No. 19-8027

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DAVID BONIFACE; NISSAGE MARTYR; JUDER YSEME,

Plaintiffs-Respondents,

v.

JEAN VILIENA

Defendant-Petitioner.

On Petition for Permission to Appeal from the United States District Court for the District of Massachusetts, No. 1:17-cv-10477-ADB, Hon. Allison D. Burroughs

ANSWER OPPOSING PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. § 1292(b)

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OCTOBER 21, 2019

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INTRODUCTION

Petitioner has failed to meet the demanding standard for an interlocutory appeal under 28 U.S.C. § 1292(b) because it is well settled that (1) Congress has the constitutional power to give the TVPA extraterritorial reach; and (2) the district court has subject matter jurisdiction over Respondents' TVPA claims under the federal question statute, 28 U.S.C. § 1331. There is no substantial ground for difference of opinion on either question. In addition, there are no extraordinary circumstances warranting a departure from the final judgment rule, particularly given the harm to Respondents and the risk of piecemeal litigation were an interlocutory appeal to be granted.

STATEMENT OF FACTS

Petitioner is a legal permanent resident of the United States currently residing in Massachusetts. Complaint, Dkt. No. 1, ¶ 9. Between 2007 and 2009, as mayor of the Haitian town of Les Irois, Petitioner led his associates in a campaign of torture, killing, and persecution of perceived political opponents. Dkt. No. 1, ¶ 28. That campaign particularly targeted Respondents David Boniface, Nissage Martyr (deceased)[1] and Juders Ysemé (collectively, "Respondents"). Dkt. No. 1, ¶¶ 29-58.

[1] On March 24, 2017, one day after Petitioner was served with the Complaint, Nissage died suddenly under unexplained circumstances. Dkt. No. 87-2, ¶ 4.

Since 2007, Respondents have diligently pursued all available avenues for accountability. Dkt. No. 1, ¶ 59. They first sought justice through the criminal justice system in Haiti. Dkt. No. 1, ¶¶ 59-60. But Petitioner then fled to the United States to avoid prosecution and worked with his co-conspirators to obstruct Respondents' efforts with violence and coercion. Dkt. No. 1, ¶¶ 61-63. It ultimately became clear to Respondents that any efforts to hold Petitioner to account in Haiti would be futile. Dkt. No. 1, ¶ 64. They thus filed this action against him for torture, extrajudicial killing, and attempted extra-judicial killing under the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note) ("TVPA"), for crimes against humanity under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), and for arson under the laws of the Republic of Haiti pursuant to 28 U.S.C. § 1367. Dkt. No. 1, ¶¶ 78-124.

Following the filing of their civil suit against Petitioner, Boniface and Ysemé came under increased threats and were forced to flee Les Irois. Decl. of Ysemé In Support of Emergency Motion for Protective Order, Dkt. No. 78-1, ¶¶ 4-5. In August 2019, the district court found that Respondents "reasonably fear for their safety and are concerned about retaliation by Defendant" and had demonstrated good cause for a protective order barring Petitioner from contacting, threatening, or

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Respondents' motion to substitute Nissandère Martyr, Nissage's son, as Plaintiff was granted by the district court on August 31, 2018. Dkt. No. 56.

harassing Respondents or their witnesses. Dkt. No. 80. Boniface and Ysemé have remained in hiding throughout the pendency of this action—disconnected from their homes, families, friends and support networks for more than two years. Dkt. No. 78-1, ¶¶ 4-5.

The district court dismissed Respondents' ATS claim but concluded they had properly stated claims under the TVPA and Haitian law, allowing those remaining counts to proceed. Order on Mot. to Dismiss, Dkt. No. 56. In doing so, the district court found that the text of TVPA provided a clear indication of extraterritorial application and exercised jurisdiction over Respondents' TVPA claims through the federal question statute, 28 U.S.C. § 1331. Dkt. No. 56 at 15-16.

