No. 24-1411

# UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DAVID BONIFACE; NISSANDERÈ MARTYR; JUDERS YSEMÉ,
*Plaintiffs - Appellees*,

v.

JEAN MOROSE VILIENA,
*Defendant - Appellant*.

On Appeal from the U.S. District Court for the District of Massachusetts,
Case No. 1:17-cv-10477; Hon. Allison D. Burroughs

**Motion for Leave to File Brief Amici Curiae of Professors of International Law in Support of Plaintiffs-Appellees**

ARAM A. GAVOOR (First Circuit Bar No. 1142350)
ADMINISTRATIVE LAW, ISSUES & APPEALS CLINIC
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 G Street, NW
Washington, DC 20052
Telephone: 202-994-2505
Email: agavoor@law.gwu.edu

*Counsel for Amici Curiae Professors of International Law*

**Motion**

Professors of International Law move under Federal Rule of Appellate Procedure 29(a)(2) and (3) for leave to file the attached amici curiae brief in support of Plaintiffs-Appellees.

1. This case presents questions of first impression for this Court on the U.S. Constitution and the interpretation of the Torture Victim Protection Act of 1991.
2. Professors of International Law offer expertise on the application of the U.S. Constitution to questions of international law and the interpretation of the Torture Victim Protection Act of 1991. They individually and collectively have an interest in the proper resolution of the issues implicated in this case.
3. Their provision of a third-party perspective on these important issues can be helpful to the Court in deciding this case.
4. Professors of International Law are as follows:
    - **William S. Dodge** is the Lobingier Professor of Comparative Law and Jurisprudence at The George Washington University Law School. Professor Dodge currently serves as a reporter for the *American Law Institute's Restatement (Fourth) of the Foreign Relations Law of the United States* (2018). He is the author of *Defining and Punishing Offenses Under Treaties*, 124 Yale L.J. 2202 (2015) (with Sarah H. Cleveland), *Customary International Law, Change, and the Constitution*, 106 Geo. L.J. 1559 (2018),

*The New Presumption Against Extraterritoriality*, 133 Harv. L. Rev. 1582 (2020), and *International Comity in American Law*, 115 Colum. L. Rev. 2071 (2015).

- **Andrew Kent** is the Joseph M. McLaughlin Chair and Professor of Law at Fordham Law School. He writes about U.S. foreign relations law, federal courts, and separation of powers, among other topics. His publications include *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 Tex. L. Rev. 843 (2007).
- **Harold Hongju Koh** is the Sterling Professor of International Law at Yale Law School and its former Dean. He served as Legal Adviser to the U.S. Department of State from 2009 to 2013, Senior Adviser (top political appointee) in that office in 2021, and as Assistant Secretary of State for Democracy, Human Rights, and Labor from 1998 to 2001. He currently serves as Co-Chair for the American Law Institute's *Restatement (Fourth) of the Foreign Relations Law of the United States*. He has written extensively on public and private international law, national security law, and human rights, including *Transnational Public Law Litigation*, 100 Yale L.J. 2347 (1991), *Why Do Nations Obey International Law*, 106 Yale L.J. 2599 (1997), and *International Law as Part of Our Law*, 98 Am. J. Int'l L. 43 (2004). His most

recent book is The National Security Constitution in the Twenty-First Century (2024).

- **Ralph G. Steinhardt** is the Lobingier Professor Emeritus of Comparative Law and Jurisprudence at The George Washington University Law School. He has written extensively about international law, international human rights, and international civil litigation, including *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 Harv. Int'l L.J. 53 (1981) (with Jeffrey M. Blum), *Fulfilling the Promise of* Filartiga*: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 Yale J. Int'l L. 65 (1995), and *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's* Filartiga, 89 Notre Dame L. Rev. 1695 (2014).
- **Beth Stephens** is a Distinguished Professor of Law at Rutgers Law School. She was an adviser to the American Law Institute's *Restatement (Fourth) of the Foreign Relations Law of the United States* (2018). She has published extensively on the relationship between international and domestic law and the enforcement of international human rights norms through domestic courts, including *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations"*, 42 Wm. & Mary L. Rev.

447 (2000), and *The Curious History of the Alien Tort Statute*, 89 Notre Dame L. Rev. 1467 (2014).

5. For the foregoing reasons, the court should grant leave for Professors of International Law to file the attached amici curiae brief in this case.

