UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

DAVID BONIFACE,
NISSANDÈRE MARTYR,
JUDERS YSEMÉ,

Plaintiffs,

v.

JEAN MOROSE VILIENA
(a.k.a. JEAN MOROSE VILLIENA),

Defendant.

Case No. 17-cv-10477-ADB

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 1

ARGUMENT 2

I. THE TVPA PROVIDES A CAUSE OF ACTION HERE AND IS CONSTITUTIONAL AS APPLIED 2

A. The TVPA Applies Extraterritorially And Provides A Cause Of Action For The Conduct At Issue Here 2

1. The tools of statutory construction confirm the TVPA's extraterritoriality 2

2. The TVPA's limitations reflect Congress's deliberate balance of foreign-policy considerations 5

3. Extraterritorial applications of the TVPA align with Congress's purpose, and international law provides no basis to narrow the statute's reach 9

a. The TVPA implements the United States's treaty obligations 9

b. The TVPA is consistent with international comity principles 11

c. In any event, Congress's ability to legislate extraterritorially is not limited by international law 12

4. Constitutional avoidance does not permit rewriting clear text 13

B. The TVPA Is A Constitutional Exercise Of Congress's Powers 14

1. The TVPA is an exercise of Congress's Offenses Clause authority 14

a. Torture and extrajudicial killing are paradigmatic offenses against the law of nations 14

b. The Offenses Clause authorizes civil remedies 16

c. Exercise of jurisdiction in this case is consistent with, and not limited by, international law 18

i. The Offenses Clause authorizes Congress to punish extraterritorial violations of international law by foreign nationals 19

ii. Torture and extrajudicial killing are universally condemned offenses over which any state may exercise jurisdiction 20

iii. In any event, international law does not constrain Congress's procedural choices 22

2. The TVPA is an exercise of Congress's authority to implement treaties under the Necessary and Proper Clause 22

II. CERTIFICATION OF AN INTERLOCUTORY APPEAL IS WARRANTED 23

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Boniface v. Viliena,
145 F.4th 98 (1st Cir. 2025).....1, 2, 5, 6, 7, 10, 11, 13

Chavez v. Carranza,
559 F.3d 486 (6th Cir. 2009).....5

Chowdhury v. Worldtel Bangladesh Holding, Ltd.,
746 F.3d 42 (2d Cir. 2014).....3, 5, 6

Clark v. Martinez,
543 U.S. 371 (2005).....13

Doe I v. Cisco Sys., Inc.,
73 F.4th 700 (9th Cir. 2023).....15

Doe v. Drummond Co.,
782 F.3d 576 (11th Cir. 2015).....3, 4, 5, 6, 13

In re Est. of Ferdinand Marcos, Hum. Rts. Litig.,
25 F.3d 1467 (9th Cir. 1994).....14, 20

Filártiga v. Peña-Irala,
630 F.2d 876 (2d Cir. 1980).....14

Fuld v. Palestine Liberation Org.,
606 U.S. 1 (2025).....2, 8

Ex parte Grossman,
267 U.S. 87 (1925).....17

Hartford Fire Ins. Co. v. California,
509 U.S. 764 (1993).....12, 22

Jesner v. Arab Bank, PLC,
584 U.S. 241 (2018).....8

Kadić v. Karadžić,
70 F.3d 232 (2d Cir. 1995).....11, 14

Kiobel v. Royal Dutch Petroleum Co.,
569 U.S. 108 (2013).....3, 6, 7, 21

Kuiper v. Reyes Mena,
No. 1:24-cv-01785, 2025 WL 2626111 (E.D. Va. Sept. 10, 2025).....5

Maxwell Commc'n Corp. v. Societe Generale (*In re Maxwell Commc'n Corp.*),
93 F.3d 1036 (2d Cir. 1996).....11

McBee v. Delica Co.,
417 F.3d 107 (1st Cir. 2005).....11

Missouri v. Holland,
252 U.S. 416 (1920).....22

Mohamad v. Palestinian Auth.,
566 U.S. 449 (2012).....6, 13

Morrison v. Nat'l Australia Bank Ltd.,
561 U.S. 247 (2010).....2, 3

Murray v. Schooner Charming Besty,
6 U.S. (2 Cranch) 64 (1804).....13

Ex parte Quirin,
317 U.S. 1 (1942).....15

RJR Nabisco v. European Cmty.,
579 U.S. 325 (2016).....3

Salinas v. United States,
522 U.S. 52 (1997).....14

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004).....7, 14, 15, 17, 18, 19, 20, 21

Tel-Oren v. Libyan Arab Republic,
726 F.2d 774 (D.C. Cir. 1984).....6

Town of Greece v. Galloway,
572 U.S. 565 (2014).....17

United States v. Arjona,
120 U.S. 479 (1887).....15

United States v. Bellaizac-Hurtado,
700 F.3d 1245 (11th Cir. 2012).....18, 20

United States v. Chouteau,
102 U.S. 603 (1880).....17

United States v. Comstock,
560 U.S. 126 (2010).....23

United States v. Noel,
893 F.3d 1294 (11th Cir. 2018) 22

United States v. Pinto-Mejia,
720 F.2d 248 (2d Cir. 1983).....13, 22

United States v. Rife,
33 F.4th 838 (6th Cir. 2022) 22

United States v. Shabani,
513 U.S. 10 (1994).....5

United States v. Smith,
18 U.S. (5 Wheat.) 153 (1820).....21, 22

Warfaa v. Ali,
811 F.3d 653 (4th Cir. 2016) 5

Wilkes v. Wood,
Lofft. 1, 98 Eng. Rep. 489 (K.B. 1763) 17

Xuncax v. Gramajo,
886 F. Supp. 162 (D. Mass. 1995) 5

Yousuf v. Samantar,
699 F.3d 763 (4th Cir. 2012) 20

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 10.....14, 22

U.S. Const. art. I, § 8, cl. 18.....22

Statutes

18 U.S.C.
§ 1091.....20
§ 1116.....20
§ 1201.....20
§ 1595.....18
§ 1596.....20
§ 1651.....20
§ 2331.....4
§ 2332f 20
§ 2332i 20
§ 2333.....4, 18
§ 2340A.....20

28 U.S.C.
§ 1292.....23, 24
§ 1331.....6
§ 1350.....6, 7
§ 1605A.....18

49 U.S.C. § 46502.....20

An Act to Protect the Commerce of the United States and to Punish Piracy, ch. 77, 3 Stat. 510 (1819).....19