The district court later declined to reconsider its order, but granted Petitioner's request to certify its order for interlocutory appeal. Dkt. No. 84.

STANDARD OF REVIEW

The "general rule" is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Dig. Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994); *see also Limone v. Condon*, 372 F.3d 39, 50 (1st Cir. 2004).

This Court thus has "repeatedly emphasized that interlocutory certification under [Section] 1292(b) should be used sparingly and only in exceptional circumstances, and where the proposed intermediate appeal presents one or more

difficult and pivotal questions of law not settled by controlling authority." *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005) (internal quotations omitted); *see also Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570, 573 (1st Cir. 2004) ("Section 1292(b) is meant to be used sparingly, and appeals under it are, accordingly, hen's teeth rare."). In particular, an interlocutory appeal of a denial of a motion to dismiss a civil case for lack of jurisdiction "is perhaps unique in its incapacity permanently to affect the rights of the moving party." *United States v. Sorren*, 605 F.2d 1211, 1213 (1st Cir. 1979) (internal quotations omitted).

This Court does not automatically accept review of questions certified by district courts. To the contrary, it independently examines whether the Section 1292(b) factors are satisfied and has often denied leave to appeal. *See, e.g.*, Judgment, *Winters v. Ocean Spray Cranberries*, No. 18-8001 (1st Cir. May 8, 2019) (denying petition for interlocutory appeal); Judgment, *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, No. 12-8040 (1st Cir. Jan. 25, 2013) (same).

Under Section 1292(b), an interlocutory appeal is permitted only where three conditions are satisfied. An order must (1) involve a controlling question of law, (2) as to which there is substantial ground for a difference of opinion, and (3) the Court must conclude that an immediate appeal may materially advance the ultimate

termination of the litigation. *Caraballo-Seda*, 395 F.3d at 9. "If any one element is unsatisfied, leave to appeal cannot be granted." *In re Air Cargo, Inc*., Civil Action No. CCB-08-587, 2008 WL 2415039, at *3 (D. Md. June 11, 2008) (citation omitted). "The movant has the obligation of showing that the § 1292(b) criteria are met. . . . And, the burden is a heavy one." *Bank of New York v. Hoyt*, 108 F.R.D. 184, 190 (D.R.I. 1985) (internal citation omitted).

REASONS WHY THE PETITION SHOULD BE DENIED

This Court should deny Petitioner's request for an interlocutory appeal because he is unable to satisfy Section 1292(b)'s demanding standard.

First, settled law leaves no doubt, let alone a *substantial* ground for a difference of opinion, that Congress has the constitutional power to give the TVPA extraterritorial reach. Petitioner cites no authority to support his contrary position.

Second, it is equally settled that the district court has subject matter jurisdiction over Respondents' TVPA claims under the federal question statute, 28 U.S.C. § 1331. The TVPA is plainly a law of the United States and numerous courts over two decades have consistently applied the plain language of Section 1331 to exercise jurisdiction over TVPA claims—whether or not there is jurisdiction under the ATS.

Finally, there are no extraordinary circumstances warranting a departure from the final judgment rule, particularly given the harm to Respondents and the risk of piecemeal litigation were an interlocutory appeal to be granted.

I. THERE IS NO SUBSTANTIAL GROUND FOR A DIFFERENCE OF OPINION ON THE DISTRICT COURT'S JURISDICTION OVER RESPONDENTS' TVPA CLAIMS.

Petitioner cannot demonstrate that there exists a "substantial ground for a difference of opinion" on the issues he seeks to raise on appeal. Long-settled law makes clear that (a) the TVPA's explicitly extraterritorial reach represents a proper exercise of Congress's constitutional authority and (b) the district court can assert jurisdiction over Respondent's TVPA claims pursuant to Section 1331, whether or not it has jurisdiction under the ATS.

