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IN THE SUPREME COURT OF THE UNITED STATES

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ASID MOHAMAD, INDIVIDUALLY AND FOR:

THE ESTATE OF AZZAM RAHIM, :

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

Petitioners :

v. :

PALESTINIAN AUTHORITY, ET AL. :

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Washington, D.C.

Tuesday, February 28, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

JEFFREY FISHER, ESQ., Stanford, California; on behalf of
Petitioners.

LAURA G. FERGUSON, ESQ., Washington, D.C.; on behalf of
Respondents.

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United States, as amicus curiae, supporting
Respondents.

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in case 11-88 Mohamad v. The Palestinian Authority.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY FISHER
ON BEHALF OF THE PETITIONERS

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

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

CHIEF JUSTICE ROBERTS: We usually like -- we usually like to begin with the language of the statute.

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

CHIEF JUSTICE ROBERTS: Well then go ahead.

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

12 After Nuremberg, starting with the
13 discussions recited most prominently in our reply brief
14 at pages 6 to 8, Professor Jessup and many others
15 discussed whether international law applies simply
16 against states or whether it applies to quote
17 individuals. The word individual was used again and
18 again to mean anyone but the state. And as Professor
19 Jessup and many others said it, includes organizations
20 and juridical persons. And this is the usage that Judge
21 Edwards used in his opinion in Tel-Oren. He uses the
22 word "individual" 43 times in that opinion. And if you
23 look at nothing else --

24 JUSTICE GINSBURG: I thought you said that
25 Judge Edwards opinion was about politically motivated

1 terrorists, not coming within the Alien Tort Statute.

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

13 So if you want to know where Congress got
14 the word individual, and what it probably thought it
15 meant, the best place to look is Judge Edwards' opinion.

16 JUSTICE SCALIA: Wait. Congress got it from
17 Judge Edwards. Gee, my goodness.

18 MR. FISHER: I think, Justice Scalia, I
19 think --

20 JUSTICE SCALIA: I will bet you none of
21 them -- none of them even read that opinion.

22 MR. FISHER: Well, I think Judge Edwards'
23 opinion was quite prominently read by the Congress then.
24 It is cited throughout the legislative history in the
25 Senate Report, in the House Report, again and again in

1 the hearings.

2 And this Court I think in Skilling, a couple
3 terms ago, this Court said we have a statute before us
4 dealing with honest services. And what did Congress
5 mean when it used particular language. Well, it
6 probably meant what lower court judges had used that
7 language to mean.

8 JUSTICE SCALIA: That is a strange phrase,
9 honest services, as, you know, as a crime, deprivation
10 -- deprivation of honest services. But the word
11 "individual" is not a strange word at all. It's used
12 all the time.

13 MR. FISHER: Well, no, Justice Scalia --

14 JUSTICE SCALIA: It means an individual.

15 MR. FISHER: I think it's a strange -- it's
16 a very strange phrase in the context of a tort statute,
17 because we know that Congress always provides for
18 organizational liability, and it's never used to our
19 knowledge, the word "individual" in a tort statute. So
20 it is odd that it appears here.

21 JUSTICE SCALIA: Is that better for you or
22 worse for you?

23 MR. FISHER: Well, I think it's better for
24 us in that it shows that Congress -- something is amiss.
25 And I think Judge Edwards' opinion explains what is

1 going on.

2 Now what my opponents want this Court to do
3 is to look at other places in the U.S. code where the
4 word individual is used outside of international law,
5 outside of tort regimes and we concede often the word
6 individual --

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

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

12 JUSTICE SOTOMAYOR: And they appear to be
13 using "person" in the organizational way that person is
14 defined in the dictionary act and elsewhere. So isn't
15 that a textual clue that they were using the word
16 "individual" in a different sense.

17 MR. FISHER: No, Justice Sotomayor, for two
18 reasons: One is because for reasons I will explain, the
19 word person as it appears in the TVPA actually only
20 applies to natural persons. Let me start with that.
21 The argument the other side has is the word --

22 JUSTICE SOTOMAYOR: Individuals legal
23 representative or to any person who may be a claimant in
24 an action for wrongful death. I'm not quite sure.
25 Legal representative is often, can be a person but can

1 often also be a corporation.

2 MR. FISHER: I think the argument -- I think
3 the argument is that the word person somehow contrasts
4 with individual.

5 JUSTICE SOTOMAYOR: Yes.

6 MR. FISHER: And as we have shown in our
7 brief only natural people can bring wrongful death
8 actions. They claim, and the D.C. circuit argues that
9 in a state, as we have shown in our brief and this Court
10 has squarely held, only natural people acting as
11 administrator or executor of an estate can bring an
12 action. So the word person refers to natural person.

