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

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AND USA*ENGAGE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are associations, some of whose member corporations have been named as defendants in

[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to *amicus* briefs.

cases involving the Torture Victim Protection Act ("TVPA"):

- The American Petroleum Institute ("API") is a national, non-profit trade association headquartered in Washington, D.C., which represents over 490 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, refining, marketing, transportation and distribution of petroleum products. API regularly represents its members' interests in matters before this Court.
- The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than three million businesses and trade and professional organizations of every size, sector and geographic region. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch and the courts, including this Court.
- The National Foreign Trade Council ("NFTC") is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies.
- The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of United States subsidiaries of multinational companies before all branches of government.

OFII's member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations throughout the country, as well as in many foreign countries, and are affiliates of companies transacting business throughout the world.

- The United States Council for International Business ("USCIB") is a business advocacy and policy development group representing 300 global companies, law firms, and business associations. USCIB advances the global interests of American business both at home and abroad. It is the U.S. affiliate of the International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD, and the International Organization of Employers.
- USA*Engage is a broad-based coalition representing organizations, companies and individuals from all regions, sectors and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state and local level.

Amici unequivocally condemn torture and extrajudicial killing in all forms.

Despite the abhorrence of these practices, the question before the Court is not a general one about their unacceptability but, rather, a very specific question of statutory construction. The TVPA authorizes a cause of action against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects another "individual" to an act of

torture or extrajudicial killing. 28 U.S.C. §1350 (statutory note).

In several cases, TVPA plaintiffs have argued that this phrase – individual … under actual or apparent authority, or color of law, of any foreign nation – encompasses private companies (for ease of reference, *amici* hereinafter refer to this theory as "the corporate liability theory"). Typically in these cases, foreign government officials such as security forces are alleged to have engaged directly in the prohibited conduct, and TVPA plaintiffs then attempt to impute that conduct to a private company. Although the case before this Court does not present such a fact pattern, the question on which this Court granted review is phrased broadly enough to implicate the corporate liability theory. *Amici* file this brief to address the possible intersection between the question presented and the corporate liability theory.

Virtually all federal appellate courts have rejected the corporate liability theory. *See, e.g., Aziz v. Alcolac, Inc.* 658 F.3d 388 (4th Cir. 2011); *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010). *See also Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 323-24 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part). On the basis of this holding, these courts have rejected TVPA claims against private companies. One federal court of appeals, the Eleventh Circuit, has reached a contrary conclusion. *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009). *Amici*'s sole interest in this case is to urge this Court to approve the specific rule announced in decisions like *Aziz* and *Bowoto* and to reject the view exemplified by the Eleventh Circuit's precedent.

That quite narrow interest differs from the interests of either party in this case. *Amici* do not ascribe to Petitioners' proposed interpretation of the TVPA. Petitioners urge this Court to adopt a view akin to that taken by the District Court in *Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345, 1358-59 (S.D. Fla. 2003), *aff'd in part, vacated in part and remanded*, 578 F.3d 1252 (11th Cir. 2009). *See* Pet. 10, 13. The District Court in *Sinaltrainal* embraced the corporate liability theory. *Amici*, several of whom also appeared in *Sinaltrainal* on appeal, believe that the District Court in that case was incorrect.

Amici's interests also are not aligned with those of Respondents. Courts and Congress have found that the Palestine Liberation Organization ("PLO") engaged in brutal acts of terrorism and torture. *See Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005) (affirming $116 million default judgment against PLO and Palestinian Authority for murder of American citizen living in Israel); Pub. L. 100-204, Title X, § 1002(a)(4), Dec. 22, 1987, 101 Stat. 1331, 1406-07 (Congressional findings that "the PLO and its constituents groups have taken credit for, and been implicated in, the murders of dozens of American citizens abroad"). *Amici* unequivocally condemn that conduct.

Furthermore, resolution of this case may be intertwined with Respondents' juridical status. The Palestinian Authority ("PA") is an administrative entity formed pursuant to the 1994 Oslo Accords and assumes certain responsibilities for the West Bank of the Jordan River and the Gaza Strip located along the Mediterranean Coast. *See Ungar*, 402 F.3d at 286-87 (discussing the Oslo Accords and the PA's

creation). While the PLO's juridical status is less clear, both it and the PA have repeatedly argued in other litigation that they constitute "foreign states" for various purposes, including immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §1603 *et seq.*, and the viability of various federal causes of action. *See, e.g., Gilmore v. The Palestinian Interim Self-Government Authority*, 422 F. Supp. 2d 96 (D.D.C. 2006); *Knox v. Palestine Liberation Organization*, 306 F. Supp. 2d 424 (S.D.N.Y. 2004).[2]