Judiciary Act of 1789, ch. 20, 1 Stat. 73.....17

Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note 1, 3, 4, 5, 11

Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) 9, 11

Legislative Materials

H.R. Rep. No. 102-367 (1991).....4, 6, 9, 15, 23

S. Rep. No. 101-30 (1990).....10

S. Rep. No. 102-249 (1991).....4, 6, 7, 9, 11, 14, 21, 23

S. Treaty Doc. No. 100-20 (1990) 10, 23

Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigr. & Refugee Affs. of the S. Comm. on the Judiciary, 101st Cong. (1990).....4

Treaties & Conventions

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Dec. 10, 1984, 1465 U.N.T.S. 85.....9, 10, 11, 14, 20, 23

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Dec. 16, 1966, 999 U.N.T.S. 171 .....12, 15, 23

Universal Declaration of Human Rights, G.A. Res. 217A (III), Dec. 10, 1948, U.N. Doc. A/810 14

Other International Materials

Comm. Against Torture, General Comment No. 3, U.N. Doc. CAT/C/GC/3 (2012).....10

Comm. Against Torture, Initial Report of the United States, U.N. Doc. CAT/C/28/Add.5 (1999).....23

U.N. Treaty Body Database, Ratification Status for CAT, tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CAT.....20

U.N. Treaty Body Database, Ratification Status for CCPR, tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR.....12

Restatements

Restatement (Fourth) Foreign Relations Law § 402 (A.L.I. 2018) 13, 22

Restatement (Fourth) Foreign Relations Law § 413 (A.L.I. 2018) 11, 15, 20

Restatement (Third) Foreign Relations Law § 403 (A.L.I. 1987) 12

Other Authorities

4 William Blackstone, Commentaries on the Laws of England (1769) 19

Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations"*, 42 Wm. & Mary L. Rev. 447 (2000) 16

Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DePaul L. Rev. 433 (2002).....18

Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations"*, 21 Vand. J. Transnat'l L. 865 (1988) 16

Christopher Keith Hall, *The Duty of State Parties to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 Eur. J. Int'l L. 921 (2007) 10

Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 Nw. U. L. Rev. 1675 (2012).....16

Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 Yale L.J. 1762 (2009) 17

Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 Yale L.J. 2202 (2015) 17, 18

William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 Geo. L.J. 1559 (2018) 16

INTRODUCTION

The First Circuit asked this Court to answer two questions: whether the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note, applies extraterritorially under the circumstances of this case and, if so, whether that application is constitutional. *Boniface v. Viliena*, 145 F.4th 98, 110-12 (1st Cir. 2025). The answer to both questions is yes. In enacting the TVPA, Congress chose to open U.S. courts to victims of torture and extrajudicial killing—wherever those abuses occur. It crafted an extraterritorial remedy for these universally condemned offenses, but only against defendants subject to personal jurisdiction in the United States and limited by substantive and procedural guardrails reflecting comity concerns. Every tool of statutory interpretation confirms the TVPA's extraterritorial reach. And its enactment rests squarely within Congress's authority under both the Offenses and the Necessary and Proper Clauses. The Court should deny Defendant's motion for reconsideration.

BACKGROUND

Plaintiffs, Haitian nationals, brought claims under the TVPA alleging that Defendant, a Haitian national residing in the United States, committed acts of torture and extrajudicial killing in Haiti while acting under color of foreign law. Defendant moved to dismiss, arguing, in relevant part, that this Court lacks jurisdiction over Plaintiffs' TVPA claims. ECF No. 46. After this Court denied Defendant's motion in relevant part, ECF No. 56, Defendant moved for reconsideration, ECF No. 66, which this Court denied, ECF No. 84. At trial, the jury found Defendant liable and awarded compensatory and punitive damages. ECF No. 250.

On appeal, the First Circuit recognized that Defendant had, before this Court, "repeatedly argued that" this Court "lack[s] subject-matter jurisdiction over this case" but "did not clearly delineate . . . arguments about subject-matter jurisdiction and legislative jurisdiction." *Boniface*, 145 F.4th at 109, 112. The First Circuit nevertheless considered both issues, holding that this

Court has federal question subject-matter jurisdiction over Plaintiffs' TVPA claims, but remanding for this Court to consider legislative jurisdiction, i.e., "Congress's power to authorize the TVPA to apply where the conduct occurred outside the United States and between foreign citizens." *Id.* at 109-12. The First Circuit asked this Court to address two questions:

> First, as a matter of statutory interpretation, does the TVPA provide a cause of action for the facts here? Second, if the TVPA does provide such a cause of action, is that constitutional? In other words, did Congress have the power to authorize civil liability in this case, for acts committed by one foreign national upon another foreign national in a foreign country?

Id. at 112.

ARGUMENT

I. THE TVPA PROVIDES A CAUSE OF ACTION HERE AND IS CONSTITUTIONAL AS APPLIED

Congress specified that the TVPA apply extraterritorially, and it drew on two independent sources of constitutional authority in doing so.

A. The TVPA Applies Extraterritorially And Provides A Cause Of Action For The Conduct At Issue Here

"The Constitution confers upon the Federal Government—and it alone—both nationwide and extraterritorial authority." *Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 15 (2025). Congress exercised that extraterritorial authority in enacting the TVPA.

1. The tools of statutory construction confirm the TVPA's extraterritoriality

While there is a presumption that statutes do not apply beyond the "territorial jurisdiction of the United States," it can be rebutted where, as here, "contrary intent appears." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). This presumption is only "a canon of construction," not "a limit upon Congress's power to legislate." *Id.* And the presumption includes no magic-words test: "an express statement of extraterritoriality is not essential" to

rebut it. *RJR Nabisco v. European Cmty.*, 579 U.S. 325, 340 (2016). "Assuredly context can be consulted as well." *Id.* (quoting *Morrison*, 561 U.S. at 265).

As two circuits have held, the TVPA's text and context make clear Congress intended that it apply extraterritorially. *Doe v. Drummond Co.*, 782 F.3d 576, 601-02 (11th Cir. 2015); *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 50-51 (2d Cir. 2014). The statute provides that an individual who, "under actual or apparent authority, or color of law, *of any foreign nation*," subjects another to torture or extrajudicial killing "shall, in a civil action, be liable for damages." 28 U.S.C. § 1350 note § 2(a) (emphasis added). This language is "naturally understood to address primarily conduct occurring in the territory of foreign sovereigns." *Chowdhury*, 746 F.3d at 51; *see Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 125 (2013) (Kennedy, J., concurring) (characterizing the TVPA as addressing "human rights abuses committed abroad"). It would make little sense for Congress to have provided a civil remedy for torture conducted at the direction of a foreign nation but *only* if it took place in the United States. Such a statute would proscribe only conduct that would rarely, if ever, occur.

