

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   ASID MOHAMAD, INDIVIDUALLY AND FOR:

4   THE ESTATE OF AZZAM RAHIM,                   :

5   DECEASED, ET AL.,                               :   No. 11-88

6                               Petitioners                   :

7                   v.                                       :

8   PALESTINIAN AUTHORITY, ET AL.                   :

9   - - - - - x

10   Washington, D.C.

11   Tuesday, February 28, 2012

12

13                               The above-entitled matter came on for oral

14   argument before the Supreme Court of the United States

15   at 11:06 a.m.

16   APPEARANCES:

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18       Petitioners.

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24       Respondents.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 11-88, Mohamad v. The Palestinian  
5 Authority.

6 Mr. Fisher.

7 ORAL ARGUMENT OF JEFFREY FISHER

8 ON BEHALF OF THE PETITIONERS

9 MR. FISHER: Mr. Chief Justice, and may it  
10 please the Court:

11 Unlike the previous case, this case does not  
12 involve the need to formulate Federal common law or to  
13 survey customary international law. Here Congress has  
14 expressly created the cause of action at issue in a  
15 statute. And we know that in every single other Federal  
16 tort statute that Congress has ever enacted, it has  
17 provided for organizational liability. As,  
18 Justice Kennedy, I think you put it earlier, it's a  
19 simple concept in our country.

20 CHIEF JUSTICE ROBERTS: We usually like --

21 MR. FISHER: Of course, the question --

22 CHIEF JUSTICE ROBERTS: We usually like to  
23 begin with the language of the statute.

24 MR. FISHER: That was my next sentence, Your  
25 Honor.

1 CHIEF JUSTICE ROBERTS: Well, then go ahead.

2 (Laughter.)

3 MR. FISHER: Thank you. But, of course, the  
4 question arises in this case why did Congress use the  
5 word "individual"? And we think the answer comes from  
6 the Tel-Oren case, which is the case, of course, from  
7 the D.C. Circuit that gave rise to the TVPA. And in  
8 that case, Judge Edwards wrote a lengthy concurrence  
9 where he again and again used the word "individual  
10 liability" and "individual" to describe the PLO, which  
11 was the very defendant in that case, against the  
12 backdrop of international law, which uses the term  
13 "individual" to differentiate anyone from the state.

14 After Nuremberg, starting with the  
15 discussions were recited most prominently in our reply  
16 brief at pages 6 to 8, Professor Jessup and many others  
17 discussed whether international law applies simply  
18 against states or whether it applies to, quote,  
19 "individuals." And the word "individual" was used again  
20 and again to mean anyone but the state. And as  
21 Professor Jessup and many others said, it includes  
22 organizations and juridical persons.

23 And this is the usage that Judge Edwards  
24 used in his opinion in Tel-Oren. He uses the word  
25 "individual" 43 times in that opinion. And if you look

1 at nothing else --

2 JUSTICE GINSBURG: I thought Justice --  
3 Judge Edwards' opinion was about politically motivated  
4 terrorists not coming within the Alien Tort Statute.

5 MR. FISHER: No. What Judge Edwards  
6 concluded, Justice Ginsburg, was that, as he understood  
7 the Alien Tort Statute at the time against the backdrop  
8 of international law, that any private actor acting  
9 under color of law could be held liable. And what Judge  
10 Edwards decided in that particular case is that the PLO  
11 as it then existed was not a state actor. But the rule  
12 that Judge Edwards prescribed -- and this is at page  
13 793, I believe, of his concurrence -- was that  
14 individuals acting under color of law should be held  
15 liable. That's the precise language that the TVPA uses.

16 So, if you want to know where Congress got  
17 the word "individual" and what it probably thought it  
18 meant, the best place to look is Judge Edwards' opinion.  
19 Now, what --

20 JUSTICE BREYER: Why isn't the place --

21 JUSTICE SCALIA: Really? Congress got it  
22 from Judge Edwards? Gee, I -- my goodness.

23 MR. FISHER: Well, I think --  
24 Justice Scalia, I think --

25 JUSTICE SCALIA: I'll bet you none of

1     them -- none of them even read that opinion.

2                   MR. FISHER: Well, I think Judge -- Judge  
3     Edwards' opinion was quite prominently read by the  
4     Congress then. It's cited throughout the legislative  
5     history in the Senate Report, in the House Report, again  
6     and again in the hearings.

7                   And this Court -- I think in Skilling, a  
8     couple terms ago, this Court said we have a statute  
9     before us dealing with honest services. And what did  
10    Congress mean when it used particular language? Well,  
11    it probably meant what lower court judges had used that  
12    language to mean, that it was --

13                  JUSTICE SCALIA: That is a strange phrase,  
14    "honest services," as -- you know, as a crime,  
15    deprivation of honest services. But the word  
16    "individual" is not a strange --

17                  MR. FISHER: Well, it's a strange --

18                  JUSTICE SCALIA: -- word at all. It's used  
19    all the time.

20                  MR. FISHER: No, Justice Scalia --

21                  JUSTICE SCALIA: It means an individual.

22                  MR. FISHER: I think it's a strange -- it's  
23    a very strange phrase in the context of a tort statute  
24    because we know that Congress always provides for  
25    organizational liability, and it has never used, to our

1 knowledge, the word "individual" in a tort statute. So,  
2 it is odd that it appears here.

3 JUSTICE SCALIA: Is that -- is that better  
4 for you or worse for you?

5 MR. FISHER: Well, I think it's better for  
6 us in that it shows that Congress -- something is amiss.  
7 And I think Judge Edwards' opinion explains what is  
8 going on.

9 Now, what my opponents want this Court to do  
10 is to look at other places in the U.S. Code where the  
11 word "individual" is used outside of international law,  
12 outside of tort regimes. And we concede --

13 JUSTICE SOTOMAYOR: The problem --

14 MR. FISHER: -- often the word  
15 "individual" --

16 JUSTICE SOTOMAYOR: The problem is I don't  
17 even look there. I look to the TVPA, section 2(a)(2),  
18 which uses the word "person." So, it wasn't as if in  
19 writing the statute Congress forgot the word "person."

20 MR. FISHER: No, it didn't.

21 JUSTICE SOTOMAYOR: They appear to be  
22 using "person" in the organizational way that "person"  
23 is defined in the Dictionary Act and elsewhere. So,  
24 isn't that a textual clue that they were using the word  
25 "individual" in a different sense?

1           MR. FISHER: No, Justice Sotomayor, for two  
2 reasons: One is because, for reasons I'll explain, the  
3 word "person" as it appears in the TVPA actually only  
4 applies to natural persons. Well, let me start with  
5 that. The argument the other side has is that the  
6 word --

7           JUSTICE SOTOMAYOR: Individuals, legal  
8 representative, or to any person who may be a claimant  
9 in an action for wrongful death. I'm not quite sure.  
10 Legal representative is often -- can be a person but can  
11 often also be a -- a corporate entity.

12          MR. FISHER: Well, I think the -- I think  
13 the argument is that the word "person" somehow contrasts  
14 with "individual."

15          JUSTICE SOTOMAYOR: Yes.

16          MR. FISHER: And, as we've shown in our  
17 brief, only natural people can bring wrongful death  
18 actions. They -- they claim -- in the D.C. Circuit  
19 argued that an estate could. As we've shown in our  
20 brief and this Court has squarely held, only natural  
21 people acting as administrator or executor of a -- of an  
22 estate can bring an action.