Before the D.C. Circuit, both Respondents pressed this argument as an alternative ground for affirmance of the district court opinion dismissing Petitioners' TVPA claims. *See* Brief of Appellees in *Mohamad v. Rajoub*, No. 09-7109 *et al.* (May 19, 2010) at 44. They relied on legislative history surrounding the TVPA's enactment to assert that the law was not intended to encompass causes of action against foreign states. *See* S. Rep. No. 102-249 at 7 (1991). While *amici*, as representatives of private companies, have no interest in Respondents' juridical status, they strenuously object to Respondents' characterization of the TVPA's legislative history insofar as Respondents are suggesting the term "individual" excludes foreign states but not private companies.

For these reasons, *amici* submit this brief in support of neither party.

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[2] Those arguments are complicated by the fact that, since the TVPA's enactment, Congress has authorized federal jurisdiction over and a cause of action against certain state sponsors of terrorism. See 28 U.S.C. §1605A; *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009) (discussing torture and terrorism exception).

SUMMARY OF ARGUMENT

The Torture Victim Protection Act does not extend liability to private companies. This conclusion flows from the plain language of the statute which limits the category of defendants to an "individual" acting "under actual or apparent authority, or color of law, of any foreign nation." Dictionary definitions of "individual," the Dictionary Act and this Court's precedents all support the conclusion that private companies fall outside the plain meaning of this term in the TVPA.

Moreover, all relevant tools of statutory interpretation point in the same direction. The legislative history surrounding the TVPA's passage illustrates with exceptional clarity that Congress amended early versions of the bill in order to ensure that corporations could not be liable. The statutory structure supports this view. The TVPA uses the term "individual" in other contexts, such as the description of the victim, where the term could not possibly be understood to mean private companies. Under well accepted canons of statutory construction, the term should be defined in a consistent manner across the statute. Finally, construing the statute not to cover private companies comports with its underlying purpose. That purpose was a narrow one – to give plaintiffs, including American citizens, a carefully crafted cause of action against individuals for certain acts of torture or extrajudicial killing.

Nor may private companies be liable under general principles of imputation. Such theories are incompatible with the TVPA's text, which limits the class of eligible defendants to individuals acting under a foreign nation's authority or color of law. Such theories also cannot be squared with other provisions

of the TVPA which limit liability to those who "subject" another individual to torture or extra-judicial killing. Other statutes embrace imputation principles explicitly, and Congress's failure to employ those statutory models in the TVPA counsels against their judicial adoption.

ARGUMENT

I. PRIVATE COMPANIES ARE NOT PROPER DEFENDANTS UNDER THE TORTURE VICTIM PROTECTION ACT.

This case concerns a straightforward matter of statutory interpretation – the meaning of the term "individual" in the Torture Victim Protection Act ("TVPA"), 28 U.S.C. §1350 (statutory note). Whatever its precise boundaries, this term as used in this statutory provision does not include private companies. That conclusion, accepted by virtually all federal appellate courts directly addressing the issue, flows from the TVPA's plain language, its legislative history, its statutory structure, and its animating purposes.

A. The plain meaning of the term "individual" in the TVPA does not encompass the corporate liability theory.

When approaching a question of statutory interpretation, this Court always begins with the plain meaning of the term at issue. *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011); *Johnson v. United States*, 130 S. Ct. 1265, 1267 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004). To discern that meaning, it routinely consults dictionary definitions in use at the time of the statute's enactment. *See, e.g.,*

AT&T, 131 S. Ct. at 1182. Such dictionaries consistently define the term "individual" to mean "a single human being" and, in some cases, expressly differentiate it from a corporation or partnership. Random House Dictionary of the English Language 974 (2d ed. 1987); Webster's Third New International Dictionary 1152, 1686 (1986); Webster's New Collegiate Dictionary 581 (8th ed. 1979); Black's Law Dictionary 773 (6th ed. 1990). These definitions do not encompass private companies.

The Dictionary Act, 1 U.S.C. §1, buttresses this interpretation of the term "individual." While the Dictionary Act does not define the term "individual," it does define the term "person." Absent contrary contextual indications, "person" presumptively includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as individuals*." (emphasis added). The inclusion of the term "individual" alongside several types of private business entities strongly hints that these business forms do not fall within the meaning of the term "individual." *Bailey v. United States*, 516 U.S. 137, 146 (1995) (statutory terms should be defined so as to give each term independent meaning).