Indeed, the TVPA's exhaustion requirement requires dismissal unless the plaintiff has "exhausted adequate and available remedies *in the place in which the conduct giving rise to the claim occurred*." 28 U.S.C. § 1350 note § 2(b) (emphasis added). That language clearly contemplates a foreign jurisdiction whose legal system might offer an avenue of redress. Had Congress intended for the statute to reach only domestic conduct, it would not have required plaintiffs to first pursue remedies in some other "place" where the conduct occurred. *See Drummond*, 782 F.3d at 602.

Because the text of the TVPA gives "clear indication of an extraterritorial application," *Morrison*, 561 U.S. at 255, no further analysis is required. But legislative history supports the

same conclusion. *Drummond*, 782 F.3d at 602. The Senate Report explained that the TVPA's purpose was to provide "a civil cause of action in U.S. courts for torture committed abroad." S. Rep. No. 102-249, at 3-4 (1991); *see id.* at 5 ("Congress clearly has authority to create a private right of action for torture and extrajudicial killings committed abroad."); *id.* at 9-10 (discussing exhaustion and noting that "this legislation involves . . . judgments regarding the adequacy of procedures in foreign courts"). The House Report likewise recognized that "judicial protections agains[t] flagrant human rights violations are often least effective in those countries where such abuses are most prevalent"; the TVPA was intended to "respon[d] to this situation." H.R. Rep. No. 102-367, at 3 (1991); *see also* Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigr. & Refugee Affs. of the S. Comm. on the Judiciary, 101st Cong. (1990), at 12 (statement of John O. McGinnis, Deputy Assistant Att'y Gen., Off. of Legal Couns.) ("Neither bill contains any territorial or nationality limitations, and both would provide a remedy for an act of torture committed by one foreign national upon another foreign national in a foreign country.").

The lack of restrictions on the TVPA's extraterritorial application is further confirmed by comparing it to other statutes addressing conduct abroad. When Congress addresses foreign-connected conduct but wants to include territorial or nationality limits, it does so expressly. *Compare, e.g.*, 18 U.S.C. §§ 2331(1), 2333(a) (limiting civil remedies for acts of "international terrorism" that "occur primarily outside the territorial jurisdiction of the United States" to "national[s] of the United States"), *with* 28 U.S.C. § 1350 note § 2 (imposing no nationality test on plaintiffs or defendants).[1] Congress's decision to omit such limits from the TVPA should not

[1] Judge Lynch cited the terrorism statute, among others, as an example of legislation with express references to foreign conduct and suggested that the lack of similar language in the TVPA

be negated. *Cf. United States v. Shabani*, 513 U.S. 10, 14 (1994) (viewing omission of overt-act requirement in federal drug conspiracy statute as "quite deliberate[]" where general federal conspiracy statute contained the requirement explicitly).

Given this, it is no surprise that every court to squarely consider this issue has held that the TVPA applies extraterritorially, including to conduct involving exclusively foreign nationals. *Drummond*, 782 F.3d at 579-81 (Colombian citizens killed in Colombia); *Chowdhury*, 746 F.3d at 45-46 (Bangladeshi citizen tortured by Bangladeshi citizen in Bangladesh).[2]

2. The TVPA's limitations reflect Congress's deliberate balance of foreign-policy considerations

Defendant argues that extraterritorial application of the TVPA "may have an adverse effect on international relations," which counsels against recognizing its extraterritorial reach. Def. Supp. Mem. 6; *see Boniface*, 145 F.4th at 122-24 (Lynch, J., concurring). But in debating and enacting the TVPA, Congress already considered and balanced sensitive foreign-policy issues, incorporating its judgments into the text. This Court should not strike a different balance.

Congress's foreign-policy judgments are reflected in limitations already built into the statute. The TVPA requires plaintiffs to "exhaust[] adequate and available remedies," ensuring that U.S. courts act only when the foreign forum is unwilling or unable to provide redress. 28 U.S.C. § 1350 note § 2(b). Congress viewed this requirement as an important safeguard that

---

implies a lack of extraterritorially. *Boniface*, 145 F.4th at 122-24 (Lynch, J., concurring). But the TVPA's text makes its extraterritoriality clear; Congress was not required to use special words to convey that intent. And the express language in parallel statutes placing *limits* on their extraterritorial applications renders particularly significant the absence of such limits in the TVPA.

[2] Other courts have adjudicated similar TVPA claims without questioning the statute's extraterritorial reach. *E.g.*, *Warfaa v. Ali*, 811 F.3d 653, 655-56, 661 (4th Cir. 2016) (Somalian tortured by Somali military in Somalia); *Chavez v. Carranza*, 559 F.3d 486, 490-91 (6th Cir. 2009) (Salvadorans tortured by Salvadoran officer in El Salvador); *Xuncax v. Gramajo*, 886 F. Supp. 162, 173-78 (D. Mass. 1995) (torture committed by Guatemalan military in Guatemala); *Kuiper v. Reyes Mena*, No. 1:24-cv-01785, 2025 WL 2626111, at *1, *9-17 (E.D. Va. Sept. 10, 2025) (Dutch journalists killed by Salvadorans in El Salvador).

"ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred." H.R. Rep. No. 102-367, at 5. Congress further recognized that personal jurisdiction rules would ensure that the TVPA would "not turn the U.S. courts into tribunals for torts having no connection to the United States whatsoever." S. Rep. No. 102-249, at 7.[3] Congress made clear that "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity." H.R. Rep. No. 102-367, at 5. Finally, Congress chose not to extend TVPA liability to corporations, allowing suits against only natural persons. *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 461 (2012).

Ignoring these limitations, Defendant demands an additional, extratextual limitation: allowing only TVPA claims that "touch and concern" the United States. He borrows that limitation from *Kiobel*, which applied it to common-law causes of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. Def. Supp. Mem. 1-7. Defendant posits that the TVPA must have the same jurisdictional limitations as the ATS because Congress passed the TVPA after Judge Bork expressed doubt in *Tel-Oren v. Libyan Arab Republic* that the ATS contained a private right of action.[4] 726 F.2d 774, 799-801 (D.C. Cir. 1984) (Bork, J., concurring).