A. The TVPA is an Explicitly Extraterritorial Statute Whose Application to Conduct Abroad Has Been Routinely Upheld.

For more than two decades since Congress's enactment of the TVPA, courts have routinely exercised jurisdiction over extraterritorial TVPA claims. The text and legislative history of the TVPA are clear: Congress intended for the statute to apply extraterritorially, as is its constitutional prerogative. As the district court correctly noted, not a single court has ever held otherwise. Dkt. No. 84 at 10-14.

The TVPA explicitly involves foreign authority, foreign territory, and foreign conduct: it applies to violations committed "under actual or apparent authority, or color of law, of any *foreign* nation," and considers "adequate and available remedies

in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350, note § (2)(a)-(b) (emphasis added).

Congress has the constitutional power to give the TVPA extraterritorial reach. The Constitution explicitly authorizes Congress to "define and punish . . . Offenses against the Law of Nations." U.S. Const., art. I, section 8. "The Offenses Clause allows Congress to prescribe punishment for conduct that the United States has an international legal obligation to prevent." Restatement (Fourth) of Foreign Relations Law § 403 (2018) (citing *United States v. Arjona*, 120 U.S. 479, 488 (1887)). Few international norms are more firmly established than the prohibitions against torture and extrajudicial killings, including in treaties ratified by the United States.[2]

The TVPA's legislative history also states specifically that the statute has extraterritorial application. *See, e.g.,* S. Rep. No. 102-249, at 3-4 (1991) (describing the TVPA as "providing a civil cause of action in U.S. courts for torture committed abroad"). As a result, "jurisdiction over TVPA actions under § 1331 is not constrained by the presumption against extraterritoriality[.]" *Doe v. Drummond Co.*, 782 F.3d 576, 602 (11th Cir. 2015); *see also* Restatement (Fourth) of Foreign

[2] *See, e.g.*, Universal Declaration of Human Rights, art. 5, G.A. Res. 217A (III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 6-7, G.A. Res. 2200A (XXI) (Dec. 16, 1966) (entered into force March 23, 1976); Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, G.A. Res. 39/46 (Dec. 10, 1984) (entered into force June 26, 1987).

Relations Law § 404 ("The presumption against extraterritoriality is not a limit on Congress's power to legislate.") (citing *Morrison v. Nat'l Australia Bank Ltd.,* 561 U.S. 247, 255 (2010)).

Petitioner argues that the TVPA constitutes "an unconstitutional exercise of legislative authority," and that the Supreme Court's concerns about extraterritoriality over the ATS, as expressed in *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013), should apply equally to claims brought under the TVPA. Petition 2, 14.

Kiobel is not relevant here. In that case, the Court could find no clear indication that Congress intended the ATS to have extraterritorial effect. *See* 569 U.S. at 118 ("nothing in the text of the [ATS] suggests that Congress intended causes of action recognized under it to have extraterritorial reach."). By contrast, and as Petitioner himself acknowledges, the text and legislative history of the TVPA give "clear indication of an extraterritorial application." *Drummond Co.*, 782 F.3d at 602 (quoting *Morrison,* 561 U.S. at 255); Petition 14.

Petitioner also contends that applying the TVPA to foreign conduct—as Congress plainly intended—would be unconstitutional. In particular, he contends that the "law of nations" does not permit one sovereign to exercise jurisdiction over the affairs of another sovereign. Petition 11-12. But the "law of nations" does not control Congress's constitutional authority to legislate. *See Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 50-51 (2d Cir. 2014), *cert. denied, Khan v.*

Chowdhury, 135 S. Ct. 401 (2014) (finding "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").