Dated: October 16, 2024

Respectfully submitted,

/s/ Aram A. Gavoor
ARAM A. GAVOOR (FIRST CIR. NO. 1142350)
ADMINISTRATIVE LAW, ISSUES & APPEALS CLINIC
THE GEORGE WASHINGTON UNIV. LAW SCHOOL
2000 G Street, NW
Washington, DC 20052
Tel: (202) 994-2505
Fax: (202) 994-8980
Email: agavoor@law.gwu.edu

*Counsel for Amici Curiae*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on October 16, 2024.

I hereby certify that all participants in the case are registered CM/ECF users and that services will be accomplished by the appellate CM/ECF system.

Dated: October 16, 2024

/s/ Aram A. Gavoor
Aram A. Gavoor

No. 24-1411

# UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DAVID BONIFACE; NISSANDERÈ MARTYR; JUDERS YSEMÉ,
*Plaintiffs - Appellees*,

v.

JEAN MOROSE VILIENA,
*Defendant - Appellant*.

On Appeal from the U.S. District Court for the District of Massachusetts,
Case No. 1:17-cv-10477; Hon. Allison D. Burroughs

## BRIEF OF AMICI CURIAE PROFESSORS OF INTERNATIONAL LAW IN SUPPORT OF PLAINTIFFS-APPELLEES

ARAM A. GAVOOR (First Circuit Bar No. 1142350)
ADMINISTRATIVE LAW, ISSUES & APPEALS CLINIC
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 G Street, NW
Washington, DC 20052
Telephone: 202-994-2505
Email: agavoor@law.gwu.edu

*Counsel for Amici Curiae Professors of International Law*

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Other Authorities**

**Constitutional Provisions**

## INTEREST OF AMICI CURIAE[1]

Amici are law professors who have an interest in the proper interpretation of the Offenses Clause of the U.S. Constitution and the Torture Victim Protection Act.

William S. Dodge is the Lobingier Professor of Comparative Law and Jurisprudence at The George Washington University Law School. He served as Counselor on International Law to the Legal Adviser at the U.S. Department of State from 2011 to 2012 and currently serves as a Reporter for the American Law Institute's RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES. He is the author, among other publications, of *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202 (2015) (with Sarah H. Cleveland), *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559 (2018), *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020), and *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015).

Andrew Kent is the Joseph M. McLaughlin Professor of Law at Fordham University School of Law. He writes about U.S. foreign relations law, federal courts, and separation of powers, among other topics. His publications include *Congress's*

[1] No person or entity other than amici and their counsel authored the brief in whole or in part. No person or entity other than amici and their counsel contributed money intended to fund preparing or submitting the brief.

*Under-Appreciated Power to Define and Punish Offenses against the Law of Nations*, 85 TEX. L. REV. 843 (2007).

Harold Hongju Koh is the Sterling Professor of International Law at Yale Law School and its former Dean. He served as Legal Adviser to the U.S. Department of State from 2009 to 2013, Senior Adviser (top political appointee) in that office in 2021, and as Assistant Secretary of State for Democracy, Human Rights, and Labor from 1998 to 2001. He currently serves as Co-Chair for the American Law Institute's RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES. He has written extensively on public and private international law, national security law, and human rights, including *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991), *Why Do Nations Obey International Law*, 106 YALE L.J. 2599 (1997), and *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004). His most recent book is THE NATIONAL SECURITY CONSTITUTION IN THE TWENTY-FIRST CENTURY (2024).

Ralph G. Steinhardt is the Lobingier Professor Emeritus of Comparative Law and Jurisprudence at The George Washington University Law School. He has written extensively about international law, international human rights, and international civil litigation, including *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53 (1981) (with Jeffrey M. Blum), *Fulfilling the Promise of*

Filartiga*: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65 (1995), and *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's* Filartiga, 89 NOTRE DAME L. REV. 1695 (2014).

Beth Stephens is a Distinguished Professor of Law at Rutgers Law School. She was an Adviser to the American Law Institute's RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES. She has published extensively on the relationship between international and domestic law and the enforcement of international human rights norms through domestic courts, including *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations"*, 42 WM. & MARY L. REV. 447 (2000), and *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467 (2014).

