QUESTION PRESENTED

Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a), permits actions against defendants which are not natural persons.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Asid Mohamad, Asid Mohamad for the Estate of Azzam Rahim, Shahid Mohamad, Said Mohamad, Shahed Azzam Rahim, Mashhud Rahim, Mohamad Rahim and Asia Rahim were plaintiffs in the district court and appellants in the court of appeals.

Respondents The Palestinian Authority and The Palestine Liberation Organization were defendants in the district court and appellees in the court of appeals.

Jibril Rajoub, Amin Al-Hindi and Tawfik Tirawi were defendants in the district court but the action against them was dismissed by the district court.

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IN THE

SUPREME COURT OF THE UNITED STATES

ASID MOHAMAD, individually and
for the Estate of AZZAM RAHIM;
SHAHID MOHAMAD; SAID MOHAMAD;
SHAHED AZZAM RAHIM; 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 District Court
for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

Petitioners Asid Mohamad, Asid Mohamad for the Estate of Azzam Rahim, Shahid Mohamad, Said Mohamad, Shahed Azzam Rahim, Mashhud Rahim, Mohamad Rahim and Asia Rahim respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The court of appeals' opinion (App. A, *infra*, 1a-13a) is published at 634 F.3d 604 (D.C. Cir. 2011). The district court's opinion (App. B, *infra*, 14a-21a) is published at 664 F.Supp.2d 20 (D.D.C. 2009).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on March 18, 2011, App., *infra*, 1a. On June 17 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to July 15, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute relevant to this case is the Torture Victim Protection Act, 28 U.S.C. § 1350 note, which provides as follows:

> 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.

"(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 aris-

ing 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

"(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."

STATEMENT OF THE CASE

This case is a civil action for damages arising from the torture and murder of United States citizen Azzam Rahim by officers of Respondents Palestinian Authority ("PA") and Palestine Liberation Organization ("PLO").

Respondents' liability for the torture and murder of Mr. Rahim is indisputable. As our own Department of State has confirmed:

> In September [1995] detainee Azzam Rahim . . . an American citizen, died in the custody of PA intelligence officers in Jericho. Members of his family reported that bruises and cuts were visible on his head and face after his death. Results of an autopsy, conducted on Rahim after he had been interred for several weeks, showed that Rahim had broken ribs and appeared to have no heart damage, but the report said it was not possible to determine the cause of death. Three intelligence officers were sentenced for their role in the case. Two were sentenced to 1-year terms and one for 7 years.

JA A86.[1]

Indeed, Respondents have never disputed their liability for the torture and murder of Azzam Rahim.

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[1] JA refers to the Joint Appendix submitted in the court of appeals.

Accordingly, the Petitioners, who are the widow, children and estate of decedent Azzam Rahim, filed suit against the Respondents under the Torture Victim Protection Act ("TVPA") 28 U.S.C. § 1350 note § 2(a), which provides in relevant part that:

> "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.

28 U.S.C. § 1350 note § 2(a).

Though TVPA § 2(a) refers to an action against "[a]n individual," district courts in the Eleventh Circuit and the Eleventh Circuit itself have explicitly held that a TVPA action may be brought against organizational defendants (such as the instant Respondents). *Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345 (S.D.Fla. 2003), *aff'd* 578 F.3d 1252 (11th Cir. 2009) (citing *Clinton v. New York*, 524 U.S. 417, 428, n.13 (1998) for the holding that the term "individual" is synonymous with "person.").

Moreover, the TVPA is codified as part of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and

"Congress enacted the Torture Victim Act to codify the cause of action recognized [under the ATS] and to further extend that cause of action to plaintiffs who are U.S. citizens." *Kadic v. Karadzic*, 70 F.3d 232, 241 (2nd Cir. 1995) (citing H.R.Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86).

Most courts of appeals have held that an ATS action may be brought against an organizational defendant. *See Flomo v. Firestone Nat. Rubber Co., LLC*, ___ F.3d ___, 2011 WL 2675924 (7th Cir. July 11, 2011); *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 WL 2652384 (D.C. Cir. July 8, 2011).

While a split panel of the Second Circuit has held that the ATS does not permit actions against organizational defendants, *see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. 2010), numerous judges on the Second Circuit have concluded that the *Kiobel* "panel majority opinion is very likely incorrect." *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379 at *1 (2nd Cir. 2011).

Moreover, the panel majority decision in *Kiobel* is currently the subject of a petition for certiorari in this Court. *See Kioebel v. Royal Dutch Petroleum Co.*, No. 10-1491.