It is thus not surprising that courts throughout the country (including in this Circuit) have consistently exercised jurisdiction over TVPA claims where plaintiff's injuries occurred entirely abroad. In doing so, none has ever even suggested that the statute is an improper exercise of Congress's constitutional authority. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 199 (D. Mass. 1995) (entering judgment pursuant to the TVPA for torture and extrajudicial killing in Guatemala); *Warfaa v. Ali,* 33 F. Supp. 3d 653, 659 (E.D. Va. 2014), *aff'd,* 811 F.3d 653 (4th Cir. 2016) ("The language of the TVPA, which creates civil liability for extrajudicial killing and torture carried out by an individual with 'actual or apparent authority, or color of law, of any foreign nation,' naturally contemplates conduct occurring in the territory of a foreign sovereign."); *Drummond Co.*, 782 F.3d at 601-02 (holding that the TVPA applies extraterritorially); *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (affirming TVPA judgment for torture in El Salvador) (cited with approval in *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 458 (2012) (affirming dismissal not because TVPA claims arose abroad, but because the defendant was not an "individual")); *see also Kiobel,* 569 U.S. at 125 (Kennedy, J., concurring) ("Many serious concerns with

respect to human rights abuses committed *abroad* have been addressed by Congress in statutes such as the Torture Victim Protection Act. . . . .") (emphasis added).

Petitioner seeks to recast the concept of international comity as a limit on Congress's constitutional authority to enact laws, such as the TVPA, with extraterritorial application.[3] Petitioner offers no controlling authority for that novel argument.[4] Nor would a rule of construction construing an ambiguous statute against

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[3] Petitioner's argument also fails to acknowledge that Congress has enacted numerous statutes that explicitly provide for civil or criminal jurisdiction over extraterritorial conduct in other contexts. *See, e.g.*, 18 U.S.C. § 1596(a)(2) (human trafficking); 18 U.S.C. § 1091(e)(2)(D) (genocide); 18 U.S.C. § 1651 (piracy); 18 U.S.C. § 2442(c)(3) (use of child soldiers); 18 U.S.C. § 37(b)(2) (violence at international airports); 18 U.S.C. § 1116(c) (murder of foreign officials or internationally protected persons); 18 U.S.C. § 1201(e) (kidnapping of internationally protected person); 18 U.S.C. § 2332f(b)(2)(C) (terrorist bombings) 18 U.S.C. § 2332i(b) (nuclear terrorism); 18 U.S.C. § 2280(b) (violence against maritime navigation); 49 U.S.C. § 46502(b)(2)(C) (aircraft piracy); 18 U.S.C. § 2339A (material support to terrorists).

[4] It is telling that Petitioner draws on Justice Scalia's *dissent* in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), to argue that the exercise of jurisdiction over extraterritorial conduct pursuant to the TVPA would offend notions of international comity. Petition 13-14. In *Hartford Fire*, the Supreme Court *upheld* the extraterritorial application of the Sherman Act even after considering the principle of international comity. *See, e.g., United States v. Nippon Paper Indus. Co.,* 109 F.3d 1, 8 (1st Cir. 1997) (noting that "the *Hartford Fire* Court gave short shrift" to the defendant's international comity argument). In addition, the issue in Petitioner's other cited cases was whether Congress *intended* the underlying statutes, 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 844(a), to apply extraterritorially. *See United States v. Hayes*, 653 F.2d 8, 15 (1st Cir. 1981) ("Thus, we must determine from the legislative history and the nature of the offense whether one can *infer* a Congressional intent that the provision apply to ships on the high seas.") (emphasis added); *United States*

an application supposedly violating the "law of nations" have any relevance here. Petition 13-14. "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." *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996); *see also McBee v. Delica Co.*, 417 F.3d 107, 111 (1st Cir. 2005) ("We reject the notion that a comity analysis is part of subject matter jurisdiction. Comity considerations . . . are properly treated as questions of whether a court should, in its discretion, decline to exercise subject matter jurisdiction that it already possesses."). Because the TVPA expressly applies extraterritorially, it is unsurprising that Petitioner cites no case where a court has dismissed TVPA claims on the grounds of comity, let alone found the TVPA unconstitutional on that basis. There exists no difference of judicial opinion on this question at all, much less the kind of substantial difference required for Section 1292(b) review.