But 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*, 746 F.3d at 50-51; *see Drummond*, 782 F.3d at 593-602 (extraterritorial nature of TVPA claims posed no jurisdictional concerns even though related ATS claims did not "touch and concern" the United States). To import the ATS's

[3] It is undisputed that the Court properly exercised personal jurisdiction over Defendant here. Defendant moved to the United States permanently in 2009, *Boniface*, 145 F.4th at 107, and was personally served in Boston, ECF No. 9.

[4] To the extent Defendant continues to argue lack of subject-matter jurisdiction under 28 U.S.C. § 1331, the First Circuit has squarely rejected this argument. *Boniface*, 145 F.4th at 110.

constraints into the TVPA would thwart the TVPA's broader purposes. For example, if establishing jurisdiction under the ATS were required, U.S. citizens could never sue under the TVPA because the ATS extends only to claims brought by foreign nationals. *See* 28 U.S.C. § 1350; S. Rep. No. 102-249, at 5 ("[W]hile the [ATS] provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.").

Unlike the TVPA, the ATS is "strictly jurisdictional" and leaves it to courts to recognize limited common-law causes of action for violations of international law norms. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 713, 731-33 (2004). In *Kiobel*, the Supreme Court applied the presumption against extraterritoriality to common-law claims brought under the ATS, explaining that absent clear statutory text or legislative guidance, it would not infer that Congress wanted judges to create extraterritorial causes of action. 569 U.S. at 114-24. The Court voiced concerns that a broad view of the ATS "would imply that other nations . . . could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States" and emphasized that recognition of causes of action with "serious foreign policy consequences" must be left, "quite appropriately, to the political branches." *Id.* at 124; *see Boniface*, 145 F.4th at 124 (Lynch, J., concurring) (citing this language).

The political branches did exactly that in the TVPA, adopting a narrow cause of action codifying specific international law norms and incorporating limitations that balance foreign-policy and comity concerns. Indeed, *Kiobel* itself cited the TVPA as emblematic of careful line-drawing by Congress. 569 U.S. at 117 (in enacting the TVPA, Congress identified "specific, universal, and obligatory" "international law norms" and then carefully crafted a cause of action with "detailed definitions," specifications on "who may be liable," an exhaustion requirement, and a statute of limitations—all decisions with "significant foreign policy implications").

Later decisions have reaffirmed this distinction between the TVPA and ATS. In *Jesner v. Arab Bank, PLC*, a plurality of Justices emphasized that the TVPA is "the only cause of action under the ATS created by Congress rather than the courts," underscoring that "Congress took care to delineate the TVPA's boundaries" and "weigh the foreign-policy implications of its rule." 584 U.S. 241, 265-66 (2018) (plurality opinion); *see id.* at 266 ("The TVPA reflects Congress' considered judgment of the proper structure for a right of action under the ATS.").

More recently in *Fuld*, Justice Thomas reiterated that it is not the role of the judiciary to second-guess Congress's foreign-policy judgments—even in the face of possible reciprocal jurisdiction abroad. 606 U.S. at 42-44 (Thomas, J., concurring). In *Fuld*, the Supreme Court affirmed Congress's constitutional authority to enact a broad personal-jurisdiction provision for suits brought under the Antiterrorism Act that deemed nonresident defendants "to have consented to personal jurisdiction" if they engaged in certain conduct. *Id.* at 5-6 (majority opinion). Justice Thomas recognized that other "countries may decide to enact retaliatory jurisdictional provisions" but explained that this "possibility is no basis for erecting constitutional barriers here." *Id.* at 42 (Thomas, J., concurring) (internal quotation marks omitted). He stressed that "[t]he 'field of foreign affairs' requires 'delicate judgments . . . that [are] the prerogative of the political branches to make,'" that are "'entitled to special respect.'" *Id.* (quoting *Jesner*, 584 U.S. at 273 (plurality opinion)). And he warned that improperly "[l]imiting the political branches' ability to extend extraterritorial jurisdiction could stymie its use of this tool for international negotiation, in turn sowing tension with the fundamental premise that foreign policy is the domain of the political branches, not the federal courts." *Id.* at 44; *see id.* at 43 ("Civil litigation can be a bargaining chip in foreign policy.").

Here, Congress and the Executive made the sensitive judgment that, subject to

substantive and procedural limitations, the United States should provide a civil forum for redress of torture and extrajudicial killing committed abroad against defendants over whom U.S. courts have personal jurisdiction. The judiciary's duty is to implement that judgment, not to veto it.

3. Extraterritorial applications of the TVPA align with Congress's purpose, and international law provides no basis to narrow the statute's reach

Defendant suggests that this Court should construe the TVPA narrowly based on his contention that some extraterritorial applications would be inconsistent with international law and principles of comity. *See* Def. Supp. Mem. 4. This argument fails twice over. The TVPA does not conflict with international law: to the contrary, it implements U.S. treaty obligations. But even if the TVPA were inconsistent with international law, the text would still control.

a. The TVPA implements the United States's treaty obligations

The TVPA's preamble states that it was adopted "[t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights." Pub. L. No. 102-256, 106 Stat. 73, 73 (1992). Congress viewed the statute as a means of fulfilling those international obligations, including (but not limited to) obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). S. Rep. No. 102-249, at 3 (TVPA "will carry out the intent of the [CAT]" by "making sure that torturers and death squads will no longer have a safe haven in the United States"); H.R. Rep. No. 102-367, at 3 (recognizing the need to "provide means of civil redress to victims of torture" in accordance with the CAT).

Article 14 of the CAT specifically requires signatories to "ensure in [their] legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." CAT, art. 14, G.A. Res. 39/46, Dec. 10, 1984, 1465 U.N.T.S. 85. Unlike other CAT provisions that refer

expressly to acts committed "in any territory under [a State's] jurisdiction," *id.* arts. 2(1), 5(1)(a), Article 14 contains no territorial limitation. And the U.N. Committee Against Torture has expressly stated that "application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party," reinforcing that signatories are obligated to provide extraterritorial civil remedies under Article 14. Comm. Against Torture, General Comment No. 3, ¶ 22, U.N. Doc. CAT/C/GC/3 (2012).