23          JUSTICE KAGAN: Mr. Fisher --

24          MR. FISHER: So, the word "person" refers to  
25 natural person.



1 JUSTICE KAGAN: You know, it's obvious that  
2 "individual" doesn't usually mean what you want it to  
3 mean. Now, you have a theory that they all just read  
4 Judge Edwards, and they came in and used "individual."  
5 But it seems actually that we know where "individual"  
6 came from in this statute. The statute started out by  
7 saying "person," and then there was this moment where  
8 one Congressman said I don't want this to apply to  
9 corporations, and the staff member said I have a great  
10 idea to make sure it doesn't apply to corporations;  
11 let's change the word "person" to "individual." So,  
12 that's the way "individual" got into the statute, and it  
13 got in specifically to address this question.

14 MR. FISHER: We don't disagree with that's  
15 how the word gets into the statute, but the question, as  
16 this Court has always looked to legislative history, is  
17 what does that -- what light does that shed on  
18 Congress's understanding of the law it ultimately  
19 passed? So, two Congresses later, 4 years later,  
20 Congress passed the statute with the word "individual."  
21 And the problem with that --

22 JUSTICE KAGAN: And "individual" means what  
23 it means.

24 MR. FISHER: And the problem with that  
25 theory, Justice Kagan, is it squarely is contradicted by

1 the committee reports contemporaneous with the statute  
2 that say we're using the word "individual" to make  
3 crystal clear that foreign states and their entities  
4 cannot be sued. And that's the reason --

5 JUSTICE BREYER: So, what else should I look  
6 at? Because I've looked at the -- I did really -- I  
7 know I have to go through legislative history. I've  
8 said it's meaningful, and so I do it.

9 (Laughter.)

10 JUSTICE BREYER: And, so far -- so far, I  
11 think I have to say that you're on a weak wicket.

12 (Laughter.)

13 JUSTICE BREYER: The -- the word "persons"  
14 -- when was there -- I found lots and lots of instances  
15 and by people in the civil -- international civil rights  
16 community who are testifying, where I look at what they  
17 say, and over and over they say a limited statute, the  
18 person won't often be in the United States. Well, the  
19 PLO had a presence in the United States. The person  
20 won't be in the United States very often. I know, but  
21 sometimes he may come over here; it's important to take  
22 a -- make a symbolic step. And not a word could I find,  
23 when they're talking even about the word "person," that  
24 suggested they meant even the PLO at that time. In  
25 fact, they thought, well, it would be a nice thing, but,

1 but, but, but....

2 MR. FISHER: Yes.

3 JUSTICE BREYER: I mean, that's the tenor of  
4 what I seem to have found so far. So, I mention that  
5 because you will point out to me the things that I have  
6 accidentally skipped.

7 (Laughter.)

8 MR. FISHER: Yes, pages 46 through 49 of our  
9 blue brief, Justice Breyer. There are numerous  
10 references to the word "organization," "group." "It" is  
11 a word used.

12 And, I think, Justice Kagan, this is also  
13 responsive to your question. Two years after the change  
14 you described was made, there was a hearing held before  
15 the Senate Judiciary Committee where both bills were  
16 being considered. The one bill from the House that used  
17 the word "individual" and the word -- and the Senate  
18 bill which used the word "person."

19 And one would expect that if people thought  
20 the word "individual" meant something different and  
21 limited the class of defendants, that that would have  
22 come up or somebody would have expressed some awareness  
23 of it. But to the contrary --

24 JUSTICE SCALIA: Well, suppose I'm a member  
25 of the House or of the Senate, and I'm not a member of

1 the committee that engages in all of this legislative  
2 history. And I -- I see the word "individual" in this  
3 statute, and that's the basis on which I vote for or  
4 against a statute. Why should I be saddled with  
5 whatever sayings by members of the committee or by  
6 experts testifying before the committee occurred? It  
7 was out of my hearing. I voted for "individual."

8 And "individual" -- well -- if Congress  
9 wanted "individual" to mean what you say it doesn't  
10 mean, what word would they have used instead? I mean,  
11 if "individual" is a code word for person, what's the  
12 code word for individual?

13 (Laughter.)

14 MR. FISHER: Natural person, Justice Scalia.  
15 And -- and we've cited many statutes in our blue brief  
16 that use the word "natural person" in the U.S. Code.

17 And this goes to the question -- I think  
18 this is also responsive to Justice Sotomayor: Why did  
19 they use the word "individual," instead of "person"?  
20 Why did they say in the committee reports that the word  
21 "individual" made it crystal clear that states and their  
22 entities could not be sued?

23 And the reason why is because "person" would  
24 have left some residual ambiguity as to whether  
25 something like a foreign city or a foreign county --

1 think of a foreign county jail that tortured somebody.  
2 Under section 1983 law, which uses the word "person,"  
3 counties and cities are liable. However, under the  
4 Foreign Sovereign Immunities Act and under established  
5 international law sovereign immunities principles,  
6 they're not.

7 CHIEF JUSTICE ROBERTS: So, they did this  
8 to --

9 MR. FISHER: The word "individual" --

10 CHIEF JUSTICE ROBERTS: They chose that word  
11 to avoid any residual ambiguity. But they thought there  
12 was no ambiguity at all as to whether the term  
13 "individual" meant natural persons or organizational  
14 entities?

15 MR. FISHER: Well, I -- I respectfully  
16 submit they didn't think about that question, which is  
17 why I'm standing here today. What they were really  
18 concerned with was avoiding sweeping in foreign states  
19 and their -- and their -- and their entities.

20 JUSTICE GINSBURG: But there were --

21 MR. FISHER: And they just didn't think.

22 JUSTICE GINSBURG: There were witnesses who  
23 testified, were there not, Mr. Fisher, that the TVPA  
24 would take care of a Filartiga type case, that when the  
25 torturer shows up physically -- those were the words

1   that were used -- the torturer comes into the state,  
2   into the United States, is physically present in the  
3   United States. That was the model that at least those  
4   witnesses had in mind, and some of them were quite  
5   distinguished witnesses.

6               MR. FISHER: There are statements to that  
7   effect. And, of course, the TVPA does cover natural  
8   persons if they happen to be in the United States. But  
9   the comment that Justice Kagan pointed out is the only  
10  comment that the other side can find anywhere in the  
11  legislative history.

12              JUSTICE KAGAN: But let's suppose that is  
13  true, Mr. Fisher. Let's suppose that aside from  
14  Congressman Leach, nobody thought about this question.  
15  But we know what the normal meaning of "individual" is,  
16  and you're suggesting -- let's suppose that they just --  
17  the -- the question of individual versus corporate  
18  liability was not on their mind, but they chose a word  
19  that means something. And you're suggesting that we  
20  should resort to background norms that -- you know, what  
21  Congress generally does when it imposes liability,  
22  rather than the words in the statute that they passed.  
23  And why should we do that?

24              MR. FISHER: Well, if the word "individual"  
25  could only mean natural person, I agree. The case would

1 be over. But we've cited many dictionary definitions,  
2 many usages in the U.S. Code, and many holdings from  
3 this Court and others that have actually found that a  
4 secondary meaning of the term is singularity.