13 JUSTICE KAGAN: You know, it's obvious that
14 individual doesn't usually mean what you want it to
15 mean. Now you have a theory that they all just read
16 Judge Edwards and they came in and used "individual" but
17 it seems actually that we know where individual came
18 from in this statute. The statute started out by saying
19 person and then there was this moment where one
20 Congressman said, I don't want this to apply to
21 corporations, and the staff member said, I have a great
22 idea to make sure it doesn't apply to corporations,
23 let's change the word person to individual. So that's
24 the way individual got into the statute. And it got in
25 specifically to address this question.

1 MR. FISHER: We don't disagree with that's
2 how the word gets into the statute. But the question,
3 as this Court has always looked to legislative history
4 is, what does that -- what light does that shed on
5 Congress's understanding of the law to ultimately pass.
6 So two Congresses later, four years later Congress
7 passed the statute with the word individual. And the
8 problem with that --

9 JUSTICE KAGAN: And it means what it means.

10 MR. FISHER: And the problem with that
11 theory, Justice Kagan, is it squarely is contradicted by
12 the committee reports contemporaneous with the statutes
13 that say we're using the word individual to make crystal
14 clear that foreign states and their entities cannot be
15 sued. And that's the reason that --

16 JUSTICE BREYER: Well, then I looked at -- I
17 have looked at -- I know I have to go through
18 legislative history. I've said it is meaningful and so
19 I do it. And so far -- so far, I think I have to say
20 that you are on a weak wicket.

21 The word persons when it was there, I found
22 lots and lots of instances and by people in the civil
23 international civil rights community who are testifying.
24 Or I look at what they say and over and over they say, a
25 limited statute -- the person won't often be in the

1 United States or the PLO had a presence in the United
2 States. The person won't be in the United States very
3 often. I know, but sometimes he may come over here,
4 it's important to take a -- make a symbolic step and not
5 a word could I find when they are talking even about the
6 word could I find when they're talking even about the
7 word person, that suggested they meant even the PLO at
8 that time.

9 In fact they thought it would be a nice
10 thing but -- but -- I mean that's the tenor of what I
11 seem to have found so far. So I mention that, because
12 you will point out to me the things that I accidentally
13 skipped.

14 MR. FISHER: Yes, pages 46 through 49 of our
15 blue brief, Justice Breyer.

16 There are numerous references to
17 organization, the word organization, group, it is a word
18 used. And, I think Justice Kagan this is also
19 responsive to your question. Two years after the change
20 you describe was made, there was a hearing held before
21 the Senate Judiciary Committee where both bills were
22 being considered. The one bill from the House that used
23 the word individual and the word -- and the Senate bill
24 which used the word person.

25 And one would expect that if people thought

1 the word individual meant something different and
2 limited the class of defendants, that that would have
3 come up or somebody would have expressed awareness of
4 it. But to the contrary --

5 JUSTICE SCALIA: Suppose I am a member of
6 the House or of the Senate. And I am not a member of
7 the committee that engages in all of this legislative
8 history. And I -- I see the word individual in this
9 statute. And that's the basis on which I vote for or
10 against the statute. Why should I be saddled with
11 whatever sayings by members of the committee or by
12 experts testifying before the committee occurred? It
13 was out of my hearing. I voted for individual. And
14 individual -- well -- if Congress wanted individual to
15 mean what you say it doesn't mean, what word would they
16 have used instead? I mean, if individual is a code word
17 for person, what's the code person for individual?

18 (Laughter.)

19 MR. FISHER: Natural person, Justice Scalia.
20 And we have cited many statutes in our blue brief that
21 use the word "natural person" in the U.S. code. And
22 this goes to the question, I think is also responsive to
23 Justice Sotomayor: Why did they use the word
24 "individual," instead of person? Why did they say in
25 the committee reports, that the word "individual" made

1 it crystal clear that states or their entities could not
2 be sued.

3 And the reason why is because person would
4 have left some residual ambiguity as to whether
5 something like a foreign city or a foreign county, think
6 of a foreign county jail that tortured somebody.

7 Under section 1983 law, which uses the word
8 "person," counties and cities are liable. However,
9 under the Foreign Sovereign Immunities Act, under
10 established international law sovereign immunities
11 principle, they are not.

12 So the word individual --

13 CHIEF JUSTICE ROBERTS: So they did this to
14 -- they chose that word to avoid any residual ambiguity.
15 But they thought there was no ambiguity at all as to
16 whether the term "individual" meant natural persons or
17 organizational entities?

18 MR. FISHER: Well, I respectfully submit
19 they didn't think about that question, which is why I am
20 standing here today. What they were really concerned
21 with was avoiding sweeping in foreign states and their
22 entities. And they just didn't think.

23 JUSTICE GINSBURG: There were witnesses who
24 testified, were there not, Mr. Fisher, that the TVPA
25 would take care of a type case that when the torturer

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

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

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

25 MR. FISHER: Well, if the word "individual"

1 could only mean natural person, I agree. The case would
2 be over. But we have cited many dictionary definitions,
3 many usages in the U.S. code, and many holdings from
4 this Court and others that have actually found that a
5 secondary of the term is singularity. A single unit or
6 entity.