//

//

//

//

## BACKGROUND AND SUMMARY OF THE ARGUMENT

This case involves torture and extrajudicial killing in Haiti committed by Defendant-Appellant, a Haitian citizen, against Plaintiffs-Appellees, who are also Haitian. A jury found Defendant-Appellant liable for violating the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified in the notes to 28 U.S.C. § 1350). Br. of Defendant-Appellant at 3–7. On appeal, Defendant argues, among other things, that the district court lacked subject matter jurisdiction. *Id.* at 9–20. As amici explain, this argument is mistaken for three reasons.

First, the district court had subject matter jurisdiction under 28 U.S.C. § 1331 and Article III of the U.S. Constitution, because Congress expressly provided a federal cause of action with the TVPA.

Second, the TVPA lies within Congress's legislative power under the Offenses Clause of Article I of the U.S. Constitution, which encompasses violations of the "Law of Nations" that occur extraterritorially and between aliens. Since the early history of the Offenses Clause, the "Law of Nations" was understood as an evolving body of law that includes post-1789 customary international law and treaties of the United States. Because the TVPA addresses customary international law violations and implements the U.S. treaty obligations, it falls within the scope of Congress's power to "define and punish Offenses against the Law of Nations."

Third, the TVPA applies to the conduct in this case. The legislative history of the TVPA squarely shows that Congress intended the Act to apply to claims by aliens. Furthermore, the plain text and legislative history of the TVPA clearly and affirmatively indicate that it applies to claims arising abroad, thus overcoming the presumption of extraterritoriality.

## ARGUMENT

### I. The District Court Had Subject Matter Jurisdiction Because the TVPA Is a Law of the United States for Purposes of 28 U.S.C. § 1331 and Article III

When Congress has provided an express federal cause of action, 28 U.S.C. § 1331 supplies federal subject matter jurisdiction. Such a cause of action also arises under the "Laws of the United States" for purposes of Article III. Defendant-Appellant does not dispute this basic and well-settled rule,[2] but claims that § 1331 subject matter jurisdiction does not exist for two reasons: first, because application of the TVPA here exceeds Congress's power under the Offenses Clause, and second,

[2] Defendant-Appellant invokes the Second Circuit's decision in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), for the proposition that claims under customary international law fall outside the scope of § 1331. Br. of Defendant-Appellant at 13. But *Kadic* involved claims for which there was no statutory cause of action. *Kadic*, 70 F.3d at 238. The Supreme Court suggested in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004), that customary international law claims may not be brought under § 1331 in the absence of an express cause of action. But there is no question that international law claims can be brought under § 1331 when Congress has enacted an express cause of action for such claims. *See Gunn v. Minton*, 568 U.S. 251, 257 (2013) (noting that "a case arises under federal law when federal law creates the cause of action asserted").

because the facts of this case fall outside the statutory bounds of the TVPA. Both contentions are incorrect.

## II. The TVPA Is Within the Scope of Congress's Legislative Power Under the Offenses Clause

### A. The Offenses Clause Authorizes Congress to Regulate Extraterritorially and Between Aliens

Appellant claims that the Offenses Clause does not authorize the exercise of civil jurisdiction with respect to conduct that takes place outside the United States between citizens of a foreign country. Br. of Defendant-Appellant at 14–15. However, examination of the provision's text, place in the constitutional structure, history, legislative use, and judicial treatment affirms that the Offenses Clause grants Congress authority to create civil liability for offenses against the law of nations even when such offenses are extraterritorial and between citizens of foreign countries.

William Blackstone was one of the writers who shaped the Framers' understanding of the "law of nations." Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202, 2212 (2015); J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 874 (2007). Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND identified three "principal offences against the law of nations . . . 1. Violation of safe-conducts; 2. Infringement of the

rights of ambassadors; and, 3. Piracy." 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769). Of those offenses, one is necessarily extraterritorial (piracy) and one extends to conduct that could occur between two foreigners (crimes against ambassadors). The Constitution's grant to Congress of power to "define and punish Offenses against the Law of Nations" was, at a minimum, intended to include these "principal offenses." *See* U.S. Const. art. I, § 8, cl. 10.

More broadly, the pre-enactment history and records of drafting and ratification in 1787–1789 show that the Constitution was intended to grant judicial and congressional control over topics such as "piracy, rights of ambassadors, interpretation of treaties, captures" on the high seas, "and the rights of foreigners," all of which were "understood to implicate the law of nations." Kent, *supra*, at 896–98. The Framers at Philadelphia ultimately distributed congressional power over these topics—often involving foreign nationals and extraterritorial conduct—through several different clauses. *See* U.S. Const. art. I, § 8, cls. 3, 10–11 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations . . . define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations[,] . . . grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.").