5 JUSTICE GINSBURG: But you found no tort --

6 MR. FISHER: A single unit or entity.

7 JUSTICE GINSBURG: -- no tort statute uses  
8 the "individual" to include organizations.

9 MR. FISHER: Right. No tort statute uses it  
10 one way or the other, Justice Ginsburg, which we think,  
11 if anything, gets you back to the background norms and  
12 the secondary meaning. And let me say two things  
13 about --

14 CHIEF JUSTICE ROBERTS: But you have the --  
15 you have the additional problem, though, that your  
16 reading gives a different meaning to "individual" in two  
17 sentences that are right -- actually it's in the same  
18 sentence: an "individual" who does the torturing,  
19 subjects an "individual" to torture.

20 Now, I understand your argument that you can  
21 Have an organization doing the -- the subject thing, but  
22 how do you subject an organization to torture?

23 MR. FISHER: You don't.

24 CHIEF JUSTICE ROBERTS: You don't.

25 MR. FISHER: And I --

1 CHIEF JUSTICE ROBERTS: So, "individual" in  
2 the one clause you say means "organization";  
3 "individual" in the other necessarily does not.

4 MR. FISHER: I don't think it's that they  
5 have different meanings, but you're certainly correct  
6 that they refer to different things. But that's no  
7 different than numerous other statutes we cite at page  
8 28 and 29 of our brief that use the word "person" to  
9 mean a plaintiff when it can be just -- be a natural  
10 person and a defendant when it can be an entity. And,  
11 indeed, I think, if I don't get ahead of my --

12 JUSTICE SOTOMAYOR: In the same sentence?  
13 In the same sentence?

14 MR. FISHER: Yes. Yes.

15 JUSTICE SOTOMAYOR: Those statutes you --

16 MR. FISHER: Yes. Go to page 28 and 29 of  
17 the blue brief. And, indeed, their whole argument --  
18 and, Justice Kagan, this goes back to your point. Their  
19 whole argument is when the word "person" was used  
20 throughout the statute, then it -- then it changed  
21 meanings in the same way, that it covered organizational  
22 entities, but -- so, if the word "person" can do the  
23 same work, the word "individual" can certainly do the  
24 same work.

25 So, the question is why -- I think the



1 question that you end up with is, given that  
2 "individual" does have this secondary meaning, does have  
3 this customary usage that Congress may well have been  
4 aware of, at least that as this Court often says that if  
5 there's a customary usage of a term, we'll assume  
6 Congress was aware of it, why would Congress have done  
7 what it did and limit this act, unlike any other Federal  
8 tort statute in the U.S. Code, to natural persons? And  
9 we submit there is no good reason.

10 Justice Ginsburg, you talked about  
11 statements in legislative history to the effect that  
12 individual people who are torturers may be found in the  
13 United States, and that's true. But the TVPA is a tort  
14 statute. Congress already had on the books immigration  
15 laws and criminal laws that refuse safe haven to such  
16 people.

17 The only purpose of the TVPA is to provide  
18 compensation. And in every tort regime of which we are  
19 aware in Federal law -- and they haven't even pointed to  
20 anything to the contrary in State law or in  
21 international law -- the way that you get compensation  
22 in tort regimes is you hold agents liable and you hold  
23 corporations liable for the acts of their agents. It's  
24 absolutely understood. And there's no good reason -- if  
25 you think of the three things that a tort statute is

1 supposed to accomplish -- compensation, deterrence, and  
2 accountability -- on all three of those stands, the TVPA  
3 utterly falls flat if it cannot reach organizations, and  
4 this is the perfect case that shows you how that is.

5 Just to start with remedies --

6 JUSTICE SCALIA: Maybe organizations opposed  
7 it.

8 MR. FISHER: Not --

9 JUSTICE SCALIA: Maybe organizations opposed  
10 the extension of the legislation to themselves. Is that  
11 conceivable?

12 MR. FISHER: Well --

13 JUSTICE SCALIA: And is Congress ever  
14 influenced by -- by such lobbying?

15 (Laughter.)

16 MR. FISHER: That may -- in other cases,  
17 perhaps, but you don't find anything in this legislative  
18 history suggesting that organizations were --

19 JUSTICE SCALIA: You don't find lobbying in  
20 the legislative history.

21 (Laughter.)

22 MR. FISHER: Well, I can't prove something  
23 that I don't have a piece of paper for, but --

24 JUSTICE SCALIA: But it's an explanation.  
25 You say there's no possible explanation.

1 MR. FISHER: But if --

2 JUSTICE SCALIA: I can imagine that  
3 corporations would have been quite upset by this notion.

4 MR. FISHER: Justice Scalia, one would  
5 expect to have found, over the 4 years this was debated  
6 and the hundreds of pages of legislative history, some  
7 clue that that's -- that that's what Congress was  
8 reacting to and thinking about. This would -- this  
9 would be an extraordinarily unusual statute, and you'd  
10 think that one person in the Congress that voted for it  
11 or in the committee reports that are contemporaneous  
12 would mention that.

13 The House -- the Senate Report has a section  
14 called "Who can be sued." And what it says -- I quoted  
15 it to you earlier. One would expect to find in that  
16 section that, unlike every other tort statute, we're  
17 restricting the people that can be sued, but they said  
18 instead --

19 JUSTICE SCALIA: This is the dog that did  
20 not bark, right? Legislation cannot mean what it says  
21 unless the legislative history says that it means what  
22 it says. Right?

23 MR. FISHER: No, Justice Scalia, I agree  
24 that if the word "individual" can have no other meaning  
25 than that which my opponent suggests, that I lose. But

1 I'm suggesting to you, and we've cited plenty of  
2 authority, that there's a secondary meaning both  
3 accepted in the U.S. Code and in cases, and in - and in  
4 international law.

5 CHIEF JUSTICE ROBERTS: But Congress -- as  
6 you've indicated, Congress focused on the very question  
7 of whether organizations would be covered or not in the  
8 context of whether a state would be covered. It seems  
9 to me that the legislative history cuts strongly against  
10 you, putting even aside Congressman Leach. The issue  
11 was there. And if they meant to say, well, let's find a  
12 term that leaves some types of organizations out,  
13 states, but not others, we'll just say "individual," and  
14 people will understand, oh, we don't mean a state, but  
15 they'll also know but we do mean another type of  
16 organization, a corporation.

17 MR. FISHER: I think, Chief Justice, that  
18 that's exactly the thought process that Congress went  
19 through. And I can't do any better than to point you to  
20 pages --

21 CHIEF JUSTICE ROBERTS: So -- but it's at  
22 least ambiguous, and you're saying, well, we want a term  
23 that's going to include individual persons and  
24 organizations but not state organizations. And the only  
25 term that fits perfectly is "individual."

1 MR. FISHER: Exactly. That's our argument.

2 CHIEF JUSTICE ROBERTS: Really?

3 (Laughter.)

4 MR. FISHER: And page 6 to 8 of our reply

5 brief explains why that is so. I know -- I know it

6 might be surprising, but if you read --

7 (Laughter.)