7 JUSTICE GINSBURG: If you found no tort
8 statute, you use the "individual" to include
9 organizations.

10 MR. FISHER: Right. No tort statute uses it
11 one way or the other, Justice Ginsburg, which we think,
12 if anything, gets you back to the background norms and
13 the secondary meaning. And let me say two things about
14 --

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

21 Now, I under your argument that you can have
22 an organization doing the subject thing, but how do you
23 subject an organization to torture?

24 MR. FISHER: You don't.

25 CHIEF JUSTICE ROBERTS: You don't.

1 MR. FISHER: And I --

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

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

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

15 MR. FISHER: Yes. Yes.

16 JUSTICE SOTOMAYOR: In those statutes you sp
17 --

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

1 So the question is why -- I think the
2 question that you end up with is, given that
3 "individual" has this secondary meaning, does have this
4 customary usage that Congress may well have been aware
5 of, that at least that this Court often says, if there
6 is a customary usage of a term, we will assume Congress
7 was aware of it. Why would Congress have done what it
8 did and limit this act, unlike any other tort statute in
9 the U.S. Code, an actual person. We submit there is no
10 good reason.

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

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

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

6 Just to start with remedies --

7 JUSTICE SCALIA: Maybe the organizations
8 opposed it.

9 MR. FISHER: Not --

10 JUSTICE SCALIA: Maybe organizations opposed
11 the extension of the legislation to themselves. Is that
12 conceivable? And is Congress ever influenced by such
13 lobbying?

14 (Laughter.)

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

18 JUSTICE SCALIA: Yes, but you don't find
19 lobbying in the legislative history.

20 MR. FISHER: Well, I can't prove something
21 that I don't have a piece of paper for.

22 JUSTICE SCALIA: It's an explanation. You
23 say there is no possible explanation. I can imagine
24 that corporations would have been quite upset by this
25 notion.

1 MR. FISHER: Justice Scalia, one would
2 expect to have found over the four years this was
3 debated and the hundreds of pages of legislative history
4 some clue that that is what Congress was reacting to and
5 thinking about. This would be an extraordinarily
6 unusual statute, and you'd think that one person in the
7 Congress that voted for it or in the committee reports
8 that are contemporaneous would mention that. The
9 House -- the Senate Report has a section called "who can
10 be sued." And it says -- I quoted it to you earlier --
11 one would expect to find in that section that, unlike
12 every other tort statute, we are restricting the people
13 that can be sued, but they said instead --

14 JUSTICE SCALIA: This is the dog that did
15 not bark, right? Legislation cannot mean what it says
16 unless the legislative history says that it means what
17 it says. Right?

18 MR. FISHER: No, Justice Scalia, I agree
19 that if the word "individual" can have no other meaning
20 than that which my opponent suggests, then I lose. But
21 I'm suggesting to you, and we have cited plenty of
22 authorities that there is a secondary meaning both
23 accepted in the U.S. code and in cases and in
24 international law at this point.

25 CHIEF JUSTICE ROBERTS: But Congress, as you

1 have indicated, Congress focused on the very question of
2 whether organizations would be covered or not in the
3 context of whether a State would be covered. It seems
4 to me that the legislative history cuts strongly against
5 you, putting even aside Congressman Leach. The issue
6 was there. And if they meant to say, well, let's find a
7 term that leaves some types of organizations out,
8 States, but not others, we will just say "individual,"
9 and people will understand that we don't mean a State,
10 but they will also know that we do mean another type of
11 organization or corporation.

12 MR. FISHER: I think, Chief Justice, that
13 that is exactly the thought process that Congress went
14 through. And I can't do any better than to point --

15 CHIEF JUSTICE ROBERTS: But it's at least
16 ambiguous. When you are saying, well, we want a term
17 that is going to include individual persons and
18 organizations but not State organizations. And the only
19 term that fits perfectly is "individual."

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

21 CHIEF JUSTICE ROBERTS: Really?

22 (Laughter.)

23 MR. FISHER: And page 6 to 8 of our reply
24 brief explains why that is so. I know -- I know it
25 might be surprising, but if you read --

1 CHIEF JUSTICE ROBERTS: Hah, hah.

2 (Laughter.)

3 MR. FISHER: If you read --

4 CHIEF JUSTICE ROBERTS: But you have been
5 saying all along "individual" has a secondary meaning.

6 MR. FISHER: It does.

7 CHIEF JUSTICE ROBERTS: So why would they
8 have picked the secondary meaning of a word rather than
9 try --

10 MR. FISHER: Because it's more precise word
11 in international law discourse than the word "person"
12 for the reason I described before. If you look Judge
13 Edward's opinion --

14 JUSTICE KAGAN: How about non-state actors?

15 MR. FISHER: Pardon me?

16 JUSTICE KAGAN: Non-state actors.

17 MR. FISHER: Well, except for -- Remember,
18 there is a State action requirement in the statute
19 that --

20 JUSTICE KAGAN: Individuals and
21 organizations.

22 MR. FISHER: I mean, maybe there's other
23 ways that Congress could have done it, but the way Judge
24 Edwards did it and the way that international law
25 scholars and people having this conversation about

1 whether people other than States ought to be liable
2 under international law, was the term that they always
3 used, and it's not just -- you don't just -- you know,
4 we are not running a west law search looking for
5 wherever we can find it. They are in the titles of the
6 articles, is whether individuals are subject to
7 liability.

