No. 10-1536

IN THE
Supreme Court of the United States

LARRY BOWOTO, ET AL,

Petitioners,

v.

CHEVRON CORPORATION; CHEVRON INVESTMENTS INC.; CHEVRON U.S.A. INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

ROBERT A. MITTELSTAEDT
CRAIG E. STEWART
Counsel of Record
CAROLINE N. MITCHELL
NATHANIEL GARRETT
JONES DAY
555 California Street
26th Floor
San Francisco, CA 94104
(415) 626-3939
cestewart@jonesday.com

Counsel for Respondents

July 22, 2011

RESTATEMENT OF QUESTION PRESENTED

Whether the Ninth Circuit correctly interpreted "individual" in the Torture Victim Protection Act in accord with its common and ordinary meaning as limited to natural persons and thereby excluding corporations from liability under that Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents make the following disclosures:

Respondent Chevron Corporation has no parent company and no publicly held company owns 10% or more of its stock. Respondent Chevron Investments Inc. is a wholly-owned subsidiary of Chevron Corporation. Respondent Chevron U.S.A. Inc. is an indirectly wholly-owned subsidiary of Chevron Corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

BRIEF IN OPPOSITION

After a lengthy trial, following nearly ten years of pretrial proceedings, the jury in this case rejected all of petitioners' claims that respondents were responsible for the injuries they suffered when they (or their relatives) overtook an offshore oil platform in Nigeria and held 150 workers hostage. The claims the jury rejected included torture, battery, assault and wrongful death.

In this Court, petitioners do not challenge the jury's verdict. They challenge only the district court's pretrial dismissal of one claim under the Torture Victim Protection Act ("TVPA")—a claim that rested on the same factual basis as the claims the jury rejected. The Ninth Circuit's ruling affirming the dismissal of that claim does not present any issue warranting review.

Only two circuits have analyzed whether corporations may be sued under the TVPA—and both have agreed that the statute's plain language dictates that only individuals, not corporations, may be liable. Petitioners rely on the Eleventh Circuit as supposedly holding otherwise. But the Eleventh Circuit has never actually ruled on the issue. In the first case petitioners cite, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005), the corporate liability question was neither raised nor decided. In the later two cases petitioners cite, the Eleventh Circuit merely cited to *Aldana*, while resolving the cases (and rejecting the TVPA claims) on other grounds. In short, the Eleventh Circuit has never analyzed and decided the TVPA corporate liability question. There is thus no relevant circuit split warranting this Court's review. And even if the

issue were settled in the Eleventh Circuit, review by this Court would be premature, given that the issue has not yet been illuminated by conflicting reasoned decisions in the lower courts.

Certiorari is also inappropriate because this case would in any event be a poor vehicle for this Court to address the issue. The only petitioners who preserved this issue in the court below lost at trial their wrongful death claim that rested on the same factual basis as their TVPA claim and required a lesser showing of proof. By rejecting the wrongful death claim, the jury necessarily rejected any basis for the TVPA claim. The existence of this alternative ground for the affirming the judgment below without deciding the TVPA issue is further reason to deny review.

Finally, the Ninth Circuit's ruling was correct. The TVPA expressly limits liability to "individuals"—a term this Court and others have ruled excludes corporations. Giving this language its ordinary meaning here is supported by the remainder of the statutory text (which carefully distinguishes between "individuals" and the broader term "person"), as well as by the legislative history. No basis exists for disturbing the Ninth Circuit's decision, which the D.C. Circuit recently found persuasive and followed.

RESTATEMENT OF THE CASE

This lawsuit grew out of a May 1998 invasion of an oil platform located nine miles offshore from Nigeria. The platform was operated by Chevron Nigeria Limited ("CNL"), an indirectly owned subsidiary of respondent Chevron Corporation. To try to coerce jobs and money from CNL, a group of about 150 Nigerians stormed onto the platform (and

an adjoining construction barge) and held the workers there hostage for three days.

