No.

In the Supreme Court of the United States

LARRY BOWOTO; OLA OYINBO, on behalf of her deceased husband BOLA OYINBO and her minor children BAYO OYINBO and DEJI OYINBO; BASSEY JEJE; MARGARET IROWARINUN, ROSELINE IROWARINUN, and MARY IROWARINUN, individually and on behalf of their deceased husband AROLIKA IROWARINUN; BOSUWO SEBI IROWARINUN, CALEB IROWARINUN, ORIOYE LALTU IROWARINUN, TEMILOLA IROWARINUN, ADEGORYE OLORUNTIMJEHUM IROWARINUN, AMINORA JAMES IROWARINUN, ENIESORO IROWARINUN, GBENGA IROWARINUN, IBIMISAN IROWARINUN, MONOTUTEGHA IROWARINUN, and OLAMISBODE IROWARINUN, individually and on behalf of their deceased father AROLIKA IROWARINUN,

Petitioners,

—v.—

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 (note), provides a private right of action against "individuals" who commit torture or extrajudicial killing under color of foreign law. The Ninth Circuit held, in conflict with the Eleventh Circuit, that the TVPA allows only suits against natural persons and not against corporations or other legal entities. The question presented is:

Whether corporations and other legal entities may be sued for torture and extrajudicial killing under the Torture Victim Protection Act of 1991.

PARTIES TO THE PROCEEDING

All parties to the proceeding below are parties in this Court, and are listed in the caption.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by any publicly traded company. EarthRights International, counsel for petitioners, is a nonprofit, nongovernmental corporation with no parent corporation or shares held by any publicly traded company.

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Petitioners Larry Bowoto, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 621 F.3d 1116 (9th Cir. 2010). The court of appeals' order denying Plaintiffs' timely petition for rehearing and for rehearing *en banc* (App. F) is unreported and was entered February 10, 2011. The district court's first order concerning the TVPA (App. E) is unreported and was entered on July 14, 2004. The district court's second order concerning the TVPA (App. D) is unreported and was entered on August 22, 2006.

JURISDICTION

The Ninth Circuit issued its final decision on September 10, 2010, App. 1a–28a, and denied rehearing and rehearing *en banc* on February 10, 2011, App. 48a. Justice Kennedy granted Petitioners' application for an extension of time to file this petition up to and including June 20, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note, provides in relevant part:

Sec. 2. Establishment of civil action

(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation–

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of remedies. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Sec. 3. Definitions

(a) Extrajudicial killing.

For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture. For the purposes of this Act–

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering

(other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from–

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

STATEMENT OF THE CASE

Petitioners are nineteen Nigerians from the Ilaje ethnic group who alleged that they and their deceased relatives were subjected to torture, extrajudicial killing, and other abuses by Nigerian

security forces operating on behalf of Chevron Corporation and its subsidiaries ("Chevron") in the Niger Delta. Petitioners Larry Bowoto and Bassey Jeje, together with decedents Bola Oyinbo and Arolika Irowarinun, were part of a group of protestors who occupied the Parabe Platform, an offshore facility operated by Chevron subsidiary Chevron Nigeria Limited (CNL). Several days into the protest, CNL called in Nigerian government security forces, who shot several protestors and killed two, including Irowarinun. App. 2a–3a.

1. The Torture Victim Protection Act of 1991 provides a cause of action for the victims of torture and extrajudicial killings by foreign state actors. Congress passed the statute in 1992 at a time when cases for state-sponsored extrajudicial killing and torture had been brought by aliens under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, but such claims had been rejected by one court of appeals and in any event were not available to U.S. citizens. The committee reports regarding the TVPA indicated that Congress chose the word "individual" to describe defendants under the statute in order "to make crystal clear that foreign states" cannot be sued. S. Rep. No. 102-249 at 7; *see also* H.R. Rep. No. 102-367 at 4.

Petitioners originally brought claims against respondents pursuant to the ATS and California law; federal jurisdiction was founded on the ATS. Petitioners subsequently sought to add claims under the TVPA, including an extrajudicial killing claim for Irowarinun's death. Respondents opposed the amendment on the basis that such claims were futile because the TVPA does not allow claims against

corporations. App. 41a. On July 14, 2004, the district court allowed the amendment, ruling that "there is sufficient legal authority that [TVPA] claims can be brought against private corporations." App. 41a. Respondents subsequently challenged this decision. On August 22, 2006, the district court reversed itself, granting respondents' motion for judgment on the pleadings on the question of whether corporations could be sued under the TVPA, and dismissing all TVPA claims. App. 35a.

Following several motions for summary judgment, the remaining claims in the case proceeded to a jury trial beginning in October 2008. On December 1, 2008, the jury returned a verdict in favor of respondents on all claims, and judgment was subsequently entered. App. 29a–30a. Following the denial of a motion for a new trial, petitioners filed a timely appeal to the Court of Appeals for the Ninth Circuit on April 3, 2009. In their opening brief, Plaintiffs identified as one of the questions presented "Did the district court err in ruling that corporations are exempt from TVPA liability, where excluding corporations is unsupported by legislative history and produces illogical results?" Appellants' Opening Br. at 4.

2. On September 10, 2010, a panel of the court of appeals affirmed the district court's ruling that corporations were not subject to liability for torture and extrajudicial killing under the TVPA. App. 15a–20a. The panel found that only natural persons could be sued under the statute. App. 20a.

The panel acknowledged that its decision was in conflict with the only other court of appeals to decide this question at the time, the Eleventh Circuit,

which had expressly ruled that corporations can be sued under the TVPA. App. 16a–17a. The panel, however, explained its disregard for the Eleventh Circuit's jurisprudence by stating that the Eleventh Circuit "did not explain its reasoning" on this issue. App. 17a.

The panel noted that the statutory text of the TVPA applies only to "individuals." Although the panel recognized that both this Court and the Ninth Circuit had previously found the term "individual" to include corporations, it reasoned that the Dictionary Act, 1 U.S.C. § 1, implies that the term "individual" is presumed to exclude corporations. App. 17a.

The panel noted that the TVPA uses the term "individual" to apply both to the defendant sued for torture, and to the victim of torture. The panel reasoned that, because a corporation cannot be a victim of torture, the term "individual" must exclude corporations in order to have a consistent meaning in the statute. App. 18a.

The panel then looked to the record of a markup of a prior version of the TVPA introduced two Congresses prior. During the House committee markup on the bill, one member of the committee requested that the term "person" in the original bill text be changed to "individual" in order to exclude corporations. The panel did not reference the legislative history from the Congress that enacted the TVPA, making no mention of the Senate and House committee reports that explicitly state that the word "individual" was used to make clear that *foreign states* could not be sued. The panel then concluded that Congress had not intended to apply the TVPA to corporations. App. 19a.

3. Petitioners sought rehearing and rehearing *en banc* on the grounds that the panel erred in its approach to statutory construction and legislative history, ignored controlling decisions of this Court, and improperly discounted the views of the Eleventh Circuit, thus unnecessarily creating a circuit split. Without further discussion, the Ninth Circuit denied the petition for rehearing and rehearing *en banc* in an order issued on February 10, 2011. App. 48a.

REASONS FOR GRANTING THE WRIT

This case presents an opportunity to resolve a significant split in authority between three federal courts of appeals on the interpretation of a federal statute, which affects the ability of U.S. citizens and others to seek relief for serious human rights abuses. The Ninth Circuit below departed from the caselaw of the Eleventh Circuit in ruling that the TVPA disallows claims against corporations. The Ninth Circuit's ruling has subsequently been followed by the District of Columbia Circuit and the same issue has recently been presented to the Second Circuit. This conflict is untenable; at the moment, a corporation or other legal entity may be liable for torturing U.S. citizens if sued in Miami or Atlanta, but not in Los Angeles or Washington, D.C. A plaintiff's choice of forum, or a defendant's effort to transfer venue, should not be dispositive of claims for torture or extrajudicial killing under a federal statute.

This case presents an appropriate vehicle to resolve this split because the TVPA issue was extensively litigated before both the district court and the Ninth Circuit, and comes to this Court following a final judgment.

This case also presents an opportunity to clarify the appropriate sources of legislative history to be used in interpreting federal statutes. The Ninth Circuit's opinion relied in part on a statement by a member of Congress in a committee markup of a previous version of the TVPA, a statement that was not reproduced in any committee report, repeated on the floor of either chamber, or found in any materials pertaining to the enacted TVPA, and which is contradicted by the committee reports for the enacted TVPA.

Certiorari is further warranted because the Ninth Circuit's approach to statutory interpretation disregards this Court's guidance and contravenes the purpose and text of the TVPA.

I. The Courts of Appeals Are Divided Over The Significant Question Of Whether The TVPA Allows U.S. Citizens To Sue Corporations And Other Legal Entities For Torture And Extrajudicial Killing.

The Ninth Circuit acknowledged that its decision was in conflict with the Eleventh Circuit, and recently the D.C. Circuit has further contributed to this split. The Court should step in to resolve this untenable conflict in appellate authority.

A. The Ninth Circuit's Opinion Created A Circuit Split With The Eleventh Circuit.

In a series of cases, the Eleventh Circuit ruled that TVPA claims could be brought against corporate defendants. *See Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir.

2008); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250–52 (11th Cir. 2005). The opinion below discusses these cases only briefly, and omits *Sinaltrainal*; the Ninth Circuit stated only that "the Eleventh Circuit did not explain its reasoning on the issue." App. 17a.

Notwithstanding the Ninth Circuit's comment, the caselaw of the Eleventh Circuit remains clearly in conflict with the decision below. In fact, the Eleventh Circuit's decisions represent the majority of appellate caselaw on the scope of the TVPA. In *Sinaltrainal*, the issue was vigorously litigated in the district court, *see Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358–59 (S.D. Fla. 2003), and the Eleventh Circuit's decision affirmed the district court's detailed discussion. Moreover, the decision is consistent with the Eleventh Circuit's statement in that case that the TVPA was designed to be "broader than the ATS in that the TVPA allows citizens, as well as aliens, to seek a remedy." 578 F.3d at 1263–64.

More recently, the District of Columbia Circuit contributed to the split with the Eleventh Circuit with its decision in *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011).[1] Although the D.C. Circuit cited the Ninth Circuit's decision, it did not adopt all of its reasoning, and did not cite the committee markup that the Ninth Circuit found compelling. *Id.* at 606–09. Instead, the *Mohamad* panel relied primarily on the argument that, because the TVPA

[1] Petitioners understand that the plaintiffs in *Mohamad* have requested an extension of time to file a petition for writ of certiorari.

uses the term "individual" to refer both to the torture victim and the torturer, it can only have been intended to signify natural persons — despite the fact that there are "situations in which the same word in a single statute has a different scope, depending upon its precise context." *Id.* at 608.

