Nos. 10-1491 & 11-88

IN THE
Supreme Court of the United States

ESTER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL.,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,
Respondents.

ASID MOHAMAD, ET AL.,
Petitioners,

v.

PALESTINIAN AUTHORITY AND PALESTINE LIBERATION ORGANIZATION,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE LAW PROFESSORS OF CIVIL LIBERTIES AND 42 U.S.C. § 1983 IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are scholars who specialize in, teach and have written in the area of civil liberties law generally, and the law pertaining to 42 U.S.C. § 1983 of the 1871 Civil Rights Act in particular. *Amici* also have significant expertise litigating major lawsuits under § 1983, and/or the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note.

All three statutes were enacted to provide victims of the most egregious violations with a judicial forum and a means of seeking monetary damages for violations of their most fundamental rights. Because all three statutes aim to address and curtail the most serious legal violations, a consistent remedy should be available to victims regardless of whether the defendant is a natural person or private entity.

In this brief, *Amici* discuss this Court's extensive jurisprudence endorsing § 1983 liability against private actors and corporations (when sufficient ties exist between those private actors and the state). They also discuss the many instances in which lower federal courts have looked to § 1983 in interpreting the ATS and the TVPA, and why the analysis used by those courts is applicable in both cases before this Court.[1]

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[1] Written consent from all parties, in both cases before the Court, concerning the filing of *amicus curiae* briefs are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici

SUMMARY OF ARGUMENT

This Court should look to the jurisprudence of 42 U.S.C. § 1983 to find that corporations can be sued under the ATS and the TVPA for violating the law of nations. Like the ATS and the TVPA, § 1983 was enacted to provide a federal forum and money damages to victims of the most serious violations.

Section 1983 was enacted in 1871, at the close of the Civil War, because newly-freed slaves, who were subjected to beatings, murder and other unconscionable crimes and abuses, could not obtain justice in state courts. *Monroe v. Pape*, 365 U.S. 167, 174-75 (1961). Similarly, in 1992, Congress enacted the TVPA to provide both a forum and money damages to torture victims who were foreclosed from seeking remedies against their torturers in the countries in which they had been abused.

Although there is almost no legislative history surrounding the passage of the ATS in 1789, this Court has recognized that the ATS was enacted to provide a forum and money damages for very serious torts of the eighteenth century—"offenses against ambassadors, violation of safe conducts, and piracy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004). In *Sosa*, this Court made clear that the ATS could be used to sue for violations of customary international law not contemplated by the first Congress, but of the same serious magnitude—such as torture. *Id.* at 712.

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curiae or their counsel contributed money to the preparation or submission of this brief.

Because the purpose of the ATS and the TVPA mirror that of § 1983, it is logical and consistent with this Court's prior decisions to look to § 1983 jurisprudence in interpreting the ATS and the TVPA for the purpose of determining whether private entities can be sued. *See, e.g., Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (looking to other anti-discrimination statutes, including 42 U.S.C. § 1982 and Title IX of the Education Amendments of 1972, to find that the Age Discrimination in Employment Act of 1967 provides for retaliation claims against employers, even though the Act is silent on the issue).

In the 50 years since this Court first held that natural persons who violated constitutional rights could be sued for money damages, *see Monroe, supra*, this Court has also held that private corporations can also be sued under § 1983 for violating civil rights. *See, e.g., Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). Since *Monroe*, this Court has addressed the corporate liability issue 12 times, and has never wavered from its holding that private corporations can be sued for violating § 1983 when there are sufficiently close ties between the private entity and the state.