Petitioners argued at trial that they were engaged only in a peaceful protest and were preparing to leave when CNL requested that the Nigerian Navy intervene to rescue the workers. However, the evidence (which the jury accepted in unanimously rejecting petitioners' claims) refuted these assertions. Witnesses testified that, on the day of the invasion, the invaders swarmed onto the platform and barge, surrounding the workers, striking some of them and threatening them with makeshift weapons. The invaders warned that "they were there to quench," would "stay until they got what they came for" and were ready to die for their cause. ER 2679, 2682-85, 2599-2600, 3409-10, 3564.

Over the next three days, the invaders threatened to kill workers, "cut [one of them] up in little pieces," or take them to shore. They poured diesel fuel on the barge deck. Some invaders had machetes with long blades and tools like wrenches that could be used as weapons. They made bombs out of bottles and placed Molotov cocktails around the barge. The invaders blocked the helidecks on the barge and platform, thus effectively preventing the workers from leaving. ER 3367-69, 3371-72, 3564, 3578, 3407, 2686-89, 3519-21, 2690-92, 3534, 3568.

When CNL sent a negotiator to try to resolve the crisis, the invaders threatened to kill him and briefly held him hostage. The invaders demanded that CNL pay 10 million Naira (more than $100,000), before they would end the invasion and release the workers. ER 2464-66, 2936.

Unwilling to pay that ransom, and worried about the increasingly volatile situation on the platform and barge, CNL asked the Nigerian Navy to rescue the hostages. The Navy has law enforcement jurisdiction over offshore facilities and it had intervened in and resolved previous such hostage situations without incident. ER 2734-35, 2765, 1325, 1389, 2769.

On the morning of the fourth day of the invasion, the Navy-led law enforcement team flew to the barge by helicopters. According to eyewitness testimony, two invaders were shot and killed as they advanced on the rescue team with pipes. Arolika Irowarinun was one of them. Larry Bowoto was shot and injured, after he admittedly had run toward the rescue team, waving his hands and shouting. Bassey Jeje also claimed he was shot, but there were no witnesses to that purported shooting and no medical evidence that it happened. ER 3528-29, 3575-76, 2926-27, 3266-69.

Petitioners filed this lawsuit a year later. Plaintiffs were Bowoto, Jeje and Irowarinun's family members, along with Bola Oyinbo. Oyinbo claimed that he was arrested on the platform and beaten by Nigerian police. He later died of causes unrelated to the lawsuit and his family members continued as plaintiffs.

Petitioners did not sue CNL. Rather, they sued Chevron Corporation and two of its U.S. subsidiaries. They asserted a three-tiered theory of liability: first, the Nigerian Navy's use of force against the invaders was unjustified; second, CNL was secondarily responsible for that use of force because it requested the Navy's intervention; and, third, Chevron and its

U.S. subsidiaries were tertiarily liable for CNL's conduct.

Before trial, the district court dismissed petitioners' claim under the TVPA, holding that, because that statute permits suit only against "individuals," it does not provide a cause of action against corporations. Pet. App. 33a-35a. When the case proceeded to trial, the Irowarinun plaintiffs asserted a single claim for wrongful death. The other plaintiffs asserted claims under the Alien Tort Statute and under common law theories of assault, battery and infliction of emotional distress.

After deliberating for less than two days following a five-week trial, the jury returned a unanimous verdict for defendants against each of the petitioners on all of their claims.

The district court thereafter denied a motion for new trial, finding that the "jury heard evidence that could have made them doubt the credibility of plaintiffs' witnesses" and the jury may not have been "persuaded by plaintiffs' evidence of secondary and tertiary liability." ER 78.

On appeal, only the Irowarinun plaintiffs challenged the pre-trial dismissal of the TVPA claim. *See* Appellants' Opening Brief at 53, 61, 62, *Bowoto v. Chevron Corp.,* No. 09-15641 (9th Cir. Sept. 18, 2009), 2009 WL 3657070. [1] The Ninth Circuit

---

[1] The other petitioners (each of whom lost at trial a claim of torture under the Alien Tort Statute) limited their arguments to challenging evidentiary rulings and jury instructions. The Ninth Circuit rejected those arguments, finding that the challenged rulings were correct (or, as to one of the rulings, that petitioners had waived their challenge). Pet. App. 20a-27a.

