No. 11-88

IN THE

Supreme Court of the United States

ASID MOHAMAD, INDIVIDUALLY AND FOR THE ESTATE OF AZZAM RAHIM, DECEASED, SHAHID MOHAMAD, SAID MOHAMAD, SHAHED MOHAMAD, MASHHUD RAHIM, MOHAMAD RAHIM, ASIA RAHIM,

Petitioners,

v.

JIBRIL RAJOUB, AMIN AL-HINDI, TAWFIK TIRAWI, PALESTINIAN AUTHORITY, ALSO KNOWN AS PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY, PALESTINE LIBERATION ORGANIZATION,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the term "individual," as used in the Torture Victim Protection Act, refers to natural persons only, precluding suit against the Palestinian Authority and Palestine Liberation Organization.

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INTRODUCTION

The Torture Victim Protection Act ("TVPA") establishes a civil cause of action where "[a]n individual," acting "under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture." 28 U.S.C. § 1350 note § 2(a)(1). The U.S. Court of Appeals for the D.C. Circuit properly held that "individual" refers to natural persons only and affirmed the dismissal of the action against the Palestinian Authority ("PA") and Palestine Liberation Organization ("PLO").

Petitioners argue that the petition should be granted to settle a "clear conflict" between the D.C. Circuit and Eleventh Circuit as to whether a TVPA action may be brought against organizational defendants. Pet. 9. Petitioners fail to include any discussion of the Eleventh Circuit decisions that give rise to this perceived conflict. In fact, the Eleventh Circuit decision petitioners cite (*id.* at 8), *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008), does not analyze the scope of "individual" under the TVPA, but rather the court states it is "bound by" its earlier decision in *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242 (11th Cir. 2005), a case petitioners do not even cite. *Romero*, 552 F.3d at 1315. As the Ninth Circuit recently observed, "[i]t does not appear the defendants in [*Aldana*] ever challenged the notion of corporate liability, . . . and the Eleventh Circuit did not explain its reasoning on the issue." *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126 (9th Cir. 2010), *petition for cert. filed*, No. 10-1536 (June 20, 2011).

Because the Eleventh Circuit has only assumed without analysis that there is corporate liability under the TVPA, the circuit conflict is not sufficiently developed to warrant the Court's review.

The petition should be denied for the additional reason that the judgment below can be affirmed on an alternate ground. The TVPA requires that the "individual" who "subjects an individual to torture" has done so "under actual or apparent authority, or color of law, *of any foreign nation*." 28 U.S.C. § 1350 note § 2(a) (emphasis added). The PA and PLO argued to both the district court and court of appeals that they do not act under color of law of a "foreign nation," and thus petitioners could not meet the TVPA' s state action requirement. The court of appeals did not reach this argument, having disposed of the case on the ground that TVPA claims may brought only against natural persons.

Finally, the petition should be denied because the D.C. Circuit's ruling was correct. The ordinary meaning of "individual" is a single natural person. In the TVPA Congress used the term "individual" rather than "person," the term Congress generally uses when intending to refer to both natural persons and corporations or other legal entities. Moreover, the TVPA uses "individual" to refer to a victim of torture or extrajudicial killing, making natural person the only meaning that logically can be applied to "individual," as used in the TVPA.

STATEMENT OF THE CASE

As an initial matter, respondents must address a mischaracterization of the record. In their

Statement of the Case, petitioners assert that the PA's and PLO's "liability for the torture and murder of Mr. Rahim is indisputable" and further assert that the PA and PLO "have never disputed their liability for the torture and murder of Azzam Rahim." Pet. 5. To the contrary, the PA and PLO vigorously contested their liability on a number of grounds in their motion to dismiss, which the district court granted. To the extent petitioners are referring to whether either the PA or PLO, as a purely factual matter and divorced from the requirements of the TVPA, bears any responsibility for Mr. Rahim's alleged torture and murder, petitioners neglect to clarify that "the district court dismissed this case on the basis of the complaint alone." *See* Pet. App. 3a. When arguing the motion to dismiss, and for affirmance of the dismissal, the PA and PLO were obligated to treat the allegations in the complaint as true. *See id.* In any event, the PA and PLO denied responsibility at both the district and appellate court levels. *See* PA/PLO C.A. Br. at 55.