Other provisions of federal law re-enforce the Dictionary Act's traditional distinction between the terms "individual" and "person." Congress routinely differentiates between corporations and individuals. *See, e.g.*, 11 U.S.C. § 101(9)(a)(i) (defining corporation to include an "association having a power or privilege that a private corporation, but not an individual or partnership, possesses"). Likewise, Congress routinely uses the term "person" when it wishes to employ a term capturing both individuals and private business entities. *See, e.g.*, 8 U.S.C. §1185(c) (defining "person"

as an "individual, partnership, association, company or other incorporated body of individuals, or corporation, or body politic"); 15 U.S.C. §69(a) (similar); 21 U.S.C. §149(a) (similar); 22 U.S.C. §1978(h)(1) (similar). Indeed, the Federal Rules of Civil Procedure, promulgated by this Court, use "individual" to denote a natural person in contrast to a private business entity like a corporation. *See* Fed. R. Civ. P. 4(e), 4(h).

This Court's precedents support this customary differentiation between the plain meaning of "person" (interpreted broadly to include private companies) and the plain meaning of "individual" (interpreted narrowly not to include such entities). *See Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125-34 (2003); *Monell v. Dep't. of Social Services*, 436 U.S. 658 (1978). For example, in *Clinton v. City of New York*, this Court, citing the Dictionary Act, stressed the traditional distinction between the two terms when used in the law:

> Although in ordinary usage both "individual" and "person" often refer to an individual human being, *see, e.g.*, Webster's Third New International Dictionary 1152, 1686 (1986) ("individual" defined as a "single human being"; "person" defined as "an individual human being"), "person" often has a broader meaning in the law, *see, e.g.*, 1 U.S.C. § 1 ("person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

524 U.S. 417, 428 n. 13 (1998). Consistent with this view, this Court later held in *Chandler* that municipal corporations constituted "persons" amenable to *qui tam* suits under the False Claims Act and, in

support of that holding, canvassed the long history in which the term "person" had been understood to encompass corporations. 538 U.S. at 125-27.

Of course, absent explicit definition by Congress, such interpretive understandings are not absolute. Accordingly, this Court has occasionally departed from this traditional understanding to avoid an absurd result or where, as the Dictionary Act instructs, context clearly indicates otherwise. For example, this Court has held that terms such as "person" or "personal" did not encompass corporations when that interpretation did not accord with the context in which the term appeared. *AT&T*, 131 S. Ct. at 1182; *Rowland v. California Men's Colony*, *Unit II Men's Advisory Council*, 506 U.S. 194, 201-06 (1993). Likewise, this Court in *Clinton* held that the term "individual" encompassed corporate entities in order to avoid an absurd result. *Clinton*, 524 U.S. at 428.

Some courts interpreting the TVPA have relied on this Court's decision in *Clinton* to support the corporate liability theory. *See, e.g., Sinaltrainal v. Coca Cola Co.*, 256 F.Supp.2d 1345, 1358 (S.D. Fla. 2003), *aff'd in part, vacated in part and remanded*, 578 F.3d 1252 (11th Cir. 2009). That view misapprehends *Clinton*. In *Clinton*, this Court considered the expedited review provisions of the Line Item Veto Act which authorized "any individual adversely affected" to challenge the Act's constitutionality. Concluding that the term "individual" included corporations, the Court explained there was "no plausible reason why Congress would have intended to provide for such special treatment of actions filed by natural persons and to have precluded entirely jurisdiction over comparable cases brought by corporate persons." 524 U.S. at 429. *Accord United States v. Middleton*, 231

F.3d 1207, 1210 (9th Cir. 2000) (holding that federal statute criminalizing the hacking of a computer system "of one or more individuals" covered hacking into a corporate computer). Yet *Clinton* did not announce a sweeping redefinition of the term "individual." The Court carefully confined its holding to the particulars of that case, noting that Congress did not intend for the broad definition of "individual" in the Line Item Veto Act's expedited review provisions to "dictate in other contexts." *Clinton*, 524 U.S. at 429 n. 14.

Here, nothing in the TVPA indicates the need to depart from the traditional presumption described in *Clinton* and routinely applied by this Court. Reading the term "individual" in the TVPA not to include private companies does not yield an absurd result. Nor will it "render nugatory the benefits that [the TVPA] still provides to individuals." *Rowland*, 506 U.S. at 211. Victims of torture and extrajudicial killing still can sue the individuals who actually engaged in those horrific acts. While personal jurisdiction doctrines may impede some suits, experience under the TVPA demonstrates that such hurdles, which Congress anticipated, have not proven insurmountable. *See, e.g., Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (*per curiam*); *Lizarbe v. Rondon*, 642 F. Supp. 2d. 473 (D. Md. 2009); *Abiola v. Abubakar*, 435 F. Supp. 2d 830 (N.D. Ill. 2006); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005). *See also* S. Rep. No. 102-249 at 7 (1991) ("First and foremost, only defendants over which a court in the United States has personal jurisdiction may be sued. In order for a Federal court to obtain personal jurisdiction over a defendant, the individual must have 'minimum contacts' with the forum state,

for example through residency here or current travel. Thus, this legislation will not turn U.S. courts into tribunals for torts having no connection with the United States whatsoever.") (footnote omitted) Consequently, there is no need to look beyond the plain meaning of the term "individual" to conclude that the corporate liability theory is incompatible with the TVPA. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 239-41 (1989).