affirmed that ruling on the ground that "the plain language of the TVPA does not allow for suits against a corporation." Pet. App. 15a. The court relied on the Dictionary Act, which distinguishes between "individuals" and "corporations," and uses the word "person" to encompass both. 1 U.S.C. § 1. The court concluded that, by using "individual" rather than the broader "person" to describe who may be liable under the Act, Congress "limit[ed] liability to natural persons." Pet. App. 18a. This conclusion was buttressed by the statute's use of "individual" to describe the victims of torture. Because corporations cannot be tortured, the Ninth Circuit concluded that this context showed that Congress used "individual" in its ordinary sense of natural persons. *Id.* The Ninth Circuit also observed that its ruling was consistent with the legislative history. Nothing in the statute's history suggested that Congress contemplated that corporations would be subject to suit. To the contrary, as originally proposed, the statute used "person" to describe who could be sued. That term was changed to "individual" in an amendment offered specifically to make clear that corporations would not be liable under the statute. *Id.* at 19a.

Following the Ninth Circuit's decision, the D.C. Circuit held in *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011), *petition for cert. filed*, No. 11-88 (Jul. 15, 2011), that the TVPA does not provide a cause of action against political organizations. Like the Ninth Circuit, the D.C. Circuit concluded that the ordinary meaning of "individual," as confirmed by the Dictionary Act and the relevant context in the TVPA, is a natural person and does not extend to artificial entities.

REASONS FOR DENYING THE PETITION

I. THE ELEVENTH CIRCUIT'S CASES DO NOT CREATE A CONFLICT WARRANTING REVIEW.

Petitioners argue that the decision below conflicts with *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005). As the Ninth Circuit recognized, however, the corporate liability question was not raised in that case and the Eleventh Circuit did not decide it. The district court there dismissed the TVPA claim on the ground that the plaintiff had not adequately alleged state action and that the alleged conduct did not amount to torture. *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1305-06 (S.D. Fla. 2003). The district court did not address whether the TVPA applies to corporations. On appeal, the Eleventh Circuit ruled that the complaint adequately alleged state action and torture. 416 F.3d at 1247-53. Like the district court, however, the Eleventh Circuit did not address whether the TVPA applies to corporations, and the issue was not raised in the parties' briefs.[2]

At best, therefore, the question of corporate liability in *Aldana* "merely lurk[ed] in the record, neither brought to the attention of the court nor ruled upon." *Webster v. Fall*, 266 U.S. 507, 511 (1925). In both this Court and in the Eleventh Circuit, such unlitigated issues "'are not to be

---

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

considered as having been so decided as to constitute precedents.'" *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999) (quoting *Webster*, 266 U.S. at 511); *see also R. A. V. v. St. Paul*, 505 U.S. 377, 386, n.5 (1992) ("It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned."). Petitioners' assertion that any conflict exists with *Aldana* is therefore without merit.

Nor are petitioners assisted by the Eleventh Circuit's subsequent decisions in *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008), and *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009)—both of which *rejected* TVPA claims.

In *Romero*, the Eleventh Circuit affirmed summary judgment against the TVPA claim on the ground that the plaintiffs had not shown the requisite state action. It discussed the corporate liability question only in addressing the defendant's argument that subject matter jurisdiction was lacking because the TVPA does not provide for corporate liability. The Eleventh Circuit rejected that subject matter jurisdiction argument on the ground that the corporate liability question is not jurisdictional. 552 F.3d at 1315.

Having thus resolved the jurisdictional issue, the court added in passing that, if the question were jurisdictional, the court "would be bound" by *Aldana* to resolve it in favor of corporate liability. *Id.* The court did not, however, analyze the corporate liability question on the merits, and it did not

address the fact that the question was neither briefed nor decided in *Aldana*.[3]

Likewise, in *Sinaltrainal* the Eleventh Circuit affirmed the district court's dismissal of the TVPA claim for failure to plead state action. 578 F.3d at 1269-70. In a footnote, the court observed that it had "determined" in *Romero* that corporations could be liable under the TVPA. *Id.* at 1264 n.13. But the court did not rely on that observation for any part of its holding.