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

15 MR. FISHER: There is obviously cases to
16 that effect, but I'm --

17 JUSTICE SCALIA: Many cases to that effect.

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

19 JUSTICE SCALIA: We say it all the time.

20 MR. FISHER: Well, I think, for example,
21 Justice Scalia, of the jurisprudence where I had an
22 argument in this Court about the second or successive
23 petitioner rule under habeas law. And this Court has
24 said second -- even though where "second" has an obvious
25 ordinary meaning, it doesn't actually mean that. It has

1 a specialized usage that accumulated in the law; and
2 when Congress used that term, we incorporate that usage.
3 And so there is case after case where this Court has
4 said -- the Morissette principle as back drop against
5 common law where this Court has said that you do look to
6 usage in prior opinions, prior case law, prior discourse
7 as a way of infusing statutes with meaning.

8 And if I could just go back to the question
9 that I posed, which is, why would Congress have done
10 this when it -- it just doesn't have an answer for why
11 Congress would do this in this particular statute. Now
12 the other side has given a few reasons why Congress
13 might --

14 JUSTICE KAGAN: It doesn't really need an
15 answer. Suppose we think there is no answer to that
16 question because Congress didn't think about it other
17 than Congressman Leach who appears to have thought about
18 it and reached the opposite result. Most of them didn't
19 think about it. But there you are. The statute says
20 what it says.

21 MR. FISHER: Well, if you find the statute
22 at least somewhat ambiguous for the reasons I've
23 described, then what Meyer and cases say is you assume
24 if Congress didn't think about it, but they want an
25 ordinary tort and agency principle, and the -- the -- in

1 Title VII and many other cases, this Court has said, of
2 course Congress doesn't think about all these things;
3 and when they don't, and absent --

4 JUSTICE BREYER: Maybe they did. You see, I
5 might as well be honest with you, page 26 of the
6 government's brief did have an impact on my thinking.
7 It's Father Drinan, and Father Drinan says in the
8 hearing, "I think it would be best to stay with that and
9 just avoid all of the problems about the PLO and related
10 groups." And then Michael Posner testifies, it says, to
11 the government to the same effect.

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

15 MR. FISHER: The --

16 JUSTICE BREYER: The -- I mean -- and you
17 have Congressman Leach, and then you have the word
18 "individual."

19 MR. FISHER: The question Father Drinan was
20 responding to was whether or not the TVPA ought to be
21 extended to private entities that do not act under color
22 of law.

23 JUSTICE BREYER: But he's --

24 MR. FISHER: And at the time --

25 JUSTICE BREYER: He's taking that -- he's

1 taking that -- go ahead.

2 MR. FISHER: Yes, if you look at that quote,
3 remember, that hearing was held before the Oslo Accords,
4 before the PLO became in our view a state actor. So
5 what he's saying, if you look at the quote in context,
6 Justice Breyer, is that the TVPA shouldn't be drawn to
7 sweep in groups that don't act under color of law. And
8 that issue is not before this Court today. We've argued
9 that the PLO now does act as a color of law, and that's
10 a question for remand.

11 JUSTICE SCALIA: I -- I find it hard enough
12 to parse the statute without having to parse Father
13 Drinan's testimony. I mean --

14 MR. FISHER: Well, of course, I was just
15 responding to Justice Breyer's question as to that
16 context.

17 But -- but if you go even beyond
18 compensation, for compensation you have to identify
19 somebody, you have to bring them into a court and you
20 have to enforce a judgment. That is virtually
21 impossible against only natural people. Of course
22 Congress would have expected the ordinary rule of
23 organizational liability. For deterrence, the
24 Respondents' argument is that even if Pirates, Inc. --
25 and for this case we'll make it Torturers, Inc. -- were

1 created for a policy of torturing people abroad,
2 torturing American citizens who travel abroad, their
3 argument is you could not hold that corporation liable,
4 even under its express policy and purpose. There is no
5 good reason under deterrence grounds why you would let
6 corporations or other organizations cycle individual
7 actors in and out with impunity.

8 And finally in terms of accountability, just
9 think about the backdrop again with which this statute
10 was created. There are some pretty horrible groups in
11 the world that actually claim credit and responsibility
12 in the world stage for torturing or killing American
13 citizens; and the idea that Congress would have passed a
14 statute that these organizations can stand proud in
15 their view and say we've done this, and that our statute
16 in the U.S. Code would -- would somehow only get their
17 agent, and not the organization or entity itself, we
18 submit it just doesn't make any sense.