8 MR. FISHER: If you read -- if you read the

9 discourse --

10 CHIEF JUSTICE ROBERTS: But you've been  
11 saying all along "individual" has a secondary meaning.

12 MR. FISHER: It does.

13 CHIEF JUSTICE ROBERTS: So, why would they  
14 have picked the secondary meaning of a word rather than  
15 try --

16 MR. FISHER: Because it's more precise word  
17 in international law discourse than the word "person"  
18 for the reason I described before. If you look Judge  
19 Edwards' opinion --

20 JUSTICE KAGAN: How about non-state actors?

21 MR. FISHER: Pardon me?

22 JUSTICE KAGAN: Non-state actors.

23 MR. FISHER: Well, except for -- remember,  
24 there's a state action requirement in the statute saying  
25 non-state actors --

1 JUSTICE KAGAN: Individuals and  
2 organizations.

3 MR. FISHER: I mean, maybe there's other  
4 ways that Congress could have done it, but the way that  
5 Judge Edwards did it and the way that international law  
6 scholars and people having this conversation about  
7 whether people other than states ought to be liable  
8 under international law was the term that they always  
9 used. And it's not just -- you don't just -- you know,  
10 we're not running a West Law search looking for wherever  
11 we can find it. There in the titles of the articles is  
12 whether individuals are subject to liability.

13 JUSTICE SCALIA: Mr. Fisher, you -- it seems  
14 to me you misrepresent our jurisprudence when you insist  
15 that "individual" has to have only that meaning. That's  
16 not what our jurisprudence says. We say that we give  
17 words their usual meaning, their common meaning. Even  
18 though they may sometimes be used in a different  
19 fashion, it's the usual or common meaning that we apply.

20 MR. FISHER: There are obviously cases to  
21 that effect, but I'm --

22 JUSTICE SCALIA: Many cases to that effect.

23 MR. FISHER: I'm aware of other cases --

24 JUSTICE SCALIA: We say it all the time.

25 MR. FISHER: Well, I think, for example,

1 Justice Scalia, of the jurisprudence where I had an  
2 argument in this Court. It's about the second or  
3 successive petition rule under habeas law. And this  
4 Court has said "second" -- even though where "second"  
5 has an obvious ordinary meaning, it doesn't actually  
6 mean that. It has a specialized usage that accumulated  
7 in the law; and when Congress used that term, we  
8 incorporate that usage.

9           And so, there is case after case where this  
10 Court has said -- the Morissette principle as a backdrop  
11 against common law, where this Court has said that you  
12 do look to usage in prior opinions, prior case law,  
13 prior discourse, as a way of infusing statutes with  
14 meaning.

15           And if I could just go back to the question  
16 that I posed, which is why would Congress have done this  
17 when it -- it just doesn't have an answer for why  
18 Congress would do this in this particular statute. Now,  
19 the other side has given a few reasons why Congress  
20 might have --

21           JUSTICE KAGAN: But it doesn't really need  
22 an answer. Suppose we think there is no answer to that  
23 question because Congress didn't think about it, other  
24 than Congressman Leach who appears to have thought about  
25 it and --

1 MR. FISHER: Yes.

2 JUSTICE KAGAN: -- reached the opposite  
3 result. Most of them just didn't think about it. But  
4 there you are. The statute says what it says.

5 MR. FISHER: Well, if you find the statute  
6 at least somewhat ambiguous for the reasons I've  
7 described, then what Meyer and other cases say is you  
8 assume if Congress didn't think about it, but they  
9 wanted ordinary tort and agency principles, in the --  
10 the -- in Title VII and many other cases, this Court has  
11 said, of course, Congress doesn't think about all these  
12 things; and when they don't, and absent evidence to the  
13 contrary --

14 JUSTICE BREYER: Maybe they did. You see, I  
15 might as well be honest with you, page 26 of the  
16 Government's brief did have an impact on my thinking.  
17 It's Father Drinan, and Father Drinan says in the  
18 hearing, "I think it would be best to stay with that and  
19 just avoid all of the problems about the PLO and related  
20 groups." And then Michael Posner testifies, it says,  
21 the Government, to the same effect.

22 So, there the great advocates of this thing  
23 are sitting there saying we don't think it should cover  
24 the PLO; let's not take that step at this time.

25 MR. FISHER: The --



1 JUSTICE BREYER: I mean -- and you have  
2 Congressman Leach, and you have the word "individual."

3 MR. FISHER: The question that Father Drinan  
4 was responding to was whether or not the TVPA ought to  
5 be extended to private entities that do not act under  
6 color of law.

7 JUSTICE BREYER: Yes, but he's taking  
8 that --

9 MR. FISHER: And at the time --

10 JUSTICE BREYER: He's taking that -- oh, go  
11 ahead.

12 MR. FISHER: Yes. If you look at that  
13 quote, remember, that hearing was held before the Oslo  
14 Accords, before the PLO became in our view a state  
15 actor. So, what he's saying, if you look at the quote  
16 in context, Justice Breyer, is that the TVPA shouldn't  
17 be drawn to sweep in groups that don't act under color  
18 of law.

19 And that issue is not before this Court  
20 today. We've argued that the PLO now does act under  
21 color of law, and that's a question for remand. But  
22 that's --

23 JUSTICE SCALIA: I -- I find it hard enough  
24 to parse the statute without having to parse Father  
25 Drinan's testimony. I mean --

1 (Laughter.)

2 MR. FISHER: Well, of course, I was just  
3 responding to Justice Breyer's question as to that  
4 context.

5 But -- but if you go even beyond  
6 compensation, you know, for compensation you have to  
7 identify somebody, you have to bring him into a court,  
8 and you have to enforce a judgment. That's virtually  
9 impossible against only natural people. Of course,  
10 Congress would have expected the ordinary rule of  
11 organizational liability. For deterrence, the  
12 Respondents' argument is that even if Pirates, Inc. --  
13 and for this case we'll make it Torturers, Inc. -- were  
14 created for a policy of torturing people abroad,  
15 torturing American citizens who travel abroad, their  
16 argument is you could not hold that corporation liable,  
17 even under its express policy and purpose.

18 There's no good reason under deterrence  
19 grounds why you'd let corporations or other  
20 organizations cycle individual actors in and out with  
21 impunity.

22 And, finally, in terms of accountability,  
23 just think about the backdrop, again, with which this  
24 statute was created. There are some pretty horrible  
25 groups in the world that actually claim credit and

1 responsibility in the world stage for torturing or  
2 killing American citizens; and the idea that Congress  
3 would have passed a statute that these organizations can  
4 stand proud in their view and say we've done this, and  
5 that our statute in the U.S. Code would -- would somehow  
6 only get their agent, and not the organization or entity  
7 itself, we submit it just doesn't make any sense.

8 CHIEF JUSTICE ROBERTS: Well, the TVPA is an  
9 extraordinary step in terms of exposing liability, and  
10 it doesn't seem to me to be an odd idea that Congress  
11 would want to proceed carefully before establishing a  
12 situation where the use of the American tribunal is as  
13 broad as it is under this situation.