In short, the Eleventh Circuit has yet to squarely confront and resolve the TVPA corporate liability question. As a result, there is no conflict with the Eleventh Circuit that warrants review by this Court.

Even if the Eleventh Circuit's cases had adopted the position (without analyzing the issue) that corporations can be liable under the TVPA, that still would not support certiorari. Given the lack of any analysis in the court's opinions, when the issue is actually presented in a case in which its resolution is necessary to the outcome, the Eleventh Circuit would have ample basis for re-visiting the issue, by en banc consideration if necessary, particularly in light of the

---

[3] *Romero's* suggestion that *Aldana* had decided the corporate liability question was inconsistent with the *Romero* plaintiffs' counsel's own acknowledgment that "[t]his Court [in *Aldana*] allowed a TVPA claim to go forward against a corporation, but the specific issue of whether a corporation was an individual was not raised." Appellants' Reply Brief And Opposition To Cross-Appeal at 56, *Romero v. Drummond Co.*, No. 07-14090 (11th Cir. Mar. 3, 2008), 2008 WL 822770.

subsequent contrary decisions in the Ninth and D.C. Circuits.[4]

Moreover, the absence of any Eleventh Circuit opinion analyzing the issue means that no court of appeals has yet articulated any reasoned basis for concluding that the TVPA covers corporations. Instead, the only two reasoned decisions on the point have reached the same conclusion that TVPA liability is limited to natural persons. In these circumstances, intervention by this Court would be premature. If review by this Court ever proves to be necessary, the Court would benefit from further deliberation and development of the issue in the lower courts.

II. THIS CASE IS AN UNSUITABLE VEHICLE FOR ADDRESSING THE ISSUE BECAUSE THE JUDGMENT WAS PROPER ON OTHER GROUNDS.

Certiorari is also inappropriate because the judgment may be affirmed on an alternative ground without reaching the point upon which the alleged conflict exists. Eugene Gressman, et al., *Supreme Court Practice* 248 (9th ed. 2007).

As noted, only the Irowarinun petitioners preserved the TVPA corporate liability question in the court below. The other petitioners limited their

---

[4] Where the Eleventh Circuit has analyzed the meaning of "individual" in congressional enactments, it has agreed with the Ninth Circuit and others that "the plain meaning of the term 'individual' does not include a corporation." *In re Jove Eng'g, Inc.*, 92 F.3d 1539, 1550 (11th Cir. 1996).

arguments to challenging evidentiary rulings and jury instructions.

As to the Irowarinun petitioners, this case is not a suitable vehicle for resolving the TVPA corporate liability question because the Irowarinuns' TVPA claim was defective on other grounds. Their TVPA claim was for alleged "extrajudicial killing," which the TVPA defines as a "deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court." 28 U.S.C. § 1350 note § 3(a). Although dismissing that claim, the district court permitted the Irowarinuns to present an equivalent wrongful death claim to the jury, in support of which the Irowarinuns offered the same evidence that they alleged in support of their TVPA claim. The jury rejected that wrongful death claim. SER 429.

By finding against the Irowarinuns on their wrongful death claim, the jury necessarily rejected the factual basis for any TVPA extrajudicial killing claim. The jury was instructed to find a wrongful death if it determined that Irowarinun's death was "caused by a battery or negligent act" of CNL or the Nigerian military. ER 39. Although the jury was elsewhere instructed that the Irowarinuns had to prove battery "beyond a reasonable doubt," the alternative negligence basis for finding wrongful death was governed by the same preponderance standard that would have governed any TVPA claim. ER 35. Thus, there was no relevant difference between the wrongful death claim the jury rejected and the TVPA claim dismissed before trial. Indeed, the TVPA's "deliberated killing" standard imposed a much greater burden on the Irowarinuns than the

wrongful death standard. 28 U.S.C. § 1350 note § 3(a).

