No. 10-1536

In the Supreme Court of the United States

LARRY BOWOTO, *et al.*,

Petitioners,

—v.—

CHEVRON CORPORATION, INC. *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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I. The Circuit Split Over Whether The TVPA Allows Suits Against Legal Entities Is Acknowledged By The Courts.

The resolution of circuit splits has been described as "the main purpose of [the Court's] certiorari jurisdiction." *Nunez v. United States*, 554 U.S. 911, 913 (2008) (Scalia, J., dissenting). Respondents cannot dispute that the Eleventh Circuit and the Ninth and D.C. Circuits have reached "inconsistent results" on corporate liability under the TVPA, which is how a circuit split is typically described. *Forest Grove Sch. Dist. v. T.A.,* 129 S. Ct. 2484, 2490 (2009).

Even if corporate liability merely "lurked in the record" in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005), *see* Br. in Opp'n at 7, the Eleventh Circuit subsequently stated that it was "bound by" *Aldana* to "allow[] suits against corporate defendants." *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).[1] The Eleventh Circuit recently allowed TVPA claims to proceed against Drummond in a similar case, *see Baloco ex rel. Tapia v. Drummond Co., Inc.,* 640 F.3d 1338, 1347–48 (11th Cir. 2011); this time Drummond did not challenge corporate liability, correctly understanding that such an argument would be foreclosed by circuit law. And, contrary to Respondents' suggestion that the Eleventh Circuit is likely to revisit this issue, Br. in Opp'n at 9-10, that court denied en banc rehearing in *Baloco* on July 5th — despite Drummond's argument that circuit

[1] The Drummond defendants briefed the issue in *Romero*. *See* Br. for Appellee at 61–63, *Romero v. Drummond Co.* (No. 07-14090).

"precedent" on corporate liability under the TVPA "conflict[s] with *Bowoto* and *Mohamad* [*v. Rajoub*]." Pet'n for Reh'g En Banc at 8 (filed May 27, 2011), *Baloco v. Drummond Co.* (No. 09-16216).

The court below and district courts have similarly stated that Eleventh Circuit law allows TVPA claims against corporations. *See* App. 16a–17a; *In re Chiquita Brands Int'l, Inc.*, No. 08-0916-MD, 2011 U.S. Dist. LEXIS 59393, *178-179 (S.D. Fla. June 3, 2011). The circuit split therefore calls for this Court's attention.

II. Because The Jury Decided No Claim With The Same Elements And Burden Of Proof As Extrajudicial Killing, There Is No Alternate Ground To Affirm The Judgment Below.

At trial, Petitioners presented evidence that would allow the conclusion that the killing of Arolika Irowarinun by government security forces was deliberated and unjustified, meeting the definition of "extrajudicial killing" under section 3(a) of the TVPA. Although Respondents cite testimony from Chevron contractors who claimed that the protestors were charging soldiers when they were shot, another witness testified that Mr. Irowarinun was not advancing on soldiers, and had no weapon in his hands, when he was shot and killed. ER:3291-94. According to the coroner who autopsied Mr. Irowarinun and another slain protestor, Mr. Irowarinun had three gunshot wounds in the side of his chest near the armpit, ER:3344–45, ER:3671, while the second protestor had four gunshot wounds in his back. ER:3347, 3670.

Dismissal of the extrajudicial killing claim would be harmless only if it clearly involved "identical issues" raised by a claim rejected by the jury. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 799 (1973). As Respondents acknowledge, the jury rejected wrongful death claims predicated on battery and negligence. Br. in Opp'n at 11. But neither is identical to extrajudicial killing.

The battery claim was not identical to the extrajudicial killing claim because, under Nigerian law, Petitioners had to prove beyond a reasonable doubt that the soldiers had used unreasonable force. *See* App. 12a, 20a–21a. A TVPA claim requires only proof by preponderance of the evidence, and this "pertinent difference in standards" entails that the dismissal was not harmless. *Fite v. Digital Equipment Corp.*, 232 F.3d 3, 6 (1st Cir. 2000).[2] A reasonable jury could have believed that it was more likely than not that Mr. Irowarinun had been deliberately shot without justification, but concluded that proof beyond a reasonable doubt was not present.