Given the close similarity between § 1983, the ATS, and the TVPA, it is not surprising that for the past 30 years, lower federal courts have looked to § 1983 in interpreting certain aspects of both the ATS and the TVPA. *See, e.g., Kadic v. Karadzic,* 70 F.3d 232, 245 (2d Cir. 1996); *Sarei v. Rio Tinto, PLC,* 221 F.Supp.2d 1116 (C.D. Cal. 2002), *aff'd*, 2011 WL 5041927, slip op. at *6 (9th Cir. Oct. 25, 2011). Notably, the TVPA's legislative history

explicitly references both § 1983 and the ATS. *See* TVPA House Report, H.R. Rep. No. 367, 102d Cong., 1st Sess. 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87.

For the same reasons that this Court should look towards § 1983 in evaluating the corporate liability issue under the ATS and the TVPA, it should disregard its decision in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) as irrelevant. In *Malesko*, this Court found that a private corporation contracting with the federal government could not be sued for violating the Constitution. *Id.* at 63. *Malesko* is irrelevant here because it was decided pursuant to *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In dismissing *Malesko*, this Court made clear that it was doing so solely because Congress had never authorized *Bivens*-type suits. Without such authorization, the Court believed it was necessary to limit *Bivens* suits to comparable situations—civil rights suits against natural persons acting under color of federal law.

This Court has unequivocally recognized corporate liability under § 1983 for 50 years. Because the ATS, the TVPA, and § 1983 are all statutes whose core aim is to provide a forum and a means for redress for legal violations of the most serious magnitude, this Court should rely on its well-established § 1983 jurisprudence to find that corporate liability exists under both the ATS and the TVPA.

ARGUMENT

I. THIS COURT SHOULD LOOK TO 42 U.S.C. § 1983 JURISPRUDENCE TO DETERMINE THAT CORPORATE LIABILITY EXISTS UNDER THE ALIEN TORT STATUTE AND THE TORTURE VICTIM PROTECTION ACT.

This Court should look to the well-established jurisprudence of 42 U.S.C. § 1983 of the Civil Rights Act of 1871 for guidance in determining whether corporate and organizational liability exists under the ATS and TVPA. That is because all these statutes are, at the core, almost identical in scope. All three statutes were enacted to provide victims of the most serious abuses with both a federal forum and a means of recovering damages against those who violated their most fundamental rights.

Although this is the first time this Court is considering the issue of corporate liability under the ATS and the TVPA, this Court has held unwaveringly in twelve cases, over the past 50 years, that corporate liability exists under § 1983.[2]

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[2] The 12 cases are: *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556 (1974); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40

The Court's reasoning in those cases easily applies to claims brought under the ATS and the TVPA.

Looking to § 1983 jurisprudence for guidance on this issue is consistent with this Court's well-established practice of statutory interpretation. When a statute's text or legislative history is silent or ambiguous on a particular issue, this Court has looked to the general purpose of similar statutes to inform its statutory interpretation. For example, in 2008, this Court found that the Age Discrimination in Employment Act of 1967 (ADEA) contemplated liability for retaliation claims against employers, even though the ADEA was silent on the issue. *Gomez-Perez v. Potter*, *supra*, 553 U.S. at 481.

Rather than foreclosing the retaliation claim on those grounds, this Court looked to other antidiscrimination statutes, such as 42 U.S.C. § 1982 and Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), to find that the retaliation claim could proceed under the ADEA. *Id.* at 479; *accord Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (finding that a retaliation claim could be brought under 42 U.S.C. § 1982); *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005) (interpreting Title IX of the Education Amendments of 1972 as prohibiting gender discrimination in the form of retaliation). The Court found that "the context . . . is the same in all three cases: that is, all three cases involve remedial provisions aimed at prohibited discrimination." *Gomez-Perez v. Potter, supra,* 553 U.S. at 481.

(1999); *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).

As such, it is both logical and consistent with this Court's practice to look to the well-settled jurisprudence of 42 U.S.C. § 1983 to inform its consideration of corporate and other private liability in both *Kiobel v. Royal Dutch Petroleum* and *Mohamad v. Rajoub*.