This lawsuit arises out of the following unproven allegation: On September 27, 1995, members of the Palestinian Preventive Security Services arrested Palestinian-American Azzam Rahim in the West Bank village of Ein Yabroud and took him to the Jericho prison where he was tortured and eventually killed on September 29, 1995. JA at A62, ¶ 18. Rahim's estate, widow and six sons (the "Rahim Family") initiated this lawsuit ten years later, on September 27, 2005. The Rahim Family named five defendants (1) Jabril Rajoub, "head of the Palestinian Preventive Security Force in the West Bank," (2) Amin Al-Hindi, "chairman of the

Palestinian General Intelligence Service," (3) Tawfik Tirawi, the "PA's General Security Chief responsible for the West Bank," (4) the Palestinian Authority, and (5) the PLO. *Id.* at A61, ¶¶ 10-14.

The complaint alleged that Azzam Rahim was the victim of torture and extrajudicial killing carried out by unidentified individuals employed by one or more Palestinian Authority security services and sought relief under the Torture Victim Protection Act, 28 U.S.C. § 1350 note; the Alien Tort Statute, 28 U.S.C. § 1350; and federal common law. JA at A67-71.

The Palestinian Authority and PLO filed a motion to dismiss all three claims. In their opposition to the motion to dismiss, the Rahim Family conceded the district court could not exercise jurisdiction under the Alien Tort Statute because the plaintiffs are U.S. citizens. *See* Pet. App. 16a n.1. "In accordance with plaintiffs' concession," the district court dismissed the Alien Tort Statute claim. *Id.* The district court granted the motion to dismiss as to the remaining TVPA and federal common law claims against the PA and PLO. *Id.* at 14a-21a. The Rahim Family subsequently voluntarily dismissed with prejudice their claims against the individual defendants, resulting in the entry of Final Judgment. *See* JA at A148-49.

The Rahim Family appealed the dismissal of their TVPA and federal common law claims against the PA and PLO. The U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal of both claims. The Rahim Family does not seek this Court's review as to the federal common law claim.

As to the TVPA claim, the PA and PLO argued the following on appeal: (1) only natural persons may be sued, and thus the PA and PLO are not proper defendants; and (2) the Rahim Family failed to state a claim for which relief could be granted because they cannot satisfy the statute's state action requirement.

With respect to whether the PA or PLO can be sued under the TVPA, the court of appeals agreed with respondents that "individual," as used in the statute, must be given "its ordinary meaning, which typically encompasses only natural persons and not corporations or other organizations . . . ." Pet. App. 7a (internal citation omitted).

The court of appeals then concluded that the "structure of the TVPA confirms what the plain text of the statute shows." Pet. App. 8a. As the court explained, "[t]he liability provision of the statute uses the word 'individual' five times in the same sentence -- four times to refer to the victim of torture or extrajudicial killing, which could be only a natural person, and once to the perpetrator of the torture or killing." *Id.* at 8a-9a (citing § 1350 note § 2(a)). "The Rahims advance no cogent reason, and we see none, to think the term 'individual' has a different meaning when referring to the victim as opposed to the perpetrator." *Id.* at 9a.

