No. 02-14427-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JUAN ROMAGOZA ARCE,
NERIS GONZALEZ,
and CARLOS MAURICIO,

Plaintiffs-Appellees,

vs.

JOSE GUILLERMO GARCIA and
CARLOS EUGENIO VIDES-CASANOVA,

Defendants-Appellants.

On Appeal from the United States District Court,
Southern District of Florida

U.S.D.C. Case No. 99-8364 Civ-Hurley/Lynch
The Honorable Daniel T.K. Hurley, Judge Presiding

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Civil Procedure 26.1 and 11th Circuit Rule 26.1-1, plaintiffs certify that the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal.

Juan Romagoza Arce

Carolyn Patty Blum

Center for Justice & Accountability

Jose Guillermo Garcia

Neris Gonzalez

James K. Green

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Judge Daniel T.K. Hurley

Kurt R. Klaus, Jr.

Carlos Mauricio

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs express no position on whether oral argument should be heard.

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INTRODUCTION

Plaintiffs Juan Romagoza Arce, Neris Gonzalez, and Carlos Mauricio are refugees who fled El Salvador after suffering torture at the hands of the Salvadoran armed forces from 1979 to 1983. During that time, defendants Jose Guillermo Garcia and Carlos Eugenio Vides-Casanova were military commanders who led these forces in a campaign of repression against the state's perceived civilian opponents, including plaintiffs.

Generals Garcia and Vides-Casanova retired from the Salvadoran military and moved to Florida in 1989. Eventually, plaintiffs located them, sued them under the federal Alien Tort Claims Act and Torture Victim Protection Act, and obtained a judgment of $54.6 million. During a four-week jury trial in United States District Court, plaintiffs presented overwhelming evidence that defendants' failure to control their troops rendered them liable for plaintiffs' injuries under the doctrine of command responsibility. That plaintiffs' action had a proper basis in law is beyond question, *see Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir. 1996), and has not been challenged in the district court or on appeal.

The sole issue raised by defendants in this Court is the statute of limitations. However, at trial, defendants did not even move for judgment as a matter of law on this ground against plaintiffs Romagoza and Gonzalez. With respect to plaintiff Mauricio, the district court properly held that in light of the extraordinary circumstances of the Salvadoran civil war, equitable tolling was merited until at least 1992, when U.N.-sponsored peace accords formally resolved the conflict and forced the Salvadoran military from power. Tolling the statute of limitations to

1992 indisputably renders the claims of Mauricio — and, indeed, of all three plaintiffs — timely. This ruling of the court below did not constitute an abuse of discretion, and the facts of this international human rights case entitle plaintiffs to equitable tolling on multiple grounds.

Though their appeal is couched as an attack on the district court's findings in equity, defendants fail to show that they were unfairly prejudiced. To the contrary, the equities in this case run entirely in plaintiffs' favor, as the district court recognized. The court's ruling on the statute of limitations should be affirmed.

STATEMENT OF JURISDICTION

Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1350. Following a jury trial and verdict for plaintiffs, final judgment was entered on July 31, 2002. R8-247, -248, -249.[1] An amended judgment was entered on August 1, 2002. R8-257, -258, -259. Defendants filed a notice of appeal on August 8, 2002. R8-260.

This Court has jurisdiction under 28 U.S.C. § 1291.

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[1] Pursuant to 11th Circuit Rule 28-4, the record is denoted "R" and is cited by volume, document, and page number. Citations to the trial transcript include volume and page numbers. Trial exhibits are denoted by offering party and exhibit number. Consistent with the 11th Circuit Rules, plaintiffs (as appellees) have not submitted Record Excerpts, but will promptly provide additional copies of trial exhibits if requested by the Court.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion or otherwise committed error in equitably tolling the 10-year statute of limitations applicable to plaintiffs' claims under the Alien Tort Claims Act and the Torture Victim Protection Act.

STATEMENT OF THE CASE

A. Procedural History

This is an appeal following judgment for plaintiffs in an action for human rights violations brought under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 Note. Although defendants purport to appeal from numerous Orders of the district court, several of which are unrelated to the 10-year statute of limitations (*see* Notice of Appeal, R8-260), their brief ("Initial Br.") addresses only the statute of limitations issue.

1. Plaintiffs' Complaint

An initial Complaint was filed on May 11, 1999, on behalf of plaintiffs Juan Romagoza Arce and Jane Doe. R1-1. The true name of Jane Doe is Neris Gonzalez. Out of concern for possible retaliation against Gonzalez and her family in El Salvador in response to the lawsuit, the Complaint withheld Gonzalez's name. The Complaint nonetheless detailed her claims for torture and other violations of international and domestic law against defendants Garcia and Vides-Casanova. *See* R1-1-1, -4, -9-15 (¶¶ 1, 10, 37-75). Plaintiff Romagoza also made similar highly detailed claims against both defendants, including the allegation that Vides-Casanova was physically present at the scene of Romagoza's

detention in El Salvador on at least two occasions. R1-1-1, -4, -5-9 (¶¶ 1, 9, 15-36).

On November 12, 1999, plaintiffs submitted to the court, and sought leave to file without opposition from defendants, an Amended Complaint. R1-31. Among other additions and substitutions, the Amended Complaint newly named John Doe as a plaintiff. The true name of John Doe is Carlos Mauricio. Although Mauricio, like Gonzalez, withheld his name for fear of injury to himself and his family if his name became public, the Amended Complaint set out his allegations at length. R1-31, Ex. B at 4, 12-14 (¶¶ 12, 58-63). Unlike Romagoza and Gonzalez, who sued both Garcia and Vides-Casanova, Mauricio asserted claims only against Vides-Casanova.

On February 18, 2000, plaintiffs filed a Second Amended Complaint. This Complaint named as plaintiffs Juan Romagoza Arce, Neris Gonzalez, Carlos Mauricio, and Jorge Montes. R1-39.[2]

2. Pre-Trial Motions

On April 27, 2001, defendants filed a three-page Motion for Judgment on the Pleadings, asserting the defense of statute of limitations as to all plaintiffs. R3-98. Plaintiffs filed an opposition to defendants' motion, arguing that a 10-year limitations period applied under the ATCA and TVPA, and that the statute of limitations should not begin to run at least until the Salvadoran civil war ended in

[2] Plaintiff Montes subsequently sought and obtained voluntary dismissal from the case.

1992. R3-110. By Order dated June 1, 2001, the district court denied defendants' motion and agreed with plaintiffs that the statute of limitations on their claims was equitably tolled "at least until the Salvadoran civil war ended on January 16, 1992, which is the date the Salvadoran Peace Accords were negotiated under the auspices of the United Nations, and the independence of the judiciary was restored in El Salvador." R3-117-1.[3]

3. Trial

Trial began on June 24, 2002. The presentation of evidence centered on defendants' responsibility for the international law violations of their troops under the test set out by this Court in *Ford v. Garcia*, 289 F.3d 1283 (11th Cir 2002), *cert. denied*, 123 S. Ct. 868 (2003).[4] To satisfy the *Ford* standard, plaintiffs presented, in addition to their own testimony and that of a medical expert, evidence from diplomatic observers who met frequently with defendants (including Robert White,

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[3] On June 12, 2001, defendants further filed a Motion for Amendment of Judgment, repeating their previous arguments regarding the statute of limitations. R3-118. The district court rejected defendants' motion in a one-page Order dated June 29, 2001. R4-123. On October 26, 2001, defendants filed another Motion to Dismiss based on the statute of limitations. R5-147. The district court deferred ruling on this motion. R7-211-4.