The scope of the TVPA is also currently at issue in the Second Circuit, in the appeal of *Mastafa v. Chevron Corp.*, No. 10 Civ. 5646, 2010 U.S. Dist. LEXIS 140289 (S.D.N.Y. Nov. 22, 2010), *appeal docketed*, No. 10-5258 (2d Cir. Dec. 29, 2010). *Mastafa* similarly relied on the Ninth Circuit's opinion below in dismissing TVPA claims against a corporation. *Id.* at *8–10.

B. It Is An Untenable Situation Where Venue May Be Dispositive Of A Federal Claim.

At the moment, venue can be dispositive of parties' legal claims. For example, in 2008 the Judicial Panel on Multidistrict Litigation considered four lawsuits brought under the ATS and TVPA against Chiquita Brands International for alleged complicity in paramilitary terrorism in Colombia. *In re Chiquita Brands Int'l, Inc.*, 536 F. Supp. 2d 1371 (J.M.P.L. 2008). One case was filed in the Southern District of Florida, in which TVPA claims may be brought against corporations; another was filed in the District of the District of Columbia, where such claims are now disallowed; another was filed in the Second Circuit, which will soon decide this issue; and the fourth was filed in the Third Circuit, which has yet to hear a TVPA case. *See id.* at 1371. The panel transferred the cases to the Southern District of

Florida, *id.* at 1372–73, where the court recently confirmed that TVPA claims may proceed against Chiquita. *See In re Chiquita Brands Int'l, Inc.*, No. 08-01916-MD, 2011 U.S. Dist. LEXIS 59393, *194–95 (S.D. Fla. June 3, 2011). Had the cases been transferred to the District of Columbia, as Chiquita sought, *see* 536 F. Supp. 2d at 1371, the TVPA claims would have been dismissed following *Mohamad*. The case originally filed in the District of Columbia may face a different legal regime if it is returned there for trial.

These geographic differences over a basic issue of who may be sued are untenable, as the *Chiquita* litigation demonstrates. In a future case, the Judicial Panel on Multidistrict Litigation might face the choice of effectively extinguishing claims by transferring a TVPA case, with the possibility that those claims could then be resurrected if the case returns to the filing jurisdiction for trial. Venue should not have a dispositive effect on federal claims for torture and extrajudicial killing; such a situation gives both plaintiffs and defendants substantial incentives to engage in forum-shopping to find a federal jurisdiction with favorable law.

II. This Case Is An Appropriate Vehicle to Address The Circuit Split And Resolve The Question Presented.

Although this Court is reluctant to review issues at an interlocutory stage, *see, e.g.*, *DTD Enters. v. Wells*, 130 S. Ct. 7, 8 (2009) (Roberts, C.J., concurring in the denial of certiorari), the instant case comes to the Court following a final judgment. Furthermore, there is a well-developed record on the TVPA at both the district court and the court of

appeals. The question of the TVPA's applicability to legal entities was briefed twice before the district court, which issued two orders on the subject, *see* App. 31a–45a; it was further briefed before the court of appeals, which discussed this question at length in its opinion, App. 15a–20a. It is presented here as a pure question of law.

III. The Ruling Below Conflicts With This Court's Jurisprudence On Statutory Interpretation And Legislative History.

Review is warranted here because the Ninth Circuit disregarded this Court's guidance on statutory interpretation and the use of legislative history. The TVPA provides a cause of action that allows "individuals" to be held liable for torture and extrajudicial killing. The Ninth Circuit improperly assumed that plain meaning of the term "individual" does not apply to legal entities. In determining the meaning of this term, the court of appeals improperly relied on materials that are not legislative history and ignored the actual legislative history of the TVPA, wrongly interpreted the Dictionary Act, 1 U.S.C. § 1, and did not follow this Court's analysis in *Clinton v. City of New York*, 524 U.S. 417, 428–29 (1998).

A. The Plain Meaning Of The Word "Individual" Includes Corporations.

The term "individual," by its plain meaning, includes corporations. The only reason given by the Ninth Circuit for rejecting this plain meaning was its misinterpretation of the Dictionary Act.

1. In *Clinton*, this Court held that, in the context of the Line Item Veto Act, the term "individual" is

synonymous with "person" and encompasses corporations. 524 U.S. at 428 & n.13 (citing Webster's Third New Int'l Dictionary 1152, 1686 (1986)). The Court found that "Congress undoubtedly intended the word 'individual' to be construed as synonymous with the word 'person.'" *Id.* at 428–29 (concluding "[t]here is no plausible reason why Congress would have intended" to exclude corporations from the definition of "individual").

As *Clinton* found, the inclusion of corporations is supported by the ordinary, dictionary definition of the word "individual." For example, the Random House Webster's Dictionary includes four definitions of "individual" that are not specified as restricted to a particular field:

> 1. a single human being, as distinguished from a group.
>
> 2. a person: *a strange individual.*
>
> 3. a distinct, indivisible entity; a single thing, being, instance, or item.
>
> 4. a group considered as a unit.

Random House Webster's Unabridged Dictionary 974 (2d ed. 2001). Although the first definition refers to a "human being," it is in contradistinction to a *group*, not to a corporation, and the third and fourth definitions plainly encompass corporations and other entities. Furthermore, as this Court observed in *Clinton*, the term "person" — which Congress undoubtedly often uses to include corporations — is also defined as "a human being." *See id.* at 1445. Indeed, none of the general definitions of "person"

suggest the inclusion of corporations; that definition is identified as peculiar to the law:

> 1. a human being, whether man, woman, or child: *The table seats four persons*.
>
> 2. a human being as distinguished from an animal or a thing. . . .
>
> 5. the actual self or individual personality of a human being: *You ought not to generalize, but to consider the person you are dealing with*.
>
> 6. the body of a living human being, sometimes including the clothes being worn: *He had no money on his person*.
>
> 7. the body in its external aspect: an attractive person to look at.
>
> 8. a character, part, or role, as in a play or story.
>
> 9. an individual of distinction or importance.
>
> 10. a person not entitled to social recognition or respect.
>
> 11. *Law*. a human being (**natural person**) or a group of human beings, a corporation, a partnership, an estate, or other legal entity (**artificial person** or **juristic person**) recognized by law as having rights and duties.

Id. Thus the ordinary meaning of "individual" is *more* suggestive of corporations than the ordinary meaning of "person."

Clinton is situated in a long line of cases holding that the term "individual" can include corporations. In 1849, the Supreme Court of Mississippi

determined that a statute taxing loans made by "individuals" nonetheless applied to banks and other corporations. *Bank of United States v. State*, 20 Miss. 456 (1849). The court observed that "the term individual, when used in a general sense, may comprehend a corporation," *id.* at 459, and that although the term "may be, and often is used, in contradistinction to banks or corporations . . . there is no necessary and invariable opposition of ideas in the term itself," *id.* at 460. The Supreme Court of Ohio similarly held that "[t]he word 'individual' . . . . 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). Thus, to exclude corporations from the ambit of "individuals" requires a legalistic gloss on its meaning to provide a more restrictive interpretation than is inherent in the word.

Although some courts have, in some contexts, found the word "individual" to exclude legal entities, the line of cases coming to the opposite conclusion continues to today, in both state and federal courts. *See, e.g.*, *United States v. Middleton,* 231 F.3d 1207, 1212–13 (9th Cir. 2000); *Cruze v. Nat'l Psychiatric Servs., Inc.*, 105 Cal. App. 4th 48, 55 (2003) (noting that "the rule seems to be that the word 'individual' is broad enough to embrace corporations and partnerships, and that where the context does not indicate otherwise, the word includes corporations" (internal quotation marks omitted)); *Georgetown College, Inc. v. Webb*, 313 Ky. 25, 28 (1950) (same); *Shively v. Belleville Twp. High Sch. Dist. No. 201*, 329 Ill. App. 3d 1156, 1165–66 (2002) (affirming decision that "the term 'individuals' as used in

section 10-20.21(i) includes corporations" because drawing distinction between "individuals doing business as sole proprietorships" and "those doing business as corporations" would be "absurd"); *Morgan v. Galilean Health Enters., Inc.*, 1998 OK 130, *8 n.16 (Okla. 1998) ("The word 'individual' includes corporations. . . . Its scope is broad enough to include corporations."); *Community Corp. v. Atlantic Bus. & Community Dev. Corp.,* 901 F.2d 325, 328–29 (3d Cir. 1990) ("individual" can encompass corporate debtor); *Budget Serv. Co. v. Better Homes of Va. Inc.,* 804 F.2d 289, 292 (4th Cir. 1986) (same); *Tenngasco Gas Gathering Co. v. Fischer*, 653 S.W.2d 469, 476 (Tex. Ct. App. 1983) (concluding that "'individuals' includes corporations" in a statute specifying to whom natural gas may be sold); *United States v. Badische & Co.*, 3 Cust. Ct. 528, 530 (1913) (noting that "numerous decisions have been given . . . in which the word 'individual' used in the statute has been held to include corporations and partnerships"). There should therefore be no presumption that the word "individual" excludes corporations.

2. The Ninth Circuit relied on the Dictionary Act, 1 U.S.C. § 1, to find that "individual" is presumed to exclude corporations. Although the Dictionary Act does not define the term "individual," the Ninth Circuit reasoned that it implies that "individual" excludes corporations because the Act defines the word "person" to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *Id.* This conflicts with *Clinton*, in which the majority did not cite the Dictionary Act, despite the fact that the dissenters made the same argument as the Ninth

Circuit decision below. *See* 524 U.S. at 454 (Scalia, J., concurring in part and dissenting in part).

The Ninth Circuit's interpretation of the Dictionary Act makes little sense in the context of that statute. Other terms within the definition of "person," such as "corporations" and "companies," are not necessarily distinct. The structure of the definition does not suggest that the term "individuals" excludes corporations any more than the term "companies" does. Other definitions included in the Dictionary Act likewise list synonyms or subsets of categories: "insane person" includes "every idiot, lunatic, [and] insane person," which do not have distinct meanings, and "writing" includes "printing" as well as "multigraphing" and "mimeographing," which are types of printing. 1 U.S.C. § 1. Thus the fact that "individual" is listed alongside "corporations" in the definition of "person" cannot be taken to mean that "individual" excludes "corporations."

