Nos. 09-7125 (lead case), 09-7127, 09-7134, 09-7135

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE VIII, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,
v.
EXXON MOBIL CORP., *et al.*,
Defendants-Appellees-Cross-Appellants.

JOHN DOE I, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,
v.
EXXON MOBIL CORP., *et al.*,
Defendants-Appellees-Cross-Appellants.

On Appeal from the U.S. District Court for the District of Columbia
(D.D.C. Case Nos. 1:07-cv-01022 (*Doe-VIII*) & 1:01-cv-01357 (*Doe-I*))

BRIEF OF AMICI CURIAE UNIVERSITY OF MINNESOTA LAW SCHOOL INTERNATIONAL HUMAN RIGHTS CLINIC AND LEGAL SCHOLARS MICHAEL AVERY, KAREN BLUM, MARTIN FLAHERTY, DAVID RUDOVSKY, BETH STEPHENS AND DAVID WEISSBRODT IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES SEEKING REVERSAL

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SEPTEMBER 13, 2010

ORAL ARGUMENT NOT YET SCHEDULED

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28.1, *Amici* certify the following:

A. Parties Appearing Before the District Court

All parties, intervenors and *amici* appearing before the district court and this Court are listed in the Brief for Plaintiffs-Appellants.

B. Rulings Under Review

The issues that are the subject of this amicus curiae brief are those in the October 14, 2005 ruling of the District Court of the District of Columbia. *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005). All other rulings under review in these consolidated appeals are listed in the Certificate of Parties, Rulings, and Related Cases filed by Plaintiffs-Appellants.

C. Related Cases

Counsel for *Amici* is unaware of any related cases currently pending before this Court or any other court outside of those cases already consolidated in this action.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel makes the following disclosure:

None of the *Amici* is a publicly held entity. None of the *Amici* is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. No parent companies or publicly held companies have a 10% or greater ownership in any of the *Amici*.

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GLOSSARY

AOB	Appellants' Opening Brief
ATS	Alien Tort Statute
Defendants	Defendants-Appellees-Cross-Appellants Exxon Mobil Corporation and ExxonMobil Oil Indonesia, Inc., and their predecessors
ExxonMobil	Exxon Mobil Corporation, ExxonMobil Oil Indonesia, Inc., and their predecessors
Plaintiffs	Plaintiffs-Appellants-Cross-Appellees John Does I through XI, and Jane Does I through VI
TVPA	Torture Victim Protection Act

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae—listed in the Appendix—are legal experts in the fields of statutory interpretation, international human rights law, and civil rights law. Amici respectfully submit that strong doctrinal, policy, and practical reasons support the interpretation of the term "individual" in the Torture Victim Protection Act, 28 U.S.C. §1350 (note) ("TVPA") to include corporations, as well as the use of 42 U.S.C. §1983's "color of law" jurisprudence to interpret the phrase "color of law" in the TVPA and "state action" in cases brought under the Alien Tort Statute, 28 U.S.C. §1350 ("ATS"). Though Amici take no position on the merits of plaintiffs' claims, Amici conclude that dismissal was premature at the pleadings stage, particularly in light of the evidence discussed in the district court's summary judgment opinion. All parties have consented to the filing of this brief; leave to file was granted June 8, 2010.

SUMMARY OF ARGUMENT

Amici respectfully submit that the district court erred when it held that corporations are exempted from liability under the TVPA. This question is one of first impression in this Circuit and Amici submit that the better reading of the statute, consistent with its text and structure, Supreme Court precedent regarding the usage of the term "individual" and the TVPA's legislative history is that the statute provides for corporate liability.

Amici also write to express their concern regarding the district court's decision that federal courts may not rely on the jurisprudence developed under 42 U.S.C. §1983 to evaluate the "color of law" requirement of the TVPA or the "state action" requirement for certain ATS claims. Recourse to §1983 case law to evaluate claims under the TVPA is mandated by Congress and supported by ample authority. It is similarly appropriate to rely on well-developed §1983 case law to evaluate whether a private party's conduct can be considered "state action" for purposes of the ATS. The district court's decision that application of §1983 jurisprudence by the courts presents justiciability problems is not supported by authority on either the political question nor act of state doctrines and if allowed to stand, would render the statutes meaningless and contravene years of case law.

ARGUMENT

I. LIABILITY FOR CORPORATIONS IS CONSISTENT WITH THE TVPA'S TEXT, STRUCTURE, AND LEGISLATIVE HISTORY AND WITH RELEVANT PRECEDENT

The district court summarily concluded that a "plain reading" of the TVPA "strongly suggests that it only covers human beings, and not corporations." JA0655. A more complete analysis reveals that exempting corporations from liability under the TVPA is inconsistent with the statute's text and structure;

Supreme Court precedent and extensive other jurisprudence regarding interpretations of "individual"; and the TVPA's legislative history.

