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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

According to respondents and the United States, Congress decided in the Torture Victim Protection Act (TVPA) to enact the first federal statute in the history of American law that categorically exempts organizations from liability for the torts of their agents. Not only that, but Congress did so under the most unlikely of circumstances – in a statute that addresses the most reprehensible conduct; with natural persons who are particularly difficult to hale into court and who, in any event, are typically judgment-proof; and where the need for organizational accountability is at its apex. And as if that were not baffling enough, Congress (assuming the Alien Tort Statute (ATS) is read the way the United States and the vast majority of federal courts of appeals interpret it) also denied American citizens the very right to sue organizations for torture and extrajudicial killing that aliens maintain.

The United States does not offer any reason why Congress could have intended these extraordinary anomalies. Respondents venture to explain them on two grounds, but neither is plausible. First, respondents note that the TVPA has extraterritorial reach. But numerous other federal tort-like statutes apply to conduct outside our borders – including conduct much like that at issue here – and those statutes always apply to organizations. Second, respondents contend that the TVPA is designed just to prevent torturers or killers from seeking safe haven in this country. But while that may be one ancillary benefit of the Act, the TVPA is not an immigration law. *It is a tort statute*. And the purpose of a tort statute is to provide meaningful

redress, deterrence, and accountability. The only way the TVPA can fulfill those goals is to cover organizations.

That leaves respondents and the United States with their argument that the TVPA's use of the word "individual" gives this Court no choice but to construe the statute in the unprecedented manner they advocate. Not so. Although the word "individual" often refers in ordinary usage to a human being, the term – particularly when used in the context of liability for violations of international law – can encompass entities. The structure of the TVPA allows for such a construction. And the legislative history squarely supports it. The House and Senate Committee Reports explain that Congress "use[d] the term 'individual' to make crystal clear that foreign states or their entities cannot be sued," S. Rep. No. 102-249, at 7 (1991); *accord* H.R. Rep. No. 102-367, at 4 (1991), not to exempt non-sovereign organizations from liability. The alternative history that respondents offer – in which Congress rejected organizational liability three years earlier by substituting "individual" for "person" at a markup hearing – is mere wishful thinking based on a single comment that few legislators ever knew about and that none ever credited. Indeed, the very committee that held the hearing at issue disseminated a report six days later treating the amendment as stylistic and using the words "person" and "individual" interchangeably. Under these circumstances, only the 1991 Committee Reports constitute reliable evidence of congressional intent, and those reports – which, unlike respondents' theory, are consistent with customary usage in the context of international norms – are decisive.

ARGUMENT

I. The TVPA's Word "Individual" Does Not Displace The Presumption Of Organizational Liability.

Respondents do not dispute that the meaning of the word "individual" depends on "context." Resp. Br. 23 (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)). Nor do respondents dispute that for over a century, Congress and courts have presumed that non-sovereign organizations "should be treated as natural persons for virtually all purposes of constitutional and statutory analysis," *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978), particularly with respect to tort statutes, *see* Petr. Br. 12-17. Respondents nonetheless attempt to push aside that presumption and argue that the TVPA's use of the word "individual" so unequivocally excludes organizational liability that this Court "must" limit the statute's reach to human beings. Resp. Br. 15. Respondents' argument is unavailing.

A. Respondents suggest that Congress, in the TVPA, might have wanted to take the unprecedented step of exempting organizations from liability because (1) the Act applies extraterritorially, Resp. Br. 31-33; and (2) *Bivens* actions preclude liability for private entities, Resp. Br. 36-37, 47. Neither of these facts, however, undercuts the traditional reasons to expect Congress would have wanted organizational liability to apply in this context.

1. The presumption against extraterritoriality has no relevance here. Under that presumption, this Court assumes, absent evidence to the contrary, that federal statutes do not govern activity beyond U.S. borders. *See, e.g.*, *Microsoft Corp. v. AT&T Corp.*,

550 U.S. 437, 454-55 (2007). Thus, even when a statute applies to some degree extraterritorially, this Court does not apply it to conduct beyond the reach of its terms. *See id.* at 455-56. Here, however, there is no dispute that the TVPA not only applies extraterritorially but also governs the precise conduct at issue: torture and extrajudicial killing.