B. The Context And Purpose Of The TVPA Indicate That Corporations Should Be Included.

The context and purpose of the TVPA suggest that the term "individual" should be read to include corporations. Congress' purpose in passing the TVPA was to enhance remedies against violators of human rights, and especially to provide such remedies to U.S. citizens who could not bring ATS claims.

1. Statutory purpose is an important factor in evaluating Congress' intent. For example, this Court in *Clinton* examined the purpose behind the Line

Item Veto Act, which it determined was to allow "a prompt and authoritative judicial determination of the constitutionality of the Act." 524 U.S. at 428–29. The Court then concluded that Congress would not have intended to exclude corporations from the definition of "individual." *Id.* at 429.

This approach of examining the purpose of the statutory scheme is consistent with *United States v. A&P Trucking Co.*, 358 U.S. 121 (1958). There, this Court considered whether the term "whoever" applied to partnerships, despite their general lack of separate legal personality. Because the statute at issue was intended to "make[] regulations . . . for the transportation of dangerous articles binding on *all* common carriers," the Court noted that "the conclusion is not lightly to be reached that Congress intended that some carriers should not be subject to the full gamut of sanctions provided . . . merely because of the form under which they were organized to do business." *Id.* at 124. The Court concluded:

> The business entity cannot be left free to break the law merely because its owners . . . do not personally participate in the infraction. The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment.

Id. at 126. This conclusion is consistent with a long line of Supreme Court cases, most recently *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), holding that corporations have similar rights as natural persons. *See, e.g.*, *First Nat'l Bank*

v. Bellotti, 435 U.S. 765, 780 n.15 (1978).

This approach dictates that the term "individuals" in the TVPA likewise encompasses corporations. Congress' purpose in passing the TVPA was to fulfill its obligation "to adopt measures to ensure that torturers are held legally accountable for their acts" by providing "means of civil redress to victims of torture." H.R. Rep. No. 102-367 at 3.

Congress additionally wanted to provide a remedy for torture and extrajudicial killing to U.S. citizens who could not bring such claims under the ATS. The TVPA "enhances the remedy already available under the [ATS] in an important respect: while the [ATS] provides a remedy to aliens only, the TVPA . . . extends a civil remedy also to U.S. citizens who may have been tortured abroad." S. Rep. No. 102-249 at 5. When it passed the TVPA, Congress understood that organizational defendants had been sued for torture under the ATS; the legislative history specifically indicates that a motivating factor for passing the bill was Judge Bork's opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), which argued that torture claims could not be brought under the ATS. *See* H.R. Rep. No. 102-367 at 4; S. Rep. No. 102-249 at 4. In *Tel-Oren*, several organizational defendants had been sued. *See* 726 F.2d at 775 (defendants on appeal included "the Palestine Liberation Organization, the Palestine Information Office, [and] the National Association of Arab Americans"). Enhancing the remedy available under the ATS by providing remedies to U.S. citizens would, therefore, entail providing such remedies against legal entities as well.

As in *Clinton*, Congress' purpose in enacting the

TVPA is antithetical to excluding corporations from liability; Congress would not have intended to create a gap in this redress scheme for abuses perpetrated by corporations — to allow "the treasury of the business" to "obtain the fruits" of torture by its agents with impunity. *A&P Trucking*, 358 U.S. at 126. Nor would Congress want U.S. citizens to be unable to sue corporations when, as it then understood, aliens could do so.[2]

2. Without examining the overall purpose behind the TVPA, the Ninth Circuit concluded that the context indicated that the term "individual" excludes corporations. The court of appeals noted that the TVPA speaks of "individuals" both as victims and perpetrators of torture, and reasoned that including corporations would require inconsistent usage, because a corporation cannot be tortured. App. 18a. But it is not inconsistent to suggest that "individual" includes corporations simply because that term refers both to torturer and victim alike. Of course not all "individuals" are capable of being tortured. Congress was not using the term inconsistently, because Congress often enacts laws using terms whose full meaning is not applicable in every instance in which the word is used.

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[2] Petitioners recognize that, against the weight of federal court authority, one court has subsequently determined that corporations cannot in fact be sued for torture or extrajudicial killing under the ATS. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *pet'n for certiorari filed*, No. 10-1491 (June 6, 2011). When Congress passed the TVPA, however, no court had made such a ruling, and Congress intended to provide the same remedies to U.S. citizens as it then understood were available to aliens.

For example, the U.S. criminal torture statute uses "person" in precisely the same way, referring to both the torturer and victim. *See* 18 U.S.C. § 2340(1) (emphasis added). By the Ninth Circuit's logic, this statute uses the word "person" inconsistently because it implies that corporations, which are generally included within the term "persons," can be tortured.[3]

Examples abound of Congress enacting statutes describing victims of violence in terms that expressly include corporations. The chemical weapons statute, for example, prescribes penalties for "[a]ny person" who causes "the death of another person" by chemical weapons, 18 U.S.C. § 229A(a)(2), and defines "person" to include a "corporation." *Id.* § 229F(5); *see also* 8 U.S.C. § 1324(a)(1) (prescribing punishment for "any person" who commits immigration crimes that "result[] in the death of any person") *and id.* § 1101(b)(3) (defining "person" in the immigration code to include "an organization"); 33 U.S.C. § 1319(c)(3) (providing penalties for "a person which is an organization" who knowingly "places another person in imminent danger of death or serious bodily injury" when committing acts of water pollution, and defining "organization" to include "a corporation"); 42 U.S.C. § 7413(c)(5) (similar with respect to air pollution).

While Congress may use words consistently, not

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[3] By the same logic, one would think that Congress believes that corporations can be kidnapped, *see* 18 U.S.C. § 1201(a), taken hostage, *see id.* § 1203(a), sold into slavery, *see id.* § 1584(a), or made to commit forced labor, *see id.* § 1589(a), in addition to being tortured.

every member of the set covered by a word is relevant to every use of the word. A word such as "individual" or "person" may include artificial entities, even though some uses of the word only apply to human beings. "Most 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." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

3. The context here indicates that Congress was not using the word "individual" in any technical sense that might exclude corporations. The TVPA states that actions on behalf of a victim of torture or extrajudicial killing may be brought by "the individual's legal representative" or by "any person who" is a wrongful death claimant. TVPA § 2(a)(2). Petitioners are unaware of circumstances in which anyone other than a natural person could be a wrongful death claimant, yet Congress used the word "person" here. If Congress did not deliberately use the word "person" to include artificial persons in this context, there is no reason to suppose that Congress used the word "individual" to exclude them.

In *Mohamad v. Rajoub*, the D.C. Circuit suggested that this usage was deliberate, because Congress was recognizing that wrongful death claimants could include, as "persons" but not "individuals," the estates of decedents. 634 F.3d at 608. But estates are neither "persons" nor can they bring wrongful death claims: "the estate of a decedent is neither a person nor a corporation. It can neither sue nor be sued." *Hess v. Reynolds*, 113 U.S.

73, 76 (1885).[4] Any claims on behalf of an estate would be prosecuted by natural persons; thus the term "individual" would have still been sufficient in this context, had Congress been keeping to precise distinctions. The use of the term "person" in this context, where it necessarily makes no difference, suggests the opposite: that Congress was not distinguishing between these terms in the statute.

C. The Legislative History Indicates That "Individual" Was Chosen To Exclude Foreign States, Not Corporations Or Other Legal Entities; The Ninth Circuit Relied On Materials That Are Not Legislative History.

The legislative history of the TVPA further indicates that the statute was not intended to exclude corporations; indeed, Congress explained exactly why it used the term "individual" instead of "person" to describe the defendant: in order to exclude foreign states. In reaching a contrary conclusion, the Ninth Circuit erroneously relied on the comments of one member of Congress in a committee markup on a prior version of the TVPA four years before its eventual passage, a source that this Court has held is not legislative history.

1. The TVPA was introduced in both houses in the 102nd Congress. The House bill, H.R. 2092, used the term "individual," *see* Torture Victim Protection

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[4] *See also* 31 Am. Jur. 2d § 1118 ("'Estates' are not natural or artificial persons, and they lack legal capacity to sue or be sued, and it is well settled that all actions that survive a decedent must be brought by or against the personal representative.").

Act of 1991, H.R. 2092, 102nd Cong., Torture Victim Protection Act of 1991, § 2(a) (as introduced Apr. 24, 1991); while the Senate bill, S. 313, used the term "person." *See* Torture Victim Protection Act of 1991, S. 313, 102nd Cong., Torture Victim Protection Act of 1991, § 2(a) (as introduced Jan. 31, 1991). The Senate then struck out the original language of S. 313 and replaced it with language almost identical to H.R. 2092, the bill that eventually became law. *See* Torture Victim Protection Act of 1991, S. 313, 102nd Cong., Torture Victim Protection Act of 1991 (as reported in Senate Nov. 26, 1991). The Senate Judiciary Committee's report on S. 313 explains that the term "individual" was used in order to avoid conflict with the Foreign Sovereign Immunities Act:

> 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. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976[.]

S. Rep. No. 102-249 at 7. This language is mirrored in House Judiciary Committee's report on H.R. 2092: "Only 'individuals,' not foreign states, can be sued under the bill." H.R. Rep. No. 102-367 at 4. Neither report suggests any intent to exclude corporations, despite the fact that, as noted above, Congress was aware that legal persons had been sued for torture under the ATS.

Because "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) (internal punctuation omitted), these reports should remove any doubt about Congress' understanding of the word "individual." To the extent that Congress deliberately chose the term "individual" to apply a more restrictive meaning than "person," it did so in order to exclude foreign states, not corporations.

2. Rather than examining the actual legislative history of the TVPA and Congress' stated reason for choosing the word "individual," the Ninth Circuit relied on a statement by one member of Congress four years prior. In the committee markup of the TVPA as it was introduced in the 100th Congress, Congressman Leach requested that the term "person" in the text be defined to "make it clear we are applying it to individuals and not to corporations in how this bill and its ramifications unfold." The Torture Victim Protection Act: Hearing and Markup before the H. Comm. on Foreign Affairs on H.R. 1417, 100th Cong. 82, 85 (1988).

In *California v. American Stores Co.*, 495 U.S. 271 (1990), this Court reversed a decision by the Ninth Circuit that relied heavily on statements made in a subcommittee hearing that were not included in the bill's legislative history. The issue in *California* was whether injunctive relief under the Clayton Act included divestiture when a suit was brought by private citizens rather than the U.S. government. The Ninth Circuit was persuaded by two statements made in a hearing before a subcommittee of the House Judiciary Committee, one of which explicitly said, "We did not intend . . . to give the individual the same power to bring a suit to dissolve the corporation that the government has," and ruled that the Act did

allow divestiture. *Id.* at 287. This Court reversed, stating that the Ninth Cirtcuit improperly relied on these statements because they were not confirmed elsewhere in the legislative history. *Id.* at 294.