The negligence claim was not identical to the extrajudicial killing claim because negligence concerns unintentional, not deliberate, conduct. The ordinary definition of "negligent" refers to "neglect," *e.g.*, American Heritage Dictionary 568 (4th ed.

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[2] The lead case on which Respondents rely expressly relies on *Fite*, rather than distinguishing it. *Tennison v. Circus Circus Enterprises, Inc.*, 244 F.3d 684, 691 (9th Cir. 2001). And in *Cavataio v. City of Bella Villa*, 570 F.3d 1015 (8th Cir. 2009), dismissal was harmless where the dismissed claim carried a *higher* standard of proof than the claim rejected by the jury. *Id.* at 1024.

2001), and would not include a deliberate killing of an unarmed protestor by a soldier. This is reflected in the law as well; negligence concerns

> injury . . . that is not the result of premeditation and formed intention. Intent and negligence are mutually exclusive; one cannot intend to injure someone by negligent conduct . . . . Thus, *there is no claim of negligence that flows from intentionally tortious conduct*.

57A Am. Jur. 2d Negligence § 30 (emphasis added) (footnotes omitted). Thus, for example, insurance policies that cover negligent acts typically exclude intentional harms. *See, e.g.*, *New Hampshire Ins. Co. v. Westlake Hardware, Inc.*, 11 F. Supp. 2d 1298, 1301 (D. Kan. 1998). Again, there is no difficulty in imagining that a reasonable jury that believed that the Nigerian security forces had deliberately killed Arolika Irowarinun would nonetheless find against negligence. Respondents cite no cases to the contrary.[3] The dismissal of the TVPA claim was not harmless.

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[3] In Respondents' remaining cases, the dismissed claim was truly identical to the claim rejected by the jury. *See Uphoff Figueroa v. Alejandro*, 597 F.3d 423, 433 (1st Cir. 2010) (identical state and federal retaliation claims); *Gross v. Weingarten*, 217 F.3d 208, 220 (4th Cir. 2000) (dismissal was harmless where, "as a matter of logical necessity," the jury would have rejected statutory fraud claim because it rejected common law fraud claims based on identical evidence).

III. Neither The Text Nor The Legislative History Of The TVPA Suggests That The Term "Individual" Is Restricted To Corporations.

Respondents fail to show that the ordinary meaning of "individual" is generally restricted to natural persons, or that the overall text of the TVPA suggests that this restriction should be implied in this case; indeed, the restrictive interpretation would lead to absurd results. The legislative history (which does not properly include the 1988 subcommittee markup of a prior version of the TVPA) shows that, despite its awareness of suits against legal entities, Congress only expressed concern about suits against foreign states — which is the only reason for the choice of the word "individual."

A. "Individual" Is Not Ordinarily More Restrictive Than "Person."

The term "individual" is not more restrictive than the term "person." Respondents suggest that *Clinton v. City of New York*, 524 U.S. 417 (1998), recognized that "individual" ordinarily refers to human beings.[4] But this argument proves too much, because the Court noted that, in ordinarily English, *both* the words "individual" and "person" typically refer to human beings. *Id.* at 428 n.13. As Petitioners demonstrated, Pet'n for Certiorari at 13–14, the plain English meaning of "individual" is *less*

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[4] Respondents note that Petitioners erroneously stated that the majority in *Clinton* did not cite the Dictionary Act, 1 U.S.C. § 1; in fact the majority did so in relation to the definition of "person," *see* 524 U.S. at 428 n.13, but not to define the word "individual." Petitioners regret the error.

restrictive than "person."

Respondents cite several sources to suggest that the term "individual" is sometimes used in contradistinction to "corporations" and other legal entities. Br. in Opp'n at 13, 15. While this is undoubtedly true, it does not demonstrate that, where Congress only refers to individuals and not corporations, it intended such a distinction. In other contexts, for example, this Court and other courts have referred to an "individual corporation," *e.g.*, *Federal Trade Comm'n v. Nat'l Lead Co.*, 352 U.S. 419, 430 (1957); *Zimmerman v. Puccio*, 613 F.3d 60, 74 (1st Cir. 2010); *Japan Telecom, Inc. v. Japan Telecom Am., Inc.*, 287 F.3d 866, 876 (9th Cir. 2002), showing that the restrictive significance is not inherent in the word "individual."