B. The legislative history, statutory structure and underlying purpose of the TVPA all support rejection of the corporate liability theory.

Even if the plain meaning of "individual" does not resolve the interpretive question, other indicia of legislative intent support *amici*'s view. Here, the legislative history, statutory structure and underlying purpose all point in the same direction: Congress did not intend for the statute to cover private companies.

1. Legislative history

The legislative history supplies perhaps the most compelling evidence. *See Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1194 (2010) (consulting legislative history). While the committee reports immediately preceding the Act's passage do not directly address the question of corporate liability, *see* S. Rep. No. 102-249 (1991); H.R. Rep. No. 102-367 (1991), evolution in the language from early versions of the bill demonstrates that the term was chosen in order to exclude private companies from liability.

Following adoption of a joint resolution in 1984 condemning torture, Congress began to consider various bills to authorize a federal cause of action for

victims of torture. *See* 134 Cong. Rec. H9692-93 (1988) (statement of Rep. Yatron). Early versions of the bill described the category of possible defendants in broad terms – to include any "person" who subjected another to torture. *See* H.R. 4756, 99th Cong. (1986); H.R. 1417, 100th Cong. (1987).

In 1988, the bill underwent a critical change. Representative Jim Leach of Iowa, the ranking minority member on the relevant subcommittee of the House Foreign Affairs Committee, proposed an amendment ("the Leach Amendment") during a full-committee mark-up of the bill. *See* The Torture Victim Protection Act: Hearing and Mark-Up on H.R. 1417 before the H. Comm. On Foreign Affairs, 100th Cong. 82, 87-88 (1988) ("*Mark-Up Report*"). *See also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1619 n. 14 (2010) (relying on committee mark-up as an informative source of legislative history): *Regan v. Wald*, 468 U.S. 222, 238 (1984) (same); *Washington v. Confederated Bonds & Tribes of Yakima Indian Nation*, 439 U.S. 463, 491 & n. 36 (1979) (same). ***The express purpose of the Leach Amendment was to clarify that the bill did not apply to corporations.*** This purpose was spelled out at the markup hearing on the bill:

> Mr. Leach: [B]efore bringing it to a vote, I would ask unanimous consent that an amendment be considered at a later point with staff that relates to a precise definition of person to make it clear we are applying it to individuals *and not to corporations* in how this bill and its ramifications unfold.
>
> If that is accepted, I would be very pleased. If it is not accepted, I still strongly support the bill.

> …
>
> Mr. Bellis [legislative counsel]: As I understand it, the intention is to limit the application of this civil action so that only individuals who engaged in torture could be the defendants.
>
> Mr. Leach: Yes, that is correct.
>
> Mr. Bellis: That would be a fairly simple amendment of changing the word "person" to "individuals" in several places in the bill.
>
> Mr. Leach: That is correct, and I will have draft language to that effect.
>
> …
>
> Chairman Fascell: Is there any objection or further question? Then the question is on the resolution as proposed to be amended. All those in favor, signify by saying aye, all those opposed, no. They ayes have it. It is so agreed.

Mark-Up Report at 87-88 (emphasis added).

Following this change, both the House Foreign Affairs Committee and the House Judiciary Committee unanimously recommended the bill containing language that reflected the Leach Amendment. The approved version described the class of potential defendants to be every "individual" who engaged in torture or extrajudicial killing. H.R. Rep. No. 100-693, pt. 1, at 1; *Mark-Up Report* at 111; 134 Cong. Rec. H9692 (1988) (containing text of H.R. 1417). In October 1988, the House approved a version of the bill containing the Leach Amendment by a voice vote, 134 Cong. Rec. H9695 (1988).

Following this October 1988 vote, subsequent House versions of the bill consistently employed the

term "individual," reflecting the Leach Amendment. H.R. 1662, 101st Cong. (1989); 135 Cong. Rec. H6423 (1989) (containing text of H.R. 1662); H.R. Rep. No. 101-55, pt. 1 at 1 (1989) ("The purpose of the legislation is to provide a Federal cause of action against any individual who, under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing."); H.R. Rep. No. 102-367, pt. 1 at 1 (same). *See also* 137 Cong. Rec. H11244 (1991) (containing text of H.R. 2092 and reflecting a change in the description of defendants from "every individual" to "[a]n individual").