Thus, in light of the express precedents holding that organizational defendants may be sued under the TVPA, as well as the case law holding that organizational defendants may also be sued under the ATS – holdings which should apply equally to the TVPA given the fact that Congress intended

the TVPA to extend the ATS cause of action to plaintiffs who are U.S. citizens – the Petitioners' action against the Respondents is well founded, notwithstanding the fact that the Respondents are not natural persons.

However, the district court and the court of appeals disagreed, and dismissed the Petitioners' action against the Respondents on the grounds that the TVPA permits actions against natural persons only – expressly rejecting the contrary holding of the Eleventh Circuit. *See* App. A, *infra*, at 1a-11a.[2]

REASONS FOR GRANTING THE PETITION

I. The Decision of the Court Below Directly Conflicts with a Decision of the Eleventh Circuit

As noted *supra*, and as the court of appeals expressly noted in its decision dismissing Petitioners' action, the Eleventh Circuit has explicitly held that a TVPA action may be brought against an organizational defendant. *See Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345, 1359 (S.D.Fla. 2003) (holding corporation may be sued under TVPA), *aff'd in relevant part*, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (TVPA "allows suits against corporate defendants").

[2] The Petitioners also asserted a cause of action under customary international law, as a part of federal common law, which was also dismissed. Petitioners do not seek review of the dismissal of that cause of action.

Thus, the decision of the court of appeals knowingly created a clear conflict between the circuits.

Petitioners respectfully submit that this circuit conflict, which will generate different and so inequitable results depending on the venue of the TVPA action, as well as inevitable forum-shopping, should not be permitted to stand. The ability of a plaintiff to obtain redress for torture or murder in U.S. courts should not depend on whether the torturer or murderer happens to be subject to personal jurisdiction in the courts in the Eleventh Circuit. Also, the specter of forum-shopping and attempts at forum-shopping is particularly strong here, considering that the statute at issue is not merely procedural but creates a cause of action.

Therefore, the instant Petition should be granted in order to settle this circuit split.

II. The Court of Appeal's Decision Is a Matter of Substantial Importance

There is no question that the TVPA is a remedial statute. *See e.g., Kadic v. Karadzic*, 70 F.3d 232, 241 (2nd Cir. 1995) (citing legislative history demonstrating that "Congress enacted the Torture Victim Act to codify the cause of action recognized [under the ATS] and to further extend that cause of action to plaintiffs who are U.S. citizens."

But the decision of the court of appeals directly undermines the remedial effect of the TVPA, severely restricting the types of defendants against which an American citizen can obtain relief.

A remedial statute – particularly a statute intended to provide relief for the most heinous conduct imaginable – should not be radically circumscribed by the decision of a lower court; this Court, and this Court alone, should determine whether the TVPA does not permit suits against organizational defendants.

The importance of review by this Court is highlighted by the sharp circuit split over the closely-related question of whether actions under the ATS – which the TVPA was intended to mirror for the benefit of American citizens – can be brought against organizational defendants, and the prospect that this Court will resolve this split by granting certiorari in *Kioebel v. Royal Dutch Petroleum Co.*, No. 10-1491.

In other words, the scope of the ATS and the TVPA in respect to organizational defendants cannot and should not be examined in a vacuum, and if this Court grants certiorari in the *Kioebel* matter it should grant the instant Petition as well, and consider both cases in tandem.

III. The Decision Is Incorrect

Finally, the instant Petition should be granted because the decision of the court of appeals is incorrect. The rationale for interpreting the term "individual" as used in the TVPA as including organizational defendants was set forth in persuasive detail in *Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345 (S.D.Fla. 2003), *aff'd* 578 F.3d 1252 (11th Cir. 2009):

Defendant Bebidas contends that as a private corporation it is not subject to suit under the TVPA. Bebidas interprets the phrase "an individual . . . [who subjects another to torture or extrajudicial killing] shall, in a civil action, be liable for damages" as referring only to natural persons, arguing that Congress intended to hold liable only natural persons who commit torture or extrajudicial killing . . . Because a corporation is not a natural person, Bebidas reasons that the TVPA does not confer subject matter jurisdiction over a claim against a corporation. *See Beanal v. Freeport-McMoRan, Inc.*, 969 F.Supp. 362, 382 (E.D.La. 1997). Plaintiffs argue that by imposing liability on "individuals who subject others to torture or extrajudicial killing," the word "individual" is equivalent to "person." By analogy, Plaintiffs point to the fact that corporations are generally treated as persons in other areas of law, therefore, liability under the TVPA should also extend to corporations.

