulfill The Purpose Of The TVPA Is To Apply The Act To Organizations.

The TVPA, like other tort statutes, seeks to provide meaningful remedies to victims, to hold wrongdoers accountable, and to deter the acts at issue. *See, e.g., Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 312 (S.D.N.Y. 2001), *aff’d in part, rev’d in part sub nom. Tachiona v. United States*, 386 F.3d 205 (2d

Cir. 2004). *See generally* RESTATEMENT (SECOND) OF TORTS § 901. In order for the Act to achieve these objectives, organizations must be subject to liability for torture and extrajudicial killings for which they are responsible. Indeed, practical considerations attendant to these kinds of cases render the TVPA the unlikeliest of candidates for dispensing with the rule of organizational liability.

1. The TVPA's foremost aim is to provide victims with remedies for torture and extrajudicial killing. *See* Pub. L. No. 102-256, 106 Stat. 73 (1992). And when a statute seeks to "creat[e] an effective remedy," this Court should avoid interpreting the statute to "thwart th[at] legislative purpose." *Agency Holding Corp. v. Malley-Duff Assocs.*, 483 U.S. 143, 154 (1987). Yet limiting liability under the TVPA to natural persons would preclude effective remedies for many victims in three different ways.

First, while victims usually can identify organizations responsible for their abuse, they usually cannot pinpoint the particular people who committed torture or extrajudicial killing. Individual torturers and their superiors do not wear identity badges or hand out business cards. On the contrary, they generally use aliases or disguise themselves in the presence of their victims, making it unlikely that a victim or her survivors will be able to identify the specific human beings who perpetrated the torture or execution. *See, e.g.*, Human Rights Watch, *HARSH WAR, HARSH PEACE* 23, 34, 45 (2010). A victim may never even have seen her torturers' faces if, for instance, she had a bag over her head while she endured beatings, shocks, or burns. Victims usually know, however, the organization that committed the

torture or extrajudicial killing. For example, while death squads formerly active in El Salvador took measures to protect the identities of those who pulled the trigger in mass shootings, they often carved their group's initials ("EM," for *Escuadrón de la Muerte*) into the chests of the corpses they left behind. *See* Bruce Campbell & Arthur Brenner, *DEATH SQUADS IN GLOBAL PERSPECTIVE: MURDER WITH DENIABILITY* 86-90 (2000).

Second, victims of torture and extrajudicial killing that took place abroad are more likely to be able to obtain personal jurisdiction in U.S. courts over organizational defendants than over specific human beings. Typically, transient ("tag") jurisdiction would be the only way of attaining personal jurisdiction over human beings who commit torture or extrajudicial killings abroad. *See Burnham v. Superior Court*, 495 U.S. 604 (1990). But it is unlikely that such people will try to travel to the United States within the TVPA's ten-year limitations period and put themselves in a situation where they could be served within the country. Even if they did try to enter the United States, it is unlikely they would be admitted into the country. And even if they did enter the country, it is unlikely that the victim would know about the visit sufficiently in advance to prepare and serve process.

It is much more plausible, therefore, that a torture victim will be able to secure general personal jurisdiction over a group through its contacts with the United States. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). Indeed, courts consistently have found foreign organizations – including the PLO and the PA – to have sufficient

contacts to support jurisdiction in the United States. *See Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 86-95 (D.R.I. 2001) (exercising personal jurisdiction over the PLO and the PA in a case under 18 U.S.C. § 2333, but dismissing natural persons for lack of personal jurisdiction); *Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F. Supp. 2d 172, 177-80 (D.D.C. 2004) (same); *see also Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2d 232, 250-57 (D.R.I. 2004) (holding Hamas subject to personal jurisdiction).