Senate versions of the bill followed a similar course, and the Senate eventually approved a version containing a narrow description of the potential defendants like that employed in the Leach Amendment. Early Senate versions of the bill, like their early House counterparts, described the class of eligible defendants in broader terms to include "[e]very person who, under actual or apparent authority of any foreign nation subjects any person to torture or extrajudicial killing." S. 2628, 99th Cong. (1986); 132 Cong. Rec. 12950 (1986) (text of S. 2628 introduced by Senator Specter). *See also* S. 824, 100th Cong. (1987); 133 Cong. Rec. S3740 (1987) (text of S. 824 introduced by Senator Specter); S. 1629, 101st Cong. (1989); S. 313, 102d Cong. (1991); Torture Victim Protection Act of 1989, Hearing Before the Subcomm. on Immigration and Refugee Affairs, of the S. Comm. on the Judiciary, 101st Cong. 2d Sess. 2 (1990).

The critical change in the Senate version occurred in November 1991. At that time, the Senate Judiciary Committee reported a version of the bill (S. 313) replacing its broader definition of the category of potential defendants ("every person") with a version

that, in relevant part, employed language comparable to the House version which, by that time, reflected the Leach Amendment. *See* S. Rep. No. 102-249 at 2. The revised version defined the class of eligible defendants to include only "an individual who, under actual or apparent authority or under color of law of any foreign nation" subjects another individual to torture or extrajudicial killing. *See* 138 Cong. Rec. S2667 (1992).

Floor statements in the House and Senate reflect the significance of the Leach Amendment. For example, in a debate on the 1991 version of the bill, Representative Yatron, chairman of the Human Rights Subcommittee of the House Foreign Affairs Committee, explained that "[i]n order for a U.S. court to hear a claim under this legislation the defendant must have been acting under the authority of *his* or *her* government …." 137 Cong. Rec. H11245 (1991) (emphases added).[3] Similarly, during debate in the

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[3] *See also* 134 Cong. Rec. H9693 (1988) (statement of Rep. Swindall) ("The individual must be subject to the personal jurisdiction of the Federal district court either by being present in the jurisdiction or by means of the long-arm statute."); *id.* H 9694 (statement of Rep. Mazzoli) ("Thus, under this bill, no longer will torture victims have to stand by helplessly while their torturers enter and leave the jurisdiction of the United States untouched."); 135 Cong. Rec. H6424 (1989) (statement of Rep. Smith) ("[We cannot allow individuals to get away with conduct that violates the most basic human rights because the countries that authorize or condone such conduct do not provide effective remedies to the victims."); *id.* H6423 (statement of Rep. Brooks) ("[T]his legislation states that any individual committing such acts under color of law of any foreign nation shall be liable …"); *id.* H6427 (statement of Rep. Gilman) ("This act gives an injured party or his legal representative the right to take civil action against an individual who, under the color of law of any foreign nation, subjects any individual to suffering from

Senate, one of its chief architects, Senator Arlen Specter, described the bill as "provid[ing] a cause of action against the *individual(s)* responsible for the torture and not against the foreign state or Government …" 138 Cong. Rec. S2668 (1992) (emphasis added).[4]

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 442-43 (1987). In this case, the legislative history demonstrates that Congress discarded the broader term "person" in favor of the term "individual." The Leach Amendment shows that Congress did so in order to exclude private companies from the class of potentially liable defendants.

Contrary to the weight of this legislative history, some district courts have seized on a single passage from a Senate report to support the proposition that the term "individual" was used solely to clarify that foreign states could not be proper defendants. *Sinaltrainal*, 256 F. Supp. 2d at 1358 (citing S. Rep. No. 102-249 at 7 (1991)). *See also* H.R. Rep. No. 102-367, pt. 1, at 4 (1991). While that reference to the

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mental or physical pain inflicted for the purpose of obtaining a confession, punishment or coercion.").

[4] *See also* 138 Cong. Rec. S2667 (1992) (statement of Sen. Inouye) (describing the act to authorize a "civil action for recovery of damages from an individual who engaged in torture or extrajudicial killing…"); *id*. (statement of Sen. Specter) ("[O]nly defendants over which a U.S. court has personal jurisdiction may be sued. In order for a court to have personal jurisdiction over a defendant, that individual must have minimum contacts with the jurisdiction.").