Defendants correctly point out that the district court in *Beanal* held that private corporations are not liable under the TVPA. *Id*. However, the *Beanal* court also stated that "[c]ongress does not appear to have had the intent to exclude private corporations from liability under the TVPA." *Id*. The Senate Judiciary Committee Report explains that the purpose of the TVPA is to permit suits

"against persons who ordered, abetted, or assisted in torture." S.Rep. No. 249, 102nd Cong., 1st Sess. (1991) . . . The Report does not mention any exemption for private corporations, *id*., and courts have held corporations liable for violations of international law under the related ATCA. See generally, *NCGUB v. Unocal*, 176 F.R.D. 329 (C.D.Ca. 1997); *Wiwa*, 2002 WL 319887 (both allowing suits against private corporations under the ATCA). Moreover, the Supreme Court in *Clinton v. New York* recently held that the term "individual" is synonymous with "person," acknowledging that "'person' often has a broader meaning in the law" than in ordinary usage. *Clinton v. New York*, 524 U.S. 417, 428 and n. 13, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998). Bearing in mind that a corporation is generally viewed the same as a person in other areas of law, it is reasonable to conclude that had Congress intended to exclude corporations from liability under the TVPA, it could and would have expressly stated so.

Given that the legislative history does not reveal an intent to exempt private corporations from liability, that private corporations can be sued under the ATCA, and that the term "individual" is consistently viewed in the law as including corporations, this court concludes that the TVPA claim against Bebidas should not be dismissed for lack of subject matter jurisdiction.

Sinaltrainal, 256 F.Supp.2d at 1358-1359 (emphasis added). *See also Estate of Rodriquez v. Drummond Co., Inc.*, 256 F.Supp.2d 1250, 1266-67 (N.D.Ala. 2003) (adopting reasoning of *Sinaltrainal*).

Thus, for the reasons set forth in *Sinaltrainal*, the court of appeals erred by holding that TVPA claims are not available against organizational defendants. *Cf. Clinton v. New York*, 524 U.S. 417, 428 (1998) (holding that "individual" is synonymous with "person").

Moreover, the decision of the court of appeals directly undermines the purpose of the TVPA, which was to extend the protections of the ATS to American citizens. "Congress enacted the Torture Victim Act to codify the cause of action recognized [under the ATS], and to further extend that cause of action to plaintiffs who are U.S. citizens." *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d. Cir. 1995) (citing H.R.Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86).

Most courts of appeals – including the D.C. Circuit itself – have held that an ATS action may be brought against an organizational defendant. *See 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).

Thus, as matters currently stand in the District of Columbia, an alien can sue an organizational defendant under the ATS, but a U.S. citizen cannot

bring an action against an organizational defendant under the TVPA. This result is not only incongruous and unjust; it also conflicts directly with Congress' purpose in enacting the TVPA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
July 15, 2011

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

ASID MOHAMAD, Individually and for the Estate of AZZAM RAHIM, et al.,

Appellants

v.

JIBRIL RAJOUB, et al.,

Appellees.

Nos. 09-7109, 09-7158.

Argued Oct. 19, 2010.

Decided March 18, 2011.

Widow and sons of a United States citizen allegedly tortured and killed in Israel brought suit against three individuals, the Palestinian Authority (PA), and the Palestine Liberation Organization (PLO), alleging violations of the Torture Victim Protection Act (TVPA), the Alien Tort Statute (ATS), and federal common law. The United States District Court for the District of Columbia, 664 F.Supp.2d 20, granted a motion to dismiss made by the PA and PLO. Plaintiffs appealed.

The Court of Appeals, Ginsburg, Circuit Judge, held that:

(1) TVPA does not create a cause of action against an organization, as opposed to a natural person, and

(2) plaintiffs had no cause of action cognizable under the federal-question jurisdiction statute for an alleged violation of federal common law.

Affirmed.

***605** Appeals from the United States District Court for the District of Columbia (No. 1:08-cv-01800). Robert J. Tolchin argued the cause and filed the briefs for appellants.

Laura G. Ferguson argued the cause for appellees. With her on the brief was Kevin G. Mosley. Richard A. Hibey and Mark J. Rochon entered appearances.

Before: GINSBURG, TATEL and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

The sons and widow of Azzam Rahim sued the Palestinian Authority and the Palestine Liberation Organization for damages on behalf of Rahim's estate. The plaintiffs alleged the defendants tortured and killed Rahim in violation of both the Tor-

ture Victim Protection Act (TVPA), 28 U.S.C. § 1350, note § 2(a), and federal common law. The district court granted the defendants' motion to dismiss, concluding only a natural person is amenable to suit under the TVPA and the Rahims had no cause of action under federal common law. We affirm the judgment of the district court.