Having concluded that "individual" cannot be construed to apply to the Palestinian Authority or PLO, the court of appeals did not reach whether the Rahim Family could satisfy the state action requirement.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Decisions -- Which Merely Assume Without Analysis that Corporations May Be Sued Under the TVPA -- Do Not Create a Circuit Conflict Warranting This Court's Review.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Here, petitioners argue that the decision of the D.C. Circuit directly conflicts with a decision of the Eleventh Circuit on a matter of substantial importance. Pet. 8-9.[1] The petition fails to acknowledge a recent Ninth Circuit decision on the question presented, which reached the same conclusion as the D.C. Circuit here. *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010) (holding that the TVPA allows suit against natural persons only), *petition for cert filed*, No. 10-1536 (June 20, 2011). In contrast to the decisions of the Ninth and D.C. Circuits, the Eleventh Circuit decisions petitioners cite include no analysis of the TVPA corporate liability issue or the relevant statutory text. The Eleventh Circuit's unexamined assumption that non-natural persons may be sued under the TVPA does not create a sufficiently well-

[1] In *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 U.S. App. LEXIS 13934, at *135-36 (D.C. Cir. Jul. 8, 2011), the D.C. Circuit again held that only natural persons are liable under the TVPA, and affirmed dismissal of the TVPA claims against the corporate defendant).

developed circuit conflict to merit the Court's exercise of its discretionary jurisdiction.

A. The Eleventh Circuit Has Not Squarely Addressed the Meaning of "Individual" Under the TVPA.

The petition asserts without elaboration that "the Eleventh Circuit has explicitly held that a TVPA action may be brought against an organizational defendant." Pet. 8. Petitioners then cite a district court decision (*Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003), *aff'd*, 578 F.3d 1252 (11th Cir. 2009)), and *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). Pet. 9. In both cases, however, the court of appeals affirmed the dismissal of the TVPA claims. In neither case did the Eleventh Circuit analyze whether the term "individual," as used in the TVPA, applies to corporate or other organizational defendants. Rather both *Sinaltrainal* and *Romero* erroneously assumed that the Eleventh Circuit's earlier precedent had extended TVPA liability to corporations.

1. In *Romero*, the plaintiffs' TVPA claims were dismissed when the district court granted a motion for partial summary judgment. 552 F.3d at 1312-13. The Eleventh Circuit affirmed on the ground that plaintiffs failed to establish the requisite evidence of state action. *Id.* at 1316-18. The defendants had also argued on appeal that the district court lacked subject matter jurisdiction because the TVPA does not allow suits against corporations. The Eleventh Circuit rejected the characterization of corporate liability as a

jurisdictional question. *Id.* at 1315 (stating "when either the Alien Tort Statute or federal question statute provides jurisdiction, defects in pleading claims under the Torture Act are not jurisdictional defects"). In dicta, the court then observed:

> Even if we agreed with Drummond that its argument about corporate liability under the Torture Act was jurisdictional, we would be bound to reject that argument. Under the law of this Circuit, the Torture Act allows suits against corporate defendants. We held that a complaint, under the Act, stated a claim against a corporate defendant in *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir. 2005), and we are bound by that precedent.

Romero contains no further discussion of corporate liability under the TVPA. Having determined, relying solely on *Aldana*, that the district court had subject matter jurisdiction over the TVPA claim, the court of appeals nonetheless affirmed dismissal because the TVPA's state action requirement was not met. *Id.* at 1318. Significantly, petitioners, though relying on *Romero* for the circuit split, fail to even cite *Aldana*, *see* Pet. 8-9, perhaps because *Aldana* does not reach the holding *Romero* attributes to it.

2. In *Aldana*, the Eleventh Circuit never considered whether corporations could be sued under the TVPA. There, the threshold question was whether plaintiffs could raise separate claims for state-sponsored torture under the Alien Tort Statute and also under the TVPA. *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1250 (11th Cir.

2005). Having resolved that question in the affirmative, the Eleventh Circuit then addressed whether the acts alleged in the complaint can be considered "torture" under the TVPA's statutory definition. *Id.* at 1251. As to that issue, the court concluded that "Plaintiffs alleged sufficient facts to establish torture causing severe mental suffering" under the TVPA. *Id.* at 1251-53. The court accordingly vacated the district court's dismissal of the plaintiffs' TVPA clam as to that form of alleged torture. *Id.* at 1253.