B. The Text Of The TVPA Does Not Suggest That "Individual" Excludes Legal Entities.

Respondents suggest that Congress used "individual" to describe only natural persons because the word is also used to describe the torture victim, and because the term "person" is used to refer to wrongful death claimants. Br. in Opp'n at 13–14. Neither argument is availing. As Petitioners previously noted, treating "individual" as synonymous with "person" with respect to torture victims would not lead to an anomalous result, because the U.S. Code *already* refers to "persons" being tortured. *See* 18 U.S.C. § 2340(1). Either Congress has no problem with inconsistency within a single sentence, or Congress recognizes that a term can be used consistently where only a subset of its meaning is relevant in some instances.

Nor is there evidence that "person" is deliberately distinguished from "individual" in the TVPA. Respondents apparently recognize that the D.C. Circuit was in error in reasoning that the term "person" was used to refer to a wrongful death claimant because such a claimant might be an estate. *Compare Mohamad v. Rajoub*, 634 F.3d 604, 608 (D.C. Cir. 2011), *with* Pet'n at 22–23 & n.4. Instead, Respondents suggest that "person" was used in order to allow subrogation of an extrajudicial killing claim under New York's workers' compensation law. Br. in Opp'n at 14. Even assuming that Congress had the particulars of state workers' compensation law in mind when drafting the TVPA, such usage would not be necessary to allow subrogation, because it is the natural person who is the actual claimant; the assignee stands in his or her shoes. *See* N.Y. Workers' Comp. Law § 29 (entitled "Subrogation"); *id.* § 29(2) (describing circumstances under which there may be "an assignment of the cause of action"); *see also* 73 Am. Jur. 2d Subrogation § 61 (noting that subrogation "places the party subrogated in the shoes of the creditor," and that this right "does not depend on contract or statute for its application"). Surely Respondents do not contend that section 2(a)(1) of the TVPA, which allows a torture claim to be brought only by the "individual" tortured, does not allow subrogation or assignment to a legal person. Respondents' explanation for the switch between "individual" and "person" is no more convincing than the D.C. Circuit's, and further demonstrates that Congress was not generally distinguishing between the use of"individual" and "person."

Respondents also argue that the TVPA has more

restricted usage than 42 U.S.C. § 1983, indicating an intent to exclude legal entities. Br. in Opp'n at 15. But Respondents do not demonstrate that the TVPA and section 1983 are generally parallel; in fact, the statutes differ in multiple ways. Indeed, the TVPA's legislative history fully explains the choice of "individual": because "person" might include foreign states, *see, e.g.*, *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), Congress used "individual." But the Eleventh Amendment bars section 1983 suits against states, *see Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70–71 (1989), so the same concern does not arise in section 1983.

Respondents suggest that Petitioners "have no explanation" for the variable usage of the terms "individual" and "person" in the TVPA, Br. in Opp'n at 17, but Respondents miss the point: aside from the stated intent to exclude foreign states, there is *no* distinction between the use of these terms in the statute, because Congress was using them interchangeably.

C. The Legislative History Indicates That, While Congress Was Aware Of Suits Against Legal Entities, Congress Was Only Concerned About Suits Against Foreign States.

Respondents do not dispute that the committee reports accompanying the TVPA give only one reason for the choice of "person" over "individual": to exclude foreign states. *See* Br. in Opp'n at 23. This is significant, because Congress was aware of suits against both foreign states and legal entities, but only expressed concern over the former.

Respondents misunderstand Petitioners' reference to *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). Although the TVPA was passed, in part, in response to Judge Bork's opinion in that case, the significance in this context is not the substance of that opinion, but Congress' awareness of the defendants in that case. Congress was paying attention to who had been sued: the lead defendant in *Tel-Oren* was the Libyan government, and Congress made sure to exclude foreign governments from the TVPA. The remaining defendants, however, were all legal entities. *See id.* at 775. Despite familiarity with *Tel-Oren*, there is no indication that Congress was concerned about legal entities as defendants.

Respondents argue that the they do not state "individual" was meant *only* to exclude foreign states. Br. in Opp'n at 23. But Respondents do not explain why Congress would have mentioned one of the classes of defendants in *Tel-Oren*, and not the other. If Congress had intended to exclude legal entities, it would not have been silent on the issue.