To be sure, when the Senate provided its advice and consent to the ratification of the CAT in 1990, the Senate Report suggested that a territorial limitation on Article 14 "appear[ed] to have been deleted by mistake." S. Rep. No. 101-30, at 23-24 (1990). The Senate thus adopted an understanding "that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party." Resolution of Ratification, S. Treaty Doc. No. 100-20 (1990); *see Boniface*, 145 F.4th at 125 (Lynch, J., concurring) (citing this ratification history). But it is contested whether this omission was a "mistake." *See* Christopher Keith Hall, *The Duty of State Parties to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 Eur. J. Int'l L. 921, 931-37 (2007) (examining Article 14's drafting history and concluding there is no contemporaneous evidence that the omission was a mistake). The Senate's understanding did not amend the treaty or bind other states. *See id.* at 936 (no other state has made a reservation, declaration, or understanding asserting that Article 14's obligations are geographically restricted). Extraterritorial applications of the TVPA are thus entirely consistent with the CAT.

In any event, even if the CAT did not *require* signatories to provide an extraterritorial civil remedy, nothing in the CAT *prohibits* a state from doing so. And it would be a mistake to

view the TVPA as limited in scope to the affirmative obligations set forth in the CAT. *See* 106 Stat. at 73 (TVPA's statement of purpose broadly referencing the "United Nations Charter and other international agreements"). Indeed, it would be absurd to do so, as extrajudicial killing is proscribed by the TVPA but not by the CAT. *Compare* 28 U.S.C. § 1350 note § 2(a) (proscribing "torture" and "extrajudicial killing"), *with* CAT, *supra*, arts. 1-2, 16 (proscribing "torture" and "cruel, inhuman, or degrading treatment"). The TVPA reflects the broad international consensus—not limited to the CAT or to any one treaty—that victims of torture and extrajudicial killing should not be left without redress simply because the abuse occurred beyond a state's borders. *See* Restatement (Fourth) Foreign Relations Law § 413 (A.L.I. 2018) (listing torture as an offense of universal concern); S. Rep. No. 102-249, at 3-4 ("A state that practices torture and summary execution is not one that adheres to the rule of law . . . . [T]he [TVPA] is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad."); *Kadić v. Karadžić*, 70 F.3d 232, 243-44 (2d Cir. 1995) ("[T]orture and summary execution . . . are proscribed by international law.").

b. The TVPA is consistent with international comity principles

Defendant ignores the TVPA's stated purpose, instead arguing that the TVPA's reach is "inconsistent with the traditional notions of comity." Def. Supp. Mem. 11; *see Boniface*, 145 F.4th at 126 (Lynch, J., concurring) (discussing prescriptive comity). Comity is a prudential doctrine, allowing a court to consider international conflicts when deciding whether "in its discretion [to] decline to exercise subject matter jurisdiction that it already possesses." *McBee v. Delica Co.*, 417 F.3d 107, 111 (1st Cir. 2005). But given the TVPA's clear extraterritorial application, prescriptive comity has no role here. *See Maxwell Commc'n Corp. v. Societe Generale* (*In re Maxwell Commc'n Corp.*), 93 F.3d 1036, 1047 (2d Cir. 1996) ("Because the principle of comity does not limit the legislature's power and is, in the final analysis, simply a

rule of construction, it has no application where Congress has indicated otherwise.").

But even if prescriptive comity were relevant, it would pose no barrier to Plaintiffs' TVPA claims. "The only substantial question" would be "whether there is in fact a true conflict between domestic and foreign law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993) (internal quotation marks omitted). "No conflict exists, for these purposes, 'where a person subject to regulation by two states can comply with the laws of both.'" *Id.* at 799 (quoting Restatement (Third) Foreign Relations Law § 403 cmt. e (A.L.I. 1987)). Unless local law "require[d] [Defendant] to act in some fashion prohibited by the law of the United States" or "compliance with the laws of both countries [was] otherwise impossible," there is no conflict for purposes of comity. *Id.* Defendant has not attempted to show that Haitian law *required* him to torture or extrajudicially kill. To the contrary, Defendant has repeatedly argued that Haitian courts have recognized a civil complaint against Defendant for the conduct at issue here. ECF No. 47 at 3, 11-12; ECF No. 140, at 4-5. And Haiti has ratified the International Covenant on Civil and Political Rights (ICCPR), which expressly proscribes arbitrary deprivation of life and torture. ICCPR, arts. 6-7, G.A. Res. 2200A (XXI), Dec. 16, 1966, 999 U.N.T.S. 171; *U.N. Treaty Body Database, Ratification Status for CCPR*.[5] There is thus no conflict between Haitian and U.S. law that could trigger any comity concerns.

c. In any event, Congress's ability to legislate extraterritorially is not limited by international law

Even if the TVPA were in conflict with international law, its text would control. Courts and commentators uniformly reject the argument that international law limits Congress's power. *See Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting) ("*Though it clearly has constitutional authority to do so*, Congress is generally presumed not to have exceeded . . . customary

[5] tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR

international-law limits on jurisdiction to prescribe." (emphasis added)); *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983), *as amended on den. of reh'g en banc* (Feb. 15, 1984) ("[Congress] may legislate with respect to conduct outside the United States, in excess of the limits posed by international law." (citations omitted)); Restatement (Fourth) Foreign Relations Law § 402 cmt. b ("[A]n unambiguous federal statute that contravened customary-international-law limits on jurisdiction to prescribe would be controlling as a matter of federal law.").

Nor would any conflict with international law be relevant even as a canon of construction. True, "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 Besty*, 6 U.S. (2 Cranch) 64, 118 (1804); *see Boniface*, 145 F.4th at 126 (Lynch, J., concurring) (citing this canon). But this canon cannot overcome the TVPA's plain text: Defendant has offered no plausible construction under which the statute would not apply extraterritorially, and there is none. *See Mohamad*, 566 U.S. at 457 & n.4 (rejecting "contention that the TVPA must be construed in light of international agreements" because international law principles "cannot overcome the statute's text"); *Drummond*, 782 F.3d at 606 ("[I]nternational law does not determine our interpretation of the TVPA. The TVPA and claims brought thereunder are governed by its language, its legislative history, and general principles of domestic law.").

4. Constitutional avoidance does not permit rewriting clear text

Defendant suggests that the TVPA should be construed narrowly to avoid possible constitutional questions. Def. Supp. Mem. 6-7; *see Boniface*, 145 F.4th at 126 (Lynch, J., concurring) (citing the canon of constitutional avoidance). But this canon, too, is appropriate only as "a tool for choosing between competing plausible interpretations of a statutory text." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005). It "is not a license for the judiciary to rewrite the language enacted by the legislature." *Salinas v. United States*, 522 U.S. 52, 59-60 (1997).