In the years immediately following the Constitution's ratification, Congress passed two significant pieces of legislation that reflect the Framers' understanding of the Offenses Clause: the Alien Tort Statute ("ATS") and the 1790 Crimes Act. *See* Cleveland & Dodge, *supra*, at 2235–36. The ATS, part of the Judiciary Act of 1789, granted federal courts jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations." Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (codified as amended at 28 U.S.C. § 1350). As the Supreme Court noted in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), infringement of the rights of ambassadors and piracy were among the violations of the law of nations the First Congress had in mind when it wrote the ATS. *Id.* at 715.

That Congress understood the ATS to reach violations between two aliens is confirmed by the text and history of the statute. The text of the ATS requires that a plaintiff under the statute be an alien and "does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Ship. Corp.*, 488 U.S. 428, 438 (1989). The ATS was motivated in part by the 1784 Marbois Affair, involving a violation of the law of nations between two aliens, specifically an assault on the Secretary of the French Legation by another French citizen. *Sosa*, 542 U.S. at 716–17; *see also* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491–94 (1986) (discussing Marbois Affair).

One year later, the 1790 Crimes Act criminalized piracy, exercising Congress's authority under the Offenses Clause to define and punish violations of the law of nations occurring outside the United States. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, §§ 8–13, 1 Stat. 112, 113–15 (1790).[3] Section 8 of the 1790 Crimes Act specifically referred to murder or robbery "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state." *Id.* § 8, 1 Stat. 113. The Supreme Court validated this extraterritorial reach in *United States v. Klintock*, 18 U.S. (5 Wheat.) 144 (1820), holding that pirates "acknowledging obedience to no government whatever . . . are proper objects for the penal code of all nations." *Id.* at 152. Although *Klintock* interpreted the text of the 1790 Crimes Act not to reach persons who were subjects of foreign governments, *id.*, Congress amended the piracy statute to apply to "any person or persons whatsoever" who "on the high seas, commit the crime of piracy, as defined by the law of nations," An Act to Protect the Commerce of the United States and to Punish Piracy, ch. 77, § 5, 3 Stat. 510, 513–14 (1819), again exercising its authority under the Offenses Clause to reach law of nations violations between aliens outside the United States. Accordingly, if a foreign pirate on the high seas committed piracy against a British merchant vessel, such conduct would be punishable under U.S. law.

[3] Section 28 of the Act also criminalized assaults on ambassadors. 1 Stat. 118.

These early statutes reflect the original understanding that Congress's power under the offenses clause extended to violations of the law of nations that occur outside the United States and to violations between two aliens.

### B. The Offenses Clause Allows Congress to Define and Punish Modern International Law Violations

Congress's Article I power "[t]o define and punish Offences . . . against the Law of Nations" extends to violations of modern international law. Defendant-Appellant asserts that the Offenses Clause encompasses only the "Law of Nations" as it existed in 1787–1789. Br. of Defendant-Appellant at 14. However, this contradicts both the Framers' understanding of the law of nations and Supreme Court precedent on the Clause. The Framers understood that the "modern law of nations" was a changing body of law, *see* William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559, 1581–83 (2018), and the Supreme Court has consulted modern international law to uphold Congress's authority to define and punish offenses, *see* Cleveland & Dodge, *supra*, at 2252–58.

#### 1. The Framers understood that the law of nations would evolve

Rather than a static set of rules, to the Framers, the law of nations was a changing body of law. In a 1793 letter advising American diplomat Thomas Pinckney, then-Secretary of State Thomas Jefferson observed that the "law of nations" had "been liberalized in latter times by the refinement of manners & morals, and evidenced by the Declarations, Stipulations, and Practice of every civilized

Nation."[4] Similarly, when charging a grand jury in 1794, Justice Iredell noted that the law of nations had recently been "cultivated . . . . with a spirit of freedom and an enlarged liberality of mind entirely suited to the high improvements the present age has made in all kinds of political reasoning."[5]

Early Supreme Court decisions repeatedly referred to "the modern law of nations." In deciding whether Virginia's confiscation of British debts during the Revolution violated international law in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), Justice Wilson wrote: "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Id.* at 281 (opinion of Wilson, J.). In seriatim opinions, Justices Chase also wrote of the "modern law of nations," *id.* at 224, 229 (opinion of Chase, J.), while Justice Iredell referred to "the most modern notions of it," *id.* at 269 (opinion of Iredell, J.). *See also Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814) (Marshall, C.J.) (referring to the "modern law of nations"); *id.* at 139, 145, 147 (Story, J., dissenting) (same); *The Commercen*, 14 U.S. (1 Wheat.) 382, 387 (1816) (Story, J.) (same).