[4] *See* 289 F.3d at 1288: "The essential elements of liability under the command responsibility doctrine are: (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes."

U.S. Ambassador to El Salvador from 1979-80), political, legal, and military experts, human rights workers who personally witnessed or monitored the abuses of the Salvadoran military, and an investigator for the U.N.-sponsored Commission on the Truth for El Salvador (the "U.N. Truth Commission"). Plaintiffs also introduced into evidence numerous declassified cables of the U.S. State Department on political and military topics pertaining to El Salvador. Defendants testified on their own behalf and further called as a witness Edwin G. Corr, U.S. Ambassador to El Salvador in 1985-88.

On July 23, 2002, the jury returned a verdict of $54.6 million against defendants, finding in plaintiffs' favor on all counts and awarding compensatory and punitive damages. *See* R8-257, -258, -259.

4. Motions During and After Trial

At the close of plaintiffs' evidence, defendant Vides-Casanova moved for judgment as a matter of law against plaintiff Mauricio on the basis of the statute of limitations. R17-1648. Neither then nor later in the trial did Vides-Casanova or Garcia seek judgment as a matter of law against Romagoza or Gonzalez on the ground of statute of limitations.

After Vides-Casanova and Garcia stipulated that they took up residence in the U.S. in August and October of 1989, respectively, R17-1656-57, the district court applied the 10-year statute of limitations to deny defendant Vides-Casanova's motion against Mauricio. The court concluded that Mauricio's claims were equitably tolled until at least January 1992, when the Salvadoran peace accords

were signed, and arguably until 1994, when the first post-civil war general elections were held in El Salvador. R17-1660-65.

Later, at the close of all the evidence, the court inquired, "Are there any other motions at this time?" R21-2334. Defendants' counsel stated: "I want to renew my motion regarding Professor Mauricio on the statute of limitations." *Id*. The district court denied the motion. R21-2335. On July 30, 2002, defendants moved for judgment on the pleadings and/or a new trial on statute of limitations grounds. R8-251. The district court denied this motion by Order dated July 31, 2002. R8-252.

B. Statement of Facts

Defendants' brief sets out a version of Salvadoran history, and of their place in it, that the jury decisively rejected. The jury's verdict — based on stipulated instructions of law that defendants have not challenged on appeal — contradicts any suggestion that defendants were freedom fighters or high-minded patriots. The bulk of defendants' purported statement of facts is either inaccurate or simply irrelevant to any issue on appeal.

Defendants challenge the district court's invocation of equity to toll the statute of limitations for plaintiffs' claims. As the court below properly recognized, application of the doctrine of equitable tolling requires careful consideration of the context in which plaintiffs' claims arose and were asserted. R17-1660-65.

1. Generals Garcia and Vides-Casanova

After graduating from El Salvador's military academy in 1956, Jose Guillermo Garcia moved up the ranks before becoming Minister of Defense of El

Salvador in October 1979, a position he held until his retirement in 1983. R18-1793-1819, -1785; R20-2109; Initial Br. 5. At that time, the Salvadoran armed forces included the Army, Navy, and Air Force (the "Military Forces") as well as the National Guard, National Police, and Treasury Police (the "Security Forces"). R18-1721; *see also* R10-195. As Minister of Defense, Garcia was the chief of these armed forces. R10-239; R18-1802. In October 1989 he moved to the U.S. and became a permanent resident. R17-1656-57.

Carlos Eugenio Vides-Casanova graduated from El Salvador's military academy in 1957. R20-2151. From October 1979 to March 1983, he held the position of Director-General of the National Guard, the top command position in that service. R20-2152-54; Initial Br. 5. In April 1983 he succeeded Garcia as Minister of Defense, a post he held until his retirement in May 1989. R20-2188; R21-2247.[5] In August 1989 he moved to the U.S. and became a permanent resident. R17-1656-57.

2. The Human Rights Abuses of the Salvadoran Military During 1979-83

The evidence presented at trial showed that in 1979-83 the Salvadoran Military and Security Forces, under defendants' command, carried out what former U.S. Ambassador to El Salvador Robert White termed "a pattern of gross violations of human rights." R10-233. Seeking to protect its traditional power and privilege in the face of increasingly vocal demands for democracy in El Salvador, *see* R10-

[5] Defendants' brief mistakenly cites 1987 as the end-date of General Vides-Casanova's service as Minister of Defense. Initial Br. 5.

201-02; Plfs. Ex. 32 at 43-44, the military responded with a campaign of intimidation and terror, killing thousands of civilians. R15-1125-29, -1132-40. The 1993 U.N. Truth Commission Report, for example, documented numerous massacres committed by the Military and Security Forces, and held these forces accountable for 85 percent of the more than 22,000 complaints of violence it received. R11-528; R15-1149; Plfs. Ex. 32 at 43, 54-57, 67-86, 114-26.[6]

Torture played a central role in this pattern of state-sponsored violence. Diplomats, scholars, and other observers testified that torture was practiced regularly against civilians perceived to be opponents of the regime. R10-210; R11-379-90; R15-1231-37; Plfs. Exs. 334, 553. Defendants' own expert witness, former Ambassador to El Salvador Edwin G. Corr, admitted that a "large amount" of torture was inflicted by the Military and Security Forces on civilians. R19-1949. Declassified U.S. government cables also reveal a detailed awareness of this practice. In one such cable sent to the U.S. Embassy in San Salvador on June 12, 1982, Secretary of State Alexander Haig observed that the U.S. had "solid evidence" that National Police forces were torturing Salvadoran citizens, and concluded: "No government should permit subjections of its citizens to this kind of humiliation, pain, and degradation in the name of achieving victory over any enemy." Plfs. Ex. 554 at 2.

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[6] The U.N. Truth Commission, formed in the wake of the Salvadoran peace accords of 1992, sought to investigate serious acts of illegitimate violence committed by all sides in the civil conflict. R11-499-506.

In this period, the Salvadoran Military and Security Forces enjoyed impunity — a privileged position, "above the law," R16-1306 — for the human rights abuses they committed. *See* Plfs. Ex. 32 at 172-73. No officer or enlisted man was arrested or punished for any such violation during 1979-83. R10-249, -253; R14-1043. Rather, as defendants' expert witness Ambassador Corr wrote in an internal memorandum, the prevailing culture of impunity ensured that "no high-ranking officer [has] ever been convicted of a human rights violation." Plfs. Ex. 557 at R 3823.[7] Writing in 1988, at least five years after plaintiffs suffered torture, Ambassador Corr observed that a "code of silence" still concealed the human rights abuses of the Salvadoran military. *Id.* He concluded that the officer corps "circles its wagons when faced with human rights scrutiny," reflecting "a skeleton-in-the-closet syndrome that keeps one officer from tattling on another for fear that each accused will become an accuser until all the long-buried secrets are unearthed." *Id*. at R 3817; *see also* R16-1321-22. This impunity, characterized by strong bonds of loyalty among officers and contempt for civilian authority, R15-1122-24, extended to the highest reaches of the military, including defendants themselves. R16-1307, -1311-12.