Although the meaning of "torture" was before the Eleventh Circuit in *Aldana*, the issue of what types of defendants constitute an "individual" was not before the court. The corporate liability issue was not raised in the defendants-appellees' brief.[2] Because, in a TVPA suit, the issue of corporate liability does not implicate the court's subject matter jurisdiction, the court had no reason to raise the issue *sua sponte*.

The fact that *Aldana* vacated a TVPA dismissal as to a corporate defendant on grounds other than the corporate liability issue cannot be construed as establishing binding precedent that the TVPA authorizes suits against non-natural persons. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989). In *Will*, the petitioner had cited a number of Supreme Court cases that petitioner characterized as assuming that a State is a "person" for purposes

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[2] *See* Appellees' Answer Brief, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, No. 04-10234, 2004 WL 4976697 (11th Cir. May 17, 2004).

of 42 U.S.C. § 1983, including cases in which a State had been sued by name under § 1983. *See id.* at 63 n.4. Rejecting these arguments, the Court stated: "But the Court did not address the meaning of person in any of those cases, and in none of the cases was resolution of that issue necessary to the decision." *Id.* The Court noted that "Petitioner's argument evidently rests on the proposition that whether a State is a person under § 1983 is 'jurisdictional' and 'thus could have been raised by the Court on its own motion' in those cases." *Id.* The Court then concluded: "Even assuming that petitioner's premise and characterization of the cases is correct, this Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us." *Id.* (internal citation and quotation omitted).

Similarly, because it did not address the meaning of "individual" under the TVPA, the *Aldana* decision should not be treated as binding precedent in the Eleventh Circuit on the question of TVPA corporate liability. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999) (unlitigated issues "'are not to be considered as having been so decided as to constitute precedents'") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). Thus, *Aldana* does not give rise to a well-developed circuit split necessitating the Court's attention.

3. Nor is the requisite "clear conflict between the circuits," Pet. 9, created by the Eleventh Circuit's affirmance in *Sinaltrainal*, the other case on which petitioners rely. In that case, the court of appeals

affirmed the district court's dismissal of the TVPA claim for failure to plead state action. 578 F.3d 1252, 1269-70 (11th Cir. 2009). The only discussion of corporate liability under the TVPA appears in a footnote, where the court states: "This Court has determined 'an individual' to whom liability may attach under the TVPA also includes a corporate defendant. *See Romero*, 552 F.3d at 1315 ('Under the law of this Circuit, the Torture Act allows suits against corporate defendants.'))." *Sinaltrainal*, 578 F.3d at 1264 n.13.

Thus, petitioners' circuit split rests on dicta in *Romero* and *Sinaltrainal* that the *Aldana* precedent compels extending liability to corporate defendants. In fact, *Aldana*, does not establish such a precedent. Moreover, because *Romero* and *Sinaltrainal* affirmed dismissal of the TVPA claims, the Eleventh Circuit did not need to reach the issue of corporate liability. When the question of corporate liability is squarely presented to the Eleventh Circuit, it will have an opportunity to consider the issue and may reach a conclusion consistent with that of the Ninth and D.C. Circuits. Until then, it is premature to treat the conflict between the Eleventh Circuit and the Ninth / D.C. Circuits as a compelling reason for granting the petition.

B. The Remedial Nature of the TVPA Does Not Provide a Compelling Reason for Certiorari.

The petition describes the question presented as one of "[s]ubstantial [i]mportance." Pet. 9. Petitioners note that the TVPA is a remedial statute, assert that a remedial statute "should not be

radically circumscribed by the decision of a lower court," and then conclude that "this Court, and this Court alone, should determine whether the TVPA does not permit suits against organizational defendants." *Id.* at 9-10.

The two courts of appeals that have substantively analyzed the question (the Ninth Circuit in *Bowoto* and the D.C. Circuit here) have concluded that the statute was not intended to reach organizational defendants. Petitioners' conclusion that those courts "radically circumscribed" the TVPA is both inconsistent with the plain meaning of the statutory text and finds no support in the legislative history.