14 MR. FISHER: Well, I don't -- I don't  
15 disagree that it's an unusual statute. It's not unheard  
16 of; just that we've cited in our briefs many other U.S.  
17 statutes that apply extraterritorially. But remember  
18 that all the arguments for and against foreign policy  
19 friction that you heard in the first case don't apply  
20 here. Congress expressly --

21 JUSTICE BREYER: Oh, the obvious thing which again  
22 they said is, look, just -- this is going to bring in  
23 suits against the Palestinian Authority. That's a very  
24 touchy issue in foreign affairs, and we don't want to  
25 have to go that far. And some of the things that are

1 said seem to bear that out. That's -- that's what's  
2 pulling --

3 MR. FISHER: With respect, Justice Breyer, I  
4 would just say if you look back at the legislative  
5 history, the only conversation that was had is should we  
6 reach non-state actors. That was the only conversation  
7 that was had, and that's the conversation you referred  
8 to earlier. Nobody suggested that if you apply this  
9 extraterritorially if you enacted this statute, that you  
10 somehow ought to shirk from the ordinary rules of -- of  
11 organizational liability. Nobody suggested that.

12 JUSTICE KAGAN: Mr. Fisher, one case that  
13 you seem to have on your side -- you don't have very  
14 many, but you have this one -- is Clinton, which --  
15 which does read "individual" in the way that you say and  
16 does it in order to avoid an absurd result, what the  
17 Court thought of as an absurd result. Do you think that  
18 this statute is absurd if not read your way?

19 MR. FISHER: I don't think -- if I could beg  
20 your indulgence for one moment, I don't think I need to  
21 argue that because I think that for all the reasons I've  
22 given, there's enough ambiguity and there's good enough  
23 reasons why we would assume Congress meant the ordinary  
24 rule. But if I had to make that argument, I think I  
25 could because the only arguments that have been advanced

1 in the papers are reasons for not having this  
2 extraterritorial statute in the first place. There's no  
3 good reason once you have it not to apply it to  
4 organizational actors.

5 And, Justice Breyer, this goes back to your  
6 comment. It's still a mystery to me how it's more  
7 problematic in international relations to hold an  
8 organization accountable -- to not -- to hold  
9 organization accountable than to hold its -- its board  
10 of directors on a personal basis or to hold, indeed, a  
11 high official of a foreign government. Nobody's made  
12 that argument.

13 And if I could say one thing and I'll  
14 reserve my time, take a good look at the United States'  
15 two briefs. Their -- the only argument they provide in  
16 of the Kiobel case is that there's no good reason --  
17 that's -- that's the United States' terms -- why  
18 Congress would want to have a statute that applies only  
19 to judgment-proof individual actors and not to agents on  
20 whom they're acting on behalf of. And we think that's  
21 exactly right, and that's why Congress wouldn't have  
22 wanted that here.

23 If I could reserve the remainder.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Ms. Ferguson.

1 ORAL ARGUMENT OF LAURA G. FERGUSON

2 ON BEHALF OF THE RESPONDENTS

3 MS. FERGUSON: Mr. Chief Justice, and may it  
4 please the Court:

5 Congress enacted the Torture Victim  
6 Protection Act to create a cause of action against  
7 individuals who commit acts of torture or extrajudicial  
8 killing under color of law against other individuals.  
9 Petitioners attempt to inject ambiguity into what is a  
10 very unambiguous term in U.S. legal usage by referring  
11 in their reply brief to a supposed subtle definition of  
12 "individual" in international law. But "individual" is  
13 not a term of art that has a specialized meaning in  
14 international law different from its ordinary meaning in  
15 -- in U.S. legal usage.

16 Petitioners' reply brief cites two secondary  
17 sources spanning a 60-year period, while other  
18 international law sources, including the Restatement,  
19 international conventions, and other scholars, emphasize  
20 the distinction between individuals and private  
21 organizations.

22 CHIEF JUSTICE ROBERTS: Mr. -- Mr. Fisher  
23 ended by saying there's no reason Congress would draw  
24 this line. Why would they want to hold the individual  
25 controlling officers of an organization liable for

1     torture, but not the organization itself?

2                   MS. FERGUSON: Congress was proceeding very  
3 cautiously and incrementally in enacting a statute with  
4 extraordinary territorial reach over executive branch  
5 opposition. It decided to focus on the personally  
6 responsible wrongdoers who subject victims to torture or  
7 extrajudicial killing, and it did not go beyond that to  
8 reach another class of organizations that could be held  
9 secondarily liable. Congress --

10                  JUSTICE KENNEDY: But the Chief Justice's  
11 question was why did Congress do that? What were the  
12 reasons for that?

13                  MS. FERGUSON: Congress was focused very  
14 much on the Filartiga case, where the Second Circuit had  
15 found that there was a norm prohibiting public officials  
16 from engaging in torture or extrajudicial killing; and  
17 Congress wanted to avoid the scenario where you have a  
18 torturer who comes to our shores; and Congress agreed  
19 with the Second Circuit in Filartiga that if the  
20 torturer comes here, he should not be able to escape  
21 accountability from his victim. If his victim finds him  
22 in our -- in our country, there should be a cause of  
23 action.

24                  But Congress had every reason to proceed  
25 very cautiously and incrementally. It put its toe in

1 the -- in the extraterritorial waters when it extended  
2 universal civil jurisdiction to violations of certain  
3 international law norms. It did not dive in. As we  
4 heard this morning in the Kiobel argument, this is a  
5 very complex area as to what norms are actionable under  
6 international law and --

7 JUSTICE ALITO: I don't understand that.

8 JUSTICE GINSBURG: How many judgments  
9 under -- I don't know whether it's *Filartiga* or *Filartiga*  
10 -- that -- that pattern, where the individual torturer  
11 is found in a U.S. jurisdiction?

12 MS. FERGUSON: There have --

13 JUSTICE GINSBURG: There have been many  
14 judgments; how many have collected?

15 MS. FERGUSON: Petitioners identified one  
16 case, the *Jean v. Dorelien* case -- excuse me -- where  
17 there was a collection. There may be other cases where  
18 there ultimately is a satisfaction of the judgment. But  
19 it's inherent in a statute that reaches foreign  
20 defendants that often they do not have assets in the  
21 United States.

22 JUSTICE GINSBURG: Well, wouldn't -- if  
23 Congress really wanted to have this, why wouldn't it  
24 include entity liability? The corporation is likely to  
25 have more money than -- than an individual torturer.



1 MS. FERGUSON: The -- the situation Congress  
2 had in mind in enacting the TVPA was adjusting the norm  
3 against state-sponsored torture and extrajudicial  
4 killing, where the agent is -- is almost invariably  
5 acting on behalf of the state; and yet, it didn't create  
6 an exception to the Foreign Sovereign Immunities Act for  
7 state sponsors of torture and extrajudicial killing.

8 It was concerned with this Filartiga  
9 scenario, where the U.S. wanted to take a position: We  
10 will not give torturers a safe haven in our country.

11 JUSTICE GINSBURG: What about the  
12 point that the immigration law takes care of that? They  
13 wouldn't be able to get into the country.

14 MS. FERGUSON: The immigration laws were not  
15 as robust in 1991 as they perhaps are now. We -- we  
16 know that the TVPA is premised on the fact that the  
17 torturer is, in fact, found in the United States  
18 because, otherwise, the United States couldn't assert  
19 personal jurisdiction over the torturer.

20 JUSTICE SCALIA: I'm not sure that the  
21 immigration officials conduct a thorough investigation.  
22 I mean, is there a box on the immigration form, you  
23 know -- have you tortured people? Yes/No.