3. The Command Responsibility of Generals Garcia and Vides-Casanova

For most of the twentieth century, El Salvador was a military dictatorship. R10-263-64. In the late 1970s and early 1980s, the high command tightened its

[7] Where trial exhibits do not contain internal pagination, citations are to the Bates number appearing on each page.

control over the military and society. A CIA cable of December 17, 1980, noted that "[t]he military is more unified and its chain of command more consolidated than at any time since the coup in October 1979." Plfs. Ex. 459; R10-254-55. This cable also stated that "[t]he Defense Ministry retains complete control of all military affairs and has significant veto power over other government policy . . . ." Plfs. Ex. 459. Not only did civilians lack control over the military, they feared the military. R16-1313.

Defense Minister Garcia and Director-General of the National Guard Vides-Casanova wielded enormous power in El Salvador. Ambassador White, who met with both Garcia and Vides-Casanova regularly in his official capacity, testified that Garcia was "the place where power resided," R10-240, and that he sought out Garcia — "the man in charge," R10-239 — when he wished to discuss human rights issues with the Salvadoran government. Vides-Casanova held commensurate power over the National Guard. R10-234-35, -240-41. According to plaintiffs' expert Prof. Terry Karl, Garcia was "the power behind the throne" and "the most powerful man in El Salvador when he was Minister of Defense," R15-1116-17, -1089; Vides-Casanova likewise "had the power to prevent and stop" human rights abuses occurring in the country. R15-1090; R16-1488.

Plaintiffs established at trial that on numerous occasions in 1979-83, defendants Garcia and Vides-Casanova were confronted with evidence of human rights violations committed by their troops, yet refused to use their power to end the abuses or punish offenders. *See, e.g.*, Plfs. Ex. 499 (January 31, 1980 letter of Christian Democratic Party outlining military abuses); R10-210-24. Defendants'

own expert witness, Ambassador Corr, acknowledged that "everybody" in El Salvador — including defendants — knew that the Military and Security Forces were violating human rights in 1979-83. R19-1952-55. However, U.S. government officials experienced frustration when they sought to bring grave human rights issues to the attention of defendants. R10-234-35; R15-1174-90. Defendants refused to take steps within their power to break impunity for human rights abusers among their troops — for example, by denouncing human rights violations, demanding immediate reports of violations, permitting investigations, and demoting or punishing violators within the military. R10-259-60; R16-1369-83.

4. The Inability of Human Rights Victims to Obtain Justice in El Salvador

The justice system of El Salvador proved to be "totally unable" to handle claims by victims of human rights abuses, such as plaintiffs. R14-1044 (testimony of plaintiffs' expert Margaret Popkin). In 1980 the Security Forces murdered the country's top justice official, Chief State Counsel Mario Zamora Rivas. Plfs. Ex. 32 at 139-41. Soldiers and officers who committed violations manipulated the courts and intimidated witnesses and victims; lawyers, fearing for their lives, were unwilling to represent potential plaintiffs; and sources of documentary evidence on official crimes were unavailable. R14-996, -1044-45; R16-1378; Plfs. Ex. 32 at 172. Moreover, Salvadoran law provided that the Security Forces were to be responsible for investigating and prosecuting offenders

within the ranks of the military. R14-997-1003. When officers failed to carry out this function, no other civil authority could provide justice. R14-1002-03.

5. The 1992 Peace Accords

On January 16, 1992, the government of El Salvador and the armed opposition signed the El Salvador Peace Agreement, thereby "put[ting] an end to 12 years of armed conflict." Plfs. Ex. 32 at 42. As part of the peace accords, in 1993-94, the nation disbanded the Salvadoran Security Forces (National Guard, National Police, and Treasury Police) and created a new police force "not tainted with human rights abuses." R15-1151 (testimony of Prof. Terry Karl); *see also* R11-531; R21-2322-23. At that time, further, between one-quarter and one-third of the Salvadoran officer corps — a total of 106 men — was removed based on complicity in human rights abuses. R16-1444-45, -1471-72, -1473 (effect of peace accords was to "abolish the security forces that were carrying out these acts [of human rights abuse] and get rid of the military officers that were murdering civilians"). An ombudsman's office was also created to hear complaints of abuses by state forces, R16-1468, and recommendations were received from the U.N. Truth Commission for reforming the judiciary. Plfs. Ex. 32 at 177.

6. Plaintiffs

a. Juan Romagoza

Plaintiff Juan Romagoza Arce is a Salvadoran doctor who worked with colleagues at the University of El Salvador and with the Catholic Church to establish medical clinics for the poor in rural areas as well as in the capital, San Salvador. R9-69, -73.

On or about December 12, 1980, Romagoza was providing medical care at a Church clinic in Santa Anita, Chalatenango. R9-98, -100. While Romagoza was treating patients, two vehicles arrived carrying soldiers from the local army garrison and the National Guard. R9-99-100. Perched on top of the trucks, the soldiers and Guardsmen opened fire on the people administering and receiving medical care at the clinic. R9-101.

The soldiers and Guardsmen shot Romagoza in the right foot and another bullet grazed his head. R9-101-02, -127. They detained him as a "guerilla commander" because he possessed medical and surgical instruments. *Id.* Romagoza received no medical treatment for his injuries. R9-110.

Subsequently, Romagoza was taken by helicopter to a local army garrison. During the flight, soldiers pushed him to the edge of the open door of the helicopter and threatened to throw him out. R9-104-06. Upon his arrival at the garrison, Romagoza was blindfolded and stripped of his clothes; he was spread onto a table, interrogated, beaten, and tortured with electric shocks. R9-105, -107-09.

The next morning (on or about December 13, 1980), Romagoza was transferred to the National Guard headquarters in San Salvador. R9-111. He was put on a gurney, beaten and interrogated, and threatened with additional torture for failing to answer questions to his captors' satisfaction. R9-113-16. On his second day of detention at the National Guard headquarters, Romagoza was tied to four pieces of iron and interrogated again. R9-117. The Guardsmen administered

electric shocks to his ears, tongue, testicles, anus, and the edges of his wounds until he lost consciousness. R9-115, -120-21.

For approximately the next 22 days, Romagoza was interrogated and tortured every day — sometimes three or four times per day. For several days, the Guardsmen hung Romagoza with ropes made of sharp material that cut into his fingers. R9-121. He was told that he would never be a surgeon again. R9-126. The Guardsmen also shot him in the left hand, severing the muscles and tendons, in a gesture said to be aimed at his "leftist" politics. R9-124-26. The Guardsmen anally raped Romagoza with foreign objects and subjected him to electric shocks, water torture, and asphyxiation with a hood containing lime or some other similarly caustic substance. R9-140. At one point, Romagoza's captors moved him into another room and kept him in a coffin-like box for two days. R9-127.