In any event, an issue does not become a "[m]atter of [s]ubstantial [i]mportance" (Pet. 9) requiring this Court's review whenever the petitioner disagrees with the court of appeals' interpretation of a remedial statute. Nor does the fact that the TVPA reaches torture and extrajudicial killing change the analysis. *See id.* at 10.

In fact, because the TVPA creates a cause of action against foreign defendants (here, the governing authority in one of the most diplomatically sensitive areas of the world) for specific international law violations occurring outside the U.S., its extraterritorial reach should not be expanded to include additional categories of defendants (such as corporations and political organizations) absent clear intent from Congress, which is lacking here *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("the potential implications for the foreign relations of the United States of recognizing private causes of action for violating

international law should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs").

C. A Circuit Split on Alien Tort Statute Corporate Liability Does Not Establish the Requisite Circuit Split on the Question Presented Here.

Perhaps recognizing the tenuous nature of the circuit conflict on TVPA corporate liability, petitioners attempt to ride the coattails of another circuit split regarding the question of corporate liability under the Alien Tort Statute. *See* Pet. 10 (citing petition filed in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491). Petitioners assert that, "if this Court grants certiorari in the *Kiobel* matter it should grant the instant Petition a well." Pet. 10. As grounds for this linkage, petitioners only vaguely assert that "the scope of the ATS and the TVPA in respect to organizational defendants cannot and should not be examined in a vacuum." *Id.*

Unlike the Alien Tort State, however, which confers jurisdiction over certain violations of customary rules of international law, the scope of liability under the TVPA is determined by statute. Because the plain meaning of the statutory text of the TVPA precludes suits against corporations, Congress has made clear that -- as to claims of torture and extrajudicial killing under color of foreign law -- only natural persons may be sued. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("a decision to create a private right of action is one left to legislative judgment in the great majority of

cases"). Whether customary norms of international law allow suits against corporations for other types of international law violations and whether the Alien Tort Statute provides a basis for exercising jurisdiction over those claims is not relevant to resolution of the question presented here.

II. The Petitioners' Failure to Satisfy the TVPA's State Action Requirement Provides an Alternate Ground for Affirmance, Making This a Poor Vehicle for Review of the Question Presented.

Where, as here, the judgment may be affirmed on an alternate ground without deciding the question presented, certiorari is not warranted. *See* Eugene Gressman, et al., *Supreme Court Practice* 248 (9th ed. 2007). Here, the dismissal of the Rahim Family's claim can be affirmed on the independent ground -- argued below but not addressed by either the district court or the D.C. Circuit -- that the claim failed to satisfy the TVPA's state action requirement.

The TVPA imposes liability only where an individual commits the torture or extrajudicial killing "under actual or apparent authority, or color of law, *of any foreign nation*." 28 U.S.C. § 1350 note § 2(a) (emphasis added). Courts previously have held that the Palestinian Authority and PLO are not immune from suit under the Anti-Terrorism Act, 18 U.S.C. § 2333, because Palestine is not yet a "foreign state." *See, e.g.*, *Ungar v. PLO*, 402 F.3d 274, 289 (1st Cir. 2005). Throughout the litigation, the Rahim Family readily conceded that neither the Palestinian Authority nor PLO is a foreign state. *See* Rahim C.A. Br. at 12 ("the Rahim Family - and

every court to have considered the issue - agree that neither the PA no[r] PLO is a foreign state"). In the absence of a state, there can be no state action or, in the TVPA's nomenclature, action "under actual or apparent authority, or color of law, of any foreign nation."

Moreover, if the Palestinian Authority is treated as a "foreign nation" for purposes of the TVPA, then it is immune from suit. *See* H.R. Rep. No. 102-367, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87 ("Only 'individuals,' not foreign states, can be sued under the [TVPA]."); S. Rep. No. 102-249, 1991 WL 258662, at *6-7 (1991) ("Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act . . . which renders foreign governments immune from suits in U.S. courts, except in certain circumstances.").