Third, foreign organizations often can be made to pay meaningful damages to victims, whereas natural persons who commit torture or extrajudicial killings abroad are likely to be judgment-proof. Natural persons who commit torture and extrajudicial killing abroad typically lack significant resources. Nor do they tend to be subject to a U.S. court's enforcement power. In contrast, organizations that direct torture and extrajudicial killing often have assets that can provide victims with meaningful remedies. *See, e.g., Knox v. Palestine Liberation Org.*, 628 F. Supp. 2d 507 (S.D.N.Y. 2009) (conducting a close review of the assets of the PA and the PLO and finding a multi-million dollar bond reasonable). What is more, U.S. courts can often attach those assets in order to satisfy judgments. *See, e.g., Strachman v. Palestinian Auth.*, 901 N.Y.S.2d 582 (App. Div. 2010) (attaching multi-million dollar investment portfolio and holding a trial to determine whether it belonged to the PA).

The court of appeals ignored all of these considerations. Once they are taken into account, it is impossible to see how the TVPA can meaningfully

serve its remedial function by reaching only natural persons as defendants. Limiting the TVPA to natural persons would render it a dead letter in all but the most unusual circumstances.

2. The TVPA also is designed to hold “legally accountable” those who torture and kill in disregard for basic human rights. S. Rep. No. 102-249, at 3. Militant and terrorist groups often take “credit” for torturing and killing their victims. For example, al-Shabaab has taken credit for atrocities in Somalia, *see* U.S. Dep’t of State, 2010 HUMAN RIGHTS REPORT: SOMALIA (2011), and the Taliban has taken credit for torturing those who oppose its power in Afghanistan, *see* U.S. Dep’t of State, 2008 HUMAN RIGHTS REPORT: AFGHANISTAN (2009). Accordingly, the U.N. special rapporteur appointed to monitor the status of all U.N. treaties pertaining to extrajudicial killing reports not only on natural persons who commit such acts, but also (indeed, primarily) on groups that programmatically commit such atrocities. His reports monitor organizations such as the Davao Death Squad in the Philippines and “paramilitary groups” like the Tamil Tigers in Sri Lanka. *See* U.N. SPECIAL RAPPORTEUR ON EXTRAJUDICIAL EXECUTIONS HANDBOOK, ch. 3, at 38, 108 (2010).

It is hard to believe that groups that use their status as organizations to take ownership over such heinous acts should simultaneously be able to rely on that status to evade accountability in U.S. courts. Such a scenario would make a mockery of the TVPA.

3. Finally, the TVPA seeks “to deter” torture and extrajudicial killing. *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1347 (11th Cir. 2011). This aim would likewise be stymied if organizations

were immunized from liability. Most acts of torture and extrajudicial killing are committed by organized groups rather than by natural persons acting alone. *See, e.g.*, U.S. Dep't of State, 2008 HUMAN RIGHTS REPORT: ZIMBABWE (2009) (the ruling political party, ZANU-PF, "set up numerous torture camps throughout the country"); U.S. Dep't of State, 2001 HUMAN RIGHTS REPORT: AFGHANISTAN (2002) ("[T]he Taliban summarily executed approximately 300 Hazara men and boys.").

To prevent these acts of torture and extrajudicial killing, such organizations need to face liability in a way that strikes directly at their organizational resources. Otherwise, organizations with patterns or programs of torturing or killing Americans could simply replace one torturer or killer with another, and then another, and another – each working as a cog in a machine that can act with impunity. *Cf. Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 150 (2d Cir. 2010) (Leval, J., concurring in the judgment). Surely Congress did not intend the TVPA to be so inept a deterrent.

III. The Legislative History Of The TVPA Reinforces That Congress Intended It To Reach Organizations.

There is no need to speculate about why Congress used the word "individual" to describe proper defendants under the TVPA. The Senate and House Reports both explicitly state that Congress did so to avoid including foreign states in the statute's sweep. At the same time, those reports and a constellation of other statements in the hearings and debates leading up to the TVPA's enactment

demonstrate that Congress understood the Act to apply to non-sovereign entities such as the PLO.