A. The Alien Tort Statute and the Torture Victim Protection Act are Substantively Very Similar to § 1983.

Section 1983, also known as the Ku Klux Klan Act, was enacted in 1871 to provide newly-freed slaves with a federal forum to sue for money damages for violations of their most fundamental rights by persons acting under color of law. *Monroe*, *supra*, 365 U.S. at 172-76. A federal statute was needed because newly freed slaves could not obtain justice in state courts.[3] *Id.* While the Civil Rights Act was being debated on the floor of the House of Representatives, Representative Beatty explained:

> [C]ertain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and

[3] It is well-settled, however, since *Monroe*, that even though state court remedies are now available to plaintiffs whose constitutional rights have been violated, those plaintiffs need not exhaust those state court remedies before filing suit under § 1983. *Monroe, supra*, 365 U.S. at 183 ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

> unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scouraged [sic], and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.

Cong. Globe, 42d Cong., 1st Sess., App. 166-167, p.428 (second and third alteration in original).

Like § 1983, the TVPA was enacted to provide a federal damages remedy to victims of torture (including U.S. citizens) who did not have another forum to adjudicate their claims. Congress enacted the TVPA in response to the dismissal of *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), an ATS suit in which plaintiffs alleged claims of torture and extrajudicial killings. *See* S. Rep. No. 102-249, at 4-5 (1991); H.R. Rep. No. 102-367, at 4 (1991); H.R. Rep. No. 100-693, at 2 (1988). As the Senate Judiciary Committee reported:

> While nearly every nation now condemns torture and extrajudicial killing in principle, in practice more than one-third of the world's governments engage in, tolerate, or condone such acts. . . . Judicial protection against flagrant human

> rights violations is often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the [TVPA] is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad.

S. Rep. No. 102-249, at 3-4.

Torture is a *jus cogens* violation of customary international law. Restatement (Third) of Foreign Relations Law of the United States § 702 cmt.n. It is reprehensible, universally condemned, and the subject of multiple international treaties, including some ratified by the United States. *See, e.g.*, Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Int'l Covenant on Civil and Political Rights, arts. 4 and 7, Mar. 23, 1976, 999 U.N.T.S. 171.

Although the ATS has almost no legislative history, *Sosa*, *supra,* 542 U.S. at 712 ("no one seems to know whence it came"), the ATS, like both the TVPA and § 1983, was enacted to provide a forum for serious harms that lacked a readily available remedy. This Court noted that the ATS was created because the early republic "was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" *Id.* at 716 (quoting JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed. 1893)). In response, Congress passed the ATS to provide an effective

venue to redress serious international wrongs, such as piracy, violation of safe passage, and assaults on ambassadors. *Id.* at 716-24.

Since *Filártiga v. Peña-Irala*, 630 F.2d 876, (2d Cir. 1980), the ATS has been used to allow victims of human rights violations who may have no other forum to sue their abusers for damages. *See, e.g., Kadic*, *supra*, 70 F. 3d at 250 (noting that "no party has identified a more suitable forum, and we are aware of none. . . . [T]he former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims."); *Eastman Kodak Co. v. Kavlin*, 978 F.Supp. 1078, 1084-87 (S. D. Fla. 1997) (dismissing a forum non conveniens challenge to ATS jurisdiction on the basis of widespread corruption in the Bolivian judiciary).[4]

In *Sosa*, this Court recognized the important role that federal courts play—and should continue to play—in adjudicating human rights violations, under the authority granted to them by Congress through the ATS. *Sosa, supra,* 542 U.S. at 724-25. This Court gave its seal of approval for using the ATS not just for the three torts for which it was used in the eighteenth century, but also for human rights abuses of comparable magnitude. *Id.* Thus, even though torture was not among the customary international law violations originally contemplated by Congress when it enacted the

[4] Notably, however, ATS does not explicitly require plaintiffs to demonstrate the lack of another available forum or that they exhausted remedies in the country where violations occurred. *See Sarei v. Rio Tinto PLC,* 487 F.3d 1193, 1223 (9th Cir. 2007) (declining to "read an exhaustion requirement into the ATCA").