Because the dismissal of the Rahim Family's TVPA claim can be affirmed on the state action ground, without addressing whether "individual" encompasses organizational defendants, this case presents an unsuitable vehicle for addressing the question presented.

If the Rahim Family's petition were granted, the Court should also review the alternative argument the Palestinian Authority and PLO raised below: whether the unidentified PA employees who allegedly carried out the torture and extrajudicial killing acted "under actual or apparent authority, or color of law, of any foreign nation." *See* 28 U.S.C. § 1350 note § 2(a).

III. The D.C. Circuit's Holding Is Correct

This Court's review is unwarranted for the additional reason that the D.C. Circuit's holding is correct.

A. The D.C. Circuit's Decision Is Consistent with the Ordinary Meaning of "Individual" and with the Term's Use Elsewhere in the Statute.

TVPA liability may be imposed only on "[a]n *individual* who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an *individual*" to torture or extrajudicial killing. 28 U.S.C. § 1350 note § 2(a) (emphasis added).

Petitioners argue that the D.C. Circuit incorrectly interpreted "individual" to apply only to natural persons and not to organizational defendants. Pet. 10-13. In lieu of argument, the petition includes a lengthy excerpt from the district court's decision in *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003), *aff'd*, 578 F.3d 1252 (11th Cir. 2009). *See* Pet. 11-12. As discussed below, that decision, in addition to being inconsistent with the majority of courts that have analyzed the question, is based on a misinterpretation of the Court's decision in *Clinton v. City of New York*, 524 U.S. 417 (1998), and an untenable inference drawn from the legislative history.

1. The term "individual" is not defined in the TVPA, but in ordinary usage refers to a natural person and in legal terminology generally has a narrower meaning than "person." In the Dictionary

Act, Congress provided definitions for a number of common statutory terms that courts are to apply "unless the context indicates otherwise." *See* 1 U.S.C. § 1. The Act defines "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *Id.* The Dictionary Act therefore speaks of "corporations" and "individuals" as distinct terms, creating a presumption that those terms have different meanings. *See Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1127 (9th Cir. 2010); Pet. App. 7a-8a. Moreover, courts regularly distinguish between "individuals" and "corporations." *See, e.g., Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2853-54 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.").

In *Clinton v. City of New York*, 524 US. 417 (1998), the Court recognized that, "in ordinary usage both 'individual' and 'person' often refer to an individual human being." *Id.* at 428 n.13 (citing Webster's Third New International Dictionary 1152, 1686 (1986)). The term "person," however "often has a broader meaning in the law." *Id.* (citing 1 U.S.C. § 1) (Dictionary Act definition of "person").

Petitioners cite *Clinton* as "holding that 'individual' is synonymous with 'person'" and then argue that "individual" in the TVPA can be construed to include corporations and other organizational defendants. Pet. 13. *See also id.* at

12 (quoting *Sinaltrainal's* discussion of *Clinton*). The Court, however, treated the terms as synonymous only as to their ordinary usage, in which both terms often refer to an individual human being. 524 U.S. at 428 n.13. With respect to their usage in legal terminology, the court distinguished between "person" and "individual," noting that "'person' often has a broader meaning in the law," and can encompass corporations. *Id.*

Clinton interpreted "individual," as it appeared in 2 U.S.C. § 692(a)(1), which allows individuals adversely affected by a line item veto to bring a declaratory judgment action. Although the Court ultimately concluded that "individual" for purposes of § 692 applied to non-natural persons, the Court emphasized the uniqueness of its holding, noting that "the structure of § 692 makes it clear that Congress believed the [line item veto] issue warranted expedited review and, therefore, that Congress did not intend the result that the word 'individual' would dictate in other contexts." *Id.* at 429 n.14.

2. Here, the structure of the TVPA confirms that "individual" was intended to refer to natural persons only. The statute's use of "individual" in the same sentence to describe both the perpetrator and the victim compels interpreting "individual" to apply only to natural persons, because only natural persons can be subject to torture or extrajudicial killing. "Individual" should not be given one meaning within the statute when referring to the perpetrator and an entirely different meaning when referring to the victim. *See Desert Palace, Inc. v.*

Costa, 539 U.S. 90, 101 (2003) (noting that "[a]bsent some congressional indication to the contrary, [courts] decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue").