Contrary to respondents' suggestion, the presumption against extraterritoriality does not extend any further – that is, beyond regulation of *conduct* and into the realm of *liability*. There are numerous federal tort-like statutes that apply extraterritorially, and they *all* impose organizational liability. Among those statutes is the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333. *See* Petr. Br. 31-32 (citing cases applying ATA to organizations including the PLO). Other such statutes abound. *See, e.g.*, Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (Sherman Act); *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400 (1990) (RICO, 18 U.S.C. §§ 1961 *et seq.*, and Robinson-Patman Act, 15 U.S.C. § 15). When Congress has enacted an extraterritorial statute governing the precise conduct at issue, organizational liability traditionally follows.

Respondents' plea to scratch organizational liability from the TVPA in order to avoid "embroil[ing] the courts in international issues," Resp. Br. 33, rings particularly hollow in the context of the TVPA. The Act is expressly designed to comport with "international agreements" prohibiting torture and extrajudicial killing, TVPA Preamble, Pub. L. No. 102-256, 106 Stat. 73 (1992), and it

defines those concepts according to internationally accepted norms, Petr. Br. 4. There is no risk, therefore, of any "clash[] between our laws and those of other nations." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

2. The rules governing *Bivens* actions are equally irrelevant here. A *Bivens* action is "an implied private action" that is "not expressly authorized by statute." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). As such, *Bivens* implicates the judiciary's ability to create a cause of action "where Congress has not provided one." *Malesko*, 534 U.S. at 66, 67 n.3. That concern, however, holds no sway under the TVPA, for Congress has expressly authorized the cause of action. In this situation, the presumption in *Monell* with respect to organizational liability controls: "[S]ince municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by [42 U.S.C. § 1983], and, further, since Congress intended § [1983] to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § [1983]." 436 U.S. at 685-86; *see also* S. Rep. No. 102-249, at 8 (directing courts construing the TVPA to consult Section 1983 case law "to give [the TVPA] the fullest coverage possible").

B. Respondents argue that (1) the ordinary meaning of "individual" and (2) usage of the term in statutes and opinions compels this Court to construe the TVPA as precluding organizational liability. Resp. Br. 15-20. Neither contention is correct.

1. Petitioners do not dispute that an ordinary meaning "individual" is human being. Rather, petitioners contend that another accepted use of the

word (especially when used alone and not directly in contrast to some kind of entity) encompasses organizations. Petr. Br. 17-18. That being so, this Court may construe the TVPA to follow that "secondary but recognized definition." *See Johnson v. United States*, 529 U.S. 694, 707 (2000); Petr. Br. 24.

Indeed – as petitioners previously emphasized, *see* Petr. Br. 20-21, 46-48, and as respondents do not deny – that is exactly how Judge Edwards repeatedly used the word in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), which provided the template for the TVPA. Citing and drawing on decades of international-law discourse, Judge Edwards used the term "individuals" to mean *any* non-sovereign actor – either "persons or groups," including "political entities." 726 F.2d at 792. He thus described the PLO's liability as raising a question concerning "individual liability," and concluded that "individuals acting under color of state law" should be subject to suit for torture or extrajudicial killing. *Id.* at 792-95 (concurring opinion); *see also* Lyal S. Sunga, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 112-13 (1992) (discussing *Tel-Oren* as a case dealing with "individual" liability). Given that Congress legislated against that backdrop of usage, this conception of "individual" should control here, even if it deviates from another common meaning of the term. *See, e.g.*, *Skilling v. United States*, 130 S. Ct. 2896, 2928-29 (2010); *Slack v. McDaniel*, 529 U.S. 473, 486 (2000).

This specialized usage in the context of international law also refutes respondents' claim that "no definition [of 'individual'] excludes states but does

not likewise exclude other entities." Resp. Br. 21; *accord* U.S. Br. 11. International law reference books define the word in precisely that way – as a term of art that distinguishes persons and entities from states, not human beings from entities. *See* John P. Grant & J. Craig Barker, ENCYCLOPÆDIC DICTIONARY OF INTERNATIONAL LAW 277-78 (3d ed. 2009) ("While international law was traditionally, and largely still is, the law governing the relations between States and created by States, it has increasingly been accepted that individuals have some status under international law."); 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 957-58 (1995) (The "main participants [in international law] are States," but "rules of international law [may] extend to individuals."). Accordingly, international law texts have long used the word "individual" – just as it appears in the TVPA – to address whether non-state entities have duties or rights under international law. *See, e.g.*, Carl Norgaard, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW (1962); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

Philip Jessup – a leading professor of international law, U.S. delegate to the United Nations, and later a judge on the International Court of Justice, on whose work this Court previously has relied, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) – put it most succinctly in 1952:

> In using the term "individual" in connection with the hypothesis [that non-states should be subject to certain international law norms], it should be understood that various

> types of groups or associations of individuals are included. . . . So long as national law creates these juristic persons, international law must deal with them as individuals.