24 (Laughter.)

25 MS. FERGUSON: That's just -- for us,

1 Justice Scalia --

2 JUSTICE SCALIA: You know, I really don't  
3 think they investigate that at all.

4 MS. FERGUSON: It's not a -- it's not a  
5 perfect screen because, of course, torturers don't  
6 announce themselves at the border as a torturer. So, in  
7 fact, that's why we have situations where we've had  
8 these gross human rights violators that end up in the  
9 United States, even -- in one of the cases we heard, won  
10 the Florida lottery. So -- so, they do find their way  
11 to our country. And --

12 JUSTICE ALITO: I still don't understand  
13 your explanation of the reason why Congress would draw a  
14 distinction between an individual and an organization.  
15 You keep saying that the -- in the case of the  
16 individual, the individual was here. But the  
17 organization can be here, too.

18 MS. FERGUSON: The organization that  
19 Congress had foremost in mind was the state. This is  
20 state-sponsored torture, state-sponsored extrajudicial  
21 killing. The -- the problem it described regarding  
22 torture and extrajudicial killing was one of states.  
23 The legislative history talks about how one-third of the  
24 states are -- have been engaged in sponsoring torture  
25 and extrajudicial killing. So those were the

1 organizations they had foremost in their mind; and yet,  
2 the statute doesn't impose liability on those  
3 organizations. It's addressed to the very personal  
4 wrong of a torturer avoiding accountability to their  
5 victims in their home country and coming to our country  
6 and seeking safe haven.

7 JUSTICE SOTOMAYOR: So, it's okay to keep  
8 out individuals who subject others to torture, but  
9 corporations -- we want their money so they should  
10 invest here --

11 (Laughter.)

12 MS. FERGUSON: I think --

13 JUSTICE SOTOMAYOR: -- because we're going  
14 to protect them from liability to -- for people that  
15 they torture.

16 MS. FERGUSON: I think -- I think the  
17 question is whether there was a plausible reason why  
18 Congress would have taken this incremental approach and  
19 focused first on those personally responsible versus  
20 extending liability more broadly under secondary  
21 liability theories. And because the statute is so clear  
22 on its face because "individual" carries its ordinary  
23 meaning and the surrounding statutory text confirm that  
24 Congress was using "individual" in its ordinary sense,  
25 Clinton sets a very high bar for the Court to depart

1 from the plain-text meaning of the statute.

2 JUSTICE SCALIA: You don't have to prove  
3 it's an intelligent statute, do you? Maybe it's a  
4 stupid statute. Is that possible?

5 MS. FERGUSON: It -- it --

6 JUSTICE SCALIA: Is it possible?

7 MS. FERGUSON: It could be stupid, but it's  
8 clear.

9 JUSTICE SCALIA: Is it possible that it's  
10 just -- that it's a stupid statute?

11 MS. FERGUSON: Yes. It is possible, but it  
12 was clear enough.

13 JUSTICE BREYER: It's also possible it's not  
14 a stupid statute.

15 (Laughter.)

16 JUSTICE BREYER: I took -- I took -- the  
17 reason I say that is because if you want to elaborate on  
18 this -- because I purposely asked it, but I -- one of  
19 the things in the Government's brief that did, as I  
20 said, have an impact was Father Drinan is asked,  
21 shouldn't we have here -- this is before it reads  
22 "individual"; it reads "person" at this time --  
23 shouldn't we have another definition for including  
24 organizations like the PLO? He responds, "I think that  
25 we should exclude non-governmental organizations."

1 MS. FERGUSON: Right.

2 JUSTICE BREYER: "I think it would be best  
3 to stay with that and just avoid all of the problems  
4 about the PLO and related groups."

5 Now -- but you heard the response to that,  
6 which really was, if I look at the context, I'll see  
7 that's less relevant than I think -- than I did think.

8 So, what do you think?

9 MS. FERGUSON: I think that even the human  
10 rights supporters who were strong advocates of getting  
11 this legislation enacted understood that this was an  
12 incremental approach, that where there was some  
13 certainty within international law within this area of  
14 official torture carried out by public officials under  
15 color of state law, and it provided a cause of action  
16 for this Filartiga scenario, and even the human rights  
17 supporters understood that it was important to proceed  
18 cautiously and incrementally.

19 This -- the United States does not tread  
20 lightly when imposing its jurisdiction over the acts of  
21 foreign defendants for foreign conduct under color of  
22 foreign law. That's an intrusion on other nations'  
23 jurisdiction.

24 JUSTICE KAGAN: But, Ms. Ferguson --

25 MS. FERGUSON: And we don't do that lightly.

1 JUSTICE KAGAN: Your story makes it sound as  
2 though everybody was really focused on this question and  
3 made a determination to proceed incrementally and not to  
4 include corporations. And isn't it, if you -- if you  
5 look at what happened here, more likely that other than  
6 Congressman Lynch -- Leach -- in fact, nobody was  
7 focused on this question. But because of Congressman  
8 Leach's intervention, the words changed, and the word  
9 was continued throughout the legislative process, and  
10 that's the word that was voted on.

11 MS. FERGUSON: Well, Representative Yatron  
12 was the sponsor of both the bill that was marked up  
13 where "person" was changed to "individual," and then was also  
14 the sponsor of the bill that was ultimately enacted.  
15 So, he was certainly aware that "individual" was  
16 selected for this reason of excluding corporations.

17 But, more importantly, "individual" almost  
18 invariably carries the meaning of "natural person." If  
19 Congress had wanted the statute to reach nonsovereign  
20 organizations, it very easily could have used the term  
21 "person," as section 1983 does. And the notion that  
22 they couldn't use "person" because it would encompass  
23 foreign states is not the case when you're dealing with  
24 "person" to describe a potential class of defendants  
25 because we presume that Congress does not intend to

1     abrogate the Foreign Sovereign Immunities Act.

2                     And the Dictionary Act tells us that  
3     "person" is the term Congress uses when it wants to  
4     refer to natural persons and artificial persons, but not  
5     sovereigns. So, if the Congress wanted to do what the  
6     Petitioners claim, they had a very useful term that  
7     Congress uses all the time to reach that category, and  
8     it's the term "person." But, instead, they used  
9     "individual," and elsewhere in the same sentence, they  
10    used "individual" to refer to who shall be liable. They  
11    used "individual" four more times in a way that can only  
12    mean a human being.

13                    Now, granted, there are exceptions to this  
14    canon of consistent usage, but they have no fair  
15    application here. Those canons apply when you have a  
16    term that has more than one ordinary meaning, and you  
17    can use them interchangeably without being confusing.  
18    Here, the ordinary meaning of "individual" is to exclude  
19    organizations. We regularly use "individual" to mean  
20    we're not talking about corporations; we're not talking  
21    about organizations.

22                    So, in -- so, in the same sentence of the  
23    statute, to use "individual" to mean -- oh, let's assume  
24    we know it normally means corporations, and then  
25    immediately just switch and -- and use it to refer to

1 human beings would be very confusing.

2 And yet, we see Congress very deliberately  
3 and carefully then switch to the broader term "person"  
4 when it wanted to sweep in a broader class of potential  
5 plaintiffs. They wanted to make sure they were sweeping  
6 as broadly as possible to allow persons who have  
7 wrongful death claims to be able to bring a suit where  
8 the victim has died. So, they use the term "person."