Senate report is technically accurate, it does not follow that Congress intended to embrace the corporate liability theory. For one thing, it would be odd to credit the Senate version of the bill when, as noted above, the Senate replaced its broader description of the defendants ("Every person") with the narrower one ("an individual") comparable to the previously adopted Leach Amendment. For another thing, the language from the Senate Report merely suggests that exclusion of foreign states as defendants was one purpose and does not state or otherwise imply an intent to *include* private companies among the categories of potentially liable defendants. When Congress only wants to exclude foreign states from liability, it knows how to do so expressly in the statute's text. *See, e.g.*, 18 U.S.C. §2337(2) (excluding foreign states from causes of action under civil antiterrorism statute). Finally, even if this excerpt from the Senate Report is given "full credit" as the expression of legislative intent (a purpose undone, to a degree, by subsequent amendments to the Foreign Sovereign Immunities Act, 28 U.S.C. §1605A), that excerpt cannot rewrite the language actually adopted by Congress. At most, the excerpt from the Senate report demonstrates that Congress inadvertently omitted private companies from the statute's ambit through the use of the narrow term "individual."

2. Statutory structure

Like the legislative history, the statutory structure also supports a construction of the term "individual" not to include private companies. Normal rules of statutory interpretation instruct that "identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996). In this case, the

TVPA uses the term "individual" twelve times. Not only does it use the term "individual" to describe the range of possible defendants (the usage at issue in this case), it also employs the term "individual" to describe the victims whose torture can give rise to a claim. TVPA §2(a)(1)-(2). A private business entity cannot be tortured, killed or endure severe pain or suffering. Consequently, it cannot be an "individual" when the TVPA uses the term to describe a victim of such conduct. Thus, at least in the context of the TVPA, it make no sense to interpret the term "individual" to encompass the corporate liability theory. To conclude otherwise would flout this Court's instruction that "[a]bsent some congressional indication to the contrary, [courts should] 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." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

Congress knows how to broaden the class of covered parties when it chooses to do so. In the very same section defining the class of potential defendants, the TVPA describes the class of potential claimants to include "any *person* who may be a claimant in an action for wrongful death." TVPA §2(a)(2) (emphasis added). This broader use, added during the mark-up of the House bill, makes sense, for it enables other entities such as estates of victims to bring causes of action under the TVPA. *See generally* 137 Cong. Rec. H11245 (1991) (statement of Rep. Mazzoli) (explaining change in phrasing). The contrasting use of "person" and "individual" within the very same section of the TVPA further illustrates Congress's intent not to depart from the ordinarily narrow meaning of the term "individual."

3. Statutory purposes

Finally, interpreting the TVPA not to embrace the corporate liability theory comports with the Act's animating purposes. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003) (Breyer, J., concurring in part and dissenting in part) ("Judges are free to consider statutory language in light of a statute's basic purpose."). Here, the TVPA's preamble, the only express statement of purpose on the statute's face suggests that it was not designed to encompass the corporate liability theory. The preamble explains that the TVPA "carr[ies] out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights" and fulfills this purpose "by establishing a civil action for recovery of damages *from an individual* who engages in torture or extrajudicial killing." TVPA Preamble (emphasis added). Thus, the only expressly stated purpose re-enforces what the text already makes plain – an intent to limit the class of potential defendants. Any other purpose at best can only be inferred.

To the extent an inquiry into implied purposes is appropriate, the history surrounding the TVPA's enactment suggests two narrow purposes. First, Congress wanted to authorize a cause of action for torture or extrajudicial killing. *See* H.R. Rep. No. 100-693, pt. 1 at 3 (1988); H.R. Rep. No. 101-55, pt. 1, at 3 (1989); H.R. Rep. No. 102-367, pt. 1, at 4. Prior to the TVPA's enactment, federal appellate courts disagreed over whether such a cause of action was cognizable under the Alien Tort Statute, 28 U.S.C. §1350. *Compare Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *with Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812-23 (D.C. Cir. 1984)

(opinion of Bork, J.). (Later this Court in *Sosa v. Alvarez-Machain* confirmed that the Alien Tort Statute is merely jurisdictional and does not create any cause of action. 542 U.S. 692, 712-14 (2004)). Second, Congress wanted to ensure that United States citizens could be plaintiffs. H.R. Rep. No. 101-55 at 3; H.R. Rep. No. 102-367 at 4; 134 Cong. Rec. 9693 (1988) (statements of Reps. Yatron and Swindall). Prior to the TVPA's enactment, plaintiffs invoked the Alien Tort Statute, which is confined to suits by aliens, 28 U.S.C. §1350.