**A. Congress Used The Word “Individual”
In The TVPA To Exclude *States*, Not
Non-Sovereign Organizations.**

The Senate Judiciary Committee Report on this legislation contains a section that addresses the very issue in this case. The section is entitled “Who can be sued.” S. Rep. No. 102-249, at 7 (1991). In that section, the Judiciary Committee explains:

The legislation uses the term “individual” to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign sovereigns immune from suits in U.S. courts, except in certain instances.

Id. (footnote omitted). The House Report makes the same point, explaining that “[o]nly ‘individuals,’ *not foreign states*, can be sued under the bill.” H.R. Rep. No. 102-367, at 4 (1991) (emphasis added). Congress thus used the word “individual” not to categorically abandon – for what would apparently have been the first time ever – the presumption that organizations are liable for the torts of their agents, but rather to avoid impinging on sovereign immunity.

Neither the court of appeals nor respondents acknowledge these explicit and direct explanations of why Congress worded the TVPA the way it did. Indeed, the court of appeals did not discuss the TVPA’s legislative history at all. For their part,

respondents assert – quoting a single legislator’s statement in a House committee meeting four years before the TVPA’s enactment – that the Act used the word “individual” instead of “person” “to make clear that the bill applies ‘to individuals and not to corporations.’” BIO 20 n.3 (quoting *The Torture Victim Protection Act: Hearing and Markup on H.R. 1417 Before the Subcomm. on Human Rights & Int’l Orgs. of the H. Comm. on Foreign Affairs*, 100th Cong. [hereinafter “1988 House TVPA Hearing”] 87-88 (1988)).

The snippet that respondents cite is of no moment. This Court has “repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which represen[t] the considered and collective understanding of those [Members of Congress] involved in drafting and studying proposed legislation.” *Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) (alterations in original) (quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984)) (quotation marks omitted). And here those reports, issued shortly before the TVPA’s enactment, specifically explain that the word “individual” is meant to exclude *states*. There is no language in either of the committee reports suggesting that the word “individual” is meant to immunize non-sovereign, organizational entities from liability.

But even if one were to look to statements in hearings for evidence of legislative intent on this point, that would not help respondents. Everyone from Senator Arlen Specter, who sponsored the bill in

the Senate,¹⁰ to a representative of the State Department,¹¹ to a human rights organization that supported the bill,¹² confirmed a collective understanding that the word “individual” was meant to avoid rendering foreign states liable. None of these individuals said anything about exempting non-sovereign organizations from liability.

That leaves the lone, unadorned comment respondents cite. Viewed from one perspective, the comment is fully consistent with using the word “individual” to steer clear of the FSIA. The FSIA immunizes corporations owned by foreign states, 28

¹⁰ In a 1992 hearing immediately preceding the vote on the TVPA, Senator Specter stated that the TVPA “does not override the FSIA and allow a suit against the foreign state. It only allows a suit against the individual(s) responsible for the torture, either by performing it or ordering it.” 138 Cong. Rec. 4176, 4177 (Mar. 3, 1992).

¹¹ In a 1990 hearing, a legal advisor at the Department of State said that the TVPA “does not get to the government. . . . The statute itself only goes to individuals.” *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration & Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. [hereinafter “1990 Senate TVPA Hearing”] 30 (1990) (testimony of David P. Stewart, Assistant Legal Advisor, U.S. Dep’t of State).

¹² In both congressional hearings on the bill, the Executive Director of the Lawyers Committee for Human Rights stated that under the TVPA, the “defendants would be the individual violators themselves and not the foreign governments.” 1990 Senate TVPA Hearing at 48 (prepared statement of Michael H. Posner, Exec. Dir., Lawyers Comm. for Human Rights); *see also* 1988 House TVPA Hearing at 25 (same statement in prepared statement of Michael Posner, Exec. Dir., Lawyers Comm. on Human Rights).

U.S.C. § 1603(b), and, at the time the TVPA was drafted, courts construed this provision broadly to include even corporations that were not directly state-owned. *See, e.g., O’Connell Mach. Co. v. M.V. “Americana”*, 734 F.2d 115, 116-17 (2d Cir. 1984), *abrogated by Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). But even if the legislator had something other than state-owned corporations in mind, his comment cannot be taken as genuine evidence of any intent to exclude non-sovereign entities from liability under the Act – especially not non-corporate organizations that might be formed for the very purpose of engaging in the atrocities Congress was targeting. The indicia of contrary intent on that subject in the committee reports and other statements are simply too overwhelming and too clear.