In the instant case, although the language of the bill that was reported out of the markup changed from "person" to "individual," *see* Torture Victim Protection Act of 1988, H.R. 1417, 100th Cong., § 2(a) (as reported in House June 13, 1988), the committee report accompanying the bill said nothing about excluding corporations. Instead, it used the words "person" and "individual" interchangeably, noting that the bill would provide liability for "[a]ny person who . . . subjects another to torture." H.R. Rep. No. 100-693 at 2; *see also id.* at 3. When the TVPA was reintroduced in the 101st Congress, and again reported out of committee in the House, the committee report again used the terms "person" and "individual" interchangeably and said nothing about excluding corporations. *See* H.R. Rep. No. 101-55 at 1 (stating that the TVPA would provide "a civil action for recovery from persons engaging in torture," then stating that the TVPA would "provide a Federal cause of action against any individual" who tortures another). In the 102nd Congress, the House report on the final version of the TVPA continued to mix the terms, stating that the statute authorizes suits against "any individual who . . . subjects a *person* to torture." H.R. Rep. No. 102-367 at 4 (emphasis added). The Senate Report did the same. *See, e.g.*, S. Rep. No. 102-249 at 8–9 ("The legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture."). When the TVPA finally passed in the 102nd Congress, there was no indication of any intent to exclude

corporations in either committee report. Instead, as noted above, the reports provided an alternate explanation for the choice of "individual."

While Congressman Leach may have intended to exclude corporations from the TVPA in 1988, and the three other members known to have been present at the markup may have shared this intent, the markup is not legislative history that can be considered in interpreting the final statute. There is no evidence "that the Senators and Representatives who voted for the [bill] when [it] reached the floor knew of" this exchange, and the "subsequent legislative history does not so much as hint" at this conversation. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 273 n.32 (1979). While committee reports represent an "exposition" of legislative intent, statements by individual members do not. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921). There is no indication that the 100th Congress, beyond the members present at the markup, had any knowledge of why the word "individual" was chosen, nor that it had any understanding that the term was intended to mean something other than "person" — let alone that the members of the 102nd Congress had any inkling of what had transpired in a markup four years before.

The Ninth Circuit's use of purported legislative history here contravenes this Court's precedent and ignores the only part of the legislative history that actually discusses the relevant word choice. Review should be granted to correct this error.

CONCLUSION

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

Respectfully Submitted,

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June 20, 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 09-15641
D.C. No. 3:99-cv-02506-SI

LARRY BOWOTO; BASSEY JEJE; OLA OYINBO; BAYO OYINBO; DEJI OYINBO; MARGARET IROWARINUN; ROSELINE IROWARINUN; MARY IROWARINUN; BOSUWO SEBI IROWARINUN; CALEB IROWARINUN; ORIOYE LALTU IROWARINUN; TEMILOLA IROWARINUN; ADEGORYE OLORUNTIMJEHUM IROWARINUN; AMINORA JAMES IROWARINUN; ENIESORO IROWARINUN; GBENGA IROWARINUN; IBIMISAN IROWARINUN; MONOTUTEGHA IROWARINUN; OLAMISBODE IROWARINUN,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California

Susan Illston, District Judge, Presiding

Argued and Submitted June 14, 2010

San Francisco, California

Filed September 10, 2010

Before: Mary M. Schroeder and Jay S. Bybee, Circuit Judges, and Owen M. Panner,[*] District Judge.

Opinion by Judge Schroeder; Concurrence by Judge Panner

COUNSEL

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Craig E. Stewart, San Francisco, California, for defendants appellees Chevron Corporation et al.

OPINION

SCHROEDER, Circuit Judge:

INTRODUCTION

This case arises from a violent episode that occurred on the Parabe oil platform nine miles off the coast of Nigeria in 1998. The platform was operated by Chevron Nigeria Limited ("CNL"), a subsidiary of the world oil giant. On May 25, 1998, over 100 native Nigerians took over the Parabe platform to protest

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[*] The Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

CNL's destruction of the environment and refusal to provide jobs to the local population. The parties here dispute whether the protest was peaceful. There is no dispute, however, that, after the protest entered its fourth day, CNL sought the assistance of the Nigerian Government Security Forces ("GSF") to end the protest. When the GSF soldiers arrived on the platform, they shot a number of the protestors, killing two.

In 1999, the injured protestors and family of a deceased protestor filed a lawsuit in the Northern District of California against three American-based Chevron companies ("Chevron"), raising a number of claims related to the GSF raid of the Parabe platform. After ten years of pretrial litigation and discovery, the claims of Larry Bowoto, Bassey Jeje, and the families of Arolika Irowarinun and Bola Oyinbo (collectively "Plaintiffs") were tried before a jury. These plaintiffs brought claims under the Alien Tort Statute ("ATS"), Nigerian law, and California law. The jury rendered a verdict in favor of Chevron on all claims, and Plaintiffs now appeal.

This appeal raises challenges principally to the jury instructions and the district court's evidentiary rulings. We find no abuse of discretion in the district court's decisions admitting the pieces of challenged evidence. We also find no error in the jury instructions provided.

There are only two legal issues in this appeal, both relating to statutes Congress adopted to incorporate principles of international law. The first

issue is whether the federal Death on the High Seas Act ("DOHSA") preempts wrongful death and survival claims brought under the ATS. The other legal issue is whether corporations can be found liable under the Torture Victim Protection Act ("TVPA"). We affirm the dismissal of the ATS wrongful death and survival claims and agree with the district court that Congress did not intend the TVPA to apply to corporations.

We therefore affirm the district court's judgment.

BACKGROUND

In 1961, the Nigerian government entered into a joint venture with Chevron to harness the resources of the oil-rich Niger Delta. The resulting company, CNL, has since opened a number of oil fields and offshore platforms, extracting billions of dollars worth of oil from Nigeria. According to Plaintiffs, CNL's success has provided little or no benefit to most Nigerians. Rather, CNL has allegedly shown total disregard for the environment, with oil spills wreaking havoc on local water supplies and fisheries.

In the mid-1990s a number of Nigerian tribes, seeking to provide a unified front against CNL, joined forces and formed a group called the Concerned Ilaje Citizens ("CIC"). CIC sought to have CNL curb its environmental abuses, and to provide more jobs to Nigerians. CNL, however, refused to recognize or negotiate with CIC, and as a result, tensions between the two escalated. CIC sought to

get CNL's attention by staging a large protest, and chose CNL's Parabe oil platform as the site. Plaintiffs claim that the protest was to be a peaceful one, effectively a sit-in that would force CNL to recognize CIC's concerns.

On May 25, 1998, over 100 members of CIC, including Plaintiffs, traveled via canoes to the platform. What happened over the next days is a matter of dispute. According to Plaintiffs, they came to the platform peacefully and unarmed, holding signs and singing. They claim the CNL workers, most of whom were not Nigerian, allowed them onto the platform without resistance and that there were no tensions between them and the workers throughout the protest.

According to Chevron, the protestors were violent and boisterous; some had brought weapons and attacked CNL workers. Chevron also disputes the contention that the protestors and workers had an amicable relationship. To the contrary, Chevron contends its workers were being held hostage and were told they could not leave under threat of violence.

CNL convened a crisis management team ("CMT") to monitor the situation on the platform, and sent a company representative there in hopes of brokering a peaceful end to the protest. According to Chevron, these negotiations were unsuccessful, and the situation steadily became more volatile on the platform. Faced with the failed negotiations and the deteriorating conditions on the platform, CNL

determined that it had to take action to protect the welfare of its workers. On the fourth day of the protest, CNL sought the assistance of the GSF to rescue the workers and stop the protest.

The GSF arrived on the platform via helicopter, opening fire on the protestors shortly after landing. Several protestors were injured, including Plaintiffs Bowoto and Jeje. Two died as a result of their injuries, including Irowarinun. The GSF arrested a number of protestors, and transported them to land where they were allegedly tortured. Oyinbo was one of the protestors arrested and allegedly tortured by the GSF. Oyinbo died prior to trial for reasons not relevant here.

In 1999, a number of CIC protestors who were injured in the Parabe protest filed a lawsuit against Chevron for injuries sustained during the incident. Plaintiffs ultimately did not pursue claims against CNL or any of the individuals involved in the Parabe incident. Over the next decade, a series of pre-trial rulings reduced the number of claims.

The district court issued three pre-trial rulings that are challenged on appeal. First, in a published decision, the district court held that DOHSA preempts the summary execution claim brought under the ATS. *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1086-88 (N.D. Cal. 2008) (*Bowoto I*). The court pointed to Supreme Court decisions holding that DOHSA preempts claims and remedies brought under state law and general maritime law. *Id.* at 1087. Relying on these opinions, the court

reasoned that DOHSA provides the exclusive remedy for wrongful deaths that occur on the high seas. *Id.* at 1087-88. In a later unpublished order, the district court employed similar reasoning to hold that DOHSA also preempts survival actions under the ATS. *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2008 WL 2872624 (N.D. Cal. July 23, 2008).

In the final pre-trial decision at issue, the district court held that Plaintiffs could not bring claims against Chevron under the TVPA. *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2604591 (N.D. Cal. Aug. 22, 2006). The district court observed that the statute permitted claims to be brought only against "an individual" who committed torture. The district court reasoned that because Congress used the term "individual," it did not intend for the TVPA to apply to corporations.

The primary claims at trial were common law actions for negligence and intentional torts under California and Nigerian law, along with international law claims brought under the ATS. The trial lasted over five weeks, with testimony from a total of 73 witnesses. Plaintiffs' theory at trial was that the Parabe protest was peaceful, and that CNL sought GSF assistance knowing the soldiers would violently attack the protestors. Plaintiffs further sought to impute CNL's wrongful Chevron countered these allegations by portraying the protestors as violent and unpredictable, and argued CNL sought the assistance of the GSF as a last resort. Chevron further argued that the GSF fired on protestors in self-defense.

The jury found in favor of Chevron on all claims. Plaintiffs have appealed.

I. The Plaintiffs May Not Pursue Claims Under the Alien Tort Statute

Of the four victim Plaintiffs in this case, one died as a result of the injuries suffered on the Parabe platform. The family of this Plaintiff sought to raise a claim under the ATS for summary execution, and also several survival claims rooted in the ATS. The district court barred Plaintiffs from presenting the summary execution and survival claims to the jury, finding that DOHSA preempts ATS wrongful death and survival claims. *See* 557 F. Supp. 2d at 1086-88. We affirm the district court's dismissal of the ATS claims.