Some district courts have seized on isolated snippets from the TVPA's history to discern a more general purpose to deter torture in all its forms. *See Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at *16 (S.D.N.Y. Feb. 28, 2002). They reason from this premise to the conclusion that the corporate liability theory advances this general deterrent purpose. The TVPA's purposes do not sweep so broadly. Indeed, if anything, the legislative record suggests Congress's purpose was to craft a narrow remedy.

"[N]o legislation pursues its purposes at all costs," and the TVPA is no exception. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). This Court's decision in *Sosa* is instructive on this point. There, this Court cautioned federal courts against expanding the reach of United States statutes based on international law and involving extraterritorial conduct. *See Sosa*, 542 U.S. at 725-28. Reasons for that caution included, among others, interference with both the foreign relations of the United States and separation of powers principles that vest Congress with the power to regulate federal causes of action.

While *Sosa* involved a judicially created cause of action, many of the same reasons underpinning that decision apply in this context of judicial construction of a congressionally created cause of action predicated on an international norm and regulating extraterritorial conduct – a point that the political branches recognized when debating passage of the TVPA. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 86-87 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Within the section of the TVPA entitled "establishment of a civil action," Congress included an exhaustion requirement, reflecting an awareness of the law's potential to tread upon the sovereign interests of other nations. TVPA §2(b). Reports surrounding consideration of the legislation stress Congress's desire not to "turn U.S. courts into tribunals for torts having no connection with the United States whatsoever." S. Rep. No. 102-249 at 7. During legislative debates on the bill, members of Congress repeatedly stressed that the bill would not open the federal courts "to lawsuits that have absolutely no connection … to the United States" and would not "entangle the judiciary in sensitive foreign policy matters." *See, e.g.*, 138 Cong. Rec. S2667-2669 (1992) (colloquy between Senators Specter and Grassley stressing the TVPA's limited sweep). Likewise, when signing the bill, the President recognized that unbridled application of the TVPA could disrupt United States foreign relations and open the floodgates of the federal courts. Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. Pres. Docs. 465-66 (Mar. 12, 1992) (noting the "danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits,

which have nothing to do with the United States and which offer little prospect of successful recovery").

A generalized deterrence rationale flies in the face of the political branches' careful work. Suits predicated on the corporate liability theory discourage essential investment in the developing world. TVPA litigation against corporations involves alleged conduct taking place in over a dozen different countries, including many in the developing world, whether Africa, Latin America or Southeast Asia. *See, e.g., Wiwa*, 2002 WL 319887 (Nigeria); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (Indonesia); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005) (*per curiam*) (Guatemala). Some of these regions are politically unstable, and constructive engagement by private corporations represents the only means by which these countries can hope to achieve economic growth and eventual political stabilization. *See* World Bank, *Swimming Against The Tide: How Developing Countries Are Coping With The Global Crisis* (2009) (discussing the relationship between foreign investment and economic growth in the developing world). TVPA suits against private companies discourage that essential investment and weaken the prospects for the development of stable political institutions.

Not only do such suits undermine economic growth in the developing world, they hurt growth in the United States as well. Foreign investment is critical to the United States economy. *See* U.S. Dep't of Commerce, The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty at 2 (2008). Such growth occurs when multinational companies establish a business presence in

the United States, often through one or more United States-based subsidiaries. By dragging foreign companies into United States Court on the basis of their alleged overseas activities, TVPA claims discourage such important investment. Such suits are occurring with alarming frequency. *See, e.g., Shan v. China Const. Bank Corp.*, No. 09 Civ. 8566(DLC), 2010 WL 2595095 (S.D.N.Y. June 28, 2010) (Chinese company); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (Swiss company); *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 Civ. 7955(GEL), 2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008) (Australian and French companies); *Arndt v. UBS AG*, 342 F. Supp. 2d 132 (E.D.N.Y. 2004) (Swiss bank); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (Dutch and United Kingdom companies). Some cases may involve multiple steps of imputation – imputing the conduct of one overseas affiliate back to the foreign parent for liability purposes and then imputing the jurisdictional contacts of the United States subsidiary back to the foreign parent in order to establish general jurisdiction. *See, e.g., Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) (suing German parent on theory that relies on alleged conduct of Argentinean subsidiary and alleged jurisdictional contacts of American subsidiary). No company relishes the prospect of being branded a torturer (even if the suit is ultimately dismissed), and the prospect of such liability in United States courts for their alleged overseas activities may persuade some foreign companies to pull out of the United States altogether; for others it may have a noticeable chilling effect on additional U.S. investment.