[4] Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793), *in* 7 THE WORKS OF THOMAS JEFFERSON 312, 314 (Paul Leicester Ford ed., 1904).
[5] Charge to the Grand Jury of Justice James Iredell for the District of South Carolina (May 12, 1794) *in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 454, 454–60 (Maeva Marcus et al. eds., 1988).

The modern law of nations applied by the early Supreme Court evolved in part based on changes in state practice. In his concurring opinion in *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), Justice Story looked to "the recent cases of the American ships captured while under British convoy by the Danes," to determine the applicable law on neutrality protections, noting that both the American and European governments had "acquiesced in the truth and correctness" of the principle. *Id.* at 443 (Story, J., concurring). Sitting as a Circuit Justice a few years later, Justice Story explained in *United States v. The La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551):

> What . . . the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations.

*Id.* at 846. In short, the Framers and early Supreme Court understood that the law of nations would continue to evolve.[6]

[6] The modern Supreme Court has given effect to this principle by interpreting the ATS to reach not just the violations of the law of nations that the First Congress had in mind but also claims "based on the present-day law of nations [that] rest on a norm of international character accepted by the civilized world and defined with a

### 2. The Supreme Court has held that the Offenses Clause applies to modern international law violations

In more recent times, the Supreme Court has repeatedly found that the Offenses Clause gives Congress the power to define and punish offenses against the modern law of nations. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court held that Congress's authority to "define and punish offenses against the law of nations" included using military commissions to try Nazi saboteurs. *Id.* at 28. The Court considered post-1789 sources on international law such as the Lieber Code,[7] Hague Convention No. IV of 1907, contemporary treatises, and other nations' military law manuals, which reflected the modern evolution of the law of nations. *Id.* at 30–31 & nn. 7–8.

*In re Yamashita*, 327 U.S. 1 (1946), citing *Quirin*, reaffirmed Congress's power to define and punish violations of the modern law of nations. The Court found that pursuant to the Offenses Clause, Congress "adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the

---

specificity comparable to the features of the 18th-century paradigms." *Sosa*, 542 U.S. at 725.

[7] Instructions for the Government of Armies of the U.S. in the Field, Gen. Orders 100, War Dep't. (1863). The Lieber Code is often referred to as one of the first codifications of the modern law of war. *See, e.g.*, R. R. Baxter, *The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100*, 25 INT'L REV. RED CROSS 171, 182 (1963).

Hague Convention . . . .” *Id.* at 8. In denying the habeas petition of the Japanese commander found guilty of war crimes, the Court applied the principle of command responsibility as it had been recently articulated in modern treaties. *Id.* at 14–17. Applying an evolving modern law of nations, much like the Framers, the Supreme Court upheld Congress’s decisions to punish modern international law violations.

### C. The TVPA Fits Within the Limits of the Offenses Clause

Since the Second World War, international human rights has emerged as an important area of international law. The 1948 Universal Declaration of Human Rights set forth various human rights “which are now binding norms of international law.” Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1475 (2014). Treaties have codified and developed the customary international law of human rights, including the Genocide Convention and the Convention Against Torture. *See* Cleveland & Dodge, *supra*, at 2261–62.[8] Such treaties require the United States to punish human rights violations. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. V, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force

[8] The original understanding of the Offenses Clause interpreted the law of nations to include both customary international law and treaties. *See* Cleveland & Dodge, *supra*, at 2212–17.

June 26, 1987). Limiting the Offenses Clause to international law violations that occur within the territorial bounds of the United States would call into question Congress's authority to comply with treaty obligations, such as those of the Convention Against Torture, that require parties to prosecute or extradite torturers found in their territory regardless of where the torture occurred.[9]

The TVPA was intended to implement the United States' obligations under the Convention Against Torture. S. Rep. No. 102-249, at 3 (1991). Congress recognized that "many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have employed extrajudicial killings to execute many people." *Id.* The legislative history states that the TVPA "will carry out the intent of the Convention Against Torture," noting that "[t]he convention obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts." *Id.*

The TVPA is fully consistent with the United States' authority to exercise jurisdiction to prescribe under international law. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 407–13 (Am. L. Inst.