I. Background

Because the district court dismissed this case on the basis of the complaint alone, we assume for the purpose of this appeal that the allegations therein are in all respects true. *Meijer, Inc. v. Biovail Corp.,* 533 F.3d 857, 865-66 (D.C.Cir. 2008). According to the complaint, Azzam Rahim, a Palestinian born and raised in the West Bank, became a citizen of the United States after moving here in the 1970s. The events in suit took place when Rahim visited the West Bank in 1995. While he was sitting in a coffee shop, some two to four men, who identified themselves as security police, forced him into an unmarked ***606** car. They took Rahim to a prison in Jericho, where he was tortured and eventually killed. In 1996 the U.S. Department of State issued a report on human rights practices in the West Bank since Israel had transferred certain responsibilities over the area to the Palestinian Authority. The report stated that Rahim had "died in the custody of PA intelligence officers in Jericho."

The Rahims initially filed suit in the U.S. District Court for the Southern District of New York.

In 2007 that court entered a default against the defendants, neither of which had answered the complaint.* After the defendants moved to vacate the entry of default and to dismiss the Rahims' complaint for, among other reasons, lack of personal jurisdiction in that district, the court granted the Rahims' motion to transfer the case to the District Court for the District of Columbia, where the defendants renewed their motions to vacate the entry of default and to dismiss the Rahims' complaint.

Granting the defendants' motions, the district court set aside the entry of default and dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(6), holding the plaintiffs have no cause of action under either the TVPA or federal common law. *Mohamad v. Rajoub,* 664 F.Supp.2d 20, 22-24 (D.D.C. 2009). The Rahims now appeal.

II. Analysis

The plaintiffs present three issues on appeal: (1) whether the district court abused its discretion in vacating the entry of default, *see Jackson v. Beech,* 636 F.2d 831, 835 (D.C.Cir. 1980), and, if not, whether the Rahims have a cause of action under (2) the TVPA or (3) federal common law. We review the latter two issues de novo. *See Rochon v. Gonzales,* 438 F.3d 1211, 1216 (D.C.Cir. 2006).

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* No judgment was ever entered upon the default.

A. Setting Aside the Default

First, we hold the district court did not abuse its discretion in setting aside the default entered against the defendants pursuant to Federal Rule of Civil Procedure 55(c), which rule permits a district court to "set aside an entry of default for good cause." *See also Jackson,* 636 F.2d at 836 ("strong policies favor resolution of disputes on their merits"). In exercising its discretion, the district court is supposed to consider "whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious." *Keegel v. Key West & Caribbean Trading Co.,* 627 F.2d 372, 373 (D.C.Cir. 1980). In this case, the district court did not say why it granted the defendants' motion to vacate but, as it happens, we need not remand the case because the Rahims' only argument against setting aside the default is that the defendants presented no "meritorious defense" to this action.

As the defendants note, "allegations are meritorious if they contain even a hint of a suggestion which, proven at trial, would constitute a complete defense." *Id.* at 374 (internal quotation marks and citations omitted). The defendants far surpassed this standard, as will be seen in what follows.

B. The Torture Victim Protection Act

The TVPA was enacted in 1992 in order to create "a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing." Pub.L. No. 102-256, 106 Stat. 73 (1992)

(codified at 28 U.S.C. § 1350, note). The relevant provision of the TVPA states:

> ***607** (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.

28 U.S.C. § 1350, note § 2(a). The defendants argue the district court properly dismissed the Rahims' claim under the TVPA because this provision does not create a cause of action against an organization, as opposed to a natural person.

We begin our inquiry, as always, with the text of the statute. *Bismullah v. Gates,* 551 F.3d 1068, 1072 (D.C.Cir. 2009). The Rahims claim the Palestinian Authority and the PLO are amenable to suit under the TVPA because the word "individual," in referring to the perpetrator of torture or of extrajudicial killing, includes organizations. The Rahims' authority for this proposition is limited to the observation that the term "individual" is "consistently viewed in the law as including corporations." *Sinaltrainal v. Coca-Cola Co.,* 256 F.Supp.2d 1345, 1359 (S.D.Fla. 2003) (holding corporation may be sued under TVPA), *aff'd in relevant part,* 578 F.3d

1252, 1264 n. 13 (11th Cir. 2009); *see also Romero v. Drummond Co.,* 552 F.3d 1303, 1315 (11th Cir. 2008) (TVPA "allows suits against corporate defendants"); *United States v. Middleton,* 231 F.3d 1207, 1210 (9th Cir. 2000) (statute making it a crime to access certain computers and thereby cause damage to "one or more individuals" applies to injured corporations). The defendants, for their part, argue "individual" should be understood in its ordinary sense, meaning only a natural person. *See, e.g., In re North (Gadd Fee Application),* 12 F.3d 252, 254-55 (D.C.Cir. 1994) ("individual" as used in the fee provision of the Ethics in Government Act describes only natural persons).