19 CHIEF JUSTICE ROBERTS: Well, the TVPA is an
20 extraordinary step in terms of exposing liability, and
21 it doesn't seem to me to be an odd idea that Congress
22 would want to proceed carefully before establishing a
23 situation where the -- the use of the American tribunal
24 is as broad as it is under this situation.

25 MR. FISHER: Well, I don't -- I don't

1 disagree that it's unusual statute. It's not unheard
2 of; we have cited in our briefs many other statutes that
3 apply extraterritorially, but remember that all the
4 arguments for and against foreign policy friction that
5 you heard in the first case don't apply here. Congress
6 expressly --

7 JUSTICE BREYER: Oh, the obvious thing that
8 they said is look, just -- this is going to bring in
9 suits against the Palestinian Authority. That's a very
10 touchy issue in foreign affairs, and we don't want to
11 have to go that far. And -- and some of the things that
12 are said seem to bear that out. That's -- that's what
13 is pulling --

14 MR. FISHER: With respect, Justice Breyer, I
15 would just say if you look back at the legislative
16 history, the only conversation that was had is should we
17 reach non-state actors. That was the only conversation
18 that was had, and that's the conversation you referred
19 to earlier. Nobody suggested that if you apply this
20 extraterritorially, if you enacted this statute, that
21 you somehow ought to shirk from the ordinary rules of --
22 of organizational liability. Nobody suggested that.

23 JUSTICE KAGAN: Mr. Fisher, one case that
24 you seem to have on your side; you don't have very many
25 but you have this one, is -- is Clinton, which -- which

1 does read "individual" in the way that you say, and does
2 it in order to avoid an absurd result -- what the Court
3 thought of as an absurd result. Do you think that this
4 statute is absurd if not read your way?

5 MR. FISHER: I don't think -- if I could beg
6 your indulgence for one moment -- I don't think I need
7 to argue that, because I think that for all the reasons
8 I have given there is enough ambiguity and there is good
9 enough reasons why we would assume Congress meant the
10 ordinary rule. But if I had to make that argument, I
11 think I could, because the only arguments that have been
12 advanced in the papers are reasons for not having this
13 extraterritorial statute in the first place. There is
14 no good reason once you have it not to apply to
15 organizational actors.

16 And Justice Breyer, this goes back to your
17 comment. It's still a mystery to me how it's more
18 problematic in international relations to hold an
19 organization accountable -- to not -- to hold
20 organization accountable than to hold its -- its board
21 of directors on a personal basis, or to hold indeed a
22 high official of a foreign government. Nobody's made
23 that argument, and if I could say one thing and I will
24 reserve my time. Take a good look at the United States'
25 two briefs. Their -- the only argument they provide in

1 of the Kiobel case is that there is no good reason --
2 that's -- that's the United States' terms -- why
3 Congress would want to have a statute that applies only
4 to judgment proof individual actors and not to agents on
5 whom they're acting on behalf of. And we think that
6 that is exactly right, and that's why Congress wouldn't
7 have wanted that here.

8 If I could reserve the remainder.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Ms. Ferguson.

11 ORAL ARGUMENT OF LAURA G. FERGUSON

12 ON BEHALF OF THE RESPONDENTS

13 MS. FERGUSON: Mr. Chief Justice, and may it
14 please the Court:

15 Congress enacted the Torture Victim
16 Protection Act to create a cause of action against
17 individuals who commit acts of torture or extrajudicial
18 killing under color of law against other individuals.
19 Petitioners attempt to inject ambiguity into what is it
20 a very unambiguous term in U.S. legal usage by referring
21 in their reply brief to a supposed subtle definition of
22 "individual" in international law.

23 But individual is not a term of art that has
24 a specialized meaning in international law different
25 from its ordinary meaning in -- in U.S. legal usage.

1 Petitioners' reply brief cites two secondary sources
2 spanning a 60-year period, while other international law
3 sources including the restatement, international
4 conventions and other scholars, emphasize the
5 distinction between individuals and private
6 organizations.

7 CHIEF JUSTICE ROBERTS: Mr. -- Mr. Fisher
8 ended by saying there's no reason Congress would draw
9 this line. Why would they want to hold the individual
10 controlling officers of an organization liable for
11 torture, but not the organization itself?

12 MS. FERGUSON: Congress was proceeding very
13 cautiously and incrementally in enacting a statute with
14 extraordinary territorial reach over executive branch
15 opposition. It decided to focus on the personally
16 responsible wrongdoers who subject victims to torture or
17 extrajudicial killing, and did not go beyond that to
18 reach another class of organizations that could be held
19 secondarily liable.