B. The Legislative History Expressly Assumes That Organizations Would Be Proper Defendants In A TVPA Lawsuit.

Lest there be any doubt that Congress envisioned organizations as proper defendants, the legislative history of the TVPA repeatedly demonstrates that the legislators assumed non-sovereign organizations would be subject to the TVPA.

1. The committee reports and hearings emphasize that the TVPA was intended to facilitate suits similar to *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). *Tel-Oren* was a case in which the main defendant was one of the very defendants here: the PLO.

Tel-Oren arose from a “barbaric rampage” in which thirteen PLO operatives hijacked a civilian

bus, taking a number of passengers hostage. *Tel-Oren*, 726 F.2d at 776 (Edwards, J., concurring). While the members of the PLO were in control of the bus, they tortured and killed hostages, shot occupants of passing vehicles, and ultimately blew the bus up with grenades. *Id.* at 799 (Bork, J., concurring). In total, the PLO killed thirty-four people and wounded eighty-seven more. *Id.*

Many of those wounded in the attack, along with the survivors of many victims who were killed, filed suit against the PLO and several other organizations under the Alien Tort Statute. The D.C. Circuit, however, refused to allow the suit to go forward, with each judge providing his own rationale for requiring the case to be dismissed. *Id.* at 775 (per curiam). In the most controversial of these opinions, Judge Bork reasoned that, absent a clearer statement from Congress, the ATS could not support a cause of action for torture and extrajudicial killing. *Id.* at 799.

The House Report on the TVPA discusses the *Tel-Oren* case and notes that it “involv[ed] terrorist activities of the Palestine Liberation Organization.” H.R. Rep. No. 102-367, at 4. That report and the Senate Report both state that the TVPA “would provide [the explicit] grant” of a private right of action that Judge Bork had said was lacking in *Tel-Oren*. *Id.*; accord S. Rep. No. 102-249, at 4-5 (identical language). The fact that both reports so explicitly describe the TVPA as responding to *Tel-Oren* and endorse the type of claims at issue in that case, without ever suggesting any problem with the organizational nature of the PLO as the primary defendant there, demonstrates that Congress understood the Act to apply to organizations such as

the PLO. Statements by Senator Specter and others confirm that this is so.¹³

2. Statements in the legislative history discussing other aspects of the TVPA further confirm Congress's assumption that the TVPA would apply to non-sovereign organizations. Among those statements:

- In its discussion of the TVPA's color of law requirement, the House Report states that the bill "does not attempt to deal with torture or killing by *purely private groups*." H.R. Rep. No. 102-367, at 5 (emphasis added). This implies that groups acting under actual or apparent authority of foreign law would be subject to liability under the TVPA.

- The Senate Report clarifies that the bill was not intended to cover "*private*" acts committed by "*nongovernmental organizations*." S. Rep. No. 102-249, at 8 (emphasis added). This statement evinces

¹³ In the Senate's hearing on the bill, Senator Specter noted that the defendants in *Tel-Oren* included the "Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab-Americans, and the Palestine Congress of North America" and suggested that the TVPA would "establish some form of justice in the form of monetary damages" against such defendants. 1990 Senate TVPA Hearing at 64-65. Several other witnesses' statements at this hearing also implied that the TVPA would have allowed the *Tel-Oren* suit to proceed. *See id.* at 66 (testimony of Father Robert F. Drinan) (reporting on a letter from counsel in *Tel-Oren*, which stated that if the TVPA "had been the law, the result in *Tel-Oren* would have been different"); *id.* at 50 (prepared statement of Michael H. Posner, Exec. Dir., Lawyers Comm. for Human Rights) (stating that the TVPA would provide a clear cause of action for the kinds of acts at issue in *Tel-Oren*).