Philip C. Jessup, A MODERN LAW OF NATIONS 19-20 (1952). That definition is still used today. *See, e.g.*, Mark Weston Janis, INTERNATIONAL LAW 247 (5th ed. 2008) ("There is little doubt that international law may sometimes apply to and its processes be available to individuals, that is to say, to private persons, in corporate as well as human form."). That accumulated usage should govern this case.

2. Even if uses of the term "individual" in statutes and judicial opinions outside of the context of international norms were also instructive here, they would not aid respondents.

The hedge in respondents' assertion that the word "individual" in federal statutes "*almost* invariably" means human being, Resp. Br. 1 (emphasis added), proves petitioners' point: the term is not always so restrictive. A tax statute, 26 U.S.C. § 542(a)(2), for example, provides that "an organization . . . shall be considered an individual." And this Court held in *Clinton v. City of New York*, 524 U.S. 417, 428-29 (1998), that Congress intended the word "individual" in the Line Item Veto Act – enacted not long after the TVPA – to encompass organizations.

Respondents' claim that statutes in all fifty states define "individual" in at least some context to mean natural person is no more persuasive. The TVPA lacks such a definition. And in the absence of definitional provisions, state courts repeatedly have construed the word "individual" to cover

organizations, corporations, and other entities. *See, e.g.*, *Morgan v. Galilean Health Enters., Inc.*, 977 P.2d 357, 362 n.16 (Okla. 1998) (in statute referring to who may be sued, "[t]he word 'individual' includes corporations"); *In re M.K.M.R.*, 199 P.3d 1038, 1042 (Wash. Ct. App. 2009) (relying on the Webster's definition of "individual" cited at Petr. Br. 18 to hold that "plain and ordinary meaning" of "individual" "encompass[es] a public entity"); *Cruze v. Nat'l Psychiatric Servs., Inc.*, 129 Cal. Rptr. 2d 65, 70 (Ct. App. 2003) ("That the Legislature in some other statutory contexts found it necessary to limit the term 'individuals' to 'natural persons' demonstrates that the term has a meaning broader than that," which includes non-natural entities.).

Still less compelling is respondents' observation that this Court sometimes uses the word "individual" in opinions on other subjects to distinguish a human being from an entity. Resp. Br. 16. The term is not always used that way, and that is not how the term is used in international law parlance. In *Tel-Oren*, Judge Edwards used the term in that context to refer to non-sovereign "persons or groups," including "political entities." 726 F.2d at 792 (concurring opinion). That is the usage that Congress consulted in drafting the TVPA and that should control here.

II. The Structure Of The TVPA And Its Relationship To Other Provisions Reinforce That It Covers Organizations.

Respondents contend that the structure of the TVPA, as well as its relationship to other domestic and international laws, precludes organizations from being held liable for the acts of their agents. Respondents are incorrect.

A. Neither the TVPA's repeated use of the term "individual" nor the Act's use of the word "person" dictates that the statute excludes organizations from liability.

1. Respondents implicitly concede – as they must – that statutes sometimes use the same word multiple times to mean different things. Resp. Br. 24. Indeed, this Court in *Clinton* held that the word "individual" encompassed organizations even though the Line Item Veto Act used the same term in another section to refer to natural persons. *See* 524 U.S. at 454 (Scalia, J., concurring). Respondents nevertheless claim that "[t]he inference of consistency" is stronger here because "Congress used 'individual' four other times in the same sentence to refer to natural persons." Resp. Br. 24.

Respondents' own position concerning an earlier version of the House bill that became the TVPA belies their argument. According to respondents, when the bill used the word "person" in all five places that the TVPA uses "individual," the bill applied to organizations as defendants, even though the uses of the word "person" to address victims referred only to natural persons. *See* Resp. Br. 28-29. If the meaning of "person" can vary according to usage – not only in the context of the TVPA but also in other statutes, *see* Petr. Br. 27-28 – then so can the meaning of "individual." *See also Barber v. Thomas*, 130 S. Ct. 2499, 2506-07 (2010) (rejecting argument that a phrase used three times in the same sentence meant the same thing each time).