A. The Plain Text of the TVPA Imposes Liability on Corporate Defendants Because the Term "Individual" Encompasses Corporations

The TVPA creates liability for an "individual who . . . subjects another individual to torture" or "extrajudicial killing." 28 U.S.C. §1350 (note). The language of the TVPA includes corporations because the term "individual" includes corporate individuals.

1. The Plain Meaning of the Term "Individual," Its Consistent Use in the United States Code, and Principles of Statutory Interpretation All Suggest that Corporations Fall Within Its Ambit

The plain meaning of "individual" supports its application to corporate entities. Black's Law Dictionary explains that while "individual" may sometimes refer only to human beings, "this restrictive signification is not inherent in the word, and it may, in proper cases, include artificial persons." *Black's Law Dictionary* 772 (6th ed. 1990); *see also Black's Law Dictionary* 789 (8th ed. 2004) (stating that "individual" refers to "an indivisible entity" or a "single person or thing"). Non-legal dictionaries in print at the time of the TVPA's passage similarly reveal that the term "individual" may encompass legal persons. *See, e.g.*, *Webster's Third New International Dictionary* 1152 (unabridged ed. 1976) (defining

"individual"—in the first of five listings—as "a single or particular being or thing or group of beings or things).

The use of the term "individual" for a plaintiff bringing suit under the TVPA is necessarily limited to natural persons, since only they can be subjected to torture or extrajudicial execution. But this does not preclude the inclusion of corporate individuals as defendants. The United States Code is replete with examples of the use of different subsets of a term's full meaning in the same statute. *See, e.g.*, 8 U.S.C. §1324 (2005) (assigning criminal penalties to "[a]ny person who—knowing that a person is an alien, brings or attempts to bring to the United States in any manner whatsoever such person" other than in the proscribed manner); 33 U.S.C. §1319(c)(3)(A) (1990) (assigning fines to "[a]ny person who knowingly violates [enumerated permit rules] . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury"). In sum, that Congress used the word "individual" in two contexts that implicate different subsets of the term's full meaning—in reference to the victim and to the perpetrator—does not render unlikely the notion that the TVPA extends liability to corporate defendants. *See Environmental Defense Fund v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (noting that the "'natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in

which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.") (quoting *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433 (1932)). Indeed, "'[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.'" *Id.* (quoting *Atlantic Cleaners*, 286 U.S. at 433).

Had Congress intended to exclude corporations from the scope of liability under the TVPA, it could have done so—as it has in countless other statutes—by using the terms "human being" or "natural person." "Murder," for example, is the "unlawful killing of a human being with malice aforethought." 18 U.S.C. §1111 (2003); *see also, e.g.*, 10 U.S.C. §926(a) (1956) (defining aggravated arson as the willful or malicious burning of a building "wherein to the knowledge of the offender there is at the time a human being"); 18 U.S.C. §1841(a)(2)(C)(2004) (assigning penalties under other sections "for intentionally killing or attempting to kill a human being").

Congress has similarly used the term "natural person" to distinguish human beings from corporate or organizational persons. *See, e.g.*, 15 U.S.C. §1693a(5)(1978) ("[T]he term 'consumer' means a natural person"); 15 U.S.C. §6602(5)(1999) ("The term 'personal injury' means physical injury to a natural

person."); 28 U.S.C. §1369(3)(2002) (stating that "the term 'injury' means . . . physical harm to a natural person"); 7 U.S.C. §21(b)(4)(2008) (specifying that an applicant for registration as a futures association must adopt rules providing that without approval "no person shall become a member and no natural person shall become a person associated with a member"); 12 U.S.C. §611 (1991) ("Corporations to be organized for the purpose of engaging in international or foreign banking . . . may be formed by any number of natural persons, not less in any case than five."). While Congress could just as easily have chosen one of these terms to exempt corporations, it did not do so. On its face, then, the TVPA offers no reason to exempt corporations from liability. *Cf. Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

2. "Individual" is Synonymous with the Term "Person," Which Indisputably Includes Corporations

It is undisputed that the term "person" has long been recognized to encompass corporations. *See, e.g.*, *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) ("One of the points made and discussed at length in the brief of counsel for defendants in error was that '[c]orporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States' . . . The court does not wish to hear argument on [this] question . . . . We are all of

opinion that it does.") (internal quotation marks omitted). This jurisprudential pedigree is critical in the TVPA context because the Supreme Court has held that the terms "person" and "individual" can be synonymous. *See Clinton v. New York*, 524 U.S. 417, 428 & n.13 (1998). The Court recognized that in ordinary usage both "individual" and "person" often refer to a natural person, or individual human being. *Id.* at 428 n.13 (citing *Webster's Third New Int'l Dictionary* 1152, 1686 (1986)). Since the words "individual" and "person" are synonyms, the term "individual" may refer to both natural and corporate persons.