The Supreme Court more than a century ago held in *The Harrisburg*, 119 U.S. 199 (1886), that maritime law did not recognize a cause of action for wrongful death. Congress repudiated this holding in 1920 with the passage of DOHSA, in order to provide a remedy in admiralty "for wrongful deaths more than three miles from shore." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 620 (1978). DOHSA creates the cause of action for the decedent's immediate family; it limits recovery to pecuniary damages, eliminates any contributory negligence bar to recovery, and preserves the ability to bring claims under the law of another country. *See* 46 U.S.C. §§ 30301-30308; *see also Higginbotham*, 436 U.S. at 620 (describing provisions of DOHSA).

Due to DOHSA's comprehensive scope, the Supreme Court has determined the Act displaces other remedies and causes of action. In *Higginbotham*, the Court held that DOHSA bars recovery of damages for loss of society under maritime law. *Id.* at 623-24. The Court recognized that DOSHA "does not address every issue of wrongful-death law," but stated that where the Act does speak to a topic, courts were not free to "supplement" the remedies already provided for in the statute. *Id.* at 625. The Court thus found that because DOHSA does speak to the issue of damages by limiting recovery to pecuniary loss, plaintiffs could not obtain damages for loss of society under maritime law. *Id.* at 622-25.

In *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232- 33 (1986), the Court held that DOHSA preempts state law wrongful death statutes. The Court noted that in passing DOHSA, Congress sought to create a uniform remedy for deaths on the high seas, "an area where the federal interests are primary," and found that permitting concurrent state law wrongful death suits would jeopardize that uniformity. *Id.* At 233.

The Court later determined that DOHSA also preempts maritime law survival claims. *See Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116, 122-24 (1998). The plaintiffs there contended that DOHSA does not preempt such claims, arguing that the statute, which authorizes recovery for losses suffered by the decedent's family, says nothing that would preclude raising survival claims on the decedent's

behalf. *Id.* at 123. The Court rejected this distinction, finding that by "authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas." *Id.* The Court went on to hold that "[b]ecause Congress has chosen not to authorize a survival action for a decedent's pre-death pain and suffering, there can be no general maritime survival action for such damages." *Id.* at 124. The Court has thus, in a series of cases, determined that DOHSA should be construed according to its terms to provide the remedy under United States law for deaths occurring more than three miles from shore.

Against that backdrop, we first examine the district court's determination that DOHSA preempts all ATS wrongful death claims. We do not necessarily agree with the district court's determination that *Higginbotham*, *Tallentire*, and *Dooley* foreclose the possibility of there ever being a cognizable ATS claim invoking principles of international law to recover for a death at sea. As the Court stated in *Higginbotham*, DOHSA "does not address every issue of wrongful death law." 436 U.S. at 625. There may then be situations where a plaintiff can simultaneously pursue claims under both DOHSA and the ATS. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) (noting that claims arising out of acts of piracy are recognized under the ATS).

With respect to Plaintiffs' summary execution claim under the ATS, however, whether and to what

extent the district court may have erred is immaterial so long as the error did not prejudice Plaintiffs. There could have been no prejudice if the jury would have found against Plaintiffs on this claim in any event. *See Tennison v. Circus Circus Enterprises, Inc.*, 244 F.3d 684, 691 (9th Cir. 2001) (finding that a jury's rejection of a sexual harassment claim made any error in failing to instruct on intentional infliction of emotional distress harmless). The jury in this case squarely rejected a wrongful death claim brought under Nigerian law that was nearly identical to the summary execution claim Plaintiffs contend the district court erroneously dismissed. The wrongful death claim under Nigerian law required Plaintiffs to prove that "Irowarinun's death was caused by a battery or negligent act by Chevron Nigeria Ltd. and/or the Nigerian Government Security Forces." Summary execution would have required, in material part, Plaintiffs to show that CNL and/or GSF "committ[ed] a wrongful, tortious act in excess of [their] authority over" Irowarinun that resulted in his death. *See Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987) (describing a summary execution claim). Both summary execution and wrongful death under Nigerian law therefore require a showing that the decedent died due to the wrongful conduct of the defendant.

We therefore conclude that even assuming the district court erred in dismissing the summary execution claim, there was no prejudice. This is because summary execution and Nigerian wrongful death law "are predicated on the same facts and

similar legal inquiries," so that the jury's rejection of the Nigerian law claim makes it "highly unlikely" that it would have found in favor of Plaintiffs on a summary execution claim. *See Tennison*, 244 F.3d at 691. We further find that any difference in the burden of proof between the ATS, preponderance, and Nigerian law, beyond a reasonable doubt standards, is immaterial under the circumstances of this case. The jury rejected a total of 20 common law claims brought by Plaintiffs under a variety of burdens of proof. There is no reason to believe the jury would have found a summary execution claim meritorious under any standard. We therefore affirm the district court's dismissal of the ATS claim for summary execution. With respect to Plaintiffs' ATS survival claims, we will not similarly infer that the jury would have rejected these claims, because Chevron has not shown that any claim presented to and rejected by the jury was materially similar to the survival claims. We must therefore decide whether DOHSA preempts ATS survival claims, and for the following reasons we conclude it does.

The Supreme Court in *Dooley* held that DOHSA preempts survival claims brought under maritime law. *See* 524 U.S. at 124. Plaintiffs do not dispute this point, but they argue *Dooley* does not bar survival claims brought under other federal statutes such as the ATS. To resolve the issue, we look to the reasoning underlying *Dooley*'s holding.

The Court in *Dooley* looked to the precision with which Congress defined the DOHSA remedy and to the legal principle that a specific statute

usually preempts more general remedies. *See id.*; *see also Hinck v. United States*, 550 U.S. 501, 506 (2007) (stating that it is a "well established principle, that in most contexts, a precisely drawn, detailed statute pre-empts more general remedies") (internal quotation marks omitted). The Court described DOHSA as a "comprehensive" statute that "expresses Congress' considered judgment . . . on the availability and contours of a survival action in cases of death on the high seas." *Id.* (internal quotation marks omitted). *Dooley* thus held that DOHSA preempts *all* survival claims for deaths on the high seas unless there is clear indication that Congress intended otherwise.

There is no evidence that Congress intended ATS survival claims to remain viable after the passage of DOHSA. In contrast to the comprehensive scope of DOHSA, the ATS is only "a jurisdictional statute creating no new causes of action." *See Sosa*, 542 U.S. at 724. Unlike DOHSA, the ATS does not speak to the issue of survival claims. This court did not even recognize that survival claims were cognizable under the ATS until 70 years after DOHSA's passage. *See Hilao v. Estate of Marcos*, 25 F.3d 1467, 1476 (9th Cir. 1994). We thus hold that DOHSA provides Plaintiffs' only available means for raising survival claims.

Plaintiffs point to the Jones Act and contend it undercuts our conclusion. The Jones Act, as relevant here, allows the family of a deceased seaman to pursue survival claims on his behalf. *See* 46 U.S.C. § 30104. Both the Supreme Court and this court have

suggested that DOHSA does not preempt these survival claims. *See Dooley*, 524 U.S. at 124; *Davis v. Bender Shipbuilding and Repair Co., Inc.*, 27 F.3d 426, 428 n.1 (9th Cir. 1994) ("The heirs of a seaman who has died on the high seas may pursue a claim under DOHSA or the Jones Act."). The distinction between the Jones Act and the ATS, however, is that the Jones Act is itself a comprehensive statute that addresses a specific issue in maritime law. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 29 (1990) (stating "the Jones Act establishes a uniform system of seaman's tort law"). Congress passed DOHSA and the Jones Act in the same year in order to provide parallel remedies for the damages a death caused to the seaman's family and to the estate. The statutes were intended to repudiate totally the rule of *The Harrisburg*. *See Dooley*, 524 U.S. at 124. It is evident that Congress intended DOHSA and the Jones Act to work together. *See Miles*, 498 U.S. at 29 (referring to the Jones Act as DOHSA's "companion statute"). There was no such intent with respect to DOHSA and the ATS, enacted more than a century apart.

The Supreme Court's decision in *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), forty years before *Dooley*, does not provide Plaintiffs much assistance. *Kernan* did not involve DOHSA at all. It involved the relationship between the Federal Employer's Liability Act and the Jones Act. *See id.* at 439. The Court there assumed, in passing, that DOHSA would not preempt a state law survival claim. *See id.* at 430 n.4 ("Presumably any claims, based on unseaworthiness, for damages accrued prior

to the decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right."). *Dooley*, however, later squarely held that DOHSA provides the Plaintiffs' sole recourse for survival claims.

We therefore affirm the district court's ruling dismissing the ATS claims arising from Irowarinun's death.

II. The Torture Victim Protection Act Does Not Apply to Corporations

Congress passed the TVPA in 1992 "to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing." Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350). The question in this appeal is whether Congress intended to permit such civil actions against corporations. We agree with the district court that it did not, and hold that the plain language of the TVPA does not allow for suits against a corporation.

We begin with the statutory language of the TVPA. The TVPA's liability provision provides that only an "individual" may be held liable under the Act; it states:

> (a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350, note § 2(a). The district court here reasoned that by extending liability only to "[a]n individual," Congress intended that only natural persons, and not corporations, could be found liable under the Act. In so doing, the district court adopted a position consistent with the majority of district courts that have considered the issue. *See, e.g.*, *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005); *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1175-76 (C.D. Cal. 2005). *But see Estate of Rodriquez v. Drummond Co. Inc.*, 256 F. Supp. 2d 1250, 1266-67 (N.D. Ala. 2003) (finding corporations can be liable under TVPA); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla. 2003) (same).

The district court's decision did conflict with the one Circuit court to mention the issue. The 11th Circuit has said that corporations can be found liable under the TVPA. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250- 52 (11th

Cir. 2005). It does not appear the defendants in that case ever challenged the notion of corporate liability, however, and the Eleventh Circuit did not explain its reasoning on the issue. *See, e.g.*, *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

We agree with the district court that Congress's use of the word "individual" throughout the statute indicates that it did not intend for the TVPA to apply to corporations. Indeed, Congress has directed courts to presume the word "individual" in a statute refers to natural persons and not corporations. In the Dictionary Act, Congress provided definitions for a number of common statutory terms that courts are to apply "unless the context indicates otherwise." *See* 1 U.S.C. § 1. One term defined is "person," which the Dictionary Act defines as being broader than a reference to an individual. The Act defines "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. The Dictionary Act therefore speaks of "corporations" and "individuals" as distinct terms, and we must therefore presume those terms have different meanings. *See id.*

Despite the presumption of the Dictionary Act, our court has recognized that the use of the word individual in a statute "does not necessarily exclude corporations." *See United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000). In *Middleton,* this court looked to a statute that criminalized hacking into the computer system of "one or more

individuals." *Id*. The court found that "individual" encompassed corporations because the statute used the words "individual" and "person" interchangeably throughout, thus indicating that Congress did not intend for the presumption of the Dictionary Act to apply. *Id*. at 1211 ("Congress used 'individuals' and 'person' in a non-technical manner, without reference to the Dictionary Act."); *see also Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (finding that "individual" as used in the Line Item Veto Act included both natural persons and corporations).