2. Respondents also suggest that the TVPA draws an intentional contrast between "individual" and "person" because it uses the latter term to

describe a potential plaintiff in a wrongful death action and, according to respondents, such a plaintiff could be (a) an estate or (b) an employer. Resp. Br. 26-27. Respondents are mistaken on both counts.

a. This Court held over a century ago that "the estate of a decedent is neither a person nor a corporation. It can neither sue nor be sued." *Hess v. Reynolds*, 113 U.S. 73, 76 (1885). Instead, only "the executor, if there be a will, or the administrator, if one has been appointed," may technically appear as a party in a case involving rights or property of an estate. *Id.* Respondents ignore *Hess*, noting instead that the text of the ATA allows an injured person "*or his or her estate*, survivors, or heirs" to bring suit. Resp. Br. 27 (quoting 18 U.S.C. § 2333(a)) (emphasis added by respondents). But that statutory reference is merely shorthand for the right of an executor or administrator of an estate – people who are not otherwise mentioned in the statute – to bring an action. Thus, even where an ATA case caption appears to name an estate as a plaintiff, a careful look at the opinion itself or the complaint shows that the administrator or executor is the actual party. *See, e.g.*, *Estate of Klieman v. Palestinian Auth.*, 272 F.R.D. 253 (D.D.C. 2011); *Estates of Ungar v. Palestinian Auth.*, 315 F. Supp. 2d 164 (D.R.I. 2004).

Respondents' argument that an estate is a legal entity that can sue and be sued not only contravenes this Court's precedent as a general matter; it makes no sense under the TVPA. Under current law, a TVPA action against a natural person who dies during its pendency continues against the person's estate. *See In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1461-62 (D. Haw. 1995);

Hilao v. Estate of Marcos, 103 F.3d 767, 776-78 (9th Cir. 1996). Under respondents' construction of the TVPA, however, such a death would render the case moot because the estate would be an entity exempt from suit. Surely Congress did not intend such an absurd result.

b. Nor is it plausible that Congress used the word "person" in the TVPA to allow an employer to bring an action. In order for an employer to bring a wrongful death action as an assignee, the tort must have occurred "in a U.S. harbor or in a place of employment *subject to state or federal workers' compensation laws*." U.S. Br. 18 (emphasis added). At the same time, the TVPA requires the conduct at issue to have occurred *under color of law of a foreign nation*. The suggestion that Congress used the word "person" to account for the possibility that these two requirements might coincide is so farfetched that it cannot be taken seriously.

B. The TVPA's relationship to other laws supports its application to organizations.

1. Respondents do not advance any reason why Congress would have wanted to hold organizations liable for torture or extrajudicial killing subject to Section 1983, the ATA, or 28 U.S.C. § 1605A, but *not* equivalent acts covered by the TVPA. Respondents nonetheless assert that the TVPA should be construed differently from those laws because those statutes contain language that more clearly contemplates organizational liability. Resp. Br. 43-44. But this argument stands the *in pari materia* canon on its head. The canon provides that words in statutes regulating the same thing should be construed harmoniously "[w]here the text permits,"

not where the text is identical. *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2447 (2010); *see also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 739 (1989) (Scalia, J., concurring) (same). Otherwise, the canon would have little use. The fact that like-minded statues besides the TVPA clearly apply to organizations indicates that the TVPA should, if possible, be construed the same way – not differently.

2. Holding that the ATS allows organizational liability would make the need to construe the TVPA in like fashion even more compelling. The United States and the vast majority of the federal courts of appeals recognize that the ATS allows organizational liability. Assuming that this Court ratifies this understanding, it would be preposterous to interpret the TVPA to give them a narrower and less effective remedy for suffering torture or extrajudicial killing than aliens have available.

To their credit, respondents do not argue to the contrary. Instead, respondents argue that the TVPA displaces the ATS, precluding organizational liability under either statute. Resp. Br. 46. But displacement turns on "congressional intent," *Fitzgerald v. Barnstable Sch. Comm'n*, 555 U.S. 246, 254-58 (2009), and Congress made it perfectly clear that it intended the TVPA to "*enhance* the remedy available under [the ATS]," not to displace it, H.R. Rep. No. 102-367, at 4 (emphasis added); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (TVPA "supplement[s]" ATS); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1250-52 (11th Cir. 2005) (rejecting displacement argument); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) (same).