ATS, this Court, quoting *Filártiga*, found that the ATS could be used to sue torturers and others who inflict comparable abuses. *See id.* at 731-33 ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis,* an enemy of all mankind"); *id.* at 762 (Breyer, J., concurring) ("[U]niversal jurisdiction exists to prosecute . . . torture, genocide, crimes against humanity, and war crimes.").[5]

Given these similarities in purpose, it is not surprising that the legislative history of the TVPA explicitly references § 1983 as a useful guide for

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[5] This finding is consistent with 30 years of ATS decisions in lower federal courts. *See also Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (affirming judgment against military dictatorship leader for torture and cruel, degrading treatment); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (affirming $2 billion ATS class claim against estate of former president of Philippines for torture, summary executions, and disappearances); *Kadic v. Kardzic*, 70 F. 3d 232 (2d Cir. 1995) (holding that the President of the self-proclaimed Bosnian-Serb republic of "Sprska" may be liable under the ATS for personally planning and ordering genocide and war crimes designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats); *Mehinovic v. Vuckovic* 198 F. Supp. 2d 1322 (N. Ga. 2002) (finding former Bosnian-Serb military commander liable for torture under ATS); *Jama v. U.S. I.N.S.*, 22 F.Supp.2d 353 (D.N.J. 1998) (recognizing that horrendous detention conditions of political asylum seekers are actionable under the ATS); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (finding that a Guatemalan official violated international law by the torture, assault, and false imprisonment of Guatemalan citizens by forces under his command and that he could thereby be held liable under ATS); *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988) (recognizing disappearance as an actionable claim under the ATS).

statutory construction. *See* TVPA House Report, H.R. Rep. No. 367, 102d Cong., 1st Sess. 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87 ("Courts should look to 42 U.S.C. § 1983 in construing 'color of law' and agency law in construing 'actual or apparent authority.'"). Congress also made clear that the TVPA provided U.S. citizens who suffered torture with a cause of action comparable to the ATS. *Id.* at 86 ("While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad."). This serves as an endorsement by Congress for courts to evaluate and interpret these statutes together, in appropriate circumstances, such as here.[6]

As such, given that the ATS, the TVPA, and § 1983 were all enacted to redress violations of comparable grave magnitude, this Court should rely on the well-settled jurisprudence of § 1983 to inform its consideration of corporate and organizational liability under the ATS and the TVPA.

B. For 50 Years, This Court has Recognized Corporate Liability Under 42 U.S.C. § 1983.

In 1961, this Court held for the first time that § 1983 permitted damages actions against state actors who commit constitutional torts,

[6] As discussed in more detail in note 9, *infra*, it is not always appropriate to interpret these statutes identically because of differences in the statutes' language. For example, while both § 1983 and the TVPA require state action, the ATS's language does not.

ushering in the field of constitutional damages litigation. *See Monroe*, *supra,* 365 U.S. at 172 (holding Chicago police officers could be sued for conducting an illegal search and seizure in violation of the Fourth Amendment). Section 1983 is silent on the issue of corporate liability. Nevertheless, there has been no question in the 50 years since this Court began interpreting and applying § 1983 that private corporations, like natural persons, can be held liable for constitutional torts, as long as there is sufficient state action.

Notably, *Burton v. Wilmington Parking Auth.,* 365 U.S. 715 (1961), the first private corporate liability case under § 1983, was decided the very same year as *Monroe*. While there was much debate in *Monroe* between the Justices about whether Congress contemplated damages actions against natural persons under the statute, no such debate occurred in *Burton*. Thus, from the very start, corporate liability under § 1983 was a given.