The jury's wrongful death verdict provides an alternative ground for affirming the judgment below. As the Ninth Circuit and numerous other courts have recognized, where the jury's finding on a related claim shows that it is "highly unlikely" that the plaintiff would have prevailed on the dismissed claim, dismissal of that claim is not prejudicial and thus not reversible. *E.g.*, *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 691 (9th Cir. 2001) (jury's rejection of harassment claim eliminated the need for the court to decide the correctness of trial court's dismissal of intentional infliction of emotional distress claim, which relied on same facts and similar legal inquiries).[5] That is the circumstance here. The dismissed TVPA claim and the rejected wrongful death claim depended "on the same facts and similar legal inquiries," *Tennison*, 244 F.3d at 691, and it would have been logically inconsistent for the jury to reject one but not the other. This alternative ground for affirming the result below is an additional reason to deny certiorari.

---

[5] *Uphoff Figueroa v. Alejandro*, 597 F.3d 423, 433 (1st Cir. 2010) (dismissal of a state retaliation claim was harmless because the jury rejected the same claim under federal law); *Cavataio v. City of Bella Villa,* 570 F.3d 1015, 1024 (8th Cir. 2009) (summary judgment was harmless error where jury verdict on other claims showed the jury would not have found for plaintiffs on dismissed claim); *Gross v. Weingarten*, 217 F.3d 208, 219 (4th Cir. 2000) (dismissal of statutory fraud claim was harmless where jury rejected common law fraud claim and it would be logically inconsistent for the jury to reject one but not the other).

III. THE DECISION BELOW WAS CORRECT.

A. The Ninth Circuit Correctly Applied the Statutory Text and Governing Precedent.

The TVPA imposes liability only on "[a]n *individual* who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an *individual"* to torture or extrajudicial killing. 28 U.S.C. § 1350 note § 2(a) (emphasis added). As the Ninth Circuit recognized, the Dictionary Act expressly distinguishes "individuals" from "corporations," and uses "person" to encompass the latter. 1 U.S.C. § 1. Moreover, in common parlance, the word "individual" does not include corporations or other organizations. In *Clinton v. City of New York*, 524 U.S. 417, 428 n.13 (1998), this Court recognized that in ordinary usage "individual" refers to an "individual human being." And this Court's recent decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853-54 (2011), used the terms in just that sense, distinguishing between an "individual" and a "corporation."

The Ninth Circuit correctly concluded that nothing in the TVPA suggests that Congress intended to depart from the ordinary meaning of "individual." To the contrary, the TVPA's plain text demonstrates that "individual" does not encompass corporations. As the Ninth Circuit recognized, the statute's use of "individual" in the same sentence to describe both the victim and the perpetrator is inconsistent with applying the statute to corporations, because corporations cannot be victims of torture or extrajudicial killing. It is a "normal rule of statutory construction that identical words used in different parts of the same act are intended to have

the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (internal quotation marks omitted). That principle applies with special force where, as here, the identical words are found in "close proximity." *Comm'r of Internal Revenue v. Lundy,* 516 U.S. 235, 250 (1996).

The remaining text of the TVPA confirms that Congress intentionally distinguished between "individual" and the broader term "person." The TVPA uses "individual" and "person" side by side: *"individuals"* can commit torture or be tortured (or killed extrajudicially) in violation of the Act, *see* 28 U.S.C. § 1350 note § 2(a), but a claim is available to "any *person* who may be a claimant in an action for wrongful death," *id.* § 2(a)(2) (emphasis added). "Person" is used in this latter subsection because potential wrongful death claimants include natural persons and organizations. *See, e.g.*, N.Y. Workers' Comp. Law § 29(2) (automatically assigning wrongful death claim to "the person, association, corporation, or insurance carrier" paying decedent's workers' compensation benefits). If Congress had been using "individual" in the TVPA in the catch-all fashion petitioners assert, it would have had no reason to switch to "person" when describing wrongful death claimants.

This usage of "individual" as meaning natural persons—and as distinct from "corporations"—is likewise evident throughout the Code, across a wide variety of statutes. *See, e.g.*, 8 U.S.C. § 1185(c) (defining "person" as "any individual, partnership, association, company, or other incorporated body of individuals, or corporation, or body politic"); 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 a partnership, possesses"); 16 U.S.C. § 796(4) (defining "person" as "an individual or a corporation"); *see also* 18 U.S.C. § 18 (defining "organization" as "a person other than an individual"). The Federal Rules of Civil Procedure also use "individual" to denote a natural person, in contrast to corporations and other organizations. *See, e.g.*, Fed. R. Civ. P. 4(e), 4(h) (distinguishing between service on an "Individual" and service on a "Corporation, Partnership, or Association").