During Romagoza's detention, defendant Vides-Casanova was physically present on two occasions. R9-128. The first occasion was in late December 1980, approximately one week prior to Romagoza's release. R9-144. At this time, Vides-Casanova and other military officers visited Romagoza in his cell. R9-140-47. His interrogators tossed maggots from his wounds onto his chest, telling him, "That is food for you." R9-128. Vides-Casanova "joined with the jokes that [Dr. Romagoza] was almost dead, that [he] stank of death." R9-143. On prior occasions, Romagoza had informed the Guardsmen about his two uncles in the Salvadoran military, Salvador Mejia Arce and Manuel Rafael Arce Blandon, hoping that this would save his life. R9-71, -108, -127.

Vides-Casanova was also present during Romagoza's release on or about January 5, 1981. R9-147-48. Romagoza was released to his uncle, Lt. Colonel Arce Blandon, a government economist. R9-71, -108, -127. His other uncle, Lt. Col. Mejia Arce, stood nearby conversing with defendant Vides-Casanova. R9-144-47.

After his release, Romagoza fled El Salvador because he feared reprisals against his family. R9-134, -139-40. He arrived in the United States in April 1983. As a direct result of the injuries inflicted during his detention, Romagoza lost his ability to perform surgery, R9-126, and continues to suffer the physical and psychological effects of his torture. R9-137-38, -144.

Based upon the persecution described above, Romagoza was granted political asylum in the United States in 1988. R9-149. He subsequently became a naturalized citizen. R9-139.

b. Neris Gonzalez

Plaintiff Neris Gonzalez is a Salvadoran woman who worked for several years as a catechist and lay worker with Catholic parishes throughout El Salvador. R17-1537-39, -1594.

On or about December 26, 1979, Gonzalez — who was then eight months pregnant — was abducted without cause from the central market in San Vicente by three uniformed National Guardsmen armed with rifles, and a paramilitary civilian. R17-1561-62, -1568. The National Guardsmen forcibly led Gonzalez to the National Guard Post in San Vicente where she was detained in an office used as an interrogation room. R17-1567.

Over the course of her detention, Gonzalez was repeatedly tortured. The Guardsmen stuck needles under her fingernails in an effort to coerce a confession that she had collaborated with subversives. R17-1567-68, -1572. They repeatedly burned her with cigarettes. R17-1572-73. On several occasions, they administered electric shocks while asphyxiating her with a powder-filled rubber mask. R17-1575-76.

After about three days, Gonzalez was taken out of the interrogation room to a place called the "Matadero," or "slaughter house," the name of which was written on the wall in blood. R17-1574. She was forced to look at body parts with maggots and rats eating them. *Id*. She was subsequently detained in the basement of the National Guard Post for approximately two weeks. R17-1575.

During this period, the National Guardsmen repeatedly raped and tortured Gonzalez, and withheld food from her. R17-1575, -1580-81. The Guardsmen forced her to sit in a trough of ice water every morning. R17-1578. Many times, Gonzalez's torture involved injuries to her uterus. R17-1576. She was put under a metal bed frame while Guardsmen stomped on top of the frame. The Guardsmen balanced the bed frame over her abdomen, standing on both ends of the frame like a seesaw. R17-1577-78.

Gonzalez was also forced to witness acts of torture against others. She watched the Guardsmen beat a man who was hanging from a noose with his feet touching the ground. R17-1587. They beat and kicked him in the testicles. *Id*. The Guardsmen took the man down from his suspended position, cut open his stomach with a machete, pushed Gonzalez's face into the wound, and forced her to

drink his blood. R17-1588. In a separate incident, Gonzalez was forced to watch the torture of a boy who looked to be approximately 12 to 15 years old. In front of Gonzalez, a Guardsman gouged out the boy's eye with a pair of pliers and threw the eyeball on Gonzalez's chest. R17-1581.

Gonzalez was later tossed into a truck with bodies. R17-1588. The next thing she recalled was being at an ex-convent "healing with doctors." R17-1589.

As a direct result of her torture, Gonzalez sustained severe physical and psychological injuries. She left El Salvador for the U.S. in 1997 to obtain treatment at the Marjorie Kovler Center for the Treatment of Survivors of Torture in Chicago. R17-1595.

c. Carlos Mauricio

On or about June 13, 1983, plaintiff Carlos Mauricio, a professor at the University of El Salvador, was abducted without cause from his classroom and forced into an unmarked vehicle by individuals dressed in civilian clothes. R12-573-79. After his abduction, colleagues at the University launched a campaign to determine his whereabouts and to obtain his immediate release. R12-621-29. The Salvadoran Defense Ministry issued a written statement acknowledging the detention of Mauricio at the National Police Headquarters. R12-627-28; Plfs. Ex. 223.

Mauricio was detained at the National Police Headquarters in San Salvador for approximately one and one-half weeks. R12-585-86. There, he was interrogated and tortured as a suspected guerilla leader in a clandestine torture center. R12-604.

Mauricio's captors at the National Police Headquarters strung him up with his hands behind his back over his head, and repeatedly hit him with a metal bar covered with rubber, inflicting injuries to his face and torso. R12-591-92, -595-97. He was blindfolded and handcuffed to a pipe, and forced to remain standing for hours at a time. R12-588-89. He heard electric shock being administered to other prisoners. R12-589-91.

On or about June 25, 1983, Mauricio was released. R12-616. He subsequently fled El Salvador for the United States, where he now resides. R12-636, -638-39, -647.

Mauricio suffered injuries to his ribs, eyes, and mouth inflicted during his detention. R12-604, -606, -642-43. In addition to his physical injuries, Mauricio continues to suffer from the long-term psychological effects of his torture. R12-643-45.

C. Standards of Review

Whether equitable tolling applies under the TVPA and ATCA is a question of law which is reviewed *de novo*. *See Justice v. United States*, 6 F.3d 1474, 1478 (11th Cir. 1993). However, defendants do not dispute that these statutes provide for tolling. Initial Br. 11.

Defendants urge that an abuse of discretion standard should apply to the rulings of the lower court. Initial Br. 2. Plaintiffs submit that, in light of the procedural background of this case, different standards of review apply to different plaintiffs.

1. Plaintiffs Romagoza and Gonzalez

Defendants failed to move for judgment as a matter of law on statute of limitations grounds as to Romagoza and Gonzalez at the close of all the evidence. Defendants thus have "forfeited [their] right to have the court consider" any such motion with respect to these plaintiffs, *Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1300 (11th Cir. 2002), and this Court reviews the district court's refusal to apply the limitations period to bar their claims under a plain error standard, which is "'an extremely stringent form of review.'" *Id*. (*quoting Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999)).

To the extent the Court reviews defendants' pre-trial motions as to Romagoza and Gonzalez, the standard is *de novo*. *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002). Judgment on the pleadings is appropriate only when "there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." *Id*.