Between 1961 and 2011, this Court has considered no fewer than 12 corporate liability cases under § 1983 without ever questioning the propriety of such liability.[7] Of all these cases, only one discusses, in a very cursory fashion, the legislative history of § 1983 as it relates to corporate liability. *See Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 926-35 (1982). The *Lugar* Court noted that the Civil Rights Act was passed "for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment,'" and it would be "wholly inconsistent with the purpose of § 1 of the Civil

[7] *See supra* note 2.

Rights Act of 1871, from which § 1983 is derived," to allow a private entity to escape liability when its conduct implicates state action. *Id.* at 934 (quoting *Lynch v. Household Finance Corp.,* 405 U.S. 538, 545 (1972)) (internal citations omitted).

Significantly, from 1961 to 1978, this Court explicitly rejected municipal corporate liability under § 1983. It was only in *Monell v. Dep't of Soc. Services of the City of New York*, 436 U.S. 658, 721-25 (1978), that this Court overruled *Monroe* on that issue. But during the same 17-year time span, this Court repeatedly reaffirmed private corporate liability under § 1983. *See Burton, supra*; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556 (1974); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

The central inquiry when a private corporation is sued for a constitutional tort under § 1983 is not the corporate nature of the defendant. Rather, it is whether a sufficiently close relationship exists between the private actor and the state to hold the private actor accountable for constitutional violations. There is no bright line rule that can resolve that question. Rather, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton*, *supra,* 365 U.S. at 722; *see also Jackson*, *supra,* 419 U.S. at 349-50 ("[W]hether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer.").

This Court has employed a number of different approaches in conducting its inquiries into

§ 1983 liability for private corporations and entities. For example, the Court used the "symbiosis" analysis in *Burton*, *supra,* 365 U.S. at 722. Other symbiosis cases include *Moose Lodge No. 107*, *supra*; *Gilmore, supra*; and *Flagg Bros., Inc., supra.* Similarly, this Court articulated the "nexus" analysis in *Adickes*, *supra.* Other nexus cases include *Jackson, supra*; *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar, supra*; *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982); *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988); and *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999). In its most recent § 1983 corporate liability case, *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), the Court applied the "entwinement" analysis, which it first used 35 years earlier in *Evans v. Newton*, 382 U.S. 296 (1966).

Regardless of which analysis it has used, in five decades, this Court has never questioned the validity of its 1961 *Burton* holding that private corporations may be held liable for constitutional torts under § 1983.[8]

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[8] The substance of any disagreement between members of this Court in this series of cases has never been whether corporate liability exists under § 1983. Rather, in some instances, Justices have debated what level of engagement is needed between a private corporation and the state to fairly characterize the private conduct as state action, and what analyses should be used to determine if state action is present. *See, e.g.*, *Moose Lodge No. 107, supra,* 526 U.S. at 176, 180 (disagreement between majority and dissent over whether government licensing practices involved state action in the context of a private dining club that refused to serve a member's guest on account of race); *Brentwood Acad.*, *supra,* 531 U.S. at 300 (disagreement between the majority and

C. Lower Federal Courts Already Rely on § 1983 Jurisprudence to Interpret the Alien Tort Statute and the Torture Victim Protection Act.

Given the similarity between § 1983, the ATS, and the TVPA, it is not surprising that, for three decades now, the lower federal courts have looked to § 1983 in evaluating human rights claims, where appropriate.[9] Determining corporate liability

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dissent over the appropriate use of the "entwinement" analysis).