20 JUSTICE KENNEDY: But the Chief Justice's
21 question was why did Congress do that? What were the
22 reasons for that?

23 MS. FERGUSON: Congress was focused very
24 much on the Filartiga case, where the Second Circuit had
25 found that there was a norm prohibiting public officials

1 from engaging in torture or extrajudicial killing; and
2 Congress wanted to avoid the scenario where you have a
3 torturer who comes to our shores; and Congress agreed
4 with the Second Circuit in *Filartiga* that if the
5 torturer comes here, he should not be able to escape
6 accountability from his victim. If his victim finds him
7 in our -- in our country, there should be a cause of
8 action.

9 But Congress had every reason to proceed
10 very cautiously and incrementally. It put its toe in
11 the -- in the extraterritorial waters when it extended
12 universal civil jurisdiction to violations of certain
13 international law norms. It did not dive in. As we
14 heard this morning in the *Kiobel* argument, this is a
15 very complex area as to what norms are actionable under
16 international law.

17 JUSTICE ALITO: I don't understand that.

18 JUSTICE GINSBURG: How many judgments
19 under -- I don't know whether it's *Filartiga* or *Fabrigas*
20 -- that that pattern, where the individual torturer is
21 found in a U.S. jurisdiction?

22 MS. FERGUSON: There have --

23 JUSTICE GINSBURG: There have been many
24 judgments; how many have collected?

25 MS. FERGUSON: Petitioners have identified

1 one case, the Jean V. -- case, excuse me, where there
2 was a collection. There may be other cases where there
3 ultimately is a satisfaction of the judgment. But it's
4 inherent in the statute that reaches foreign defendants
5 that often they do not have access in the United States.

6 JUSTICE GINSBURG: If Congress really wanted
7 to have this, why wouldn't it include entity liability?
8 The corporation is likely to have more money than an
9 individual torturer.

10 MS. FERGUSON: The -- the situation Congress
11 had in mind in enacting the TVPA was adjusting the norm
12 against State-sponsored torture and extrajudicial
13 killing, where the agent is -- is almost invariably
14 acting on behalf of the State, and yet it didn't create
15 an exception to the Foreign Sovereign Immunities Act to
16 State sponsors of torture and extrajudicial killing.

17 It was concerned with this Filartiga
18 scenario, where the U.S. wanted to take a position -- we
19 will not give torturers a safe haven in our country.

20 JUSTICE GINSBURG: Wouldn't that be the
21 point that the immigration law takes care of it? They
22 wouldn't be able to get into the country.

23 MS. FERGUSON: The immigration laws were not
24 as robust in 1991 as they perhaps are now. We -- we
25 know that the TVPA is premised on the fact that the

1 torturer is in fact found in the United States, because
2 otherwise, the United States couldn't assert personal
3 jurisdiction over --

4 JUSTICE SCALIA: But I'm not sure that the
5 immigration officials conduct a thorough investigation.
6 I mean, is there a box on the immigration form, you
7 know, "have you tortured people? Yes, no."

8 I really don't think they investigate that.

9 MS. FERGUSON: It's not a -- it's not a
10 perfect screen, because of course, torturers don't
11 announce themselves at the border as torturers. So in
12 fact, that's why we have situations where we've had
13 these gross human rights violators that end up in the
14 United States. Even -- in one of the cases we heard,
15 won the Florida lottery.

16 So -- so they do find their way to our
17 country.

18 JUSTICE ALITO: I still don't understand
19 your explanation of the reason why Congress would draw a
20 distinction between an individual and an organization.
21 You keep saying that the -- in the case of the
22 individual, the individual was here. But the
23 organization can be here, too.

24 MS. FERGUSON: The organization that
25 Congress had foremost in mind was the State. This is

1 State-sponsored torture, State-sponsored extrajudicial
2 killing. The -- the problem it describes regarding
3 torturers and extrajudicial killing is one of States.
4 The legislative history talks about how one-third of the
5 States are -- have been engaged in sponsoring torture
6 and extrajudicial killing. But those were the
7 organizations they had foremost in their mind, and yet
8 the statute doesn't impose liability on those
9 organizations. It suggested a very personal wrong of a
10 torturer avoiding accountability to their victims in
11 their home country, and coming to our country and
12 seeking safe haven --

13 JUSTICE SOTOMAYOR: So it's okay to keep out
14 individuals who subject others to torture, but
15 corporations, we want their money so they should invest
16 here, because we're going to protect them from liability
17 for people that they torture?

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

1 Congress was using "individual" in its ordinary sense,
2 couldn't prevent the very high bar for the Court to
3 depart from the plain-text meaning of the statute.

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

7 MS. FERGUSON: It could be clearer --

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

10 MS. FERGUSON: Yes. It's possible, but it
11 was clear enough --

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

14 (Laughter.)

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

24 He responds, "I think that we should exclude
25 nongovernmental organizations. I think it would be best

1 to stay with that and just avoid all of the problems
2 about the PLO and related groups."