Whether targeted at domestic companies or their foreign counterparts, such suits subject companies to damaging attacks on their reputation and potentially

their share value. For example, in the *Sinaltrainal* litigation against Coca-Cola, some suits were filed around the time of the company's first-quarter earnings meeting and prompted some shareholders to dump the company's stock. *See* Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, World Pol'y J. 60, 64 (Spring 2004). During multi-year litigation, the company bears the stigma with no meaningful redemption after dismissal of the case. Litigation involving TVPA claims against the Drummond Company based on its alleged activities in Colombia supplies a good example. Though the company was exonerated altogether, *Romero v. Drummond Co.*, 552 F.3d 1303, 1313 (11th Cir. 2008), the plaintiffs' lawyers explained that the maintenance of the litigation was their primary interest. They publicly admitted that they were "not in a hurry for the cases to be resolved, *because as long as they stay tied up in the courts, they will continue to receive attention in the media*." Malcolm Fairbrother, *Colombia, Human Rights and U.S. Courts: An Interview with Daniel Kovalik*, *available at http://clas.berkeley.edu/Events/spring 2002/04-25-02-kovalik/index.html* (emphasis added). The damage caused by such reputational attacks supplies an additional reason counseling against judicial expansion of liability under the TVPA beyond the narrow scope expressly authorized by Congress. *See Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008).

For these reasons, a generalized deterrent purpose should not be read into the statute or used to support the corporate liability theory.

C. The Eleventh Circuit's view, embracing the corporate liability theory, lacks any legal support.

Given that all the tools of statutory interpretation point in the same direction, it is perhaps unsurprising that only one federal appellate court – the Eleventh Circuit – has embraced the corporate liability theory. Close examination of the Eleventh Circuit's three precedents on this point reveals a total dearth of legal support for this outlier view. The earliest precedent, *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005) (*per curiam*), vacated a district court's order dismissing, in relevant part, TVPA claims against a private company. Nothing in *Aldana* suggests that the issue of corporate liability was before the Eleventh Circuit; rather, its opinion addresses whether the conduct allegedly committed by the primary tortfeasor (Guatemalan security forces) satisfied the definition of torture under the TVPA. The second precedent, *Romero*, stated that "the Torture Act allows suits against corporate defendants." 552 F.3d at 1315. *Romero* offered no reasoning in support of that proposition but simply (and inexplicably) cited the prior decision in *Aldana* as binding Circuit precedent on the point. The third precedent, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009), again merely restated the *Romero* rule without any reasoning. Thus, the only federal appellate court expressly embracing the corporate liability theory has not offered any reasoning whatsoever in support of that rule.

D. Common law imputation principles may not be relied upon to circumvent the TVPA's explicit textual limits.

Notwithstanding the congressionally imposed limits on the potential defendants under the TVPA, some district courts have suggested that the corporate liability theory may be proper under common law agency principles imputing certain employee torts to the employer. *Wiwa*, 2002 WL 319887 at *13. This theory is incompatible with the TVPA and should be rejected.

This theory cannot be reconciled with the TVPA's text, which confines the range of eligible defendants to "individuals." Moreover, for a TVPA claim to be cognizable, the individual must be acting "under actual or apparent authority, or color of law, of any foreign nation." Employees of private companies do not act under actual or apparent authority or color of law of a foreign nation; their authority is defined, instead, by the company employing them. Even if it were possible for a private company's employee to shift roles – to assume the authority of a foreign nation or act under its color of law – then the employee is no longer acting within the scope of his or her employment, and principles of corporate imputation would not apply.

Moreover, this theory of imputation is incompatible with the TVPA's structure. The TVPA limits liability to those individuals who "subject" another individual to torture. The verb "subject" is commonly understood to mean "to cause to undergo" or "to submit to" and has been previously been interpreted by this Court as a term that "cabins the range of misconduct that the statute proscribes." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 644-45 (1999). Applying

principles of imputation to the TVPA runs contrary to the TVPA's express terms. *Cf. Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302-03 & n. 6 (2011) (statutory terms should not be construed so as to obliterate the distinction between those who are primarily liable and those who are, at most, secondarily liable).

Congress knows perfectly well how to impute acts of torture to parties other than the primary wrongdoer. Recent amendments to the FSIA, post-dating the TVPA's enactment, impute to certain state-sponsors of terrorism acts of torture or extrajudicial killing perpetrated by an "official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. §1605A. *See also* 28 U.S.C. §1605(a)(5) (imputing foreign official's noncommercial torts to foreign state). Similarly, the federal criminal torture statute, imposes criminal liability not only on certain individuals who commit but also on persons who "conspires to commit an offense" under the statute. 18 U.S.C. §2340A. Because Congress declined to construct a similar scheme for civil liability under the TVPA, the Court should not engraft one onto the statute.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to hold that the term "individual," when used in the TVPA to describe the category of possible defendants, does not include private companies.

Respectfully submitted,

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