Comparing the TVPA to 42 U.S.C. § 1983 further confirms Congress' intent. The TVPA tracks section 1983, but with an important difference. Whereas section 1983 extends liability to "[e]very *person* who, under color of any statute, ordinance, regulation, custom, or usage" deprives another of a constitutional right, the TVPA is limited to "[a]n *individual* who, under . . . color of law" subjects another individual to torture or extrajudicial killing (emphasis added). The Court must give effect to the different wording Congress adopted in enacting the TVPA. *Gov't of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 638 (9th Cir. 1999); *cf. BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (presumption that Congress acts intentionally when particular language is included in one section but omitted in another).

As the Ninth Circuit further recognized, nothing in the legislative history suggests any intent to apply the TVPA to corporations. To the contrary, the only mention of corporate liability in the legislative history was to *reject* it. The bill that became the

TVPA was introduced in 1987. As introduced, it imposed liability on "[e]very person who, under actual or apparent authority of any foreign nation, subjects any person to torture or extrajudicial killing." *The Torture Victim Protection Act: Hearing and Markup Before the H. Comm. on Foreign Affairs on H.R. 1417* ("1988 House Hearing"), 100th Cong. 82 (1988). However, the bill was amended in committee to change "person" to "individual" explicitly to make "it clear that we are applying it to individuals and not to corporations." *Id.* at 87-88. The bill retained "individual" when reintroduced in 1991. The TVPA ultimately was passed without further discussion of substituting "individual" for "person." Pub. L. No. 102-256, 106 Stat. 73 (1992).

B. Petitioners' Challenges to the Ninth Circuit's Decision are Unfounded.

1. Petitioners misconstrue the relevant cases.

Petitioners rely (Pet. 12-13) on *Clinton* as supposedly holding the ordinary meaning of individual includes corporations. In fact, *Clinton* held the opposite. The Court recognized that "individual" is ordinarily "defined as a 'single human being,'" whereas "'person' often has a broader meaning in the law." 524 U.S. at 428 n.13 (quoting *Webster's Third New International Dictionary* 1152, 1686 (1986)). And contrary to petitioners' assertion (Pet. 16) that the "majority did not cite the Dictionary Act," the majority expressly relied on the

Dictionary Act for this conclusion. 524 U.S. at 428 n.13 (citing 1 U.S.C. § 1).[6]

Clinton construed "individual" in the Line Item Veto Act's provision for expedited review to include corporations, but did so solely on the ground of absurdity—*i.e.*, that a conventional interpretation would so clearly defeat the statutory purpose of expediting review as to amount to "an absurd and unjust result which Congress could not have intended." *Id.* at 429 (internal quotation marks omitted). And the Court expressly observed that this interpretation differed from "the result that the word 'individual' would dictate in other contexts." *Id.* at 429 n.14.

Here, there is no colorable argument that giving "individual" its ordinary meaning will produce an absurd and unjust result that Congress could not have intended. To the contrary, the TVPA's careful distinction between "individual" and "person"—a distinction for which petitioners have no explanation—confirms that Congress fully intended to impose liability only on natural persons. It is hardly surprising, let alone "absurd," that Congress made this choice. Extraterritorial legislation of any sort is the exception, not the rule, *see Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-78 (2010) (citing cases), and the TVPA raises particularly sensitive issues concerning the conduct of

---

[6] Petitioners claim that the Dictionary Act uses "individual" and "corporation" as "synonyms." Pet. 17. Not only is this argument inconsistent with *Clinton,* it ignores the syntax of the provision, which sets up two categories—various organizations, and "individuals"—separated by the phrase "as well as."

foreign government officials. In extending United States law in this new direction, it is entirely sensible that Congress chose to enact targeted legislation aimed at actual torturers instead of acting in more sweeping fashion. As this Court has recognized, "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam), and Congress often "approach[es] a perceived problem incrementally," *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993).