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

6 So what do you think?

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

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

22 And we don't do that lightly.

23 JUSTICE KAGAN: But Miss Ferguson, your
24 story makes it sound as though everybody was really
25 focused on this question, and made a determination to

1 proceed incrementally and not to include foreign
2 nations. Isn't it -- if you -- if you look at what
3 happened here, more likely that other than Congressman
4 Lynch -- Leech -- in fact, nobody was focused on this
5 question. But because of Congressman Leech's
6 intervention, the words changed, and the word was
7 continued throughout the legislative process. And
8 that's the word that was voted on.

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

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

25 And the Dictionary Act tells us that

1 "person" is the term Congress uses when it wants to
2 refer to natural persons and artificial persons, but not
3 sovereigns. So if the Congress wanted to do what the
4 Petitioners claim, they had a very useful term that
5 Congress uses all the time to reach that category, and
6 it's the term "person."

7 But instead, they used "individual," and
8 elsewhere in the same sentence, they used "individual"
9 to refer to who shall be liable. They used "individual"
10 four more times in a way that can only mean a human
11 being.

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

21 So in the same sentence of the statute to
22 use individual to mean -- let's assume we don't normally
23 mean corporations and then immediately just switch and
24 -- and use it to refer to human beings would be very
25 confusing.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Gannon.

2 ORAL ARGUMENT OF CURTIS E. GANNON,
3 FOR UNITED STATES, AS AMICUS CURIAE,
4 SUPPORTING THE RESPONDENTS

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

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

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

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

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

1 so long as the ATS is still on the books and has any
2 vitality.

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

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

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

18 MR. GANNON: Well, I think that is
19 ultimately going to depend on what happens under this
20 Court's ATS jurisprudence, and so it does seem that the
21 Court --

22 JUSTICE ALITO: I'm asking about your
23 position, the position of the United States.

24 MR. GANNON: The position of the United
25 States in the other case today is that the ATS does not

1 include a categorical bar on corporate liability; and
2 that -- that has no regard for the theory of liability,
3 the locus of the acts, the citizenship of the parties
4 and the character of the international law norm at
5 issue.

6 JUSTICE ALITO: But Mr. Rahim had never been
7 naturalized. I guess that was a mistake.

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

15 The Alien Tort Statute will always give more
16 rights to aliens than to U.S. citizens because by
17 definition it is only available to aliens.

18 JUSTICE SOTOMAYOR: So what's the good
19 reason --

20 MR. GANNON: Well, I --

21 JUSTICE SOTOMAYOR: -- for the U.S. to have
22 limited liability to natural persons in the TVPA, but
23 not in the ATS context?

24 MR. GANNON: Well, I think that there are
25 several reasons that Congress could have had in mind,

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

13 JUSTICE SCALIA: But they were thinking
14 about that in 1797, I mean -- you are saying in the
15 later statute --

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

17 JUSTICE SCALIA: A more perceptive Congress
18 in -- in 1797?

19 MR. GANNON: No, I think the difference is
20 that the ATS has not even attempted to speak to this
21 question, whereas the TVPA does. As this Court noted in
22 *Amerada Hess*, the ATS does not define a class of
23 defendants here. Congress define a class of defendants,
24 and I think that there are several reasons why they
25 ended up with this result, the chief of which is that

1 all of the cases that they were thinking about at that
2 time had involved natural persons. The -- the Filartiga
3 case was -- was the flagship case --

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

11 MR. GANNON: It's true.

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

16 MR. GANNON: But the fact --

17 JUSTICE BREYER: The only one who thought
18 about it was Congressman Leach, and that was four bills
19 earlier. And --

20 MR. GANNON: No, but the reason they are not
21 thinking about it is because the paradigm they were
22 thinking about was the torturer who is found in the
23 United States who is - who is walking on the streets.
24 There is an individual moral accountability that -- that
25 everybody understood needed to happen there.

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

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

21 And I think if you -- as Respondents'
22 counsel already noted, because the TVPA requires state
23 action, the organizational entity here is usually going
24 to be the states, but petitioners acknowledge that no
25 state entity is going to be liable here, and indeed the

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

11 And so I do think that there are policy
12 reasons why Congress could have said something different
13 here. But -- and they may well be encouraged to do that
14 by 20 years of ATS precedent, that as now for the first
15 time since the TVPA was enacted started to raise the
16 question of whether corporations should be held liable
17 under the other statute.

18 If Congress wants to disagree with the types
19 of policy concerns that were behind this Court's Monell
20 decision, Congress could reach a different result, but
21 we don't -- don't think that that's a decision that
22 ought to be reached through statutory construction.

23 Here, Congress used the term "individual."
24 It spoke about an individual who subjects an individual
25 to torture or extrajudicial killing. It separately

1 referred to "person." And Petitioners' reading of the
2 statute actually gets the relationship between person
3 and individual, which is quite clear as an ordinary
4 question of Federal statutory construction in the
5 Dictionary Act, precisely backwards, because under their
6 reading, "individual" means any nonsovereign natural or
7 artificial person, but "person" can only mean natural
8 person.