We agree with the defendants. Because the Congress did not define the term "individual" in the TVPA, we give the word its ordinary meaning, *Asgrow Seed Co. v. Winterboer,* 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995), which typically encompasses only natural persons and not corporations or other organizations, *North,* 12 F.3d at 254 ("In common usage, 'individual' describes a natural person") (citation omitted); *cf. Clinton v. City of New York,* 524 U.S. 417, 428 n. 13, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (" 'person' often has a broader meaning in the law" than does "individual"). Notably, the Dictionary Act, which provides guidance in "determining the meaning of any Act of Congress," strongly implies the word individual does not comprise organizations because it defines "person" to include "corporations, companies, associations, firms, partnerships, societies, . . . *as well as individuals.*" 1 U.S.C. § 1; *see also Bowoto v.*

Chevron Corp., 621 F.3d 1116, 1126-27 (9th Cir. 2010) (through the Dictionary Act, the "Congress has directed courts to presume the word 'individual' in a statute refers to natural persons and not corporations").

The Rahims nonetheless argue the term "individual" is at least ambiguous, wherefore the court should look to the purpose of the TVPA, which supports liability for organizations. Quoting *Kadic v. Karadzic,* 70 F.3d 232, 241 (2d Cir. 1995), they reason that because the Congress enacted the TVPA in order "to codify the cause of action" recognized by the Alien Tort Statute, 28 U.S.C. § 1350, and to "extend that cause of action to plaintiffs who are U.S. citizens," and because the ATS permits a ***608** plaintiff to sue an organization, the TVPA must do also. *See Sinaltrainal,* 578 F.3d at 1263 ("corporate defendants are subject to liability under the ATS"). *But see Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111, 120 (2d Cir. 2010) (ATS does not confer jurisdiction over claims against corporations).**

We reject the Rahims' argument because the structure of the TVPA confirms what the plain text of the statute shows: The Congress used the word "individual" to denote only natural persons. The 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,

** The issue whether corporations may be held liable in a suit brought under the ATS is pending before this court in *Doe v. Exxon Mobil Corp.*, No. 09-7125 (D.C.Cir. argued Jan. 25, 2011)

and once to the perpetrator of the torture or killing. § 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. *See Bowoto,* 621 F.3d at 1127 ("There is no indication Congress intended 'individual' to have a variety of meanings throughout the TVPA"); *Comm'r v. Lundy,* 516 U.S. 235, 250, 116 S.Ct. 647, 133 L.Ed.2d 611 (1996) ("the normal rule of statutory construction" is "that identical words used in different parts of the same act are intended to have the same meaning") (internal quotation marks and citations omitted). We note also the liability provision uses the word "person" in reference to those "who may be a claimant in an action for wrongful death," § 1350, note § 2(a)(2); because a claimant could be a non-natural person, such as the decedent's estate, this further supports the significance of the Congress having used "individual" rather than "person" to identify who may be sued under the TVPA.

To be sure, there are, as the Rahims note, situations in which the same word in a single statute has a different scope, depending upon its precise context. They point to *Weaver v. U.S. Information Agency,* 87 F.3d 1429 (D.C.Cir. 1996), where this court said, "Identical words may have different meanings where the subject-matter to which the words refer is not the same . . ., or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another," *id.* at 1437 (internal quotation marks

and citation omitted). Because none of those conditions obtains here, the more applicable statement in *Weaver* is the topic sentence of the same paragraph: "Normally, the same word appearing in different portions of a single provision or act is taken to have the same meaning in each appearance." *Id.*