Indeed, it is a "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (internal quotation marks omitted). Here, "individual" is used to refer to both perpetrator and victim in the same sentence, making a particularly compelling case for giving the term a consistent meaning.

3. In *Sinaltrainal*, the district court decision on which petitioners rely, the court treated the absence of an express statement of intent to exempt corporations in the legislative history as supporting an inference that Congress intended them to be sued. Pet. 12 (quoting 256 F. Supp. 2d at 1358-59). Given (i) the ordinary meaning of "individual," (ii) the fact that Congress used the term "individual" rather than "person," and (3) "individual" is used elsewhere in the same sentence to refer to natural persons only, there is no ambiguity in the statutory text requiring resort to legislative history.

In any event, the legislative history does not support an inference that Congress intended to impose liability on corporations. As the Ninth Circuit noted in *Bowoto*, "[n]either the Senate nor House report . . . even hint at corporate liability." *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1127 (9th Cir. 2010) (citing The Torture Victim Protection Act

of 1991, S. Rep. 102-249 (1991); Torture Victim Protection Act of 1991, H.R. Rep. 102-367 (1991)). Because Congress used the term "individual," not "person," silence in the legislative history is more properly viewed as creating an inference that Congress intended the ordinary usage of "individual" to apply. *See Bowoto*, 621 F.3d at 1127-28 ("Had Congress intended for the court to interpret the term 'individual' so broadly as to include corporations, it would have included some evidence of this intent in the legislative history.").[3]

B. The D.C. Circuit's Decision Does Not Undermine the Purpose of the TVPA.

Petitioners cite legislative history indicating that Congress enacted the TVPA to extend certain causes of action available to aliens under the Alien Tort Statute to plaintiffs who are U.S. citizens. Pet. 13. Petitioners then assert that, because two courts of appeals have held that Alien Tort Statute suits may

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[3] Moreover, a precursor to the TVPA would have imposed liability on any "person who, under actual or apparent authority of any foreign nation" subjected any other "person to torture or extrajudicial killing," H.R. 1417, 100th Cong. § 2 (as referred to the H. Comms. on Foreign Affairs and the Judiciary, Mar. 4, 1988). The House Foreign Affairs Committee amended the bill in June 1988 to replace the word "person" with "individual" to make clear that the bill applies "to individuals and not to corporations." *The Torture Victim Protection Act: Hearing and Markup before the H. Comm. on Foreign Affairs on H.R. 1417*, 100th Cong. 87-88 (1988). The TVPA ultimately was enacted without further discussion of substituting "individual" for "person." Pub. L. No. 102-256, 106 Stat. 73 (1992).

be brought against corporate defendants, the TVPA also must be construed to allow suits against corporate defendants. Pet. 13 (citing *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 WL 2652384 (D.C. Cir. July 8, 2011); *Flomo v. Firestone Nat. Rubber Co., LLC*, ___ F.3d ___, 2011 WL 2675924 (7th Cir. July 11, 2011)). *But see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *petition for cert. filed*, No. 10-1491 (June 6, 2011) (holding that corporations may not be sued under the Alien Tort Statute).

At the time the TVPA was enacted, however, corporate liability under the Alien Tort Statute was not established. Indeed, the leading Alien Tort Statute case at the time, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), involved a suit against a former Paraguayan police official. *See* H.R. Rep No. 102-367, at 4, reprinted in 1992 U.S.C.C.A.N. at 84, 86 (discussing *Filartiga*). Congress enacted the TVPA to clarify that such suits could be brought in the United States, a proposition Judge Bork had called into question in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 103 (1985). *See* H.R. Rep. No. 102-367, at 4, reprinted in 1992 U.S.C.C.A.N. at 84, 86 ("Judge Bork questioned the existence of a private right of action under the Alien Tort Claims Act"). Thus, even assuming Congress intended the TVPA to mirror the Alien Tort Statute with respect to claims of torture or extrajudicial killing, there is no reason to believe Congress understood such a right of action to permit suits against organizational defendants. More importantly, given the plain meaning of the TVPA

statutory text, there is no basis for resort to drawing inferences from the legislative history.