9 And so we think that that is -- is a
10 particularly odd reading of the statute in light of the
11 Dictionary Act, and the statutory structure.

12 If there are no further questions, I would
13 urge the Court to affirm.

14 CHIEF JUSTICE ROBERTS: Thank you, Mr.
15 Gannon.

16 Mr. Fisher, you have 4 minutes remaining.

17 REBUTTAL ARGUMENT OF JEFFREY FISHER

18 ON BEHALF OF THE PETITIONERS

19 MR. FISHER: I can make four points, if I
20 may, Your Honor.

21 First, when asked again and again why
22 Congress would have done this, I think all I heard was
23 that Congress wanted to adopt an incremental approach.
24 And then Mr. Gannon said, well, maybe we also wanted to
25 have moral accountability. Well, an incremental

1 approach doesn't make any sense.

2 Yes, Congress did so in the context of
3 requiring exhausting a limitations period, so it treaded
4 softly there. But there are numerous Federal statutes:
5 RICO, the Sherman Act, the Antiterrorism Act, which is
6 quite similar to this act in many ways, that apply to
7 events abroad. And they all apply to organizations. So
8 if Congress was going to do this, there's no reason to
9 think it wouldn't have wanted to do it.

10 Miss Ferguson pointed to the Dorelien case
11 as the one example she could point of where a TVPA
12 judgment was able to be enforced. And the only reason
13 why that was able to be enforced is because that guy
14 happened to win the Florida Lottery. He had hidden all
15 of his other assets abroad and won the Florida Lottery.

16 Is that the statute that Congress meant to
17 pass? We don't think so. Moral accountability was
18 already taken care of in the U.S. Criminal Code.
19 There's an express provision of the U.S. Criminal Code
20 that holds torturers liable for torturing abroad. And
21 we've cited that in our briefs.

22 I know some of you are going to look at the
23 legislative history, so let me say two quick things
24 about the legislative history.

25 First, Justice Kagan, with respect to

1 Representative Leech's comment, if anyone after that
2 hearing wanted to know what that committee thought the
3 change it had made meant, and what the bill meant, it
4 would have looked at its report. And if we've cited --
5 we've cited the committee reports in the Foreign
6 Relations Committee, and it says the TVPA allows
7 liability for any person that commits torture. It uses
8 the word "person" utterly interchangeably with the word
9 "individual." So that's -- whatever moment happened 4
10 years before the enactment was long since lost.

11 And the reason it used ultimately the word
12 "individual" and not "person," as I've described before,
13 was to steer clear I think of any possibility of State
14 entities.

15 Mr. Gannon points to Monell, but Monell
16 favors us. Monell holds that organizations can be
17 liable. Now, there's a separate question that you
18 talked about in the earlier argument, too, as to what
19 the mens rea would be, whether it would have to be
20 according to a policy or practice, or whether it would
21 be pure respondeat superior. But Monell is on our side
22 in this case, and we've alleged a policy in our
23 complaint in this case.

24 Thirdly, in the U.S. Code, where the word
25 "individual" is used, it obviously means natural persons

1 lots of times. But when it does, it almost always uses
2 the -- contrasts it in that very sentence with an entity
3 or organization.

4 So in this course, when you say individuals
5 or corporations, yes, you mean a natural person. But as
6 the United States points out in footnote 3 of its own
7 brief, the word "individual" when it is used alone is a
8 less favored usage that actually gives rise to ambiguity
9 because of the secondary meaning I've described before.

10 And then finally, let me say the questions
11 are asked about the relationship between this case and
12 the Kiobel case, and I think it's absolutely clear --
13 and this goes again to one of Justice Kagan's questions
14 on absurdity -- if this Court holds that the Alien Tort
15 Statute would have let a torturer right by Mr. Rahim,
16 someone who's tortured, that is, bring a cause of
17 action, I think it would indeed be absurd to imagine
18 Congress stepping in and passing a statute saying if
19 you're an American citizen, I'm sorry, you're out of
20 luck.

21 But if you happen to be lucky enough to be
22 an alien and never having tried to be a citizen in this
23 country, go ahead and bring the case in our courts; we
24 think that would be absurd.

25 So with those points, if the Court has any

1 further questions around the submissions I've made -- I
2 guess the last thing I would say is, at the end of Mr.
3 Gannon's argument, he referred to the interplay between
4 the word "individual" and "person" in the briefs, and I
5 can assure you from having worked on this during
6 the case, it is an incredible sideshow as to whether or
7 not estates are people and all the ways that that works.

8 But it's laid out in our brief, and we think
9 that it's quite clear that there is no disjoint between
10 the word "individual" and "person."

11 If you look at our brief, it will explain
12 why.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Counsel.

15 The case is submitted.

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

18

19

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