B. For More Than Two Decades, Courts, Including Those In This Circuit, Have Routinely Exercised Jurisdiction Over TVPA Claims Pursuant To Section 1331.

It is equally settled that courts can exercise jurisdiction over TVPA claims under the federal question statute. Petitioner thus cannot meet his burden of

v. Cafiero, 242 F. Supp. 2d 49, 53 (D. Mass. 2003) (same). These cases are inapposite given that the TVPA is explicitly extraterritorial in reach.

demonstrating that there is substantial ground for a difference of opinion on this issue, either.

The text of Section 1331 is straightforward: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The TVPA is plainly a law of the United States and, as such, the federal courts' jurisdiction over the statute is proper under Section 1331. What Petitioner attempts to deride as "tautological reasoning," is the logical application of the text of Section 1331. Petition 3. And the TVPA's legislative history expressly contemplated federal-question jurisdiction. *See* S. Rep. No. 102-249, at 3-5 (1991) ("Congress clearly has authority to create a private right of action for torture and extrajudicial killings committed abroad. Under article III of the Constitution, the Federal judiciary has the power to adjudicate cases 'arising under' the 'law of the United States.'").

The legislative history also makes clear that the statute was meant to implement the United States' international treaty obligations under the Convention Against Torture, which requires state parties to provide all victims of torture with "redress and … an enforceable right to fair and adequate compensation." G.A. Res. 39/46, art. 14; *see, e.g.,* S. Rep. No. 102-249, at 3 (1991) (stating that the TVPA's purpose is to "carry out the intent of the [Convention against Torture] . . . . This legislation will do precisely that—by making sure that torturers and death squads

will no longer have a safe haven in the United States."). Through the TVPA, Congress domesticated the United States' international obligations under the Convention Against Torture by creating a federal cause of action that could be pursued in federal court.

Courts have thus long exercised jurisdiction over TVPA claims under Section 1331. *See Gramajo*, 886 F. Supp. at 178 ("The case thus 'arises under' the laws of the United States for purposes of federal question jurisdiction under 28 U.S.C. § 1331. . . . This Court therefore has subject matter jurisdiction to hear plaintiff['s] TVPA claims."); *Drummond Co.*, 782 F.3d at 601 ("Our jurisdiction to consider Plaintiffs' TVPA claims is grounded . . . in 28 U.S.C. § 1331, the general federal question jurisdiction statute."); *Haim v. Neeman*, Civil Action No. 12-cv-351 (JLL), 2012 WL 12905235, at *3 (D.N.J. Aug. 29, 2012) (same); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1145 n.2 (E.D. Cal. 2004) (same); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1354-55 (S.D. Fla. 2001) (same); *Penaloza v. Drummond Co., Inc.*, 384 F. Supp. 3d 1328, 1340 n. 6 (N.D. Ala. 2019) (same).

There is nothing in Petitioner's recitation of the TVPA's legislative history that defeats the application of Section 1331's plain text here. Petitioner mischaracterizes Judge Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), as standing for the proposition that the TVPA was passed in order to correct a jurisdictional defect in the ATS. Petition 9-

10. As a result, Petitioner argues, jurisdiction over TVPA claims is necessarily tied to jurisdiction over ATS claims. Petition 9-10. That is not what Judge Bork said. Instead, he noted that Congress intended the TVPA to extend "a clear and specific remedy" through a tailored statutory private right of action to U.S. citizens and aliens *alike* for torture and extrajudicial killing committed outside of the United States. *See Tel-Oren*, 726 F.2d at 808-11.

Indeed, courts routinely treat their jurisdiction over TVPA claims as unrelated to their jurisdiction over ATS claims. *See, e.g., Warfaa*, 811 F.3d at 657 ("the TVPA . . . provides a jurisdictional basis separate from the ATS"); *Drummond Co.*, 782 F.3d at 601 ("the TVPA provides an independent action for claims of extrajudicial killing and torture"); *Chowdhury,* 746 F.3d at 45 (reversing trial judgment regarding ATS claims as barred by *Kiobel* while affirming judgment regarding TVPA claims).