[9] It is not always appropriate or necessary to look to § 1983 in interpreting the ATS. Section 1983 always requires state action. That is not the case in all ATS cases. For example, in *Kadic*, the Second Circuit Court held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." *Kadic*, *supra,* 70 F.3d at 239. Thus, federal courts have held that no state action is needed in ATS lawsuits alleging certain *jus cogens* violations, such as torture, genocide, piracy, prohibitions against the slave trade, and certain war crimes. *See, e.g., Doe I v. Unocal Corp.,* 395 F.3d 932, 964 (9th Cir. 2002) (stating that "a cause of action against non-state actors for conduct in which they engage directly exists only for acts that constitute jus cogens violations"); *Sinaltrainal v. Coca-Cola Co.,* 578 F.3d 1252, 1266-67 (11th Cir. 2009) (finding that "[s]ome acts, such as torture and murder committed in the course of war crimes, violate the law of nations regardless of whether the perpetrator acted under color of law"); *M.C. v. Bianchi,* 782 F.Supp.2d 127, 132 (E.D. Pa. 2011) (recognizing that no state action is required for piracy and enslavement and that private "liability for human rights violations dates back to at least the Nuremberg Trials."); *Wissam Abdullateff Sa'eed Al-Quraishi v. Adel Nakhla,* 728 F.Supp.2d 702, 742 (D. Md. 2010)

under the ATS and the TVPA is one of these appropriate circumstances.

Indeed, § 1983 was discussed in 1980 in *Filártiga, supra,* 630 F.2d at 885 n.18, the very first human rights-related ATS case. There, the Court of Appeals for the Second Circuit noted that "[c]onduct alleged [in the case] would be actionable under 42 U.S.C. § 1983 . . . if performed by a government official." *Id.* Similarly, in *Kadic*, *supra,* 70 F.3d at 245, the Second Circuit also held that § 1983 was relevant in interpreting both the ATS and the TVPA: "The 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act." It also held that, when construing the TVPA, the "courts are instructed to look to principles of agency law and to jurisprudence under 42 U.S.C. § 1983, respectively." *Id.*

Relying on the Second Circuit's "instruct[ion] that applicable principles from the jurisprudence of § 1983 of the Civil Rights Act should guide the courts" in analyzing human rights violations under both the ATS and the TVPA, the U.S. District Court for the Southern District of New York found that a private political party could be sued under both statutes. *Tachiona v. Mugabe*, 169 F.Supp.2d 259, 314 (S.D.N.Y. 2001). That is because the political party "worked in tandem with Zimbabwe government officials, under whose direction or

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(concluding that "some offenses against the law of nations can be committed by private parties, [while] others require state action"); *Adhikari v. Daoud & Partners,* 697 F.Supp.2d 674, 685 (S.D. Tex. 2009) (recognizing that "state action requirement under the ATS is not absolute.").

control many of the wrongful acts were conceived and executed," becoming "an integral arm of the state."*Id.* at 315.

Similarly, in *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1546 (N.D. Cal. 1987), the court found that "[c]laims for tortious conduct of government officials under 28 U.S.C. § 1350 may be analogized to domestic lawsuits brought under 42 U.S.C. § 1983 . . . ." Along these same lines, in 2002, the U.S. District Court for the Central District of California allowed an ATS suit to go forward against a private mining group that committed human rights violations, including war crimes, through its collaboration with the Papua New Guinea government. *Sarei, supra,* 221 F.Supp.2d 1116 (C.D. Cal. 2002). The court relied extensively on § 1983 jurisprudence in evaluating the relationship between the defendant mining group and the State. *Id.* at 1139-49, 1153. In affirming that opinion, the Court of Appeals for the Ninth Circuit explicitly disagreed with *Kiobel's* holding that the ATS does not contemplate corporate liability. *See Sarei v. Rio Tinto PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927, slip op. at *6 (9th Cir. Oct. 25, 2011).

It is thus puzzling and completely inconsistent with its prior ATS and TVPA holdings that the Second Circuit Court of Appeals did not look to § 1983 in examining the corporate liability issues in *Kiobel,* and that the Court of Appeals for the D.C. Circuit also ignored that well-settled body of law in deciding *Mohamad.*

II. *CORRECTIONAL SERVICES CORP. v. MALESKO* SHOULD HAVE NO BEARING ON THE COURT'S ANALYSIS.

Correctional Services Corp. v. Malesko, 534 U.S. 61, 63 (2001), should have no bearing on this Court's review of *Kiobel* and *Mohamad*. Malesko was an inmate who was detained in a halfway house operated by a private corporation contracted by the federal Bureau of Prisons. *Malesko*, *supra,* 534 U.S. at 64. Malesko suffered a heart attack after the private prison's guards ignored medical orders and made him walk up five flights of stairs. *Id*. Subsequently, he filed an action against the prison corporation pursuant to *Bivens*, *supra,* 403 U.S. at 396.