As the committee reports confirm, Congress sought to "[s]trik[e] a balance" in the TVPA between providing redress and the other concerns implicated by the novel TVPA cause of action. H.R. Rep. No. 102-367(I), at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87; *see also* 1988 House Hearing at 79 (the statute was drafted "narrowly" to prevent "an abundance of lawsuits"). Among other things, Congress excluded foreign states from the statute's reach, and required exhaustion of adequate and available remedies in the place where the torture occurred. 28 U.S.C. § 1350 note § 2(b). These limitations make clear that Congress recognized the burden that unrestrained liability would impose on federal courts and the foreign relations activities of the Executive Branch. Excluding corporations by expressly limiting liability to individuals is, like other limitations in the text of the TVPA, consistent with the balance Congress sought to strike.

Nor are petitioners assisted (Pet. 15-16) by the smattering of other cases finding in certain contexts that "individual" was used to include corporations. None of those cases involved the statutory text and

structure at issue here. And most of them came from state courts, which are not guided by the Dictionary Act or the ordinary usage in the U.S. Code of individual as meaning natural person.[7]

Similarly, far from supporting petitioners, *United States v. A&P Trucking Co.*, 358 U.S. 121 (1958), demonstrates that the Ninth Circuit's ruling is correct. The relevant statutes in that case used the terms "person" and "whoever." In finding that a partnership could be held liable under those statutes, the Court relied on the Dictionary Act, which defines those terms as including partnerships. *Id.* at 122-23; 1 U.S.C. § 1. By contrast, Congress used "individual" in the TVPA to limit liability to natural persons, not partnerships or corporations.

Petitioners contend (Pet. 21) that "[e]xamples abound" where Congress uses the same term to describe both the perpetrator and victim of violence, including statutes in which corporations may be held liable. But the cited examples only prove the point—they all use the broader term "person" to refer to the perpetrator and victim, rather than the narrower "individual." When Congress intends to cover corporations as potentially liable for harm to natural person victims, it uses the word "person," which covers both humans and corporate entities.

---

[7] Likewise irrelevant is *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), which addressed corporations' First Amendment rights. That case had nothing to do with the meaning of "individual," or even of "person." Indeed, neither word is part of the First Amendment's Free Speech Clause.

2. Petitioners' reliance on the legislative history is misplaced.

Petitioners argue (Pet. 19) that the TVPA should be construed as applying to corporations because Congress supposedly "understood" that the Alien Tort Statute covers corporations, and Congress intended to provide the same remedy under the TVPA. In fact, however, there is no indication that Congress had any understanding that corporations could be sued under the ATS. The two cases cited in the committee reports as evidencing the ATS claims that had been permitted at that time were against individuals, not corporations. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (claim against former Paraguayan police official); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (claim against former Argentine military officer). Indeed, no court had ruled then that corporations could be sued under the ATS—and the corporate liability issue was not considered in any ATS decision until a decade after the TVPA was enacted. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308 (S.D.N.Y. 2003). This history refutes, rather than supports, the notion that Congress had any intent that the TVPA applied to corporations. And, most fundamentally, the existence or not of corporate liability under the ATS cannot override the express language Congress choose in the TVPA limiting liability to individuals.[8]

---

[8] In recently ruling in *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 WL 2652384 (D.C. Cir. Jul. 8, 2011), that corporations may be liable under the ATS, the D.C. Circuit confirmed that the result is different under the TVPA. As the court explained, (continued)

Petitioners assert (Pet. 19) that Congress was reacting to Judge Bork's opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). But Judge Bork did not address whether corporations could be sued. Instead, he asserted that no ATS torture claim was permitted unless Congress explicitly created a cause of action. *Id.* at 799 (Bork, J., concurring). Congress enacted the TVPA in part to address that concern. But it did so using language that excludes corporate liability, consistent with the decided ATS cases at that time that had recognized such claims only against natural persons.

Nor is there any merit to petitioners' assertion (Pet. 23-27) that it was improper for the panel to look to the amendments made when the TVPA was first introduced. In circumstances where resort to legislative history is appropriate, the history and modification of an unenacted bill is "wholly relevant to an understanding of" a subsequently enacted statute containing the same operative language. *United States v. Enmons*, 410 U.S. 396, 404 n.14 (1973).[9] And "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact

---

under the ATS, the court operated in what it called "common law fashion, . . . guided by reason and experience." *Id.* at *35. By contrast, in determining the meaning of the TVPA, the court must give effect to "Congress's use of the word 'individual.'" *Id.* at *36.