Petitioners assert that it is "incongruous and unjust" that an alien can sue an organizational defendant under the Alien Tort Statute, but a U.S. citizen cannot. Pet. 13-14. This Court may ultimately conclude that corporations may not be sued under the Alien Tort Statute, eliminating any incongruity. But even if corporate liability becomes well-established under the Alien Tort Statute, decisions interpreting that statute cannot trump the express language Congress chose in limiting the TVPA to suits against individuals.

Moreover, petitioners' concerns regarding incongruity and injustice in treating alien plaintiffs differently than U.S. plaintiffs erroneously assumes that suits that could not be maintained under the TVPA could nonetheless proceed under the auspices of the Alien Tort Statute. The TVPA, however, should be viewed as providing the sole cause of action for claims alleging torture or extrajudicial killing under color of law of a foreign nation.

In *Sosa v. Alvarez-Machain*, the Court emphasized that a "decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 542 U.S. 692, 727 (2004). With the TVPA, Congress legislated specific relief for victims of torture and extrajudicial killing. *See* H.R. Rep. No. 102-367 at 3, reprinted in 1992 U.S.C.C.A.N 84, 86 (explaining that the purpose of the statute is to provide "a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing").

In enacting the TVPA, Congress considered whether the TVPA would entirely supplant the Alien Tort Statute. The House Report explains:

> Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits *based on other norms* that already exist or may ripen in the future into rules of customary international law.

H.R. Rep No. 102-367, at 4, reprinted in, 1992 U.S.C.C.A.N. at 86 (emphasis added). The Senate Report contains similar language: "Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. Consequently, that statute should remain intact." S. Rep. No. 102-249, 1991 WL 258662, at *4 (1991).

Thus, Congress did not repeal the Alien Tort Statute, as it recognized that it would continue to serve as the basis for actions alleging international law violations other than torture and extrajudicial killing. But, for claims based on torture and extrajudicial killing, the legislative history expresses Congress' intent that the TVPA would provide the sole cause of action. As the Supreme Court noted, the TVPA provides a "clear [legislative] mandate" for

federal claims of torture. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004).

In *Enahoro v. Abubakar*, the Seventh Circuit relied on the legislative history of the TVPA and the Supreme Court's reasoning in *Sosa* in holding that the TVPA "occup[ies] the field" with regard to torture and extrajudicial killing claims. 408 F.3d 877, 884-85 (7th Cir. 2005). As a result, the "cause of action Congress provided in the [TVPA] is the one which plaintiffs alleging torture or extrajudicial killing must plead," and there is no independent cause of action under the Alien Tort Statute. *Id.* at 885. Similarly, in *Corrie v. Caterpillar*, *Inc.*, another federal court held that the TVPA "provides the exclusive remedy for plaintiffs who allege extrajudicial killing under color of foreign law." 403 F. Supp. 2d 1019, 1025 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 974 (9th Cir. 2007). *But see Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 416 F.3d 1242, 1251 (11th Cir. 2005) (holding that the TVPA does not preempt the Alien Tort Statute); *Shafi v. Palestinian Auth.*, 686 F. Supp. 2d 23, 27-28 (D.D.C. 2010) (same). *See also Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 U.S. App. LEXIS 13934, at *111-12 n.37 (D.C. Cir. Jul. 8, 2011) (noting that "Exxon has waived any argument that enactment of the TVPA preempted torture and extrajudicial killing claims under the [Alien Tort Statute] by raising the argument only in a conclusory footnote").

In sum, the D.C. Circuit's decision follows from the plain language of the TVPA and, in any event, is

consistent with the history and purpose of the statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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