Here, in contrast, it is evident that Congress drafted the TVPA in such a manner as to limit liability to natural persons. The TVPA consistently uses "individual" throughout the statute to refer both to the torturer and the victim of torture. *See, e.g.*, 28 U.S.C. § 1350, note § 2(a) ("An individual who. . . subjects an individual to torture."). Corporations, of course, cannot be tortured. *See Middleton*, 231 F.3d at 1211 (noting that "[c]orporations . . . cannot suffer physical injury") (internal quotation marks omitted). Plaintiffs ask us to give the same word different meanings in the same statute. They ask us to interpret "individual" to mean a natural person when referring to the victim, but to mean either a natural person or a corporation when referring to the torturer. This interpretation of the statute runs counter to the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (citation omitted). There is no indication Congress intended "individual" to have a variety of meanings

throughout the TVPA.

Indeed, the legislative history demonstrates that Congress rejected the notion of corporate liability. When first introduced in 1987, the TVPA imposed liability on any "person" who subjected another to torture. *See* The Torture Victim Protection Act: Hearing and Markup before the H. Comm. on Foreign Affairs on H.R. 1417, 100th Cong. 82, 85 (1988). The House Foreign Affairs Committee amended the bill to substitute "individual" for "person" in order to "make it clear [they were] applying [the Act] to individuals and not to corporations." *Id.* When introduced five years later, the TVPA still spoke of liability for individuals.

Neither the Senate nor House report, moreover, even hint at corporate liability. *See* The Torture Victim Protection Act of 1991, S. Rep. 102-249 (1991); Torture Victim Protection Act of 1991, H.R. Rep. 102-367 (1991). Had Congress intended for the court to interpret the term "individual" so broadly as to include corporations, it would have included some evidence of this intent in the legislative history. *See In re Goodman*, 991 F.2d 613, 619 (9th Cir. 1993) (finding "individual" as used in a statute did not include corporations because there was "no legislative history showing that the section was meant to apply to" corporations) (citation omitted).We thus conclude that both the text and legislative history indicate Congress did not intend to allow suits against corporations under the TVPA. Plaintiffs offer an alternative argument that they may sue Chevron under the TVPA upon a theory of

"aiding and abetting." Plaintiffs contend that corporations can be found vicariously liable for torture they direct individuals to commit. The TVPA, however, does not contemplate such liability. It limits liability to "[a]n individual" who subjects another to torture. *See* 28 U.S.C. § 1350, note § 2(a). Even assuming the TVPA permits some form of vicarious liability, the text limits such liability to individuals, meaning in this statute, natural persons. The language of the statute thus does not permit corporate liability under any theory.

We therefore affirm the district court's ruling that the TVPA does not apply to corporations.

III. Challenges to Jury Instructions

Plaintiffs raise a series of challenges to the jury instructions, arguing first that the battery instruction incorrectly allocated the burden of proof on a key element, and second that the instructions pertaining to affirmative defenses misstated the law. We review each argument in turn and affirm.

Battery

Plaintiffs tried their battery claims to the jury under both Nigerian and California law. The district court provided a single jury instruction for battery after determining that Nigerian and California law on this tort was the same. This instruction required Plaintiffs to prove the elements of common law battery, and additionally gave them the burden of demonstrating the GSF used unreasonable force. Plaintiffs here challenge this instruction and argue

that under both Nigerian and California law, Chevron should have had to prove reasonable force as an affirmative defense.

To support their challenge under Nigerian law, Plaintiffs would have us rely on the English Court of Appeal's decision in *Ashley v. The Chief Constable of Sussex Police*, [2006] EWCA (Civ) 1085, [20]-[28], for the proposition that plaintiffs trying a civil battery claim are never required to show unreasonable force as a part of their prima facie case. But even if we were to agree with Plaintiffs that *Ashley* supports their position, Plaintiffs concede that English cases carry only persuasive weight in Nigerian courts.

Chevron relies on the Nigerian Supreme Court's decision in *Okuarume v. Obabokor*, [1965] N.S.C.C. 286, 287 (S.C.), and we agree that it is more authoritative. In *Okuarume*, the Nigerian court held that both civil and criminal battery require that the plaintiff/prosecution prove the charge beyond a reasonable doubt. *See id.* In so doing, the court stated there was a policy in Nigerian courts of applying the same standard to civil and criminal battery in order to avoid the situation where "a person who alleges that he was assaulted might fail to prove the assault in a criminal prosecution and yet obtain judgment in civil proceedings." *Id.* In criminal battery cases under Nigerian law the prosecution has the burden of proving unreasonable force. *See* Criminal Code Act, (1990) Cap. 77, §§ 252-253 (Nigeria). Under *Okuarume*, therefore, it remained Plaintiffs' burden to prove that the GSF used

unreasonable force during the Parabe raid. We find no error in the Nigerian law battery instruction.

With respect to the California law battery instruction, Plaintiffs waived any claim of error because they never offered an instruction on the key issue. Under California law, a plaintiff bringing a battery claim against a law enforcement official has the burden of proving the officer used unreasonable force. *See Edson v. City of Anaheim*, 74 Cal. Rptr. 2d 614, 615-17 (Ct. App. 1998); *see also Saman v. Robbins*, 173F.3d 1150, 1157 n.6 (9th Cir. 1999) ("A prima facie case for battery is not established under California law unless the plaintiff proves that an officer used unreasonable force against him to make a lawful arrest or detention."). Therefore if the GSF was acting in a law enforcement capacity, California law would require that Plaintiffs show it used unreasonable force. Plaintiffs contend the GSF did not act as a government sanctioned law enforcement organization in stopping the protest, but rather as CNL's private security company. Plaintiffs then argue that it was for the jury — not the district court — to decide the factual question of whether the GSF was a government or private force, and thus decide which party had the burden on the reasonableness of force issue. Plaintiffs' argument fails because in district court they never offered any jury instruction on the issue. *See EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 683 (9th Cir. 1997) (finding that a party waived an argument for which it did not request a jury instruction). Plaintiffs did argue to the district court that it was inappropriate to assume the GSF acted in a law enforcement capacity at Parabe, but they never

proposed an instruction that would have allowed the jury to decide this question. Plaintiffs cannot now claim the district court erred by not providing an instruction they never offered. *See id.* The argument they now urge on appeal has been waived.

Affirmative Defenses

Plaintiffs raise several claims of error with respect to the "Privileges, Duties, and Defenses" section in the jury instructions. These instructions listed a series of affirmative defenses to Plaintiffs' negligence claims that shielded Chevron from liability if the jury determined that CNL sought GSF assistance because of a reasonable belief that the Parabe protestors were engaged in criminal activity.

Plaintiffs first claim that, under Nigerian law, a party reporting criminal activity is liable for any wrongful conduct the government commits in stopping the alleged crime. This argument, however, was rejected in *Ezeadukwa v. Maduka*, [1997] 8 N.W.L.R. 635 (C.A.), where a Nigerian appellate court stated that "liability does not attach to a private citizen who merely names a suspect" to the police. Plaintiffs next argue the wording of the affirmative defense instruction allowed the jury to find in favor of Chevron even if CNL played a "direct role" in the GSF's alleged torts. But the challenged instruction made clear that Chevron could not "be liable merely for [CNL's] reporting [criminal] activity to the Nigerian authorities." Finally, plaintiffs are finally incorrect that the affirmative defense instruction suggested Plaintiffs had the burden to

negate certain elements of Chevron's affirmative defenses. The instruction clearly required Chevron to prove all of the listed elements in order for the defenses to apply.

We find no error with any of the jury instructions.

IV. Plaintiffs' Evidentiary Challenges

Plaintiffs raise four evidentiary challenges, claiming the district court admitted irrelevant and unfairly prejudicial evidence in violation of Federal Rules of Evidence 401 and 403. Plaintiffs first challenge the admission of the testimony of the captain of a CNL tugboat tethered to the Parabe platform during the protest. He testified that after the GSF commenced the raid on the platform, a group of CIC protestors kidnapped him and his crew and held them hostage on shore for several days. The district court overruled Plaintiffs' objection to this testimony, finding that it rebutted Plaintiffs' position that the protestors did not act violently towards CNL workers.

The district court did not abuse its discretion in admitting this testimony because Plaintiffs opened the door to evidence of the tug kidnaping incident. During opening statement, counsel for Plaintiffs referred to the tug kidnaping, characterizing the event as a desperate attempt of some protestors to elude the GSF violence. This reference, likely designed to "pull the sting" of the captain's anticipated testimony, provided a non-sinister motive for the actions of the protestors for

the jury to consider as it heard Chevron's version of the incident. The present challenge is therefore precluded because "a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." *Ohler v. United States*, 529 U.S. 753, 755 (2000); *see also United States v. Chavez*, 229 F.3d 946, 952 (10th Cir. 2000) ("It is widely recognized that a party who raises a subject in an opening statement 'opens the door' to admission of evidence on that same subject by the opposing party.").

Plaintiffs next claim the admission of a series of photographs showing a CIC protestor using a machete to kill a sea turtle at some point during the protest was irrelevant and unfairly prejudicial. Yet, plaintiffs put a number of witnesses on the stand who consistently testified that they saw no weapons or other indications that the CIC protestors were violent. These photographs of a protestor holding a large machete were relevant in that they undercut Plaintiffs' version of events. *See United States v. Terry*, 760 F.2d 939, 943-44 (9th Cir. 1985) (noting that evidence is relevant if it undercuts the testimony of a witness from the opposing side). The district court did not abuse its discretion in allowing Chevron to rebut Plaintiffs' story on a key issue. Plaintiffs' third evidentiary challenge pertains to the testimony of CNL employees John Stapleton and Randall Hervey. Hervey testified to information about the protesters' conduct that he obtained from Stapleton and then conveyed to the Chevron CMT. The district court admitted this testimony subject to the limiting instruction that the jury was to consider

this evidence only to show what information CNL decision makers had when CNL decided to call in the GSF.