3. The TVPA's relationship to international law reinforces its coverage of organizations. While respondents argue that neither the Convention Against Torture nor other treaties require states to provide remedies against non-sovereign organizations that commit torture or extrajudicial killing under color of law, the U.N. Special Rapporteur on Torture disputes those claims here in his amicus brief. Even assuming the question whether international law *requires* the TVPA to apply to organizations is debatable, there can be no debate that the TVPA is designed to carry out the general "intent of the Convention Against Torture," S. Rep. No. 102-249, at 3, and "other international agreements pertaining to the protection of human rights," TVPA Preamble, Pub. L. No. 102-256, 106 Stat. 73 (1992). And as the United States emphasizes in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, nothing in those treaties "contemplates[] a distinction between natural and juridical actors." U.S. Br. in *Kiobel* at 20-21 (citing CAT and Common Article 3 of the Geneva Conventions). Common Article 3, in fact, applies to non-sovereign, but armed groups such as the PLO at the time of the events at issue here. Consequently, the TVPA should do the same.

III. The TVPA's Purposes Make Clear That Congress Intended It To Cover Organizations.

As petitioners explained in their opening brief, the TVPA cannot hope to deliver meaningful redress, deterrence, and accountability – as federal tort statutes are designed to do – unless it reaches organizations. Petr. Br. 37-42. Respondents attempt

to counter this reality in three ways. First, they argue that the TVPA is really meant only to "prevent[] human rights violators from seeking safe haven in the United States." Resp. Br. 2, 37, 40. Second, respondents contend that even if the TVPA is designed to deliver redress, deterrence, and accountability, Congress did not wish to achieve these goals at ordinary levels. Resp. Br. 37. Third, respondents contend that even if the TVPA is designed to deliver redress, deterrence, and accountability at ordinary levels, allowing TVPA plaintiffs to sue natural persons alone meets those objectives. Resp. Br. 38. None of these arguments withstands scrutiny.

A. The TVPA is designed to do far more than deny safe haven to torturers and killers. Our immigration laws already do that. The Immigration and Nationality Act precludes anyone who has "committed, ordered, incited, assisted, or otherwise participated in the commission of" torture or extrajudicial killing from entering the United States. 8 U.S.C. § 1182(a)(3)(E)(iii); *see also id.* § 1227(a)(4)(D) (requiring removal for same).[1] Furthermore, a federal criminal statute permits prosecution of anyone "present in the United States, irrespective of the nationality of the victim or offender," who committed or conspired to commit torture "outside of the United States." 18 U.S.C § 2340A.

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[1] These particular immigration provisions postdate the enactment of the TVPA, but prior law likewise required such criminals to be excluded and deported. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) & (h) (1990).

By contrast, the focus of the TVPA – as its title indicates – is on *victims* of torture and extrajudicial killing. The TVPA seeks to aid such people by means of "a civil action for recovery of damages." TVPA Preamble, Pub. L. No. 102-256, 106 Stat. 73 (1992); *see also* 137 Cong. Rec. H11244 (Nov. 25, 1991) (statement of Rep. Mazzoli) ("[A] criminal prosecution does not make a victim whole. The Torture Victim Protection Act complements what we did in the crime bill by allowing victims to obtain money damages from torturers in a civil cause of action."). In other words, the TVPA is unquestionably a tort statute like any other, aimed at redress, as well as deterrence and accountability.

B. The TVPA's goals of redress, deterrence, and accountability should be fully honored. Respondents assert that Congress "struck a balance" between furthering those goals and "'the fear of imposing additional burdens on U.S. courts.'" Resp. Br. 37 (quoting H.R. Rep. No. 102-367, at 4); *id.* at 38 (same). But respondents wrest this quotation out of context. The full sentence they quote from the House Report reads: "Striking a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. courts, the bill recognizes as a defense the existence of adequate remedies in the country where the violation allegedly occurred." H.R. Rep. No. 102-367, at 4. This passage obviously deals with the TVPA's exhaustion requirement. It has nothing to do with classes of defendants, nor does it signal the slightest intent to compromise the TVPA's goals of redress,

deterrence, and accountability as compared to other tort statues. Nor does anything else in the legislative history.[2]

C. This leaves respondents' argument that covering natural persons adequately serves the Act's purposes because plaintiffs "have successfully brought [five] TVPA actions" against foreign officials who authorized torture or extrajudicial killings. Resp. Br. 37-38. But petitioners' understanding is that only two of these "successful" plaintiffs have been able to collect on their judgments – in one instance, because the defendant happened to win the Florida lottery, *see Jean v. Dorelien*, 431 F.3d 776, 778 (11th Cir. 2005). These cases, therefore, actually underscore that the TVPA cannot perform its compensatory function – much less achieve its other goals of deterrence and accountability – without applying to organizations responsible for torture and killings.