B. The TVPA's Official Legislative History Supports the Inclusion of Corporations as Potential Defendants

The contemporaneous official legislative history of the TVPA suggests that following the Supreme Court's lead in *Clinton* to recognize "individual" and "person" as "synonymous" is particularly appropriate here. "The authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill," *Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) (quotation marks and citation omitted), and the Senate Report accompanying the TVPA uses the terms "person" and "individual" interchangeably. *Compare* S. Rep. No. 102-249, at 8 (1991) ("The legislation is limited to lawsuits against *persons* who ordered, abetted, or assisted in the torture.") (emphasis added) *with id.* at 3 ("The purpose of this legislation is to provide a Federal cause of action against any *individual*, who . . . subjects any individual to torture or extrajudicial killing.") (emphasis added).

Even if the term "individual" could be read to exclude corporations, therefore, the interchangeable use of the terms "person" and "individual" in the official legislative history suggests that such a reading would be inappropriate.

1. Corporate Liability Is Consistent with the Object and Purpose of the TVPA and Any Other Result Would Be Absurd

At a minimum, the Court's holding in *Clinton* stands for the proposition that the term "individual" includes corporations where an alternative reading would produce an absurd result. *Clinton v. New York*, 524 U.S. at 429 & n.14. Interpreting the term "individual" to exclude corporations would violate this principle, leading to a result that Congress could not have intended. Both the House and Senate Reports emphasize that an important purpose of the TVPA is to extend to U.S. citizens the remedies available to aliens under the Alien Tort Statute ("ATS"). The House Report cites the need to extend to U.S. citizens a remedy for torture and extrajudicial killing abroad—that this remedy "not [be] limited to aliens." H. Rep. No. 102-367(I), at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86; *see also* S. Rep. No. 102-249, at 5 (1991). Given that corporations can be sued under the ATS, (see Appellants' Opening Brief, "AOB" at 30–42), reading the TVPA to exclude corporations would mean that an alien tortured abroad by a corporation would have a civil remedy in the United States against the offending corporation, but that a similarly situated U.S. citizen would not. Following the Supreme Court's reasoning

in *Clinton*, the term "individual" must be read to encompass corporations in order to avoid this result.

2. The Use of the Term "Individual" Is Intended to Shield Foreign Governments from Liability Under the TVPA, Not Corporations

The statute's legislative history shows that Congress chose the word "individual" to ensure that foreign governments—not corporations—are excluded from liability under the TVPA. "The legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued." S. Rep. No. 102-249, at 7 (1991); *see also* H. Rep. No. 102-367(I), at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87 ("Only 'individuals,' not foreign states, can be sued under the bill."). Indeed, the district courts in this circuit have recognized that the use of the term "individual" was directed to shield foreign *sovereigns* from liability. *See Fisher v. Great Socialist People's Libyan Arab Jamahiriya*, 541 F. Supp. 2d 46, 50 n.2 (D.D.C. 2008) (relying on the official reports accompanying the bill to hold that "the TVPA only creates a cause of action against individuals, not states."); *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 18 (D.D.C. 2005) (same); *Dammarell v. Islamic Republic of Iran*, No. 01-2224 (JDB), 2005 WL 756090, at *31 (D.D.C. Mar. 29, 2005) (same); *Collett v. Socialist Peoples' Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230, 242 (D.D.C. 2005) (same). In sum, Congress

was concerned with ensuring that the Act did not impinge on sovereign immunity, and did not use any parallel restrictive language for corporations in either legislative report.

C. Courts Have Long Held that Corporations Are Individuals

Courts have interpreted the word "individual"—both in the TVPA context and others—to apply to corporations. In the specific context of the TVPA, the Eleventh Circuit has found that the term "individual" encompasses corporations. In *Aldana v. Del Monte Fresh Produce*, after extensive briefing and argument, the court allowed plaintiff's torture claim under the TVPA to proceed against corporate defendant Del Monte. 416 F.3d 1242, 1250–53 (11th Cir. 2005). In *Rodriguez v. Drummond Co.,*, the district court held that the corporate defendants were "individuals" under the TVPA. 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003). The Eleventh Circuit subsequently affirmed this result on appeal. *See Romero v. Drummond Co.* 552 F.3d 1303, 1315 (11th Cir. 2008) ("Under the law of this Circuit, the Torture Act allows suits against corporate defendants."). *In Sinaltrainal v. Coca-Cola Co.*, the court reaffirmed its determination that "'an individual' to whom liability may attach under the TVPA also includes a corporate defendant."). 578 F.3d 1252, 1264 n.13 (11th Cir. 2009).[1]

[1] In *Saleh v. Titan*, this Court remarked in dicta that the TVPA "provides a cause of action whereby U.S. residents [can] sue foreign states for torture, but [does] not . . . include as possible defendants either American government officers or private U.S.