D. The 1988 Markup, Which Was Never Referred To In Any Committee Report Or Floor Statement, Is Not Legislative History Of The 1992 Statute.

As did the court below, Respondents rely heavily on statements made in the 1988 subcommittee markup of an unenacted version of the TVPA. But Respondents cite no case, and Petitioners have found none, in which a court has relied on statements made only in a small subcommittee hearing, which never found their way into any committee report or floor statement, and which were not even made in the

same Congress as the enacted statute.

Respondents suggest that *United States v. Enmons*, 410 U.S. 396 (1973), relied on statements made with respect to an unenacted prior bill. In *Enmons*, the Court considered it "wholly appropriate" to consider statements by the bill's sponsor on the House floor in 78th Congress where "[t]he congressional debates on the Hobbs Act in the 79th Congress repeatedly referred to the legislative history of the original bill." *Id.* at 404 n.14. Thus, the statements in *Enmons* not only were made on the floor, but they were also referenced in the debate on the enacted bill. Neither is true of the statements on which Respondents rely here, which never surfaced again following the markup itself — not even in the committee report following the markup. *See* H.R. Rep. No. 100-693.

Nor do Respondents' other cases help their argument. In *Dixson v. United States*, 465 U.S. 482 (1984), the Court considered draft language that had been included in prior versions of a bill but was then changed by the Congress that enacted the statute, in response to Justice Department testimony. Reasoning that the new language must have been distinct from the original language, the Court looked at the text of the prior bills to assist interpretation of the final text. *Id.* at 493-94 & n.13 (1984). Here, however, the enacting Congress gave an express reason for the language change, which differed from the apparently unremembered reason given in the markup two Congresses prior. And in *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 85 (2d Cir. 2006), the Second Circuit referred to hearings in prior Congresses in stating

the general congressional purpose behind the statute at issue, but did not rely on these hearings as legislative history to interpret any provisions of the law. Neither case is remotely similar to the Ninth Circuit's use of the subcommittee markup.

Respondents also suggest that the statement at issue concerned an amendment that "immediately passed by a voice vote," and "occurred on the record, as part of the bill's official history." Br. in Opp'n at 22. Because records of such meetings exist, Respondents suggest that Congress can be expected to be aware of them. But that is a far cry from expecting that a subsequent Congress should be aware of a subcommittee markup in a prior Congress, especially where the discussion at issue never appeared in any report. Indeed, the evidence suggests that if any members of Congress were aware of the exchange in the markup, they would have understood that it had essentially been repudiated by the committee reports in the 102nd Congress, which gave an entirely different reason for the selection of the word "individual."

E. Excluding Legal Entities As Defendants Would Produce Absurd Results.

As Respondents point out, the Court in *Clinton* suggested that the term "individual" should be interpreted as synonymous with "person" in order to avoid an absurd result. Br. in Opp'n at 17. Recent cases have confirmed that corporations can be sued under the ATS. *See Flomo v. Firestone Natural Rubber Co., Inc.*, ___ F.3d ___, No. 10-3675, 2011 U.S. App. LEXIS 14179, *21 (7th Cir. July 11, 2011); *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, No. , 2011 U.S. App. LEXIS 13934, *133–34 (D.C. Cir. July 8,

2011). Excluding them as TVPA defendants would produce absurd results that conflict with Congress' purpose in extending ATS remedies to U.S. citizens.

Respondents suggest that, because foreign states were excluded from the TVPA's scope and because exhaustion of remedies is required, *other* restrictions not found in the ATS can also be read into the TVPA. Br. in Opp'n at 18. But the statutory restrictions are discussed in the committee reports accompanying the TVPA, *see* H.R. Rep. No. 102-367 at 4–5; S. Rep. No. 102-249 at 6, 8–9, and nothing in these reports suggests any intent to exclude corporations. Instead, the reports state that the "important" manner in which the TVPA "enhances the remedy" available under the ATS is to "extend a civil remedy also to U.S. citizens." H.R. Rep. No. 102-367 at 4; S. Rep. No. 102-249 at 4. The general purpose of the TVPA is to extend the remedy, not to limit it; excluding corporations is inconsistent with that purpose.

CONCLUSION

For all these reasons, this Court should grant the Petition.

Respectfully Submitted,

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