[9] *See also Dixson v. United States*, 465 U.S. 482, 493-94 & n.13 (1984) (comparing enacted language to draft bills considered by earlier Congresses); *Islander E. Pipeline Co., v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006) (relying on House hearing from earlier Congress).

statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation marks and citations omitted); *see also Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). Indeed, the Congress that enacted the TVPA did not even hold a hearing on the legislation, relying entirely on the subcommittee hearings conducted earlier. *See* H.R. Rep. No. 102-367(I) at 2.

Petitioners downplay (Pet. 27) the amendment as purportedly reflecting only an "individual member['s]" understanding." But in fact the representative who proposed the change expressly stated that the purpose was to exclude corporations, asked for "unanimous consent" on the point, did not receive an "objection or further question," and the amendment immediately passed by a voice vote. 1988 House Hearing, 100th Cong. at 87-88. The entire exchange occurred on the record, as part of the bill's official history—and is thus completely unlike the off-the-record, unofficial meeting disregarded in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 273 n.32 (1979). Congress "keeps official verbatim records of committee hearings" and distributes them to the other members of the legislature. 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 48:10 (7th ed. 2010). Accordingly, federal courts rely on "statements of members of the committee" when interpreting federal statutes. *Id.* This Court has often considered committee markup hearings as part of the relevant legislative history. *See, e.g.*, *Jerman*

v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1619 n.14 (2010); *Regan v. Wald*, 468 U.S. 222, 238 (1984).[10]

Petitioners argue that the panel ignored the relevant Senate report, which noted that the use of "individual" made "crystal clear that foreign states" cannot be sued. Pet. 24 (quoting S. Rep. No. 102-249, at 7 (1991)). But that report does not mean that Congress intended to exclude *only* foreign governments. To the contrary, it shows that the Senate deliberately used the term "individual" because it understood it to be narrower than "person." Even if the Senate committee's primary focus was on excluding "foreign states or their entities," it chose to accomplish that goal by limiting liability to natural persons: "only individuals may be sued." S. Rep. No. 102-249, at 7 (1991). "Individuals," in this context, necessarily refers to natural persons, because there is no known definition of "individual" that means "natural persons and corporations, but not foreign states or their entities." Indeed, if Congress had wanted to exclude only foreign states, it knew how to do so more directly. *Cf.* 28 U.S.C. § 1603(a) (defining "foreign state" and "agency or instrumentality of a foreign state" for purposes of foreign sovereign immunities).

Finally, petitioners make much of the fact (Pet. 26) that the legislative history uses both

---

[10] *California v. American Stores Co.*, 495 U.S. 271, 287-95 (1990), does not help petitioners. The Court there did not hold that the statements could not be considered but simply that they did not have the meaning the respondents ascribed to them.

"person" and "individual" when describing who can violate the Act. But this merely reflects that committee reports, which are often less precise in their use of language than statutes, used "person" to connote a human being, since "person" "in ordinary usage . . . often refer[s] to an individual human being." *Clinton*, 524 U.S. at 428 n.13. It certainly *cannot* reflect that "person" and "individual" are interchangeable in the statutory text, as both that text and the legislative history—in the very passage on which petitioners chiefly rely—make clear that Congress intentionally distinguished between "individual" and "person." *See* S. Rep. No. 102-249, at 7 (indicating that "individual" intentionally used to narrow scope of liability).

In short, the Ninth Circuit faithfully followed the plain language of the statute to reach a result that is consistent with the statute's purpose and history. The only other circuit to analyze the issue has reached the same conclusion. This Court's intervention is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. MITTELSTAEDT
CRAIG E. STEWART
Counsel of Record
CAROLINE N. MITCHELL
JONES DAY
555 California Street,
26th Floor
San Francisco, CA 94104
(415) 626-3939
cestewart@jonesday.com

Counsel for Respondents

July 22, 2011