2. Plaintiff Mauricio

Whether the district court properly applied equitable tolling to Mauricio's claims is reviewed for abuse of discretion. This is consistent with the equitable nature of the discretion granted courts to craft rules of tolling, laches, and waiver. *See Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998) (noting "discretion" of district court to apply equitable tolling); *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 435 (1965) ("Whether laches bars an action in a given case depends upon the circumstances of that case and is a question primarily addressed to the discretion of the trial court.") (quotations omitted); *Bowen v. City*

of New York, 476 U.S. 467, 479 (1986); *Zipes v. Trans World Airlines, Inc*., 455 U.S. 385, 398 (1982); *Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218, 223 (1870) ("It seems, therefore, to be established, that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself."); *cf. Fisher v. Johnson*, 174 F.3d 710, 713 & n.9 (5th Cir. 1999) (reviewing district court's decision whether to allow equitable tolling under abuse of discretion standard, because "[s]uch a decision is left to the district court's discretion," but noting that where a court "denie[s] equitable tolling as a matter of law rather than in exercise of discretion," *de novo* review would apply).

Also in the case of Mauricio, since the question of equitable tolling was tried to the court, not the jury, a clear error standard applies to the court's determination of underlying facts.[8] *See Dorsey v. Chapman*, 262 F.3d 1181, 1185 (11th Cir. 2001), *cert. denied*, 535 U.S. 1000 (2002). This standard requires affirmance of the findings of fact unless "the record lacks substantial evidence" to support that determination. *Lightning v. Roadway Express, Inc*., 60 F.3d 1551, 1558 (11th Cir. 1995) (quotation omitted).

SUMMARY OF ARGUMENT

The district court properly held that the statute of limitations applicable to plaintiffs' claims should be equitably tolled until at least January 1992, when El

[8] Defendants have not appealed the district court's ruling that statute of limitations issues in this case should be decided by the court, not the jury. *See* R19-2043-52.

Salvador's civil war ended. Under this ruling, applying the undisputed 10-year statute of limitations of the TVPA and ATCA, plaintiffs' claims are timely.

As the district court acknowledged, an equitable tolling determination must be based on the particular facts of this case. After hearing extensive evidence at trial, the court correctly found that no lawsuit could have been maintained against defendants until at least 1992, given the military's control over El Salvador prior to that date, its history of refusing to discipline or prosecute members who committed human rights abuses, and plaintiffs' legitimate fear of retaliation against themselves and their family members. This ruling is supported by numerous authorities holding that the "extraordinary circumstances" of civil war and dictatorial rule justify tolling. Equitable tolling until 1992 is also necessary to prevent defendants from benefiting by their repudiation of the established facts of human rights abuses committed by their troops.

It is undisputed that plaintiff Gonzalez remained in El Salvador until 1997. She clearly lacked access to the courts of that country in the midst of a civil war in which she was regarded as an enemy of the state. For this further reason, tolling of the statute as to her claims is appropriate until the war ceased.

Moreover, because defendants Vides-Casanova and Garcia did not arrive in the U.S. to take up residence until August and October of 1989, respectively, plaintiffs' claims against them should be tolled until these dates. Congress has expressed its intent to extend tolling where human rights defendants are absent from the United States. A central aim of the TVPA and ATCA is to deter human rights abusers from entering the U.S.; this goal cannot be accomplished unless the

10-year statute of limitations is tolled during the period while such defendants remain outside the country. This alternative ground defeats defendants' appeal as to plaintiffs Romagoza and Gonzalez.

Finally, the application of equitable tolling in this case is not unfair to defendants. They point to no source of evidence that would have assisted them and that became unavailable through the passage of time. Their objection to the district court's application of tolling to preserve plaintiffs' claims should thus be rejected.

ARGUMENT

I. THE LAW OF EQUITABLE TOLLING

"'Equitable tolling' is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances." *Ellis*, 160 F.3d at 707 (citation omitted). Limitations periods are "customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (quotations omitted); *see also Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (noting "presumption that a statute of limitations may be equitably tolled"); *Branch v. B. Bernd Co.*, 955 F.2d 1574, 1580 (11th Cir. 1992) (federal courts are empowered "to read equitable tolling principles 'into every federal statute of limitation'") (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). Congress "must be presumed to draft limitations periods in light of this background principle." *Young*, 535 U.S. at 49-50.

Federal law governs equitable tolling issues arising under a federal statute. *Holmberg*, 327 U.S. at 395. The scope of such tolling is determined by

congressional intent. "'The basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.'" *Ellis*, 160 F.3d at 707 (quoting *Burnett*, 380 U.S. at 427). To decide whether and how equitable tolling applies, "courts 'examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the . . . Act.'" *Id*. (omission in original).

Defendants are wrong that plaintiffs must show fraudulent concealment as a prerequisite to invoking equitable tolling. *See* Initial Br. 2, 9. Unlike equitable estoppel, "equitable tolling does not require any misconduct on the part of the defendant." *Browning v. AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997). "[S]uch tolling has been allowed," moreover, "even where the unfairness that would otherwise result was not the fault of the defendants." *Haekal v. Refco, Inc.*, 198 F.3d 37, 43 (2d Cir. 1999) (citing *Burnett*, 380 U.S. 424).

Defendants concede that equitable tolling is available under the TVPA and ATCA. Initial Br. 11; *see Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1368 (S.D. Fla. 2001) (equitable tolling applies under TVPA); *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (same under ATCA); *Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 360 (C.D. Cal. 1997) (same). They further concede that the limitations period under both the TVPA and ATCA is ten years. Initial Br. 10.[9]

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[9] The TVPA expressly provides for a 10-year limitations period. 28 U.S.C. § 1350 Note, Sec. 2(c). As for the ATCA, both the Ninth Circuit and every district court to consider the question after passage of the TVPA in 1992 have concluded

II. THE DISTRICT COURT PROPERLY FOUND THAT THE EXTRAORDINARY CIRCUMSTANCES OF THE SALVADORAN CIVIL WAR JUSTIFY EQUITABLE TOLLING UNTIL 1992

Like other courts that have considered equitable tolling in the context of civil war and authoritarian rule, the district court here found that El Salvador's civil conflict presented "extraordinary circumstances." Based on this determination, the court properly held that the 10-year statute of limitations should be tolled until at least 1992, when the Salvadoran conflict ended, and arguably until 1994, when the nation's first free elections were held. This ruling does not constitute an abuse of discretion, much less plain error.

A. The District Court Correctly Identified the Extraordinary Circumstances Presented by this Case

The district court tolled the statute of limitations only after hearing extensive testimony regarding plaintiffs and the circumstances in which their claims arose in El Salvador. At trial, upon defendants' motion for judgment as a matter of law against plaintiff Mauricio, the court noted that the evidence "discloses a time of heightened repression in an effort to deal with [the Salvadoran] civil war," and "a concerted effort throughout the country in which individuals were being apprehended, abducted, and so on." R17-1662.

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that the TVPA's limitations period should apply to the ATCA, given the closely similar goals and remedial mechanisms of the two statutes. *See Papa v. United States*, 281 F.3d 1004, 1011-12 & n.33 (9th Cir. 2002) (citing cases, and holding that "the realities of litigating claims brought under the ATCA, and the federal interest in providing a remedy, also point towards adopting a uniform — and a generous — statute of limitations"); *Estate of Cabello*, 157 F. Supp. 2d at 1363; *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1194-97 (S.D.N.Y. 1996).