The district court cited only one contrary case linking ATS and TVPA jurisdiction, but Petitioner declines to cite it. *See* Dkt. No. 84 at 16-17 (citing *Chen Gang v. Zhao Zhizhen*, No. 3:04CV1146 RNC, 2013 WL 5313411, at *4 (D. Conn. Sept. 20, 2013)). For good reason. A single unpublished district court decision with no reasoning on the relevant question does not create a *substantial* ground for a difference of opinion, particularly given the weight of settled law to the contrary. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) (noting that "a stray district court opinion or two does not herald a jurisprudential

tangle"); *see also In re Air Cargo, Inc.*, 2008 WL 2415039, at *3 ("[I]t is not dispositive to show a lack of unanimity of authorities in dealing with a complicated or confusing area of law.").

Chen Gang was wrong in any event. As the only support for its conclusion that jurisdiction under the TVPA is contingent on jurisdiction under the ATS, *Chen Gang* misinterprets a truncated quotation from *Kadic v. Karadzĭć*, 70 F.3d 232, 246 (2d Cir. 1995): "Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute." But *Kadic* stands for no such proposition, as its next sentence and citation to *Gramajo* make clear: "The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act *and also under the general federal question jurisdiction of section 1331*, *see Xuncax v. Gramajo,*[5] 886 F. Supp. 162, 178 (D. Mass. 1995)." *Kadic*, 70 F.3d at 246 (emphasis added). Rather, the principal issue in *Kadic* was whether federal question jurisdiction provides *its own independent basis* for subject-matter jurisdiction over claims alleging violations of international law in instances where no other statutorily authorized causes of action like the TVPA govern, an issue *Kadic* ultimately left

[5] *Gramajo* is the long-standing District of Massachusetts decision upholding TVPA jurisdiction under Section 1331. 886 F. Supp. at 178.

unresolved. *Id*.[6] In a subsequent decision, the same court appears to have recognized its own error, noting that "[u]nlike the ATS, the TVPA confers jurisdiction on federal courts over wholly extraterritorial claims." *See Chen Gang v. Zhao Zhizhen*, No. 3:04-CV-1146(RNC), 2018 WL 4693949, at *2 (D. Conn. Sept. 30, 2018).

Nor does *Singh v. G.K*, the only other case cited by the district court on the issue, draw Petitioner any closer to establishing a substantial ground for a difference of opinion. *Singh v. G.K.*, which Petitioner also fails to cite, dismissed plaintiffs' claims for lack of *personal* jurisdiction over the defendant. No. 1:15-CV-05372 (ALC), 2016 WL 3181149, at *6 (S.D.N.Y. June 2, 2016).[7] *Singh* explicitly did not rule on whether the court could exercise subject matter jurisdiction over plaintiffs' TVPA claims, nor did it need to. Instead, *Singh* observes in *dicta* that subject-matter jurisdiction over plaintiffs' TVPA claims is "a thorny issue" based on the same misreading of *Kadic* discussed above. *Id.*

[6] *Kadic*, 70 F.3d at 246 ("We recognized the possibility of section 1331 jurisdiction in *Filártiga,* 630 F.2d at 887 n. 22, but rested jurisdiction solely on the applicable [ATS]. Since that Act appears to provide a remedy for the appellants' allegations of violations related to genocide, war crimes, and official torture, and the [TVPA] also appears to provide a remedy for their allegations of official torture, their causes of action are statutorily authorized, and, as in *Filártiga,* we need not rule definitively on whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on section 1331 jurisdiction.").

[7] Petitioner does not contest the issue of personal jurisdiction.