Tellingly, Defendant does not analyze the TVPA's text, much less offer a reading that would render it inapplicable here. There is no ambiguity for the constitutional avoidance canon to resolve. And, as explained in the next section, there is no constitutional concern to avoid.

B. The TVPA Is A Constitutional Exercise Of Congress's Powers

Congress clearly intended the TVPA to provide victims of torture and extrajudicial killing a remedy without regard to territorial or nationality limits. It had two independent sources of constitutional authority to do so.

1. The TVPA is an exercise of Congress's Offenses Clause authority

The Offenses Clause gives Congress the power "[t]o define and punish . . . Offences against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. Congress expressly invoked this enumerated power when enacting the TVPA, *see* S. Rep. No. 102-249, at 5-6, and the statute fits comfortably within it.

a. Torture and extrajudicial killing are paradigmatic offenses against the law of nations

There is little doubt that torture and extrajudicial killing violate the law of nations. "[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." *Sosa*, 542 U.S. at 732 (quoting *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)). And "[t]he prohibition against summary execution . . . is similarly universal, definable, and obligatory" under international law. *In re Est. of Ferdinand Marcos, Hum. Rts. Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); *see Kadić*, 70 F.3d at 243-44. Codifications of international law, Congress, courts, and commentators have uniformly recognized both torture and extrajudicial killing as conduct that is universally condemned under international law. *E.g.*, CAT, *supra*, arts. 2, 14; Universal Declaration of Human Rights, art. 5, G.A. Res. 217A (III), Dec. 10, 1948, U.N. Doc. A/810 at 71; ICCPR, *supra*, arts. 6-7; H.R. Rep.

No. 102-367, at 2-3; *Doe I v. Cisco Sys., Inc.*, 73 F.4th 700, 716 n.7 (9th Cir. 2023) ("[T]he prohibition against state torture has attained *jus cogens* status—the highest and most universal norm of international law."); Restatement (Fourth) Foreign Relations Law § 413.

Defendant does not dispute that torture and extrajudicial killing were universally condemned under the law of nations at the time of the TVPA's enactment. Rather, Defendant argues that Congress's Offenses Clause authority is limited to punishing offenses prohibited by "the law of nations as it was known in 1787-1789." Def. Supp. Mem. 9. That static view of the law of nations conflicts with precedent and the original public meaning of the Offenses Clause.

The Supreme Court looks to the contemporary understanding of the law of nations when reviewing Congress's exercise of authority under the Offenses Clause. In *United States v. Arjona*, for example, the Court upheld as a valid exercise of the Offenses Clause a federal statute criminalizing the counterfeiting of "notes, bonds, and other securities of foreign governments." 120 U.S. 479, 480, 485-86 (1887). Because such foreign notes were unknown at the founding, the *Arjona* defendant argued that his crime fell outside the Offenses Clause. *Id.* The Court rejected this argument, explaining that the law of nations had long required countries to prevent counterfeiting of foreign currency and that these principles "may, with just propriety, be extended to the protection of this more recent custom among bankers of dealing in foreign securities." *Id.* at 486. Likewise, in *Ex parte Quirin*, the Court upheld Congress's Offenses Clause power to create military tribunals, citing current international practice and treaties alongside historical practice. 317 U.S. 1, 26-28, 32-37 (1942); *see Sosa*, 542 U.S. at 724-25 (explaining that ATS reaches claims "based on the present-day law of nations").

This is consistent with historical evidence establishing that "[i]t would have been anomalous for the framers to have viewed 'offenses against the law of nations' as a static

grouping," because they "understood the law of nations to be, at least in part, positive law derived from the customs of nations." Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations"*, 21 Vand. J. Transnat'l L. 865, 880 (1988); *accord* Brief of Amici Curiae Professors of International Law in Support of Plaintiffs-Appellees at 10-14, *Boniface*, 145 F.4th 98 (No. 24-1411); William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 Geo. L.J. 1559, 1581-83 (2018); Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 Nw. U. L. Rev. 1675, 1732-33 (2012); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations"*, 42 Wm. & Mary L. Rev. 447, 477-83 (2000).

b. The Offenses Clause authorizes civil remedies

Defendant suggests that the TVPA is unique in establishing a civil cause of action for extraterritorial torture and extrajudicial killing, but nowhere explains why the civil nature of the remedy would bear on the statute's constitutionality. *See* Def. Supp. Mem. 9, 12. Thus, any such argument is forfeited. In any event, limiting the Offenses Clause to criminal enforcement would be atextual and inconsistent with two centuries of historical practice.

The text of the Offenses Clause grants Congress power to define "offenses" against the law of nations and to "punish" them. Although these terms may now be colloquially associated with criminal enforcement, neither was confined to criminal conduct or criminal sanctions at the founding. *See* Stephens, 42 Wm. & Mary L. Rev., *supra*, at 454, 483-525 (tracing historical understandings of the Offenses Clause and concluding that "'offenses' encompasses all violations of international law, regardless of whether criminal or civil sanctions apply, and the power to 'define and punish' includes the power to impose civil or criminal regulations and sanctions"). "'[O]ffenses' is used in the Constitution in a more comprehensive sense than are

the terms 'crimes' and 'criminal prosecutions.'" *Ex parte Grossman*, 267 U.S. 87, 117 (1925). And the term "punish" has long been understood to encompass both civil and criminal consequences. *See Wilkes v. Wood*, Lofft. 1, 18-19, 98 Eng. Rep. 489, 498-99 (K.B. 1763) ("Damages are designed not only as satisfaction to the injured person, but likewise as a punishment to the guilty."); *United States v. Chouteau*, 102 U.S. 603, 611 (1880) (A "penalty [that] may be recovered in a civil action" is still "a punishment for the infraction of the law.").

Indeed, the First Congress immediately exercised its Offenses Clause power to provide for civil remedies when it enacted the ATS as part of the First Judiciary Act of 1789. *See* Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 Yale L.J. 2202, 2235-36 & n.193 (2015) ("[T]he ATS falls squarely within Congress's authority under the Offenses Clause."); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 Yale L.J. 1762, 1809 (2009) ("The Law of Nations Clause is also the constitutional basis for the [ATS] . . . ."). The ATS confers jurisdiction over *only* civil claims—specifically, "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. This early example is powerful evidence that Congress's Offenses Clause authority is not limited to criminal punishment. *See, e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565, 575-77 (2014) (looking to actions of First Congress when assessing original understanding of the Establishment Clause).