Squarely rejecting the argument that plaintiffs could have sued defendants while the Salvadoran military remained in power, the court observed that "it seems very clear that there were extraordinary numbers of casualties to the civilian population . . . and there was in fact a state of armed conflict in El Salvador." R17-1663. The court concluded:

> Now, it is my view, and it would be the ruling of [t]he Court that the earliest possible date that one could look to for the limitations period to begin to run would be January 1st of 1992.
>
> . . . .
>
> Now, bearing in mind that General Vides held one of the most important positions in his country, first as the Director General of the National Guard, and then ultimately as the Minister of Defense, and also bearing in mind the testimony regarding the nature of the military in El Salvador, [its] cohesiveness, the fact that from the Plaintiffs' point of view, what was happening in San Salvador was being directed by the military.
>
> It seems to me that it is unrealistic to suggest that the mere presence of General Vides here [*i.e.*, in the United States], while the military remained in power, where people either associated with, or related to or close to the Plaintiff would be subject to reprisals. We are talking about the ability to gather evidence and take other actions that would be appropriate to maintaining a lawsuit.
>
> I think when you look at all of that . . . it would be [t]he Court's ruling that under the facts and circumstances of this particular case, the earliest date upon which the limitations period should begin to run would be January 1 of 1992.
>
> Now, I want to say that I do believe an argument could be made that that should not be the concrete date because clearly in January, '92, with the negotiation of the Peace

> Accord, there has to be a time period for the transition to take place. And I think the parties have pointed out that was roughly a two year period before the first general elections were held [in 1994].

R17-1662, -1664-65.[10]

As the district court explicitly recognized, the policy of repose embodied in the statute of limitations "is frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights." *Burnett*, 380 U.S. at 428.[11] This principle is at its most compelling in international human rights cases brought in U.S. courts, where plaintiffs sue their torturers after they have fled their home countries and sought refuge in the United States.

Congress intended that the ATCA and TVPA would "further[] the protection of human rights" under U.S. and international law. *Papa*, 281 F.3d at 1012; *see also Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000) (federal

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[10] The district court's detailed analysis belies the contention that it "failed to balance or weigh any factors" relevant to equitable tolling. Initial Br. 13. *See* R17-1660 (district court: "It is clear that the statute of limitations serves important societal interests. The difficulty I have on taking evidence, issues becoming stale, things of that nature are obviously very significant. And yet at the same time, I think it is recognized that statute[s] of limitations can be tolled."). Defendants' further claim that the court never took testimony on the tolling issue rings hollow, *see* Initial Br. 13, since defendants had ample opportunity to present evidence.

[11] *See also Timoni v. United States*, 419 F.2d 294, 299 (D.C. Cir. 1969) ("Courts have often recognized legislatively unarticulated exceptions to limitations periods arising from the necessities of the situation."); *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1996) (analyzing "totality of . . . circumstances" in TVPA case, and concluding that "sound legal principles" and "interests of justice" require tolling).

human rights statutes express "a policy of U.S. law favor[ing] the adjudication" in U.S. courts of cases involving official torture committed abroad). By their very nature, claims under these statutes "will tend to preclude filings in United States courts within a short time." *Papa*, 281 F.3d at 1012.[12]

Numerous courts adjudicating lawsuits against foreign despots and renegade commanders have thus held that equitable tolling applies where "'extraordinary circumstances outside the plaintiff's control made it impossible to timely assert the claim.'" *Estate of Cabello*, 157 F. Supp. 2d at 1368 (citation omitted). Here, two important factual circumstances support the equitable underpinnings of the district court's holding. First, because defendants and the Military and Security Forces held enormous power in El Salvador until 1992, it would not have been feasible for plaintiffs to pursue a lawsuit against them prior to that time. Second, because the Salvadoran military — including its leaders, defendants in this case — consistently denied human rights abuses committed by its members and obfuscated investigations into those abuses, tolling is warranted until there was a reasonable opportunity to uncover the historical truth.

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[12] As the legislative history of the TVPA further acknowledges, "[c]ases involving torture abroad which have been filed under the Alien Tort Claims Act show that torture victims bring suits in the United States against their torturers only as a last resort." S. Rep. No. 102-249, at 9 (1991). For the Court's convenience, pursuant to Federal Rule of Appellate Procedure 28(f), the Senate and House of Representatives Reports on the TVPA are attached to this brief as an Addendum, at Tabs A and B, respectively.

B. No Lawsuit Could Have Been Maintained Against Defendants Until the Salvadoran Military Was Forced from Power

This case fits within a line of authority in which courts have held that "extraordinary circumstances" — marked by dictatorial government, civil war, torture, and emigration — tolled the statute of limitations on human rights claims under the ATCA and TVPA. *See Estate of Cabello*, 157 F. Supp. 2d at 1368 (tolling applies during rule of Chilean military authorities); *Hilao*, 103 F.3d at 773 (same during rule of Philippines' Ferdinand Marcos); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1550 (N.D. Cal. 1987) (same during Argentine military rule), *reconsideration granted in part on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988); *Doe v. Unocal*, 963 F. Supp. 880, 896-97 (C.D. Cal. 1997) (same during Burmese military rule).

The district court's ruling highlights the "extraordinary circumstances" of this case. Because plaintiffs have directly challenged two of the most powerful leaders of a military dictatorship, who commanded an exceptionally cohesive military that remained in power until 1992, filing a lawsuit would have been "unrealistic" prior to that date. R17-1664. As plaintiffs' expert witness, Prof. Terry Karl, told the jury, "remember, the [Salvadoran] military is not just a military, the officer corps is not just an officer corps, *it is the government*." R15-1109 (emphasis added).

In *Forti*, plaintiffs filed ATCA claims for torture, murder, and prolonged arbitrary detention against a former Argentine general, based on the actions of military subordinates during that country's "dirty war." One of the plaintiffs

suffered injury in Argentina in 1977 and entered the U.S. in 1981. 672 F. Supp. at 1535-37. Applying the principle of "exceptional circumstances," the court held that the statute of limitations was nonetheless tolled until at least 1984, when democratic reforms ousted the military and caused defendant to flee to the United States. *Id*. at 1550. "As a practical matter," the court observed, access to Argentine courts was denied to plaintiffs; moreover, "given the pervasiveness of the military's reign of terror," the judiciary likely would have lacked the courage to adjudicate plaintiffs' claims against a military commander. *Id*.

The basis for the *Forti* court's invocation of equitable tolling — covering even the period between 1981 and 1984, when one of the plaintiffs in that case was in the U.S. and the defendant was in Argentina — justifies tolling for all plaintiffs here until 1992. As the district court correctly observed, military rule in El Salvador precluded "gather[ing] evidence" and "other actions that would be appropriate to maintaining a lawsuit," regardless of whether defendants were in that country or in the United States. R17-1664.

For years even the U.S. government was unable to force the Salvadoran military to dismiss or prosecute human rights abusers within its ranks. R10-234-38 (testimony of former Ambassador White). Ambassador Corr, defendants' own expert witness, conceded that the culture of impunity in El Salvador's military made it "very difficult to prosecute a military officer on any crime." R19-1967-68. Witnesses were unwilling to come forward in human rights cases, and "there really wasn't documentary records [sic] that could be obtained that would have been helpful." R14-1045 (testimony of plaintiffs' expert Margaret Popkin). Thus, the

core assumption of much equitable tolling jurisprudence — that once a complaint is filed, "liberal civil discovery rules" will give plaintiffs "broad access" to evidence in an effort to document their claims, *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 n.19 (11th Cir. 1993) (quotation omitted) — simply does not apply in the extraordinary circumstances of this case, at least until impunity for the Salvadoran military was broken by the peace accords of 1992.