More than two centuries of Supreme Court precedent in non-TVPA contexts supports the conclusion that corporations are individuals under the law. Plaintiffs' opening brief discusses the well-accepted rule that corporations are liable for their torts (AOB at 52–54). As early as 1825, in *Bank of the United States v. Dandridge*, the Supreme Court acknowledged the autonomous legal identity of corporate individuals. 25 U.S. (12 Wheat.) 64, 87–88 (1825) (the execution of a bond by a corporate agent, unaccompanied by written authorization from the board of directors, is an official action of the corporate individual). Even Justice Marshall, in his dissent in *Dandridge*, acknowledged the autonomous identity of the corporate individual: "The corporation being one entire impersonal entity . . . must

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persons, whether or not acting in concert with government employees." 580 F.3d 1, 16 (D.C. Cir. 2010). This characterization of the TVPA—in a case where the statute was not in issue—can only be squared with the language and legislative history of the TVPA if it refers to private individuals acting under color of *U.S.* law; both text and legislative history are clear that the statute emphatically does *not* provide a cause of action for U.S. residents to sue foreign states for torture. *See supra*, Parts I.A.1 (text) & I.B.2 (legislative history). Yet the TVPA manifestly provides a cause of action against "private persons" to the extent they act under "color of law, of any foreign nation." 28 U.S.C. §1350 (note). The *Saleh* dicta, therefore, says nothing about the question at issue here of whether the statute restricts potential defendants to natural persons. Unfortunately, the erroneous *Saleh* dicta was then mistakenly expanded by a district court in this circuit to state that no private U.S. persons can be sued under the TVPA. *Estate of Manook v. Research Triangle Institute*, 693 F. Supp. 2d 4, 20 (D.D.C. 2010). Two other cases analyzing the TVPA's applicability to foreign states also erred, using sweeping language that included all private defendants, without analysis. *Mohamad v. Rajoub*, 664 F. Supp. 2d 20, 22 (D.D.C. 2009); *Ali Shafi v. Palestinian Authority*, 686 F. Supp. 2d 23 (D.D.C. 2010).

be endowed with a mode of action peculiar to itself." *Dandridge*, 25 U.S. at 91–92 (1825).

Beginning with *Dandridge*, and continuing into the twenty-first century, the Supreme Court has endorsed the concept that corporations are "individuals." *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (corporations are individuals for the purposes of the Fourteenth Amendment); *Hale v. Henkel*, 201 U.S. 43, 77 (1906) (corporations are protected from illegal searches and seizures by the Fourth Amendment). More recently, the Court has reaffirmed its extension of constitutional protections to corporations. *See, e.g., U.S. v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (Fifth Amendment double jeopardy protections); *Dow Chemical Co. v. U.S.*, 476 U.S. 227 (1986) (Fourth Amendment prohibitions). Most recently, the Supreme Court has stated that corporate persons deserve the same First Amendment protections as natural persons. *See Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 917 (2010).

In *Clinton*, the Supreme Court held that Congress intended the term "individual" to include corporations in a provision of the Line Item Veto Act that authorized "any individual adversely affected" to challenge the Act's constitutionality. 524 U.S. 417, 428 n.13 (1998). The Circuits have also found that the term "individual" can include corporations. In *United States v. Middleton*, the Ninth Circuit found that the ordinary meaning of the word "individuals" did "not

necessarily exclude corporations." 231 F. 3d 1207, 1210 (9th Cir. 2000) (citing *Webster's Third New Int'l Dictionary* 1152 (unabridged ed. 1993)). The court then determined that, as a legal term of art, "individual" can apply to corporate persons. *Id.*[2] Other circuits have also reached this conclusion. *In re Atlantic Bus. &*

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[2] In a decision issued September 10, 2010, the Ninth Circuit attempted to distinguish the applicability of this language to TVPA claims against corporations with an incomplete and inaccurate analysis of the TVPA's drafting history. *Bowoto v. Chevron Corp.*, No. 09-15641, slip op. at 13–17 (9th Cir. Sept. 10, 2010). The court did not provide a complete analysis of the legislative history accompanying the bill when it was presented for a vote; this error was the basis for distinguishing *Middleton* and prevents *Bowoto* from being persuasive authority. *See supra* Section I.B (discussing use of *both* "person" and "individual" in the Senate and House Reports, including in section pertaining to aiding and abetting liability). Nor did the court comment on the long and widespread use of the term "individual" to encompass corporations. *See supra* Section I.C. The reliance on the Dictionary Act is erroneous: it is common for items on a list in a legal definition to overlap with one another. The Dictionary Act itself includes several lists of terms that have overlapping meanings. 1 U.S.C. § 1 (1947). For instance, it defines "writing" to include "printing and typewriting ... multigraphing, mimeographing, or otherwise," notwithstanding that multigraphing and mimeographing are types of printing. The U.S. Code contains numerous other examples of lists of terms that overlap or encompass one another. For example, 8 U.S.C. § 1101(a)(15)(U)(iii) (2009), defines criminal activity as, *inter alia*, rape, torture, incest, domestic violence, sexual assault, abusive sexual contact, notwithstanding that several of those terms encompass or overlap with other terms on the list. It would be error to assume that incest cannot be rape, or rape cannot be torture, merely because those terms are separately listed in the statute. The *Bowoto* court also ignores the very clear statements that the reason "individual" was used was to exclude states. Finally, the *Bowoto* court's reliance on a 1988 floor statement is inapposite to the interpretation of the TVPA because it relates to an un-enacted version of the bill introduced in the 100th Congress—a deliberation that occurred three years prior to the passage of the TVPA. *See supra* Section I.B (quoting *Eldred v. Ashcroft*, 537 U.S. at 209 n.16). Because there is no evidence that the senators that voted to pass the Act were aware of this exchange, it is secondary to the official reports described above, which ambiguously use the terms "person" and "individual"

Community Corp. v. Atlantic Bus. & Community Dev. Corp., 901 F.2d 325, 328–29 (3d Cir. 1990) ("individual" can encompass corporate debtor); *Budget Service Co. v. Better Homes of Va. Inc.*, 804 F.2d 289, 292 (4th Cir. 1986) (same).