Plaintiffs contend the testimony was irrelevant because there was no evidence that the CNL employee who made the final decision to call in the GSF relied on information from either witness. This argument is not supported by the record. Stapleton indicated at several points in his testimony that he passed to Hervey information he received from the platform. Hervey in turn testified that he discussed this information at CMT meetings that Davis attended. Davis, for his part, testified that he considered Hervey one of his "principal sources" of information during the protest. The testimony at trial demonstrates that the information Stapleton obtained from the platform was relied on to some extent by Davis when he called in the GSF. There was no abuse of discretion.

Plaintiffs additionally challenge the admission of a portion of the testimony of the CNL employee who was sent to negotiate with CIC leaders and whose testimony referred to four instances where local Nigerians had kidnaped CNL employees. The district court issued a limiting instruction stating that the reference to the four kidnapings could only be considered to show the employee's state of mind during negotiations. The testimony was relevant because his determination that negotiations had failed was instrumental in CNL's decision to seek GSF assistance. The testimony that he was afraid that he would be kidnaped provided context for his

assessment of the status of negotiations. The district court was within its discretion in admitting this testimony.

Plaintiffs finally argue that the district court erred by failing to provide a detailed explanation as part of each challenged ruling, of why the evidence was not unfairly prejudicial. The district court, however, was not required to engage "in a mechanical recitation of Rule 403's formula on the record . . . [a]s long as it appears from the record as a whole that the trial judge adequately weighed the probative value and prejudicial effect of proffered evidence before its admission." *United States v. Sangrey*, 586 F.2d 1312, 1315 (9th Cir. 1978). The record here indicates the district court was well aware of Rule 403 and the factors it requires to be weighed. Plaintiffs' objections in district court to the challenged evidence all raised the issue of prejudice. For that reason, Rule 403 must have "figured crucially in the court's mind." *United States v. Verduzco*, 373 F.3d 1022, 1030 n.2 (9th Cir. 2004) (finding district court did not err in admitting evidence even though it did not explicitly balance Rule 403 factors). We cannot accept Plaintiffs' argument that the experienced trial judge in this case overlooked the Federal Rules of Evidence.

CONCLUSION

The judgment of the district court is **AFFIRMED**.

PANNER, District Judge, concurring:

I am pleased to concur in the excellent, well-reasoned opinion of the court. I write separately to express the view that we are deciding only DOHSA's preemptive effect on the survival claims brought here under the ATS.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

No. C 99-02506 SI

BOWOTO ET AL, Plaintiff,

v.

CHEVRON CORPORATION ET AL, Defendant.

[Filed: December 3, 2008]

AMENDED JUDGMENT

This action came on for trial before the Honorable Susan Illston, United States District Judge presiding. The issues having been tried before the jury and special verdict rendered on December 1, 2008.

IT IS ORDERED AND ADJUDGED judgment shall be entered in favor of defendants and against plaintiffs.

IT IS SO ORDERED.

Dated: 12/3/08

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

No. C 99-02506 SI

BOWOTO, ET AL., Plaintiff,

v.

CHEVRON CORPORATION, ET AL., Defendant.

[Filed December 2, 2008]

JUDGMENT

This action came on for trial before the Honorable Susan Illston, United States District Judge presiding. The issues having been tried before the jury and special verdict rendered on December 1, 2008.

IT IS ORDERED AND ADJUDGED judgment shall be entered in favor of defendant and against plaintiff.

IT IS SO ORDERED.

Dated: 12/2/08

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

No. C 99-02506 SI

LARRY BOWOTO, ET AL., Plaintiff,

v.

CHEVRON CORP., ET AL., Defendant.

[Filed August 22, 2006]

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

On March 24, 2006, the Court heard argument on defendants' motion for judgment on the pleadings as to plaintiffs' claims under the Torture Victim Protection Act, 28 U.S.C. § 1350, note ("TVPA"). Having considered the arguments of counsel and the papers submitted, and for good cause appearing, the Court hereby GRANTS defendants' motion.

BACKGROUND

Plaintiffs filed this lawsuit in 1999, seeking to hold defendants accountable for a series of brutal attacks that were allegedly committed in Nigeria by

the Nigerian military. In 2004, plaintiffs moved to file a sixth amended complaint to make explicit their claims for torture and extrajudicial killing under the TVPA. In a July 14, 2004, order, this court granted plaintiffs' motion, rejecting defendants' argument that such an amendment would be futile because the TVPA does not allow suits against corporations. Based on the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739 (2004), defendants have renewed their challenge to plaintiffs' TVPA claims. They now seek judgment on the pleadings based on their earlier argument that the TVPA does not allow suits against corporations.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." Fed. R. Civ. P. 12(c). "A judgment on the pleadings is properly granted where, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1042 (9th Cir. 2005) (internal quotation marks omitted).

DISCUSSION

Section 2 of the TVPA provides:

> (a) Liability.--An individual who, under actual or apparent authority, or color of law, of any foreign nation--

> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350, note § 2(a). Defendants argue that "individual" is a term of art that Congress uses to signify "human being," and that the TVPA therefore does not authorize plaintiffs' lawsuit against a corporate defendant. The Court agrees.

The Court recognizes that it previously rejected defendants' argument. In its July 14, 2004, order, the Court found that while the term "individual" ordinarily refers only to human beings, it has also been construed to encompass corporations. *See, e.g.*, *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000) ("[Individual] does not necessarily exclude corporations."). The Court then concluded, based upon the purpose of the statute and supporting case law, that Congress intended the term to include corporations.

The Court now believes that its logic was incorrect. While there is no evidence that Congress intended to exclude corporations from the reach of the TVPA, there is certainly no evidence that Congress intended that the statute reach corporations. Indeed, plaintiffs' counsel conceded as

much at oral argument. The legislative history makes clear that Congress's overarching concern was the conduct of foreign officialsand suggests that Congress did not even consider whether the TVPA would apply to corporations. *See, e.g.*, S. Rep. 102-249, at *3 ("*Official* torture and summary execution violate standards accepted by virtually every nation."); *id.* at *8-9 ("This legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture."); *id.* at *9 ("Finally, low-level officials cannot escape liability by claiming that they were acting under orders of officials."). Moreover, Congress's use of the word "individuals" strongly suggests that Congress contemplated that only natural persons would be liable; Congress generally uses the term "individual" in a manner that excludes corporations. *See, e.g.*, the Dictionary Act, 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations, . . . as well as individuals . . . .")

At oral argument plaintiffs' counsel encouraged the Court to focus, expansively, on Congress's desire to fight torture, rather than Congress' specific contemplation of who the statute would reach. However, the Supreme Court's decision in *Sosa* is rife with cautions to district courts about expanding the reach of American statutes that are based on international law. *See, e.g.*, 542 U.S. 692, 725 28, 124 S. Ct. 2739, 2762-65 (2004) (listing five reasons for "great caution in adapting the law of nations to private rights"). While *Sosa* did not involve the TVPA, it involved the Alien Tort Statute,

28 U.S.C. § 1350 ("ATS"), and the TVPA is born directly from the international norms that the ATS invokes. *See* S. Rep. 102-249 at *4-5. Further, there can be little doubt that the TVPA raises the same foreign policy concerns as the ATS. All this leads the Court to conclude that it is better to adhere to what Congress specifically intended, rather than imposing liability based upon an extrapolation from Congress's general goal.

The Court concludes that Congress intended only that the TVPA reach natural persons, not corporations. Accordingly, defendants' motion for judgment on the pleadings is GRANTED.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendants' motion for judgment on the pleadings (Docket No. 923).

IT IS SO ORDERED.

Dated: August 21, 2006

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

No. C 99-2506 SI

LARRY BOWOTO ET AL., Plaintiff,

v.

CHEVRONTEXACO CORPORATION and CTOP ET AL., Defendant.

[Filed: July 14, 2004]

ORDER GRANTING PLAINTIFFS' MOTION TO FILE A SIXTH AMENDED COMPLAINT AND DENYING DEFENDANTS' CROSS-MOTION TO STRIKE ALLEGATIONS OF THE FIFTH AMENDED COMPLAINT

On July 9, 2004 the Court heard argument on plaintiffs' Motion for Leave to File a Sixth Amended Complaint and defendants' Cross-Motion to Strike Allegations from the Fifth Amended Complaint. Having carefully considered the arguments of the parties and the papers submitted, the Court GRANTS plaintiffs' motion for leave to file a sixth amended complaint and DENIES defendants' cross

motion to strike allegations from the fifth amended complaint.

BACKGROUND

This action, which asserts claims under the federal Alien Tort Claims Act (28 U..C. § 1350 et seq.), was filed on May 27, 1999 by five Nigerian plaintiffs who alleged that defendant ChevronTexaco, Inc. ("ChevronTexaco") is involved in the commission of human rights abuses in Nigeria. Plaintiffs' initial complaint named 500 "Moe" defendants in addition to ChevronTexaco; this complaint was never served. Pl.'s Mot. at 4:20-21; Grenfell Decl. at ¶ 2. A First Amended Complaint, adding eighteen new plaintiffs and naming 50 "Moe" defendants, was filed and served on September 23, 1999. *Id.* at 4:21-24. On January 3, 2000 a Second Amended Complaint was filed by stipulation of the parties. *Id.* at 5:1-5. This complaint added new plaintiffs and clarified certain allegations. *Id.* at 5:5-9. Presiding Judge Charles Ledge granted plaintiffs leave, except as to the naming of the individual defendant. *Id.* On June 28, 2001, this case was reassigned to this Court.

In June 2002, plaintiffs filed a motion for leave to file a Fourth Amended Complaint which added TOP as a defendant, added a *Casc* [sic] claim under California Business and Professions Code § 17200 and added a Racketeer Influenced and Corrupt Organizations Act ("RICO") claim.[1] That motion was granted on August 19, 2002. Defendants

[1] 18 U.S.C. §§ 1961 et seq.

moved to dismiss or strike plaintiffs' RICO and § 17200 *Kasky* claims. This court granted defendants' motion to dismiss plaintiffs' § 17200 *Casc* [sic] claims, holding that plaintiffs did not have standing to maintain these claims; and denied defendants' motion to strike the RICO claims, except with respect to plaintiffs' wife fraud claims. As to the wire fraud claims, the motion was granted on the grounds that plaintiffs failed to plead wire fraud with sufficient specificity. On February 25, 2003, plaintiffs moved for leave to file a Fifth Amended Complaint in which they sought to allege their mail and wire fraud claims with particularity. On April 15, 2003, this Court denied plaintiff's motion to add the mail and wire fraud claims, but permitted certain factual amendments. On March 23, 2004, this Court issued an order denying defendants' motion for summary judgment on Phase I, finding that plaintiffs raised triable issues of fact with regard to defendants' liability under plaintiffs' agency, ratification, aiding and abetting theories, and RICO claims.