Properly exercising its discretion, the district court concluded that a refusal to toll the statute of limitations would "seriously" overlook these facts. R17-1663. Indeed, to require torture victims to pursue a lawsuit in the face of such obstacles would not comport with equity, since "'equity does not require the doing of a vain thing as a condition of relief.'" *Gibson v. Bd. of Pub. Instruction*, 246 F.2d 913, 914 (5th Cir. 1957) (citation omitted).

The district court drew attention, further, to plaintiffs' reasonable fear of reprisal if they sued defendants while the military remained in control of El Salvador. R17-1664. All three plaintiffs testified to profound terror upon their release from captivity. R9-133-35; R12-629, -640-44, -648-50; R17-1590-94, -1598-99. The jury also heard testimony that plaintiffs have relatives in El Salvador who could be victimized by current or former soldiers, or others sympathetic to defendants. R9-134; R12-637, -650; R17-1596-97. In its Report, issued in 1993, the U.N. Truth Commission provided powerful support for the district court's reasoning:

> The situation in El Salvador is such that the population at large continues to believe that many military and police

> officers in active service or in retirement, Government officials, judges, members of FMLN and people who at one time or another were connected with the death squads are in a position to cause serious physical and material injury to any person or institution that shows a readiness to testify about acts of violence committed between 1980 and 1991. The Commission believes that this suspicion is not unreasonable, given El Salvador's recent history and the power still wielded or, in many cases, wielded until recently by people whose direct involvement in serious acts of violence or in covering up such acts is well known but who have not been required to account for their actions or omissions.

Plfs. Ex. 32 at 23. "[I]ntimidation and fear of reprisals" is an established basis for equitable tolling in international human rights cases. *See Hilao*, 103 F.3d at 773. Such tolling should be applied to plaintiffs' claims here until the Salvadoran military left power.

C. Defendants' Pattern of Denial Justifies Equitable Tolling

Tolling is appropriate for the additional reason that defendants engaged in a pattern of denial about their personal responsibility for human rights abuses in El Salvador, thereby preventing plaintiffs from exercising their rights.

This repeated denial — despite knowledge of the facts — formed a key theme at trial. Numerous documents and witnesses established that, in the words of a 1988 U.S. government cable authored by defendants' own expert Ambassador Corr, the Salvadoran military's "normal reaction to a human rights accusation is to deny involvement . . . ." Plfs. Ex. 557 at R 3820; *see also* R16-1308-17, -1356-58 (expert testimony on Salvadoran military's "code of silence" and pattern of denial of human rights violations). Another U.S. cable recorded defendant Garcia's

"cocky" reaction to the El Mozote massacre — in which, according to the U.N. Truth Commission, Salvadoran troops killed more than 500 villagers: "I'll deny it and prove it fabricated." Plfs. Ex. 713; *see also* Plfs. Ex. 32 at 114-21.

The U.N. Truth Commission Report cites numerous examples of defendants and lower officers covering up or denying human rights abuses by their troops, and concludes that "[i]t is impossible to blame this pattern of conduct [*i.e.*, military executions of civilians] on local commanders and to claim that senior commanders did not know anything about it." Plfs. Ex. 32 at 126; *see also id.* at 68-69, 75, 80, 101-03, 121, 123-26, 147; R11-512-13. Yet at trial, defendants denied that they received reports of torture committed by their subordinates, or indeed that any such torture had taken place.[13]

"Extraordinary circumstances" meriting equitable tolling are present where "it would have been impossible for a reasonably prudent person to learn or

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[13] *See, e.g.*, R18-1769 (counsel: "Do you acknowledge that people were tortured in detention facilities of the armed forces of El Salvador while you were Minister of Defense?" General Garcia: "No, I have never had any proof of that."); R18-1772 (counsel: "Did you ever receive complaints of anyone else being tortured?" General Garcia: "No."); R20-2162 (counsel: "Could someone have been tortured on the 10 acres of the National Guard headquarters without you knowing it in December of 1979?" General Vides-Casanova: "I think it could have happened without one knowing about it, but I was never aware of a single act of torture during my tenure at the National Guard."); R20-2188 (counsel: "What would you do when you received, or if you received a complaint regarding torture of a detainee at one of the outposts?" General Vides-Casanova: "I do not recall having received complaints of that nature."); R21-2274 (counsel: "And General Vides, because you never ordered an investigation, you never punished anyone who was responsible for torture?" General Vides-Casanova: "I never discovered anyone carrying out torture.").

discover critical facts underlying their claim." *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 135 (S.D.N.Y. 2000). In *Bodner*, the court tolled the statute of limitations for plaintiffs who sued European banks to recover cash, jewelry, and other assets looted from them during the German occupation of France in World War II. Plaintiffs alleged that the banks had maintained "a policy of systematic and historical denial and misrepresentation concerning the custody of the looted assets." *Id*. Exercising its equitable powers, the *Bodner* court concluded that tolling was warranted because defendants were alleged to have engaged in "deceitful practices," and should not be "entitled to benefit from whatever ignorance they have perpetuated in the plaintiffs." *Id*. at 135-36.

A court in this Circuit has recently adopted the rationale of *Bodner*. *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002), was brought, *inter alia*, under the ATCA on behalf of Hungarian Jews whose property was allegedly stolen and loaded on to the "Gold Train," which fell into the hands of the U.S. Army at the close of World War II. According to plaintiffs, the U.S. government professed to be unable to trace the ownership of items on the Gold Train, even though it "was in possession of overwhelming circumstantial evidence" to permit it to identify the owners. *Id*. at 1205.

The *Rosner* court rejected the government's statute of limitations defense, holding that "equitable tolling is permitted in situations . . . 'where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" *Id*. at 1208 (quoting *Young*, 535 U.S. at 50). This condition was met on the basis of plaintiffs' allegations that the U.S. government had

wrongfully claimed to be unable to identify the owners of property on the Gold Train until 1999, when a Presidential Advisory Commission released a report. The court also took into account that the chaos and displacement of World War II's aftermath would have posed an insurmountable barrier to the filing of any lawsuit:

> In addition, the Court notes that, for the majority of Plaintiffs, the years following World War II were particularly difficult. This, combined with the fact that the Government cannot benefit from its own alleged misconduct, tips the balance in favor of tolling the limitations period. Accordingly, at this stage of the proceedings, given the equitable considerations at play in this case, Plaintiffs are entitled to the benefit of equitable tolling and their Complaint is timely.

Id.

This case, brought by plaintiffs in the no less "difficult" circumstances of the Salvadoran civil war, likewise merits tolling based on defendants' long-standing denial of the facts. At a minimum, as in *Rosner*, such denial "tips the balance" of equity against defendants. As Ambassador White testified, it was "impossible" for defendants not to have known of the abuses committed by their troops. R10-234-35. Equity "will not lend itself to" fraud, and "historically has relieved from it." *Holmberg*, 327 U.S. at 396.