The idea that the term "individual" can encompass corporations extends into state law. The Supreme Court of Delaware, the state in which most corporations have legal residence, has accepted that corporations are individuals under the law. *See Paramount v. Time*, 571 A.2d 1140 (1989) (ruling that corporations could prefer the preservation of a unique corporate culture over shareholder interests). In another example, the Supreme Court of Ohio held that "[t]he word 'individual' is here used in the sense of person, and embraces artificial or corporate persons as well as natural." *State ex rel. Am. Union Tel. Co. v. Bell Tel. Co.*, 36 Ohio St. 296, 310 (1880); *see also Danyluk v. Glashow*, 784 N.Y.S.2d 919 2004 WL 556582 at *6 (N.Y. Civ. Ct. Feb. 20, 2004) ("a corporation…is legally treated as an individual).

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interchangeably. "The authoritative source for finding the Legislature's intent lies in the Committee reports on the bill, not statements from individual members of Congress." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 273 n.16 (1979); *see also Duplex Printing Press v. Deering*, 254 U.S. 443, 474 (1921) (stating that it is "well established" that Committee Reports are an "exposition" of legislative intent, but statements by individual members are not). There is no evidence, therefore, that the 102nd Congress, which passed the TVPA, intended to exclude corporations from liability. On the contrary, the text, purpose, and legislative history indicate that Congress did not intend to exempt corporations from liability.

Conceptually, then, for nearly 200 years courts have held that corporations are individuals under the law, with rights to be protected and responsibility for their torts. Abiding by the prohibitions against torture and extrajudicial killing that Congress codified in the TVPA are among the responsibilities of corporate individuals. *See generally* Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. Int'l Econ. L. 263, 265 (2004) ("If corporations have rights under international law, by parity of reasoning, they must have duties as well.").

II. IT IS WELL-ACCEPTED AND SOUND PRACTICE FOR COURTS TO APPLY 42 U.S.C. §1983 ANALYSIS TO TVPA AND ATS CLAIMS

Congress requires that the perpetrator act under "color of law" to sustain a cause of action for torture in the TVPA. 28 U.S.C. §1350(note)(2)(a). The statute does not define "color of law," but the term is extensively defined in the case law of the Civil Rights Act of 1871—specifically, 42 U.S.C. §1983. Recourse to §1983 case law to evaluate claims under the TVPA is both mandated by Congress and supported by ample authority. Moreover, for the ATS claims that require state action, such as torture and summary execution, courts have similarly applied §1983 jurisprudence. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995).

A. Courts Should Construe "Color of Law" in the TVPA by Recourse to §1983 Jurisprudence

By using the term "color of law" when drafting the TVPA, Congress chose a legal term that has a longstanding meaning within U.S. law. Indeed, the official House Report to the TVPA unambiguously states that "[c]ourts should look to 42 U.S.C. §1983 in construing 'color of law' . . . ." H.R. Rep. No. 102-367(I) at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87. Congress's directive should therefore be conclusive.[3]

B. Courts May Construe the "State Action" Requirement of the ATS by Recourse to §1983 Jurisprudence

The "state action" requirement of the ATS should also be construed in light of case law under §1983 because the ATS "state action" requirement is closely related to the TVPA "color of law" analysis. Federal courts apply domestic procedural rules such as "color of law" analysis to ATS claims under *Sosa*, and the weight of authority supports use of §1983 jurisprudence to explicate "color of law."

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[3] Courts consistently apply §1983 analysis to TVPA claims. *See, e.g.*, *Sinaltrainal v. Coca-Cola,* 578 F.3d 1252, 1264 (11th Cir. 2009); *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1247 (11th Cir. 2005); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 316 (S.D.N.Y. 2001), *rev'd on other grounds sub nom. Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

1. Courts Have Correctly Equated the TVPA "Color of Law" Requirement and the ATS "State Action" Requirement

Certain claims under the ATS, such as torture and summary execution, require some form of state conduct or the appearance of state conduct. *Kadic*, 70 F.3d at 241–45.[4] Although the ATS does not use the term "color of law," the Supreme Court has held that there is no difference between the "state action" requirement and "color of law" analysis. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 929 (1982) (citing *United States v. Classic*, 313 U.S. 299, 326 (1941)). Because the Supreme Court equates "color of law" and "state action," courts should apply a §1983 analysis to claims under both the TVPA and the ATS.