Congress's belief that a nongovernmental organization acting under color of law could be sued under the TVPA.

- The Senate Report refers to the activities of “death squads” as within the aims of the statute. S. Rep. No. 102-249, at 3; *see also* 1988 House TVPA Hearing at 40 (prepared statement of the Comm. on Int’l Human Rights of the N.Y.C. Bar Ass’n) (“The statute would apply . . . to situations where a government has attempted to conceal its responsibility by allowing nominally private persons, such as Central American ‘death squads,’ to carry out torture or killings.”). “Death squads” at the time were not amorphous collections of people; they were well-funded, structured organizations that were treated as such. In El Salvador, for example, death squads frequently “operated in coordination with the armed forces and acted as a support structure for their activities.” U.N. Comm. on Truth for El Salvador, *From Madness to Hope: The 12-Year War in El Salvador* 126, U.N. Doc. S/25500 (Apr. 1, 1993).

- With regard to the statute’s jurisdictional requirement, the State Department explained that a “prospective defendant must be found in the United States or otherwise submit himself (*or itself*) to U.S. jurisdiction.” *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration & Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. 29 (1990) (prepared statement of David P. Stewart, Assistant Legal Advisor, U.S. Dep’t of State) (emphasis added). Since the statute does not cover foreign governments, the parenthetical using the word “itself” can refer only to an organizational defendant.

C. Congress Intended For The TVPA To Enhance And Expand The Alien Tort Statute.

The House and Senate Reports also explain that the TVPA was intended to affirm and expand causes of action for torture and extrajudicial killing that courts had previously held were available to aliens under the jurisdictional grant of the ATS. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Specifically, the reports state that the TVPA would “*enhance* the remedy already available” under the ATS and “*extend a civil remedy also to U.S. citizens*” who have been tortured abroad. S. Rep. No. 102-249, at 5 (emphasis added); H.R. Rep. No. 102-367, at 4 (same). An earlier House report makes the same point, stating that the TVPA “*represents an effort to clarify and expand existing law pertaining to the practice of torture*” and “*authorizes suits by both aliens and U.S. citizens who have been victims of gross human rights abuses.*” H.R. Rep. No. 100-693, at 2 (1988) (emphasis added).

Accordingly, if the ATS subjects organizations to liability for torture or extrajudicial killing, then organizations must also be subject to liability under the TVPA. Any other outcome would flout Congress’s intent to expand available remedies and would convert the benefit of U.S. citizenship into a handicap. Aliens, that is, would be able to sue organizations in U.S. courts for torture in foreign nations, but American citizens would not. It is implausible that Congress intended to create such a state of affairs.

* * *

Congress enacted the TVPA to guarantee a meaningful remedy in the U.S. Code for the most atrocious of human rights violations. This Court should construe the Act to fulfill that objective, not to limit liability in a manner unprecedented in federal tort law.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Jeffrey L. Fisher
Jenny S. Martinez
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Nathaniel A. Tarnor
TARNOR, PLLC
1200 G Street, N.W.
Suite 800
Washington, D.C. 20005

Robert J. Tolchin
Counsel of Record
THE BERKMAN LAW OFFICE,
LLC
111 Livingston Street
Suite 1928
Brooklyn, NY 11201
(718) 855-3627
tolchinlaw@gmail.com

Thomas C. Goldstein
Kevin K. Russell
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave. N.W.
Suite 404
Washington, D.C. 20015

December 14, 2011

APPENDIX

The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), as codified (without preamble) at 28 U.S.C. § 1350 note, provides:

An Act

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Torture Victim Protection Act of 1991”.

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY. – An individual who, under actual or apparent authority, or color of law, of any foreign nation –

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

2a

(b) EXHAUSTION OF REMEDIES. – A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS. – No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING. – For the purposes of this Act, the term “extrajudicial killing” means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE. – For the purposes of this Act –

(1) the term “torture” means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

3a

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from –

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Approved March 12, 1992.