Now before the Court are two motions: (1) plaintiffs' Motion for Leave to File a Sixth Amended Complaint to make explicit that their allegations include claims for torture and extrajudicial killing under the Torture Victim Protection Act of 199l ("TAPA"), 28 U.S.C. § 1350 (note)[2]; and defendants'

[2] Section 2 of the TVPA provides: "An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to

cross motion to strike the allegedly unauthorized aider and abettor claims that first appeared in the fourth amended complaint.

LEGAL STANDARD

Federal Rule of Civil Procedure 15 governs the amendment of complaints. It provides that if a responsive pleading has already been filed, the party seeking amendment may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. This rule reflects an underlying policy that disputes should be determined on their merits, and not on the technicalities of pleading rules. *See Woman v. Davis* 371 U.S. 178, 181-82, 83 S. Ct. 227 (1962). Accordingly, the Court must be very generous in granting leave to amend a complaint. *Moron go Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *Ascot Properties, Inc. V. Mobil Oil Co.,* 866 F.2d 1149, 1160 (9th Cir. 1989).

Once a plaintiff has given a legitimate reason for amending the complaint, the burden shifts to the defendant to demonstrate why leave to amend should not be granted. *Greentech, Inc. v. Abbot Laboratories*, 127 F.R.D. 529, 530 (N.D.Cal 1989) (citing *Senze-Gel Corp. v. Sieffhart*, 803 F.2d 661, 666 (Fed. Cir. 1986)); William W. Schwarzer et al.,

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extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death."

Federal Procedure Before Trial, 8:415, at 8-75 (1991). There are several accepted reasons why leave to amend should not be granted, including the presence of bad faith on the part of the plaintiff, undue delay, prejudice to the defendant, futility of amendment, and that the plaintiff has previously amended. *See Ascot Properties,* 866 F.2d at 1160; *McGlinchy v. Shell Chemical Co.*, 845 F.2d 809 (9th Cir. 1988). The Court has the discretion to determine whether the presence of any of these elements justifies refusal of a request to amend. *Ascot Properties*, 866 F.2d at 1160.

DISCUSSION

1. Leave to amend

A. Timeliness

Defendants argue that plaintiffs did not raise their TAPA claims earlier, despite ample opportunity, and this neglect should bar plaintiffs from now adding the claims. Opp'n to Mot. at 3: 5-7. Although it is true that plaintiffs could have added their TAPA claims earlier, the Court does not find that plaintiffs' failure to do so warrants denial of leave to amend their complaint at this time.

Defendants do not deny that plaintiffs' proposed amendments are substantively equivalent to the existing claims for torture and summary execution. Plaintiffs demonstrate that the terms "torture" and "summary execution" or "extrajudicial killing" are defined similarly in both the Alien Tort Claims Act and the TAPA, and that the terms are

defined in accordance with international standards under both statutes.[3] Pls.' Mot. at 7-8: 19-6. The proposed amendment, therefore, merely adds another statutory base for existing claims. Given these circumstances, and absent a showing of futility, undue prejudice, or bad faith, the motion to amend should be granted.

B. Futility

Defendants argue that plaintiffs' motion should be denied because their proposed amendment is not supported by law and is, consequently, a futile attempt at amendment. Opp'n to Mot. at 7: 8-11. Defendants argue that the TAPA is limited to claims against individuals, and thus does not apply to the corporate defendants in this case. *Id.* This Court finds that there is sufficient legal authority to conclude that TAPA claims can be brought against private corporations.

Defendants rely primarily on *Goodman v. Knight*, 991 F.2d 613, 619-20 (9th Cir. 1993), for their argument that the term "individual" in the TAPA does not extend to corporations. Opp'n to Mot. at 5: 14-15. *Goodman*, however, only reached the conclusion that the term "individual" does not typically include corporations in the Bankruptcy Code. Moreover, *Goodman*'s restricted construction of the term "individual" is inconsistent with the

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[3] *See* H.R. Rep. No. 102-367(I) at 4:; *reprinted in* 1992 U.S.C.C.A.N. 84, 87 (1997) (Act "defines 'torture' and extrajudicial killing in accordance with international standards").

broader view expressed in more recent Supreme Court and Ninth Circuit cases. *See*, *i.e.*, *Clinton v. New York*, 524 U.S. 417, 428-29, 118 S. Ct. 2091 (1998) (holding that term "individual" as used in Line Item Veto Act does not preclude "corporate persons"); *United States v. Middleton*, 231 F.3d 1207 (9th Cir. 2000) (holding that the term "individual" as used in 18 U.S.C.S. § 1030(a)(5) criminalized computer crimes that damaged natural persons and corporations). Subsequent district court cases have found that "individual," as used in the TAPA, includes corporations. *See, i.e.*, *Sinaltrainal v. The Coca Cola Co.*, 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla. 2003); *Lacarno v. Drummund*, 256 F. Supp. 2d 1250, 1266 (N.D. Ala. 2003).

Defendants also argue that there are good policy reasons that might have led Congress to intend to exclude corporations from the term "individual" in the TAPA. Opp'n to Mot. at 6: 11-12. As possible Congressional motives for excluding corporations from the term "individual," defendants cite the greater deterrence gained by limiting the cause of action to people who actually committed the acts and reducing the number of frivolous lawsuits by forcing plaintiffs to identify the individual who committed torture or extrajudicial killings. Opp'n Mot. at 613-21. Defendants' arguments are not persuasive. Excluding corporations from the term "individual" in the TAPA would be inconsistent with the Acts' purposes. In *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000), the Second Circuit stated that the TAPA recognizes that

"the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law." Further, under international law, corporations may be held responsible for torture (a *jus cogens* norm) and extrajudicial killing. *Presbyterian Church of Sudan v. Talisman Energy, Inc.* 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (finding that "[c]lear and consistent Second Circuit precedent demonstrates that corporations may be held liable for *jus cogens* violations of international law.")

Furthermore, corporations are subject to liability under the Alien Tort Claims Act for violations of customary international law, including torture and summary execution. *Id.* at 315-14 and n. 24 (reviewing widespread precedent, including Ninth Circuit precedent, supporting corporate liability under the ATCA). Thus, interpreting TAPA as excluding corporate liability would suggest that a U.S. citizen tortured by a foreign government with the assistance of a corporation would have no remedy against the corporation, while an alien tortured in the same incident would, under the ATCA, have a cause of action against the corporation. This cannot have been the consequence that Congress intended. Accordingly, this Court finds that the TAPA supports plaintiffs' claims against the corporate defendants, and plaintiffs' proposed amendments are, therefore, not futile.

C. Prejudice

Defendants argue that plaintiffs were required to include their TAPA claims in Phase I so that the issue of defendants' potential liability under the Act could have been briefed and decided by the Court at that time. Opp'n to Mot. at 7: 22-25. Defendants argue that if the TAPA claim had been raised in Phase I it would have been more clear that Congress did not intend civil liability to attach to plaintiffs' aiding and abetting accusations, as per *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182, 114 S. Ct. 1439 (1994). Opp'n to Mot. at 8: 5-7. This, defendants argue, amounts to undue prejudice and should result in the denial of plaintiffs' leave to amend. Defendants' arguments, however, amount to no more than speculation on how this Court would have ruled given the inclusion of the TAPA claims. Moreover, if defendants continue to believe that they have been prejudiced by the absence of plaintiffs' TAPA claims during Phase I, they may still raise the issue with the Court. Defendants' contention that the Court may have ruled on this particular issue had the TAPA claims been inserted earlier does not amount to undue prejudice required to overcome the strong presumption in favor of granting leave to amend.

D. Bad faith

Defendants claim that plaintiffs, in their proposed amendment, seek to re-allege direct and alter-ego liability theories that have previously been rejected by the Court, Opp'n to Mot. at 3: 17-19. However, plaintiffs have persuaded the Court that they merely seek to add another statutory basis for

pre-existing claims. The factual allegations and definitions of the relevant terms are identical under both statutes. The Court fails to see bad faith on the part of plaintiffs.

2. Motion to strike

Defendants' cross-motion seeks to strike alleged unauthorized aider and abettor claims from the fifth amended complaint. Defendants argue that permitting an allegation that defendants aided and abetted CNL would amount to allowing a new theory of vicarious liability, and not a factual change as permitted by this Court's order dated April 15, 2003. Opp'n at 9: 12-14. However, plaintiffs point out that this Court has already ruled on this issue. Pls.' Reply at 8: 27-28. In this Court's Order Denying Defendants' Motion for Summary Judgment, the Court stated that "To the extent that plaintiffs may proceed against defendants on the theory that CNL was acting as defendants' agent, they may also proceed on their claims for aiding and abetting and ratification." March 22, 2004, at 21: 26-27. There is no reason for the Court to revisit its earlier decision. Therefore, defendants' cross-motion to strike plaintiffs' aider and abettor claims is DENIED.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS plaintiffs' motion to leave to amend their complaint and DENIES defendants' cross-motion to strike alleged unauthorized allegations in the fifth amended complaint. [docket # 387]

IT IS SO ORDERED

Dated: July 14,2004

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 09-15641
D.C. No. 3:99-cv-02506-SI
Northern District of California,
San Francisco

LARRY BOWOTO; BASSEY JEJE; OLA OYINBO; BAYO OYINBO; DEJI OYINBO; MARGARET IROWARINUN; ROSELINE IROWARINUN; MARY IROWARINUN; BOSUWO SEBI IROWARINUN; CALEB IROWARINUN; ORIOYE LALTU IROWARINUN; TEMILOLA IROWARINUN; ADEGORYE OLORUNTIMJEHUM IROWARINUN; AMINORA JAMES IROWARINUN; ENIESORO IROWARINUN; GBENGA IROWARINUN; IBIMISAN IROWARINUN; MONOTUTEGHA IROWARINUN; OLAMISBODE IROWARINUN,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

ORDER

Filed Feb. 10, 2011

Before: SCHROEDER and BYBEE, Circuit Judges, and PANNER, District Judge.*

The panel has voted to deny appellants' petition for panel rehearing. Judges Schroeder and Bybee have voted to deny appellants' petition for rehearing en banc, and Judge Panner has so recommended.

The full court has been advised of appellants' petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for panel rehearing and petition for rehearing en banc are denied. Further petitions for rehearing and rehearing en banc shall not be entertained.

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*The Honorable Owen M. Panner, Senior United States District Judgefor the District of Oregon, sitting by designation.