That civil remedies are permitted under the Offenses Clause is further supported by recent Supreme Court authority. In *Sosa*, the Court held that the ATS is a purely jurisdictional statute, but one that "enable[s] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." 542 U.S. at 712. *Sosa* recognized that "torts in violation of the law of nations would have been recognized within the common law of the

time" of the ATS's enactment, noting that its drafters contemplated tort recoveries for "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 714-15. Although the defendant in *Sosa* argued that offenses against the law of nations were historically handled as exclusively criminal offenses, the Supreme Court disagreed. *Id.* at 724. The Court explained that the Continental Congress viewed "a private remedy . . . necessary for diplomatic offenses under the law of nations" and recognized that a remedy for "international law violations, encompassing both criminal prosecution . . . and compensation to those injured through a civil suit, would have been familiar to the founding generation." *Id.* (quoting Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DePaul L. Rev. 433, 444 (2002)). Given that the ATS was enacted under the Offenses Clause, *see, e.g.*, Cleveland & Dodge, 124 Yale L.J., *supra*, at 2235 & n.193, *Sosa* further supports interpreting the Clause to include authority to provide civil remedies.

Indeed, multiple modern statutes grounded in Congress's Offenses Clause authority provide civil remedies for violations of international law. 18 U.S.C. § 2333(a) (authorizing civil actions against terrorists and their sponsors); 18 U.S.C. § 1595 (providing damages for victims of slavery and forced labor); 28 U.S.C. § 1605A(a)(1), (h)(7) (allowing suits against foreign states for torture, extrajudicial killing, and related offenses). Defendant provides no reason why these statutes would be constitutionally suspect or why the TVPA should be treated differently.

c. Exercise of jurisdiction in this case is consistent with, and not limited by, international law

Finally, Defendant argues that jurisdiction under the TVPA here transcends limitations on jurisdiction found in international law and incorporated into the Offenses Clause. Def. Supp. Mem. 12-13 (citing *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1249 (11th Cir. 2012) (Barkett, J., concurring)). But Defendant's interpretation of international law's jurisdictional

principles is wrong: the Offenses Clause authorizes extraterritorial legislation, and torture and extrajudicial killing are recognized by the law of nations as subject to universal jurisdiction. In any event, any international law limitations in the Offenses Clause apply to proscribed conduct, not procedural matters, which are left to Congress.

i. The Offenses Clause authorizes Congress to punish extraterritorial violations of international law by foreign nationals

The Offenses Clause authorizes Congress to define and punish violations of international law even when the underlying conduct occurs abroad and involves only foreign nationals. As the Supreme Court explained in *Sosa*, the framers would have understood the "primary offenses" against the law of nations to include "violation of safe conducts, infringement of the rights of ambassadors, and piracy." 542 U.S. at 715, 724 (citing 4 William Blackstone, Commentaries on the Laws of England 68 (1769)). Each of these offenses necessarily involve foreign conduct or foreign nationals. Safe-conduct violations and violations of ambassadors' rights necessarily involve foreign nationals, and piracy is, by definition, extraterritorial.

Longstanding congressional practice reflects this same understanding. In 1819, Congress exercised its authority under the Offenses Clause to amend the 1790 Crimes Act to ensure that its prohibition on piracy (conduct already outside U.S. territory) extended to "any person or persons whoever"—including foreign nationals. *See* Brief of Amici Curiae, *supra*, at 9 (citing An Act to Protect the Commerce of the United States and to Punish Piracy, ch. 77, § 5, 3 Stat. 510, 513-14 (1819)). Since then, Congress has repeatedly exercised its authority to punish violations of the law of nations committed abroad and by foreign nationals so long as the perpetrator (like

Defendant here) is properly subject to personal jurisdiction in U.S. courts.[6] Imposing new territorial or nationality restrictions on Congress's Offenses Clause power would upend this settled practice and cast doubt on numerous statutes beyond the TVPA—a result Defendant provides no authority to justify.

ii. Torture and extrajudicial killing are universally condemned offenses over which any state may exercise jurisdiction

Torture and extrajudicial killing are universally condemned offenses for which the international community recognizes universal jurisdiction. *See, e.g.*, *Sosa*, 542 U.S. at 762 (Breyer, J., concurring) (international law reflects "procedural agreement that universal jurisdiction exists to prosecute a subset" of "universally condemned behavior," including torture); *Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012) (recognizing torture and extrajudicial killing as *jus cogens* offenses); *Marcos*, 25 F.3d at 1475; Restatement (Fourth) Foreign Relations Law § 413 (A.L.I. 2018). Indeed, in the concurrence in *Bellaizac-Hurtado* on which Defendant relies, Judge Barkett listed torture as a canonical example of a universal-jurisdiction offense. 700 F.3d at 1260-61 (Barkett, J., concurring) (contrasting drug trafficking with *jus cogens* offenses such as torture over which any state may exercise jurisdiction).

As discussed above, *see supra* Section I.A.3.a, Article 14 of the CAT embraces a civil remedy for torture victims unconstrained by territorial limits. By the time the TVPA was first introduced in Congress, the CAT had been ratified by 54 countries and signed by an additional 18. *U.N. Treaty Body Database, Ratification Status for CAT*.[7] That widespread international

[6] *E.g.*, 18 U.S.C. §§ 1091(e)(2)(D) (genocide), 1116(c)(3) (murder of foreign officials), 1201(e)(3) (kidnapping of internationally protected persons), 1596(a)(2) (slavery and certain trafficking offenses), 1651 (piracy), 2332f(b)(2)(C) (terrorist bombing), 2332i(b)(4) (nuclear terrorism), 2340A(b)(2) (torture); 49 U.S.C. § 46502(b)(2)(C) (aircraft piracy).

[7] tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CAT

acceptance of the CAT is strong evidence of the codification of an international law norm embracing universal civil jurisdiction over torture claims.

Indeed, legislative history shows that Congress expressly concluded that the TVPA's extraterritorial applications were grounded in international law. The Senate Report explained that "legislation allowing for the civil suits against torture occurring abroad is by no means unknown" and that "[s]tates have the option, under international law, to decide whether they will allow a private right of action in their courts" for such violations. S. Rep. No. 102-249, at 5. Ultimately, Congress decided that exercising civil jurisdiction over two universally condemned offenses, constrained by personal jurisdiction, exhaustion, and other limitations, was grounded in international law. *See Kiobel*, 569 U.S. at 117 (in enacting the TVPA, Congress identified torture and extrajudicial killing as violations of "specific, universal, and obligatory" international law norms). That judgment is entitled to deference. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820) (since the law of nations "cannot, with any accuracy, be completely ascertained and defined in any public code recognised by the common consent of nations . . . , there is a peculiar fitness in giving the power to define as well as to punish").