Bivens dealt specifically with violations of the Fourth Amendment by federal officials. *Id.* at 395-96. No statute existed to provide redress for such wrongs. As such, this Court created a cause of action to "grant the necessary relief" when "federally protected rights" have been violated by federal officials. *Id.* at 392. As the *Malesko* Court noted, the *Bivens* remedy has been extended to cover only two additional types of circumstances: violations of the Due Process Clause of the Fifth Amendment in *Davis v. Passman*, 442 U.S. 228 (1979), and violations of the Cruel and Unusual Punishment Clause of the Eighth Amendment in *Carlson v. Green*, 446 U.S. 14 (1980). *Malesko, supra*, 534 U.S. at 70-71.

In denying relief in *Malesko*, the Court reasoned that extending *Bivens* to include liability for private corporations would stray from the

purpose of *Bivens* actions, which is to deter federal officials from violating the Constitution. *Malesko*, *supra,* 534 U.S. at 69. Notably, this Court made very clear that it was not extending *Bivens* liability to corporations because Congress had never endorsed *Bivens*-type lawsuits. *Id.* at 72.

As such, *Malesko* has no bearing on § 1983 claims. Its holding is limited to circumstances related to judicially-created remedies. Evidence of this is this Court's affirmation of corporate liability in § 1983 claims in the very same year *Malesko* was decided. *See Brentwood Acad.*, *supra,* 531 U.S. at 295 (successfully applying the "entwinement" analysis).

Not surprisingly then, after *Malesko*, lower federal courts have continued to recognize corporate liability in § 1983 claims with facts very similar to those in *Malesko. See, e.g., Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) ("Clearly, confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function. These corporations and their employees are therefore subject to limitations imposed by the Eighth Amendment."); *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 927 (7th Cir. 2004) (holding that for the purposes of § 1983, a "corporate entity violates an inmate's constitutional rights 'if it maintains a policy that sanctions the maintenance of prison conditions that infringe upon the constitutional rights of the prisoners.'" (quoting *Estate of Novack ex rel. v. County of Wood*, 226 F.3d 525, 530 (7th Cir. 2000))); *Olivas v. Corr. Corp. of Am.*, 408 F.Supp.2d 251, 254 (N.D. Tex. 2006) ("[A] private corporation . . . may be sued

under 42 U.S.C. § 1983 for alleged constitutional injury, because the operation of a prison is a fundamental government function.").

In analyzing *Kiobel* and *Mohamad* then, this Court should look exclusively to § 1983 jurisprudence for guidance and by-pass all *Bivens* jurisprudence, including *Malesko*. Any of the Court's reservations articulated in *Malesko* are irrelevant here, because both the ATS and TVPA, like § 1983 were endorsed by Congress.

* * *

At its most basic, liability for torts serves our society's compelling interest in redressing wrongs and deterring future misconduct. This bedrock idea has shaped our jurisprudence and given life to the principle that for every right there should be a remedy: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 3 WILLIAM BLACKSTONE, COMMENTARIES *23; *accord*, *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

As such, whether the murderer or torturer acts as a natural person, or through a corporation (or some other private entity) should be of no more consequence to the Court's analysis of the ATS and the TVPA than it would be under § 1983. This is particularly true because this Court has previously stated that "[t]he Alien Tort Statute by its terms does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (discussing the interplay between the ATS and the Foreign

Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq*.).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments of the Courts of Appeals in both the *Kiobel* and *Mohamad* cases.

Respectfully submitted,

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APPENDIX

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