9 And Petitioners' interpretation gives no  
10 separate meaning to "individual" and "person," but we  
11 assume that when Congress uses those terms distinctly,  
12 they intend to give them different meanings.

13 I would just return to the plain text of the  
14 statute. It's very clear. The only situation in which  
15 the Court has found that "individual" should be  
16 interpreted inconsistent with its ordinary meaning is  
17 upon a showing of absurd results. And here, there  
18 simply is no absurd result. Congress had every reason  
19 to proceed cautiously and incrementally in extending  
20 U.S. jurisdiction over conduct that has no nexus to the  
21 United States. And it proceeded by focusing on this  
22 Filartiga scenario, ensuring that the U.S. would not  
23 become a safe haven for torturers.

24 I would ask that the Court give the statute  
25 its plain-text meaning and affirm the court of appeals.



1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Gannon.

3 ORAL ARGUMENT OF CURTIS E. GANNON  
4 ON BEHALF OF THE UNITED STATES,

5 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

6 MR. GANNON: Mr. Chief Justice, and may it  
7 please the Court:

8 By using the term "individual" when  
9 describing who shall be liable for damages under the  
10 Torture Victim Protection Act, Congress chose to limit  
11 the statute's scope to natural persons. That's the  
12 ordinary meaning of the term "individual," especially in  
13 legal usage. And, as Justice Sotomayor pointed out,  
14 this statute uses the term "person" in addition to the  
15 term "individual."

16 JUSTICE ALITO: Mr. Gannon, suppose two  
17 people are tortured, and one is an alien who has never  
18 been within 10,000 miles of the United States, and the  
19 other is a U.S. citizen.

20 The position of the United States is that  
21 the alien can sue, but the U.S. citizen can't?

22 MR. GANNON: The position of the United  
23 States is that the alien may be able to sue. And I  
24 think that that's going to depend ultimately on this  
25 Court's construction of the ATS. There are always going

1 to be differences in application between the ATS and the  
2 TVPA so long as the ATS is still on the books and has  
3 any vitality.

4 That, of course, wasn't clear to Congress  
5 when it enacted the TVPA in 1992. It wasn't sure  
6 whether the ATS was going to be a going concern in light  
7 of Judge Bork's opinion in Tel-Oren. But rather than  
8 amend the ATS, Congress in the TVPA decided to create a  
9 separate statute which provided an express right of  
10 action both to aliens and to U.S. citizens for two  
11 specific norms.

12 It's broader than the ATS in several ways,  
13 but it's narrower than the ATS in several ways. So, if  
14 your hypothetical involved piracy, two victims of  
15 piracy, then it's quite clear after this Court's  
16 decision in Sosa --

17 JUSTICE ALITO: No, but two victims of  
18 torture -- you don't find that to be an incongruous  
19 result?

20 MR. GANNON: Well, I think that is  
21 ultimately going to depend upon what happens under this  
22 Court's ATS jurisprudence. And so, it does seem that  
23 the Court --

24 JUSTICE ALITO: I'm asking about your  
25 position, the position of the United States; not how --

1                   MR. GANNON: The position of the United  
2 States in the other case today is that the ATS does not  
3 include a categorical bar on corporate liability and  
4 that that -- that has no regard for the theory of  
5 liability, the locus of the acts, the citizenship of the  
6 parties, and the character of the international law norm  
7 at issue.

8                   JUSTICE ALITO: Suppose Mr. Rahim had never been  
9 naturalized. I guess that was a mistake.

10                  MR. GANNON: Well, in -- in this instance  
11 then -- then that would present a different question  
12 that this Court has not yet been presented with under  
13 the ATS; and, ultimately, maybe an alien will be able to  
14 bring a suit under the ATS that he can't bring -- that a  
15 U.S. citizen could not bring under the TVPA, but that is  
16 a product of the fact that there are still two different  
17 statutes.

18                  The Alien Tort Statute will always give more  
19 rights to aliens than to U.S. citizens because by  
20 definition it is only available to aliens.

21                  JUSTICE SOTOMAYOR: So, what's the good  
22 reason --

23                  MR. GANNON: Well, I --

24                  JUSTICE SOTOMAYOR: -- for the U.S. to have  
25 limited liability to natural persons in the TVPA but not

1 in the ATS context?

2 MR. GANNON: Well, I think that there are  
3 several reasons that Congress could have had in mind,  
4 although I think that if you read the legislative  
5 record, that Justice Kagan is probably correct, that  
6 most members of the Congress weren't thinking precisely  
7 about this question. Representative Leach appears to  
8 have been. I think that in the other passage cited on  
9 page 25 of the United States' brief involving Father  
10 Drinan that Justice Breyer was looking at before,  
11 there's an earlier passage that we cite where Father  
12 Drinan seems to indicate that there may be a distinction  
13 between the two bills that are pending before the Senate  
14 at that point because one refers to persons and one  
15 refers to individuals.

16 JUSTICE SCALIA: But they were thinking  
17 about that in 1797. I mean, you're saying in the later  
18 statute --

19 MR. GANNON: No, I think that in --

20 JUSTICE SCALIA: They were a much more  
21 perceptive Congress in 17 --

22 MR. GANNON: No, I think the difference is  
23 that the ATS has not even attempted to speak to this  
24 question, whereas the TVPA does. As this Court noted in  
25 *Amerada Hess*, the ATS does not define a class of

1 defendants. Here Congress did define a class of  
2 defendants, and I think that there are several reasons  
3 why they ended up with this result, the chief of which  
4 is that all of the cases that they were thinking about  
5 at that time had involved natural persons. The  
6 Filartiga case was -- was the flagship case --

7 JUSTICE BREYER: That's why they're thinking  
8 of it. His argument the other way, which I see now, is  
9 that -- is that, look, Father Drinan and the others are  
10 not talking about individual versus person; they're  
11 talking about whether, say, the PLO falls under color of  
12 law of a foreign state. And so, they're not thinking of  
13 that question.

14 MR. GANNON: It's true --

15 JUSTICE BREYER: And if -- and if, in fact,  
16 it does fall under color of law there, they don't care  
17 about whether it's individual or person. They've never  
18 really thought about that.

19 MR. GANNON: Well, but the --

20 JUSTICE BREYER: In fact, the only one who  
21 thought about it was Congressman Leach, and that was  
22 four bills earlier. And --

23 MR. GANNON: No, but the reason that they're  
24 not thinking about it is because the paradigm that they  
25 were thinking about was the -- the torturer who is found

1 in the United States who is -- who is walking on the  
2 streets. There's an individual moral accountability  
3 that -- that everybody understood needed to -- to happen  
4 there.

5 To the extent that the legislative history  
6 is referring to groups -- my friend Mr. Fisher referred  
7 to references in the legislative history to groups and  
8 organizations. They basically are references to things  
9 like death squads. And, as a practical matter, even  
10 today, none of the cases in the Eleventh Circuit that  
11 are being brought under the TVPA are being brought  
12 against death squads. They -- the case that Petitioners  
13 cite in their reply brief, the Drummond case, was not a  
14 case where the Colombian paramilitary was a defendant.  
15 The defendants there were actually two corporations and  
16 a CEO.