In their reply brief, the Rahims for the first time argue in the alternative the defendants are secondarily liable for Rahim's death either pursuant to the principle of respondeat superior or for aiding and abetting his killer(s). *See Sinaltrainal,* 578 F.3d at 1258 n. 5 ("the TVPA permits aiding and abetting liability"); *but see Bowoto,* 621 F.3d at 1128 (rejecting argument plaintiffs could sue corporation "under the TVPA upon a theory of 'aiding and abetting' "). This argument comes too late. *Sitka Sound Seafoods, Inc. v. NLRB,* 206 F.3d 1175, 1181 (D.C.Cir. 2000) ("In order to prevent . . . sandbagging of appellees and respondents, we have generally held that issues not raised until the reply brief are waived") (internal quotation marks and citation omitted). In any event, we doubt the Rahims could prevail upon such a theory ***609** of liability. As the Ninth Circuit observed, even if we assume some form of vicarious liability is possible, the text of the TVPA still "limits such liability to individuals," *Bowoto,* 621 F.3d at 1128, and we have already seen that in this statute "individual" comprises only natural persons.

In sum, we hold the TVPA does not permit a suit against either the Palestinian Authority or the PLO. Accordingly, we affirm the judgment of the

district court dismissing the Rahims' claim under the TVPA.

C. Federal Common Law

The Rahims also advance a claim against the Palestinian Authority and the PLO under "customary international law, as a part of federal common law," over which this court has federal-question jurisdiction pursuant to 28 U.S.C. § 1331. In response, the defendants maintain the Supreme Court's opinion in *Sosa v. Alvarez-Machain,* 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004), precludes such a claim. They also rely upon a recent Ninth Circuit decision, *Serra v. Lappin,* 600 F.3d 1191 (2010), in which the court rejected the idea that any federal statute other than the ATS "recognizes a general cause of action under the law of nations." *Id.* at 1197, 1197-98 n. 7 ("If any plaintiff could bring any claim alleging a violation of the law of nations under federal-question jurisdiction, there would be no need for statutes such as the ATS and the [TVPA], which recognize or create limited causes of action for particular classes of plaintiffs (aliens) or particular violations (torture)").

As the defendants note, the Supreme Court in *Sosa* cautioned against reading § 1331 to imply a federal common law claim for a violation of the law of nations. One issue in that case was whether the plaintiff had a remedy under the ATS against a foreign national whom the Drug Enforcement Administration had hired to abduct the plaintiff from Mexico. 542 U.S. at 697-98, 124 S.Ct. 2739. The

Court explained that although the ATS is a "jurisdictional statute creating no new causes of action," the "historical materials" indicate it "was intended to have practical effect the moment it became law" in 1789. *Id.* at 724, 124 S.Ct. 2739. Accordingly, the Court concluded, "The jurisdictional grant" in the ATS "is best read as having been enacted on the understanding that the common law would provide a cause of action for" a "modest number of international law violations," including at least "Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* Because nothing between the enactment of the ATS and our modern case law "has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law," the Court added that federal courts today may consider "new cause[s] of action" under the ATS, but only with "great caution." *Id.* at 724-28, 124 S.Ct. 2739.

The Supreme Court also went on, however, to caution that its decision should not be read as "imply[ing] that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law." *Id.* at 731 n. 19, 124 S.Ct. 2739. Indeed, the Court expressly distinguished the ATS—under which a cause of action for a violation of the law of nations could be recognized—from § 1331, stating: "Section 1350 [i.e., the ATS] was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations," whereas federal-question jurisdiction

pursuant to § 1331 was not "extended subject to any comparable congressional assumption"; indeed a "more expansive common law power***610** related to 28 U.S.C. § 1331" may not be "consistent with the division of responsibilities between federal and state courts after *Erie* [*v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)]." *Id.*

Accordingly, following the Supreme Court's guidance in *Sosa,* we hold the Rahims do not have a cause of action cognizable under § 1331 for an alleged violation of federal common law. The district court correctly so held in dismissing this aspect of their complaint.

III. Conclusion

For the foregoing reasons, the judgment of the district court is

Affirmed.

C.A.D.C.,2011.
Mohamad v. Rajoub
634 F.3d 604, 394 U.S.App.D.C. 277

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

Asid MOHAMAD, Shahid Mohammad,
Said Mohamad, Shahed Azzam Rahim,
Mashhud Rahim, Mohamad Rahim, Asia Rahim,

Plaintiffs

v.

Jibril RAJOUB, Amin Al-Hindi, Tawfik Tirawi,
Palestinian Authority,
Palestine Liberation Organization,

Defendants.

Civil Case No. 08-1800 (RJL)
Sept. 30, 2009.

Widow and sons of U.S. citizen allegedly tortured and killed in the West Bank of Israel brought action against three individuals, the Palestinian Authority (PA), and the Palestine Liberation Organization (PLO), alleging violations of the Torture Victim Protection Act (TVPA), the Alien Tort Statute (ATS), and federal common law. PA and PLO moved to dismiss.