2. Courts Apply Federal Procedural Rules, Including "Color of Law" Analysis, to ATS Claims

While the substantive norms that are actionable under the ATS are derived from international law, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004), the procedural rules of decision are derived from the law of the forum, in this case, U.S. domestic law. *See id.* at 726; Restatement (First) of Conflict of Laws §585 (1934) ("All matters of procedure are governed by the law of the forum."). This principle has been endorsed in this circuit. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777–78 (D.C. Cir. 1984) (Edwards, J. concurring) ("[T]he law of nations

[4] For direct liability claims in this category the defendant must act under actual or apparent authority or color of law. For secondary liability, it is sufficient that a private defendant aid and abet, conspire with, or enter into an agency relationship with a principal who is a state actor. *See* AOB at 44–47, 57–58.

never has been perceived to create or define the civil actions to be made available … states leave that determination to their respective municipal laws."). Judge Hall, in his concurrence in *Khulumani v. Barclay Nat. Bank Ltd.*, stated that "[i]t is a 'hornbook principle that international law does not specify the means of its domestic enforcement.'" 504 F.3d 254, 286 (2d Cir. 2007) (citation omitted). As Judge Hall noted, quoting the amicus curiae brief of the United States, "[A]lthough the substantive norm to be applied is drawn from international law or treaty, any cause of action recognized by a federal court is one devised as a matter of federal common law." *Id.* In determining the proper procedural rules, courts should "'borrow[] from the most analogous body of law.'" *Id.* At 287 (quoting Beth Stephens, Sosa v. Alvarez-Machain: "*The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts,* 70 Brook. L. Rev. 533, 558 (2004)).

Although the distinction between procedure and substance is far from clear, *see Sun Oil Co. v. Wortman,* 486 U.S. 717, 726–727 (1988) (discussing the dichotomy for purposes of conflicts of laws), in the context of §1983, the question has already been resolved by the Supreme Court: "It is for violations of such constitutional and statutory rights that 42 U.S.C. §1983 authorizes redress; that section is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3

(1979). *Sosa* makes clear that under the ATS, the common law provides a cause of action for enforcing sufficiently definite international law norms. 542 U.S. at 724. Thus the procedural rules of decision in ATS cases, including "color of law" analysis, rightly derive from the federal common law.

3. The Weight of Authority Supports the Application of §1983 Case Law in Claims Under the ATS

With the exception of the decision below, courts routinely turn to §1983 doctrine to determine whether defendant acted with state action for purposes of direct liability under the ATS. *See, e.g.*, *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 228 (D.D.C. 2007) (following *Kadic* to apply the joint participation and entwinement tests from *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)); *see also Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 188 (2d Cir. 2009); *Doe v. Constant*, 354 Fed. Appx. 543, 545(2d. Cir. 2009); *Sinaltrainal,* 578 F.3d at 1264; *Aldana*, 416 F.3d at 1247; *Kadic*, 70 F.3d at 245; *Drummond*, 256 F. Supp. 2d at 1264–65; *Tachiona*, 169 F. Supp. 2d at 315&n.235; *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1144 (C.D. Cal. 2002), *rev'd in part on other grounds*, 487 F.3d 1193 (2007), *rehearing en banc granted*, 499 F.3d 923 (2007); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 892 (C.D. Cal. 1997).

Unfortunately, the lower court, JA0651, relied on a misreading of *Sanchez-Espinoza v. Reagan,* 770 F.2d 202, 206–07 (D.C. Cir. 1985) to hold that §1983 was

inapplicable because "only states (and not persons) could be liable under the Alien Tort Statute for torture, arbitrary detention, or extrajudicial killing."[5] In *Sanchez-Espinoza*, however, this Court relied on the analysis of Judge Edwards in *Tel-Oren* for the assertion that "private, non-state conduct" is not covered by the ATS. 770 F.2d at 206–07 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–96 (D.C.Cir.1984) (Edwards, J., concurring)). However, Judge Edwards distinguished wholly private conduct from conduct by "individuals acting under color of state law." *Tel-Oren*, 726 F.2d at 793. This type of analysis for individual liability was found in *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir.1980), a case whose legal principles Judge Edwards endorsed. *Id.* at 791, as did *Sanchez-Espinoza*, 770 F.2d at 207 n.5. The present case, like *Filartiga*, alleges violations by ExxonMobil for torts under color of Indonesian law.