[9] There are limits on Congress's authority under the Offenses Clause. Congress cannot "create new violations of the law of nations out of whole cloth," nor can it choose means of punishment not rationally related to the international law rules it aims to enforce. *See* Cleveland & Dodge, *supra*, at 2276–77, 2279–80. The Due Process Clause further requires that the extraterritorial application of U.S. law is not "arbitrary or fundamentally unfair." *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999).

2018) (restating international law of prescriptive jurisdiction). Congress has exercised universal jurisdiction in a limited number of cases. *See id.* § 402 reporters' note 10 (discussing statutes). In such cases, international law recognizes a state's jurisdiction to prescribe law for "offenses of universal concern . . . even if no specific connection exists between the state and the persons or conduct being regulated." *Id.* § 413. In creating a cause of action for torture and extrajudicial killing with the TVPA, Congress recognized that "States have the option, under international law, to decide whether they will allow a private right of action in their courts for violations of human rights that take place abroad." S. Rep. 102-249, at 5 (1991). "[A]ccording to the doctrine of universal jurisdiction," Congress noted, "the courts of all nations have jurisdiction over 'offenses of universal interest.'" *Id.*

## III. This Case Is Within the Scope of the TVPA

### A. The TVPA Applies to Claims by Aliens

The TVPA was enacted to supplement and extend the ATS and, thus, applies to claims made by aliens. In 1980, the Second Circuit recognized claims between aliens for torture abroad under the ATS. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Four years later in *Tel-Oren*, the D.C. Circuit held that claims for terrorism under the ATS should be dismissed, but the judges disagreed on the rationale. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). Judge Bork's concurrence asserted that there needed to be an express cause of action for

the plaintiffs to bring claims under the ATS. *Id.* at 801 (Bork, J., concurring); *see also id.* at 789 (Edwards, J., concurring) (noting that Congress could clarify the law).

The TVPA addresses the concerns expressed by Judge Bork and removes all doubt concerning the ability to bring claims for torture and extrajudicial killing under the ATS. H.R. Rep. 102-367, at 4 (1991) ("Judge Bork questioned the existence of a private right of action under the Alien Tort Claims Act . . . . [T]he TVPA would provide such a grant."). Appellant concedes the point, stating "Congress responded to the concerns articulated in *Tel-Oren* by passing the TVPA in 1991." Br. of Defendant-Appellant at 12. Because the ATS is limited to claims by aliens, 28 U.S.C. § 1350 (granting jurisdiction over "any civil action by an alien"), it follows that Congress intended the TVPA to reach claims by aliens.[10]

### B. The TVPA Extends to Claims Arising Abroad

Both the text and the legislative history of the statute unambiguously indicate that the TVPA applies to claims arising outside of the United States. The text of the statute creates liability for acts of torture and extrajudicial killing "under actual or apparent authority, or color of law, *of any foreign nation*." Torture Victim Protection Act of 1991 § 2(a), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified in the notes to 28 U.S.C. § 1350) (emphasis added). The legislative history reinforces this

[10] The TVPA also granted a private right of action to U.S. citizens. H.R. Rep. 102-367, at 3 (1991) ("There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.").

reading. *See* S. Rep. 102-249, at 5 (1991) (referring to "violations of human rights that take place abroad"); *see also* H.R. Rep. 102-367, at 4 (1991) (noting that "the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad"). Indeed, Defendant-Appellant acknowledges that "[t]he legislative history of the TVPA evinces an interest in providing a remedy in the form of a civil action for torture that may be committed abroad." Br. of Defendant-Appellant at 16–17. The Senate Report confirms that Congress was thinking of torture and extrajudicial killing in other countries: "Despite universal condemnation of these abuses, many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have employed extrajudicial killings to execute many people." S. Rep. 102-249, at 3 (1991).