The District Court, Richard J. Leon, J., held that:

(1) PA and PLO were not "individuals" within meaning of the TVPA, and

(2) allegation that PA and PLO inflicted torture on plaintiffs' decedent failed to state a claim for violation of federal common law.

Motion granted.

***21** Robert Joseph Tolchin, Brooklyn, NY, for Plaintiffs.

Laura G. Ferguson, Mark J. Rochon, Richard A. Hibey, Miller & Chevalier, Chartered, Washington, DC, for Defendants.

MEMORANDUM OPINION

RICHARD J. LEON, District Judge.

Plaintiffs in this case are the widow and sons of Azzam Rahim, a U.S. citizen, who was tortured and killed in the West Bank of Israel in September 1995. The defendants are three individuals (i.e. Jibril Rajoub, Amin Al-Hindi, and Tawfik Tirawi), the Palestinian Authority, and the Palestine Liberation Organization. Plaintiffs allege that the defendants violated the Torture Victim Protection Act ("TVPA"), the Alien Tort Statute, and federal common law. Defendants Palestinian Authority and the Palestine Liberation Organization ("defendants") have filed a Motion to Dismiss on the

grounds that plaintiffs' complaint failed to state a claim on which relief may be granted under the TVPA, the Alien Tort Statute,[1] or federal common ***22** law.[2] For the following reasons, the Court GRANTS the defendants' motion.

ANALYSIS

Plaintiffs first allege defendants violated the TVPA, which creates a cause of action for torts committed by "individual[s]" "in violation of the law of nations or a treaty of the United States." 28 U.S.C. §§ 1350 & 1350 note § 2(a)(1)-(2). Plaintiffs argue that the Court should broadly interpret "individual" to include organizations, such as the Palestinian Authority and the Palestine Liberation Organization, similar to the way courts often interpret "person." (*See* Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") [Dkt. # 14] at 5-7.)

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[1] Plaintiffs initially sought relief under the Alien Tort Statute. 28 U.S.C. § 1350. However, this statute grants district courts jurisdiction over civil actions filed only by "alien[s]." 28 U.S.C. § 1350. And, as plaintiffs admit, the deceased and all of the plaintiffs are citizens of the United States. (*See* Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") [Dkt. # 14] at 11.) In accordance with plaintiffs' concession, the Court also dismisses the Alien Tort Statute's claims.

[2] The individual defendants have not joined the organizational defendants in filing the motion to dismiss, (Mem. of Law in Support of the Palestinian Authority's and the Palestine Liberation Organization's Mot. to Dismiss ("Mot. to Dismiss") [Dkt. # 11] at 4 n. 1), and the Court does not address plaintiffs' claims against the individual defendants.

Defendants, not surprisingly, argue that "individual" is limited to human beings. (Mem. of Law in Support of the Palestinian Authority's and the Palestine Liberation Organization's Mot. to Dismiss ("Mot. to Dismiss") [Dkt. # 11] at 9-13.) I agree.

A plain reading of the statute and applicable case law in this jurisdiction, leads this Court to overwhelmingly conclude that the term "individual" includes only human beings, and does not encompass the Palestinian Authority and the Palestine Liberation Organization. *See Clinton v. New York,* 524 U.S. 417, 428 n. 13, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (noting that "person" ordinarily has a broader meaning than "individual"); *Fisher v. Great Socialist People's Libyan Arab Jamahiriya,* 541 F.Supp.2d 46, 50 n. 2 (D.D.C. 2008) ("[T]he TVPA only creates a cause of action against individuals, not states."); *Holland v. Islamic Republic of Iran,* 496 F.Supp.2d 1, 18 (D.D.C. 2005) (holding, based on the plain language of the statute and the legislative history, that the TVPA applies only to individuals, not foreign states); *Doe v. Exxon Mobil Corp.,* 393 F.Supp.2d 20, 28 (D.D.C. 2005) ("On balance, the plain reading of the statute strongly suggests that it only covers human beings, and not corporations."); *Collett v. Socialist Peoples' Libyan Arab Jamahiriya,* 362 F.Supp.2d 230, 242 (D.D.C. 2005) (holding the TVPA applies only to individuals, not Libya or a Libyan intelligence agency); *Dammarell v. Islamic Republic of Iran,* No. 01-2224, 2005 WL 756090, *31 (D.D.C. Mar. 29, 2005); *see also In re Terrorist Attacks on September 11,*

2001, 392 F.Supp.2d 539, 565 (S.D.N.Y. 2005) ("The TVPA claims against [certain named defendants] are dismissed because these Defendants are not individuals."); *but see Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 416 F.3d 1242, 1265 (11th Cir. 2005) (allowing a TVPA claims to be raised against corporations). Of course, this conclusion is also consistent with Congress's decision to use the term "individual" in the TVPA to describe both those who commit torture and extrajudicial killings and those who are victims. *See* 28 U.S.C. § 1350 note §§ 2(a)(1)-(2).