C. "Color of Law" Analysis Under §1983 Is Broader Than the Two Tests Employed by the Court Below

Section 1983 jurisprudence includes numerous tests to determine whether an action was taken under "color of law." In addition to joint action and proximate cause, considered by the lower court, JA0652–54, courts have analyzed the relationship between a state and private party by looking at whether there is

[5] The District Court also relies on *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.20, in stating that the Supreme Court has limited liability under the ATS to states, but the *Sosa* dictum left open the question of private liability.

entwinement, a public function, symbiotic relationship, nexus, or state compulsion, or some combination of these actions. *See Lugar,* 457 U.S. at 939 (analyzing four tests); *Arias*, 517 F.Supp.2d at 228 (citing *Brentwood*, 531 U.S. at 296, to hold §1983 elements satisfied when defendants are "entwined with governmental policies"); *Abdullahi*, 562 F.3d at 188 (finding nexus for state action where Nigerian government provided scarce resources and explicit approval for drug testing). The court need not apply only one test to decide whether or not a private party acted under color of law, but should weigh the facts. *Lugar*, 457 U.S. at 939. Supreme Court precedent, as well as this court's prior decisions, indicate that a broad range of fact patterns may support a finding that a private party acted under color of law, including facts such as those analyzed in the District Court's 2008 summary judgment decision.

1. Courts Have Found Acts To Be Under Color of Law when Police Officials Have Been Hired by a Private Party

Courts have long held that actions taken by agents of the state may be considered under color of law even if performed while off duty, or for a private party, provided the officer is clothed with the authority of law. *See Classic*, 313 U.S. at 326 (misuse of power possessed by virtue of state law is action taken under color of law); *Williams v. United States*, 341 U.S. 97, 99–100 (1951) (private investigator with police authority acted under color of law); *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980) (a police officer's actions as a security guard for a

bank were under color of law); *see generally* Michael Avery et al., *Police Misconduct: Law and Litigation* §1:2 (3d ed. 2009) ("An off-duty officer who purports to exercise authority by virtue of his official position will generally be held to have acted under color of law."). In *Griffin v. State of Maryland*, the Supreme Court held that a security employee of an amusement park who was not authorized by state law, but was "deputized" by the state, had a sheriff's badge, and enforced the segregation policy of the park was acting under color of law because he was "possessed of state authority and purport[ed] to act under that authority." 378 U.S. 130, 135 (1964). This court has cited these propositions favorably. *See Williams v. United States*, 396 F.3d 412, 414 (D.C. Cir. 2005).

2. Joint Participation with Security Forces Renders a Private Party Liable for Torts Committed Under "Color of Law"

A private party may be liable under §1983 if it is "a willful participant in joint action with the State *or its agents*" to deprive a person of constitutional rights. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (emphasis added). At summary judgment, the district court found that ExxonMobil could be liable for the relevant state-law torts because of ExxonMobil's control over the security function and over the Indonesian military personnel in its employ. JA1221–41. These facts could support a finding of state action under a "color of law" analysis, or at minimum, present questions of fact properly resolved by a jury.

Using the "joint participation" standard as the guidepost, the relationship between ExxonMobil and the Indonesian military personnel, as portrayed by the fact findings in the District Court's summary judgment decision, is analogous to *Lugar*, in which a private party used state officials for a state function, rather than to *Parker v. Grand Hyatt Hotel*, which the lower court cited, JA0652, where a private party simply called police for assistance. *Compare Lugar*, 457 U.S. at 941–42, *with Parker*, 124 F. Supp. 2d 79, 88 (D.D.C. 2000). *Parker* considered a charge of conspiracy under §1983, and held that the single act of calling the police did not meet the elements of conspiracy. In contrast, *Lugar*, the touchstone case for joint participation, held that invoking the aid of state officials to use state attachment procedures constituted state participation. *Lugar*, 457 U.S. at 941–42. The applicability of *Lugar,* rather than *Parker,* to the "color of law" question here is supported by the district court's later 2008 opinion. At the summary judgment phase, the lower court found that ExxonMobil contracted for the use of government security forces and exerted sufficient control over those security forces to satisfy the test for an employment relationship. JA1229–37. The court's finding of extensive association between the private actor and the government-provided security forces also satisfies the joint participation test and supports a finding that ExxonMobil is a state actor.

Through its involvement with the Indonesian security personnel in its employ, *see* JA1230-37, ExxonMobil's conduct satisfies the "entwinement" test. *See generally Brentwood*, 531 U.S. at 295 (citing, as an example of state action, a situation in which a government and private party are intertwined). The record indicates a factual dispute between the parties as to whether the oil field was designated a "Vital National Object" and required military security protection. JA1222–23. This dispute highlights the state-like nature of military security protection, even if provided by private parties. Contracting with uniformed state actors may render a private entity's activities attributable to the state. *Cf. West v. Atkins*, 487 U.S. 42, 44–49, 56 (1988) (finding a physician's contract to exercise supervisory authority over a normally public function constituted action under color of law). Another category of actions which may render a defendant liable under §1983 in this circuit is when the failure to adequately supervise or train employees rises to deliberate indifference. *Daskalea v. D.C.*, 227 F.3d 433, 441 (D.C. Cir. 2000); *Atchinson v. D.C.*, 73 F.3d 418, 420–22 (D.C. Dir. 1996); *Amons v. D.C.*, 231 F. Supp. 2d 109 (D.D.C. 2002); *Maniaci v. Georgetown Univ.*, 510 F. Supp. 2d 50 (D.D.C. 2007).