The facts alleged in this further illustrate that actuality. According to the complaint, agents of respondents tortured and killed an American citizen

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[2] Like respondents, the United States asserts that the TVPA embodies a "policy balance." U.S. Br. 32. But the United States does not advance a single policy reason for limiting liability under the TVPA to natural persons. To the contrary, the Government says with respect to the ATS that "there is . . . *no good reason* to conclude that the First Congress would have wanted to allow [a] suit to proceed only against the potentially judgment-proof individual actor, and to bar recovery against the company on whose behalf he was acting." U.S. Br. in *Kiobel* at 24 (emphasis added). The same reasoning obviously applies here as well.

pursuant to an organizational policy of perpetrating such acts. C.A. App. A29 ¶ 57. Petitioners, however, were unable to serve process upon the natural persons who committed acts, Petr. Br. 6 n.3, much less obtain any judgment against them. Their only chance of enforcing the TVPA rests on their ability to sue respondents. *Id.* at 40-42.

IV. The History Of The TVPA Shows That Congress Intended To Exempt Foreign States, Not Non-Sovereign Organizations, From Liability.

This Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill." *Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) (quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984)). And the Committee Reports on the TVPA could hardly be more instructive here. They explain – consistent with international-law usage – that "[t]he legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued." S. Rep. No. 102-249, at 7; *accord* H.R. Rep. No. 102-367, at 4. Respondents nevertheless contend, for two reasons, that this language is not as devastating to their position as it appears. First, respondents attempt to recast the Reports' explanation of *why* Congress used the word "individual" as a mere observation concerning one aspect of the term's effect. Resp. Br. 29-30. Second, respondents argue that the Reports are trumped by a single legislator's suggestion three years earlier, during a markup hearing in a subcommittee of the House Committee on Foreign Affairs, that the word

"individual" excludes corporations. Resp. Br. 28-29. Neither argument withstands scrutiny.

A. Respondents' attempt to recast the meaning of the Committee Reports fails to come to grips with what the Reports say. The Reports do not merely observe that the word "individual" happens to exclude foreign states from the TVPA's reach. Rather, they explain Congress's *reason* for using the term "individual": "to make crystal clear that foreign states or their entities cannot be sued." S. Rep. No. 102-249, at 7; *accord* H.R. Rep. No. 102-367, at 4. That reasoning is perfectly sensible; as respondents themselves note, the word "person" only "ordinarily" excludes states. Resp. Br. 30 (quotation marks and citation omitted). By contrast, the word "individual," used in the context of liability for a violation of international law, is mutually exclusive with a state. *See supra* at 6-8.

B. Representative Leach's comment during the markup session three years earlier does not require any adjustment to this analysis of congressional intent.

1. The key question with respect to any legislative history is whether it sheds light on what legislators "understood" statutory text to mean "when they voted to enact it into law." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011). The mutually reinforcing 1991 Committee Reports on the TVPA, issued shortly before the House and Senate voted on the bill, unquestionably do so.

The relevance of earlier comments (including purported explanations for amendments) depends on whether other legislators were aware of, or relied upon, those comments. For instance, in *Edmonds v.*

Compagnie Generale Transatlantique, 443 U.S. 256 (1979), this Court rejected a purported understanding of a bill expressed at an earlier meeting because "subsequent legislative history d[id] not so much as hint" at such an understanding, and there was no other evidence "that the Senators and Representatives who voted for the [bill] when [it] reached the floor knew" anything about what had transpired at the earlier meeting. *Id.* at 273-74 n.32.

So too with Representative Leach's comment. Only four other congresspersons are reflected on the record as having been in the room when his remark was uttered. *See 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. 85-88 (1988). Thus, other committee members, as well as anyone else in Congress who wanted to learn what the subcommittee had done at the hearing, would have consulted the report it issued six days afterwards.