17 And so, I think as a -- as a practical  
18 matter, although it is natural for us to think that if  
19 an individual is liable, then so too is the -- is the  
20 organization that it may have been acting -- he may have  
21 been acting on behalf of; but it is not natural to think  
22 that these type of clandestine shadowy organizations  
23 that would claim responsibility for such acts, such  
24 heinous acts, overseas would have a jurisdictional  
25 presence in the United States.

1           And I think if you -- as Respondents'  
2   counsel already noted, because the TVPA requires state  
3   action, the organizational entity here is usually going  
4   to be the state, but Petitioners acknowledge that no  
5   state entity is going to be liable here.

6           And, indeed, the result here is not that  
7   dissimilar to some of this Court's 1983 jurisprudence.  
8   Petitioners mentioned the question of whether Congress  
9   was concerned that the term "person" might pull in  
10   something like municipalities because it could be read  
11   to bring in sovereigns, but in -- in the context of  
12   municipalities, under Monell this Court has concluded  
13   that there's no respondeat superior liability and that  
14   superiors or supervisors are not liable for the torts of  
15   their agents; they're only liable for their own  
16   individual wrongs.

17           And so, I do think that there are policy  
18   reasons why Congress could have said something different  
19   here, but -- and they may well be encouraged to do that  
20   by 20 years of ATS precedent that has now, for the first  
21   time since the TVPA was enacted, started to raise the  
22   question of whether corporations should be held liable  
23   under the other statute.

24           If Congress wants to disagree with the types  
25   of policy concerns that were behind this Court's Monell

1 decision, Congress could reach a different result, but  
2 we don't -- we don't think that that's a decision that  
3 ought to be reached through statutory construction.

4 Here, Congress used the term "individual."  
5 It spoke about an individual who subjects an individual  
6 to torture or extrajudicial killing. It separately  
7 referred to "person." And Petitioners' reading of the  
8 -- of the statute actually gets the relationship between  
9 person and individual, which is quite clear as an  
10 ordinary question of Federal statutory construction in  
11 the Dictionary Act, precisely backwards because under  
12 their reading, "individual" means any nonsovereign  
13 natural or artificial person, but "person" can mean only  
14 natural person.

15 And so, we think that that is -- is a  
16 particularly odd reading of the statute in light of the  
17 Dictionary Act and the statutory structure.

18 If there are no further questions, I'd urge  
19 the Court to affirm.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
21 Gannon.

22 Mr. Fisher, you have 4 minutes remaining.

23 REBUTTAL ARGUMENT OF JEFFREY FISHER

24 ON BEHALF OF THE PETITIONERS

25 MR. FISHER: I can make four points, if I



1     may, Your Honor.

2                     First, when asked again and again why  
3     Congress would have done this, I think all I heard was  
4     that Congress wanted to adopt an incremental approach.  
5     And then Mr. Gannon said, well, maybe we also wanted to  
6     have moral accountability.

7                     Well, an incremental approach doesn't make  
8     any sense. Yes, Congress did so in the context of  
9     requiring exhaustion and a limitations period. And so,  
10    it treaded softly there. But there are numerous Federal  
11    statutes -- RICO, the Sherman Act, the Antiterrorism  
12    Act, which is quite similar to this act in many ways --  
13    that apply to events abroad. And they all apply to  
14    organizations. So, if Congress was going to do this,  
15    there's no reason to think it wouldn't have wanted to do  
16    it.

17                    Ms. Ferguson pointed to the Dorelien case as  
18    the one example she could point of where a TVPA judgment  
19    was able to be enforced. And the only reason why that  
20    was able to be enforced is because that guy happened to  
21    win the Florida lottery. He had hidden all of his other  
22    assets abroad and won the Florida lottery.

23                    And is that the statute that Congress meant  
24    to pass? We don't think so. Moral accountability was  
25    already taken care of in the U.S. Criminal Code.

1 There's an express provision of the U.S. Criminal Code  
2 that holds torturers liable for torturing abroad. And  
3 we've cited that in our briefs.

4 I know some of you are going to look at the  
5 legislative history. So, let me say two quick things  
6 about the legislative history.

7 First, Justice Kagan, with respect to  
8 Representative Leach's comment, if anyone after that  
9 hearing wanted to know what that committee thought the  
10 change it had made meant and what the bill meant, it  
11 would have looked at its report. And if we've cited --  
12 we've cited the committee reports from the Foreign  
13 Relations Committee, and it says the TVPA allows  
14 liability for any person that commits torture. It uses  
15 the word "person" utterly interchangeably with the word  
16 "individual." So, that -- whatever -- whatever moment  
17 happened 4 years before the enactment was long since  
18 lost.

19 And the reason it used ultimately the word  
20 "individual" and not "person," as I've described before,  
21 was to steer clear, I think, of any possibility of state  
22 entities.

23 Mr. Gannon points to Monell, but Monell  
24 favors us. Monell holds that organizations can be  
25 liable. Now, there's a separate question that you

1 talked about in the earlier argument, too, as to what  
2 the mens rea would be, whether it would have to be  
3 according to a policy or practice or whether it would be  
4 pure respondeat superior. But Monell is on our side in  
5 this case, and we've alleged a policy in our complaint  
6 in this case.

7 Thirdly, in the U.S. Code, where the word  
8 "individual" is used, it obviously means natural persons  
9 lots of times. But when it does, it almost always uses  
10 the -- contrasts it in that very sentence with an entity  
11 or organization.

12 And so, in discourse, when you say  
13 "individuals" or "corporations," yes, you mean a natural  
14 person. But as the United States points out in footnote  
15 3 of its own brief, the word "individual" when it's used  
16 alone is a less favored usage that actually gives rise  
17 to ambiguity because of the secondary meaning I've  
18 described before.

19 And then, finally, let me say -- the  
20 questions were asked about the relationship between this  
21 case and the Kiobel case. And I think it's absolutely  
22 clear -- and this goes again to one of Justice Kagan's  
23 questions on absurdity -- if this Court holds that the  
24 Alien Tort Statute would have let a torturer right by  
25 Mr. Rahim, someone who is tortured, that is, bring a

1     cause of action, I think it would indeed be absurd to  
2     imagine Congress stepping in and passing a statute  
3     saying if you're an American citizen, I'm sorry, you're  
4     out of luck; but if you happen to be lucky enough to be  
5     an alien and never having tried to be a citizen in this  
6     country, go ahead and bring a case in our courts. We  
7     think that would be absurd.

8                 So, with those points, if the Court has any  
9     further questions around the submissions I've made -- I  
10    guess the last thing I would say is, at the end of Mr.  
11    Gannon's argument, he referred to the interplay between  
12    the word "individual" and "person" in the briefs, and I  
13    can assure you from have having worked on this during  
14    the case, it is an incredible sideshow as to whether or  
15    not estates are people and all the ways that that works.  
16    But it's laid out in our brief, and we think that it's  
17    quite clear, that there is no disjoint between the word  
18    "individual" and "person." If you look at our brief, it  
19    will explain why.

20                CHIEF JUSTICE ROBERTS: Thank you, counsel,  
21    counsel.

22                The case is submitted.

23                (Whereupon, at 11:56 a.m., the case in the  
24    above-entitled matter was submitted.)

25

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