Moreover, the TVPA's legislative history further supports the conclusion that the Palestinian Authority and the Palestine Liberation Organization are not proper defendants under the TVPA. *See* H.R.Rep. No. 102-367 (1991), 1992 U.S.Code Cong. & Admin.News 1991, pp. 84, 87 ("Only ***23** 'individuals,' not foreign states, can be sued under the bill."); S.Rep. No. 102-249, 1, 6 (1991) ("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."). Simply stated, Congress's plain intent as reflected in the text (which specifies only individuals) and the legislative history (which could not be clearer) "was to confine liability for acts of torture and extrajudicial killing to private individuals." *Dammarell,* No. 01-2224, 2005 WL 756090 at *31. Therefore, this Court finds plaintiffs cannot bring a TVPA claim against the Palestinian Authority or the Palestine Liberation

Organization, and the Court dismisses these claims.

Next, plaintiffs claim to have a cause of action under federal common law against these two organizations. I disagree. Plaintiffs' claim that "torture carried out by a public official or one acting in an official capacity" *is* a violation of federal common law, as reflected in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and the United Nations' Declaration on the Protection of All Persons from Being Subjected to Torture, (Pl.'s Opp'n at 14), is, at best, strained. Unfortunately, plaintiffs' additional argument that the Supreme Court held this in *Sosa v. Alvarez-Machain,* 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004), is similarly exaggerated. (Pl.'s Opp'n at 12 (arguing that the Supreme Court in *Sosa* "recognized torture as being on the short list of actionable torts under international law and so under federal common law").)

The question in *Sosa* was which causes of action would be permissible under the Alien Tort Statute, 28 U.S.C. § 1350. Plaintiffs' claim that the general federal question jurisdiction statute, 28 U.S.C. § 1331, provides this Court with jurisdiction to fashion a cause of action for them out of federal common law is not supported by the *Sosa* decision. Indeed, the Supreme Court in *Sosa* explicitly limited its discussion to the Alien Tort Statute and specifically excluded § 1331:

> Our position does not . . . imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop federal common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350). . . . Section 1350 was enacted on the congressional understanding that some courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption. Further, our holding today is consistent with the division of responsibilities between federal and state courts after *Erie* [*v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)] as a more expansive common law power related to 28 U.S.C. § 1331 might not be.

Sosa, 542 U.S. at 731 n. 19, 124 S.Ct. 2739 (internal citation omitted).

Our Circuit Court has similarly noted that describing actions that are brought under the Foreign Sovereign Immunities Act (and presumably, the Alien Tort Statute) as "federal common law" is a "misnomer." *Bettis v. Islamic Republic of Iran,* 315 F.3d 325, 333 (D.C.Cir. 2003). Those actions are based on *statutory* rights. *Id.* "Without the statute, the claims could not arise," and absent a statute creating a cause of action, courts are not "authorize[d] . . . to fashion a complete body of federal law." *Id.* (internal quotation omitted).

The Supreme Court itself has also "repeatedly said that a decision to create a ***24** private right of action is one better left to legislative judgment in the great majority of cases." *Sosa,* 542 U.S. at 727, 124 S.Ct. 2739. Surely, caution in developing a cause of action under federal common law is appropriate in situations such as this where Congress has already established a cause of action and explicitly defined its scope in the TVPA. "The fact that Congress has provided at least one statute that provides such a cause of action (the Torture Victim Protection Act) cautions against the construction of another by judicial fiat." *The Herero People's Reparations Corp. v. Deutsche Bank AG,* No. 01-1868, 19 (D.D.C. July 31, 2003).

In short, plaintiffs ask this Court to effectively amend the TVPA's requirements by treating their claim as one arising under federal common law. To do so would be inconsistent with the controlling judicial precedent and Congress's legislative directive to date. Plaintiffs would thus be better off seeking such relief from Congress than the Federal Courts. Accordingly, for all of the aforementioned reasons, the Court must and will GRANT the defendants' Motion to Dismiss. An Order consistent with this Memorandum Opinion is attached.

D.D.C., 2009.
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