That report is not only silent about any purported limitation on who could be sued under the bill, but it uses the terms "person" and "individual" interchangeably, repeatedly stating that the bill would "provid[e] a civil action for recovery from *persons* engaging in torture." H.R. Rep. No. 100-693, at 1 (1988) (emphasis added); *id.* at 2 ("Any person who" tortured or killed under color of law "would be liable."); *id.* at 3 ("New section 10(a) provides that persons" who commit torture or killing may be sued.); *id.* ("Any *person* who committed one of the specified offenses . . . may be liable. . . . The *individual* must be subject to . . . jurisdiction." (emphasis added)). Subsequent reports on the amended House bill

likewise used the words "person" and "individual" interchangeably. *See* H.R. Rep. No. 101-55, at 1 (1989) (TVPA would "provid[e] a civil action for recovery from *persons* engaging in torture") (emphasis added); *id.* at 4 (bill "authorizes the Federal courts to hear cases brought by or on behalf of a victim of any *individual* who, under color of law of any foreign nation, subjects any *person* to torture or extrajudicial killing"); H.R. Rep. No. 102-367, at 4 (same).

The 1990 hearing before a subcommittee of the Senate Judiciary Committee confirms that no one understood the House language to preclude organizational liability. At that hearing, the subcommittee considered the amended House bill, which used the word "individual," and the Senate bill, which used the word "person." *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. 2-7 (1990). If, as respondents contend, the House bill excluded organizational defendants from its reach, one would have expected someone to have exhibited some awareness of – not to mention offered some opinion on – that key difference from the Senate bill. Yet not one senator did, in 84 pages of single-spaced discussion and prepared submissions. Nor did the Government, which supplied detailed oral and written testimony from the Office of Legal Counsel and the State Department. *See id.* at 8-16, 18-29. To the contrary, the State Department's representative indicated that they understood the bills' reach to be synonymous, stating that "[w]e understand that *under either version of the act*, the prospective defendant must be found in

the United States or otherwise submit himself *or itself* to U.S. jurisdiction." *Id.* at 20 (oral testimony) (emphasis added); *accord id.* at 28-29 (prepared testimony). Nor did any of the other witnesses – all human rights experts who offered careful feedback about various words and phrases in the bills – suggest any difference in scope between the two bills. *Id.* at 35-60, 77-84.

In short, this is not a case – as respondents would like – of Congress discarding certain language in favor of a different rule. *See* Resp. Br. 29 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987)). Instead, when Congress voted, it believed "person" and "individual" had similar meanings, and it used the latter term simply because it more clearly excluded foreign states from liability.

2. Congress's favorable references to the claims the plaintiffs brought in *Tel-Oren* – as well to "organizations," "groups," and other entities as potential defendants – further evince Congress's assumption that the TVPA would cover non-sovereign organizations such as the PLO. Petr. Br. 46-49. Respondents offer two responses to these references, but neither has merit.

First, respondents assert that the "lead defendant" in *Tel-Oren* "was a foreign *state* – Libya." Resp. Br. 51. But Libya was merely the first defendant named in the case's caption. The PLO was the primary wrongdoer, and all agreed that Libya was immune from suit, so the judges' opinions were "limited to the allegations against the Palestine Liberation Organization." *Tel-Oren*, 726 F.2d at 775 n.1 (Edwards, J., concurring).

Second, respondents argue that Congress could not have intended the TVPA to allow lawsuits against organizations because the PLO and other groups that Congress mentioned do not act under color of law. Resp. Br. 51-52. Respondents again are mistaken. Although the TVPA's state action requirement is not at issue here, U.S. Br. 9 n.2, the policing and security-related actions taken by the PA and the PLO are under color of law due to the quasi-governmental status and activities of those entities. *See Kadic*, 70 F.3d at 245 (actions taken pursuant to purportedly "official authority" constitute state action, even if the regime is not recognized by United States).[3] Other non-sovereign entities akin to those the legislative history mentions likewise have been treated as state actors. *See, e.g.*, *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 315 (S.D.N.Y. 2001) (Robert Mugabe's political party); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1265, 1268 (N.D. Ala. 2003) (Colombian paramilitary unit).

In light of the heinous acts such groups sometimes commit, Congress had every reason to want to hold them accountable for the conduct of their agents. This Court should not construe the TVPA categorically to thwart that objective.

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[3] To be sure, Judge Edwards did not believe in *Tel-Oren* that the PLO had acted under color of law. 726 F.2d at 776 (concurring opinion). But the events at issue there occurred in 1978, long before the Oslo Accords between Israel and the PLO created the PA and gave these entities governing authority.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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