Other countries' practices confirm Congress's judgment. While universal jurisdiction is most widely exercised in criminal statutes, "the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself." *Sosa*, 542 U.S. at 762-73 (Breyer, J., concurring). "Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well." *Id.* at 763. In any event, international unanimity is not required. Congress was entitled to exercise its judgment to conclude that jurisdiction over torture and extrajudicial killing occurring abroad involving only foreign nationals is sufficiently grounded in

international law. *See Smith*, 18 U.S. (5 Wheat.) at 159.

iii. In any event, international law does not constrain Congress's procedural choices

Even without an international law norm favoring universal civil jurisdiction, nothing in the Offenses Clause barred Congress from adopting it in the TVPA. Congress's legislative power is not constitutionally constrained by customary international law. *See, e.g.*, *Hartford Fire*, 509 U.S. at 815 (Scalia, J., dissenting); *Pinto-Mejia*, 720 F.2d at 259; Restatement (Fourth) Foreign Relations Law § 402 cmt. b. True, the Offenses Clause incorporates international law principles by providing Congress with authority to define and punish "Offenses" that violate "the Law of Nations." U.S. Const. art. I, § 8, cl. 10. But the clause expressly gives *Congress* the power to "define," and, in any event, "the law of nations" is textually linked to the *substantive* offenses that Congress may regulate. It does not limit *how* Congress may do so, nor tether Congress's enforcement choices to international law norms. Subject only to constitutional constraints outside the Offenses Clause, Congress was thus free to shape its sanctions for "Offences against the Law of Nations."

2. The TVPA is an exercise of Congress's authority to implement treaties under the Necessary and Proper Clause

Congress had an independent constitutional basis for enacting the TVPA: its authority under the Necessary and Proper Clause to implement the United States's treaty obligations. U.S. Const. art. I, § 8, cl. 18. "If [a] treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *see, e.g.*, *United States v. Rife*, 33 F.4th 838, 845-48 (6th Cir. 2022) (upholding a federal statute criminalizing sexual conduct with a minor abroad as a valid exercise of Congress's authority under the Necessary and Proper Clause to implement a treaty); *United States v. Noel*, 893 F.3d 1294, 1302 (11th Cir. 2018) (same

for a federal statute criminalizing hostage taking abroad). Both elements of this test are satisfied.

First, several valid international treaties ratified by the United States prohibit torture and extrajudicial killing. *See* CAT, *supra*, arts. 2, 14; ICCPR, *supra*, arts. 6-7. Most relevant here is the CAT, which requires signatories to "ensure in [their] legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." CAT, *supra*, art. 14.

Second, Congress reasonably concluded that enactment of the TVPA was a necessary and proper exercise of its authority to satisfy U.S. treaty obligations. Congress expressly stated that "[t]his legislation will carry out the intent of the [CAT] . . . . The [CAT] obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. This legislation will do precisely that." S. Rep. No. 102-249, at 3; *see also* H.R. Rep. No. 102-367, at 3. And, in a report to the U.N. Committee Against Torture, the State Department listed enactment of the TVPA as an action the United States had taken to implement Article 14 of the CAT. Comm. Against Torture, Initial Report of the United States, ¶ 281, U.N. Doc. CAT/C/28/Add.5 (1999). While the Senate, when providing its advice and consent, included an understanding that legislation providing for such universal jurisdiction was not *required* by the CAT, *see* S. Treaty Doc. No. 100-20, *supra*, such legislation was certainly a reasonable means of implementing the treaty. That is all that is required to find it within Congress's necessary and proper authority. *See United States v. Comstock*, 560 U.S. 126, 134 (2010) (relevant inquiry is "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power").

II. CERTIFICATION OF AN INTERLOCUTORY APPEAL IS WARRANTED

Should this Court deny Defendant's motion, Plaintiffs support this Court's certification of its order for an interlocutory appeal under 28 U.S.C. § 1292(b). The issues here are controlling

questions of law, and an immediate appeal would materially advance the ultimate termination of this litigation and serve judicial economy by permitting the First Circuit to address these threshold questions before this Court and the parties undertake a retrial on damages.

CONCLUSION

The Court should deny Defendant's motion for reconsideration and certify its order for immediate appeal under 28 U.S.C. § 1292(b).

Dated: December 5, 2025

Respectfully submitted,

DAVID BONIFACE, NISSANDÈRE MARTYR, JUDERS YSEMÉ

By their attorneys,

/s/ Joseph R. Palmore

MORRISON & FOERSTER LLP
Joseph R. Palmore (pro hac vice)
JPalmore@mofo.com
Brian R. Matsui (pro hac vice)
BMatsui@mofo.com
2100 L Street NW, Suite 900
Washington, DC 20037
(202) 887-1500 (telephone)

MORRISON & FOERSTER LLP
Cassandra J. Lincoln (pro hac vice)
clincoln@mofo.com
425 Market Street
San Francisco, CA 94105
(415) 268-7000 (telephone)

DENTONS US LLP
Philip A. O'Connell, Jr. (BBO# 649343)
philip.oconnelljr@dentons.com
101 Federal Street, Suite 1900
Boston, MA 02110
(617) 235-6802 (telephone)

WILSON SONSINI GOODRICH & ROSATI
Bonnie Lau (pro hac vice)
blau@wsgr.com
One Market Plaza, Spear Tower, Suite 3300
San Francisco, CA 94105-1126
(415) 947-2000 (telephone)

WILSON SONSINI GOODRICH & ROSATI
Sarah Y. Mosisa (pro hac vice)
smosisa@wsgr.com
31 West 52nd Street, Fifth Floor
New York, NY 10019
(212) 999-5800 (telephone)

CENTER FOR JUSTICE & ACCOUNTABILITY
Daniel McLaughlin (pro hac vice)
dmclaughlin@cja.org
Elzbieta T. Matthews (pro hac vice)
ematthews@cja.org
Carmen K. Cheung (pro hac vice)
ccheung@cja.org
268 Bush Street #3432
San Francisco, CA 94104
(415) 544-0444 (telephone)

CERTIFICATE OF SERVICE

I certify that on December 5, 2025, I caused a true copy of the foregoing document to be filed electronically with the Clerk of the Court using the CM/ECF system, which will notify the parties of record via electronic notification.

Dated: December 5, 2025

/s/ Philip A. O'Connell, Jr.
Philip A. O'Connell, Jr.