**1. The TVPA rebuts the presumption against extraterritoriality**

Defendant-Appellant's reliance on the presumption against extraterritoriality is misplaced. Br. of Defendant-Appellant at 16. The Supreme Court has developed "a two-step framework" to apply the presumption. *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412, 417 (2023) (quoting *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 337 (2016)). Step one asks whether the provision "gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco*, 579 U.S. at 337. Step two determines whether applying the statute would be domestic by looking

for "conduct relevant to the statute's focus . . . in the United States." *Id.* The TVPA rebuts the presumption at step one.

As noted above, Section 2(a) of the Act creates liability for acts of torture and extrajudicial killing "under actual or apparent authority, or color of law, of *any foreign nation*," Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified in the notes to 28 U.S.C. § 1350) (emphasis added), and the legislative history further states that the TVPA applies to claims abroad, *see* S. Rep. 102-249, at 5 (1991); H.R. Rep. 102-367, at 86 (1991). If "there is a clear indication at step one that [a provision] applies extraterritorially," a court "do[es] not proceed to the 'focus' step." *RJR Nabisco*, 579 U.S. at 342. Instead, it simply applies the statute as Congress has indicated.

Defendant-Appellant invokes *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), but *Kiobel* is readily distinguishable. *Kiobel* interpreted the ATS, not the TVPA. *Kiobel*, 569 U.S. at 112. As the Second Circuit has noted, there is "no support in *Kiobel* or any other authority for the proposition that the territorial constraints on common-law causes of action under the ATS apply to the statutory cause of action created by the TVPA." *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 50–51 (2d Cir. 2014).

Defendant-Appellant also invokes the *Charming Betsy* canon that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2

Cranch) 64, 118 (1804); *see* Br. of Defendant-Appellant at 16 (quoting *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting)). But, as explained above, applying the TVPA to conduct abroad in the limited cases that Congress has authorized is consistent with the international law principle of universal jurisdiction. *See supra* II.C.

**2. The TVPA is consistent with international comity**

International comity refers to "deference to other foreign states that is not required by international law." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, part IV, ch. 1, intro. note (Am. L. Inst. 2018). International comity is not a freestanding doctrine but rather a principle that informs a variety of doctrines of U.S. law. *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2099–2120 (2015). Most relevant, here, is the presumption against extraterritoriality. *See id.* at 2102–03. As explained above, Congress has unambiguously indicated that the TVPA applies extraterritorially. Under such circumstances, international comity has no further role to play.[11]

[11] The TVPA addresses other comity concerns by requiring the exhaustion of "adequate and available remedies in the place in which the conduct giving rise to the claim occurred." TVPA § 2(b), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified in the notes to 28 U.S.C. § 1350). In this case, the district court found "undisputed evidence that remedies in Haiti are 'ineffective, unobtainable, unduly prolonged, inadequate, and obviously futile.'" *Boniface v. Viliena*, No. 17-CV-10477-ADB,

## CONCLUSION

For the reasons stated above, this Court should affirm the holding of the district court that federal subject matter jurisdiction over Plaintiffs-Appellees' TVPA claims exists in this case.

Dated: October 16, 2024

Respectfully submitted,

/s/ Aram A. Gavoor
ARAM A. GAVOOR (FIRST CIR. NO. 1142350)
ADMINISTRATIVE LAW, ISSUES & APPEALS CLINIC
THE GEORGE WASHINGTON UNIV. LAW SCHOOL
2000 G Street, NW
Washington, DC 20052
Tel: (202) 994-2505
Fax: (202) 994-8980
Email: agavoor@law.gwu.edu

*Counsel for Amici Curiae*

ROHIN BALKUNDI*
ALLISON CHESKY*
CLAIRE HOUSLEY*
SEAN HULLIHAN*
ADMINISTRATIVE LAW, ISSUES & APPEALS CLINIC
THE GEORGE WASHINGTON UNIV. LAW SCHOOL

**Law Students Under Local R. 46.0(f)(1)(B)*

2023 WL 1797760, at *10 (D. Mass. Feb. 7, 2023) (quoting S. Rep. 102-249, at 10 (1991)).

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. Rs. App. P. 29(a)(5) and 32(a)(7)(B) because the brief contains 4,994 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Times New Roman font.

Dated: October 16, 2024

/s/ Aram A. Gavoor
Aram A. Gavoor

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on October 16, 2024.

I hereby certify that all participants in the case are registered CM/ECF users and that services will be accomplished by the appellate CM/ECF system.

Dated: October 16, 2024

/s/ Aram A. Gavoor
Aram A. Gavoor