II. THERE ARE NO "EXCEPTIONAL CIRCUMSTANCES" WARRANTING IMMEDIATE APPELLATE REVIEW

Petitioner fails to show any exceptional circumstances justifying an interlocutory appeal, particularly given the harm to Respondents and the likelihood of piecemeal litigation were the petition to be granted. As this Court has stated, "[a]n interlocutory denial of a motion to dismiss a civil case for lack of jurisdiction . . . 'is perhaps unique in its incapacity permanently to affect the rights of the moving party' . . . [and] courts have not found that the 'inconvenience' to a party of awaiting review of a jurisdictional question justifies permitting immediate review." *Sorren*, 605 F.2d at 1214; *see also N. Laminate Sales, Inc. v. Davis,* 403 F.3d 14, 23 (1st Cir. 2005) ("'[T]he denial of a motion to dismiss a complaint for a lack of jurisdiction over the defendant's person . . . is not a final adjudication and generally is not appealable'" on an interlocutory basis.").

Nor is Petitioner's hypothetical future *pro se* status sufficient to depart from this Court's general rule against interlocutory appeals. Dkt. No. 84 at 17-18.

First, Petitioner is currently represented by *pro bono* counsel in these proceedings. His future *pro se* status is speculative. Respondents have no means of determining Petitioner's future ability to hire legal counsel given that Petitioner has refused to disclose any information about his income and assets in response to Respondents' discovery requests.

Second, counsel for Petitioner has exhaustively briefed the TVPA's constitutionality three times (twice in the district court and now in the petition). Even if Petitioner proceeds *pro se* after final judgment, he will be able to adapt that briefing. This Court might also appoint an amicus to further address the issue if necessary. *See, e.g.*, *Guerro v. Mulhearn*, 498 F.2d 1249, 1251 (1st Cir. 1974) (discussing appointing amicus curiae in *pro se* appeal to brief a specific question); Order, *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008) (No. 06-2683) (appointing amicus).

Further, granting an interlocutory appeal would prejudice Respondents. The district court's Certification Order focused exclusively on the Petitioner's circumstances but overlooked the impact of certification (and a likely stay that would follow) on Respondents. As recognized in the district court's protective order, Respondents have demonstrated good cause to conclude that Petitioner poses a threat to them and to witnesses in light of the long-standing and ongoing pattern of threats and intimidation by Petitioner and his associates. *See* Dkt. No. 80. Further delay in these proceedings, which were initiated in March 2017, would provide additional time for Petitioner to threaten and intimidate Respondents and their witnesses. Already, one of the original plaintiffs died under unexplained circumstances the day after Petitioner was served in this matter, and Respondents Boniface and Ysemé

have been forced to live in hiding for over two years as they await resolution of this action. Dkt. No. 87-2, ¶¶ 4-6.

Finally, granting Petitioner's request for an interlocutory appeal would run counter to this Court's "policy preference against piecemeal litigation." *Caraballo-Seda*, 395 F.3d at 9. Respondents have reserved their right to appeal the district court's dismissal of their ATS claims after a final judgment, as is the preferred course. Granting the petition thus creates the possibility of two separate appeals. The better course is to wait for final judgment so that all issues can be considered together.

CONCLUSION

For these reasons, this Court should deny Petitioner's request for leave to file an interlocutory appeal pursuant to Section 1292(b).

Dated: October 21, 2019

Respectfully submitted,

/s/ Joseph R. Palmore

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CERTIFICATE OF COMPLIANCE

This answer complies with the type-volume limitation of Rule 5(c) of the Federal Rules of Appellate Procedure because it contains 4,561 words, excluding those parts of the answer exempted by Rule 32(f).

This answer complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this answer has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, in 14-point Times New Roman font.

Dated: October 21, 2019 s/ Joseph R. Palmore

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 CM/ECF system on October 21, 2019.

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

Dated: October 21, 2019 s/ Joseph R. Palmore