D. No Doctrine Renders Non-Justiciable Claims Based on Acts Taken Under Color of Foreign Law

The lower court stated that a "color of law" analysis "cuts too close to adjudicating the actions of the Indonesia government." JA0653–54. The court did not explore any specific justiciability doctrine, though it does refer in passing to the political question doctrine and the act of state doctrine. JA0656-57& n.7. However, neither doctrine applies to plaintiffs' TVPA and ATS claims. A finding to the contrary would render the TVPA and ATS meaningless and contravene Congress's intent and years of case law. The plaintiffs have provided extensive description of these doctrines and relevant jurisprudence (AOB at 58–67), and Amici merely add a few points concerning their relationship with "color of law" jurisprudence.

The political question doctrine, a prudential bar to subject matter jurisdiction based on separation of powers, *Baker v. Carr*, 369 U.S. 186, 209-11(1962), is only meant to apply in "those controversies which revolve around policy choices and value determinations *constitutionally committed* for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (emphasis added). But, as plaintiffs have explained, that is not the case here. AOB at 64–65; s*ee also Arias*, 517 F.

Supp. 2d at 225 (political question doctrine inapplicable where no review was sought of executive branch decisions).

The act of state doctrine applies when U.S. courts, in order to decide a case, *must* "declare invalid the official act" of another government in its own territory. *W.S. Kirkpatrick & Co. v. Env'l. Tectonics Corp.*, 493 U.S. 400, 405 (1990). Cases that require a state action or "color of law" analysis do not automatically implicate the act of state doctrine. The district court cited *Kadic*, 70 F.3d at 245, for the proposition that the TVPA requires a plaintiff to "establish government involvement" to state a torture claim and that such a determination "impermissibly requires adjudication of another country's action." JA0655. Yet while *Kadic* found state action where conduct by a private actor was taken under "color of law," 70 F.3d at 245, it concluded that the acts did not reflect the official policy of a government, and therefore, did not trigger the act of state doctrine. *Id* at 249-50.

The broader policy concerns are that the District Court's reading of the TVPA is contrary to its text and would render the statute meaningless. The TVPA explicitly requires that the acts be committed under either "actual or apparent authority" or "color of law." *See* 28 U.S.C. §1350 (note) §2(a). If the District Court's ruling were allowed to stand, then *any* claim under the statute would necessitate that courts pass on governmental action and would thus be barred on justiciability grounds. As noted in the TVPA's legislative history, however, "[t]he

U.S. Senate, in passing the TVPA, specifically confirmed that torture and similar human rights abuses can never be 'public acts' for the purpose of the acts of state doctrine." *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 488–89 (D.Md 2009) (citing S. Rep. No. 102-249, at 8 (1991)).

A similar analysis shows that liability under the ATS must include holding private parties liable for acts requiring "state action." The Second Circuit recognized this principle in *Kadic* by noting that "private persons may be found liable under the Alien Tort Act . . ." and the Executive Branch supported this view. 70 F.3d at 240. Courts in this circuit have incorporated the *Kadic* court's interpretation, calling its analysis "directly on point." *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998). In subsequent ATS case law, the notion that state action (or "color of law") includes non-state actors has been confirmed many times over. *See, e.g.*, *Shafi v. Palestinian Authority*, 686 F. Supp. 2d 23, 29 (D.D.C. 2010) (stating that Plaintiff "is free to plead a cause of action under the ATS for torture committed by non-natural persons."); *Arias*, 517 F. Supp. 2d at 227 ("It is clear that the ATCA may be used against corporations acting under 'color of [state] law,' or for a handful of private acts . . . ."); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 n.9 (D.D.C. 2003) ("The ATCA may be applied to certain actions of private, non-state actors.").

Thus, in this case, as in many other ATS and TVPA cases, plaintiffs have argued that ExxonMobil's relationship with the Indonesian security forces satisfies the color of law and state action requirements, *see supra* Section II.C.3, yet the political question and act of state doctrines do not come into play because the tortious actions jointly undertaken by ExxonMobil and its designated security personnel do not interfere with one of the other branches of the U.S. government and because they do not reflect the official acts or policy of the Indonesian government. *See* JA0656-57.

CONCLUSION

For the above reasons, this Court should find that corporations can be sued under the TVPA and that the "color of law" analysis in §1983 jurisprudence is applicable to both the TVPA and the ATS claims.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of 7,000 words set by Order of this Court on June 8, 2010 (Doc. No. 1248571) because this brief contains 6989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I, Jennifer M. Green, the undersigned, hereby certify that I am employed by the University of Minnesota Law School at 229 19th Ave. South, Minneapolis, Minnesota 55455 I further declare under penalty of perjury that on September 13, 2010, I caused to be served a true copy of the foregoing Brief of Amici Curiae University of Minnesota Law School International Human Rights Clinic and Legal Scholars Michael Avery, Karen Blum, Martin Flaherty, David Rudovsky, Beth Stephens, Stephen Vladeck, and David Weissbrodt in Support of Plaintiffs-Appellants-Cross-Appellees Seeking Reversal via the court's CM/ECF filing system upon the following persons:

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