Defendants should not be permitted to benefit from their denials of the historical truth. Just as the *Rosner* plaintiffs were entitled to equitable tolling until 1999, when the 50-year silence of defendant was ended by an Executive Branch report, so plaintiffs in this case should be granted tolling until the Salvadoran peace accords of 1992. To prove liability under a command responsibility theory,

plaintiffs must establish that defendant commanders knew or should have known that their subordinates were committing abuses, and failed to prevent such abuses or punish the offenders. *Ford*, 289 F.3d at 1288. Here, the "code of silence" imposed by defendants and El Salvador's military kept human rights plaintiffs in ignorance of facts material to their legal claims until the nation's civil conflict ceased. *See* R16-1318-22. Only then, when impunity for the military was broken, did access to the truth become possible — as evidenced, for example, by issuance of the U.N. Truth Commission Report approximately one year later. The limitations period should be tolled so long as defendants' repudiation of the facts precluded a lawsuit, until at least 1992.

III. BECAUSE PLAINTIFF GONZALEZ REMAINED IN EL SALVADOR, SHE IS ENTITLED TO EQUITABLE TOLLING UNTIL 1992

Plaintiff Gonzalez remained in El Salvador throughout the civil conflict and indeed until 1997, when she emigrated to the United States. R17-1590. This fact provides a separate and independent ground for applying equitable tolling to her claims.

A. The Existence of the Civil War Tolls the Statute for Gonzalez's Claims

In *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1868), the Supreme Court held that because the U.S. Civil War closed the courts to claims asserted by a New Hampshire resident against a resident of Arkansas, it tolled the statute of limitations. "[T]o say that the courts were shut, is a good excuse [to toll the statute] on voucher of record." *Id*. at 541. *Hanger* observed that in time of war,

"the courts of justice be, as it were, shut up," *id.*, and that "it necessarily follows" that the statute of limitations is "suspended" during that period. *Id.* at 542. The return of peace restarts the running of the statute. *Id*.

Hanger further covers plaintiffs who are practically, if not legally, precluded from bringing claims in times of war or political oppression. *See Osbourne v. United States*, 164 F.2d 767, 768-69 (2d Cir. 1947) (citing *Hanger* and tolling statute where courts, though open, were unavailable to prisoner of war). In particular, this principle of equitable tolling extends to victims of human rights abuse who are "unable to obtain access to judicial review." *Union of Burma*, 176 F.R.D. at 360; *see also Forti*, 672 F. Supp. at 1550 (citing *Hanger* and tolling statute where Argentine courts were only nominally open to torture survivor); S. Rep. No. 102-249, at 11 (1991) (TVPA legislative history, stating that limitations period should be tolled where plaintiff is imprisoned or "otherwise incapacitated").

Though Gonzalez is a citizen of El Salvador, her own government clearly regarded her as an enemy during the civil conflict. *See, e.g.*, R17-1553-64. The courts of El Salvador were effectively closed to her for as long as the conflict continued — *i.e*., until 1992. Moreover, according to defendants' own expert witness, Ambassador Corr, it would not have been "prudent" for a victim of state-sponsored torture to file a claim against the Salvadoran government or its high officials. R19-1937. Plaintiffs' expert Margaret Popkin confirmed that to her knowledge, no victim of torture pressed a claim against the Military and Security Forces. R14-1045. Thus, *Hanger* and its progeny toll the statute of limitations on

Gonzalez's claims against defendants until the Salvadoran military was forced from power in 1992.[14]

B. Defendants Have Conceded that the Statute of Limitations Does Not Apply to Human Rights Plaintiffs While They Remained in El Salvador

Even defendants do not maintain that the limitations period should be permitted to run on human rights plaintiffs such as Gonzalez who remained in El Salvador. At oral argument, counsel for defendants sought to distinguish between the time after plaintiff Mauricio entered the U.S. in 1983, and the prior period when he remained in El Salvador:

> *I don't have a problem with the equitable tolling period from the time [Mauricio] was in El Salvador, understanding and given what was going on there*, without being in the United States, he didn't have access to United States courts given the testimony.

R17-1654 (emphasis added); *see also* R19-2047-48 (defense counsel: "I can understand a date where somebody living in El Salvador couldn't bring a lawsuit in El Salvador until after the Peace Accord, I can understand the reasoning there . . . ."). In the analysis of defense counsel, "what was going on" in El Salvador justified equitable tolling for a plaintiff remaining in that country in the

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[14] Gonzalez appeared before the U.N. Truth Commission in 1992 and testified regarding her detention and torture. R17-1591-92. Thereafter, however, the Salvadoran legislature granted a broad amnesty to defendants and others named in the Commission's Report. R11-533; R15-1151-52. Consequently, Gonzalez was unable to file legal claims against defendants in El Salvador even after 1992. R17-1593. The grant of amnesty applies only within El Salvador and does not extend to actions brought in the United States. R15-1151-52, -1164-65.

midst of civil war. This reasoning applies to Gonzalez and supports tolling the statute of limitations for her claims until 1992.[15]

IV. ALTERNATIVELY, THE STATUTE OF LIMITATIONS WAS EQUITABLY TOLLED UNTIL DEFENDANTS TOOK UP RESIDENCE IN THE UNITED STATES

Under the ATCA and TVPA, equitable tolling is merited during the period that a human rights defendant is absent from the United States. The earliest date on which either defendant moved to the U.S. and became a permanent resident was August 1989. Since Romagoza and Gonzalez filed suit in May 1999, their claims were timely filed under the 10-year statute of limitations on this additional ground.[16]

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[15] Based on the above analysis, Gonzalez's claims would be timely even if she filed suit in 2000 rather than 1999. Nonetheless, defendants are mistaken that she did not sue until February 22, 2000. Initial Br. 9. Her claims are set out in detail in the Complaint filed on May 11, 1999. That Gonzalez did not initially disclose her name, out of fear of retaliation against herself and her family, does not alter the filing date for limitations purposes. *Doe v. Hallock*, 119 F.R.D. 640, 644-45 (S.D. Miss. 1987) (lawsuit is effectively commenced upon filing of complaint where plaintiff proceeds anonymously). Indeed, given the detailed allegations of the initial Complaint, the result would be the same even if Gonzalez had subsequently been *added* as a plaintiff. 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1501, at 154-55 (2d ed. 1990 & Supp. 2002) ("As long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense.").

[16] It is irrelevant that this ground for equitable tolling was not specifically cited by the district court, since this Court may affirm a judgment below "'on any ground that finds support in the record.'" *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001) (citation omitted).

A. Congress Intended for Equitable Tolling to Apply Under the ATCA and TVPA Where a Human Rights Defendant is Absent from the U.S.

Congress has made clear its intent that equitable tolling should be available to plaintiffs in this case based on defendants' absence from the United States. This intent is reflected, *inter alia*, in the legislative history of the TVPA, which this Court has expressly relied upon in construing both the TVPA and the ATCA. *See Abebe-Jira*, 72 F.3d at 848; *Ford*, 289 F.3d at 1286.[17] Because such congressional intent is the touchstone of equitable tolling, plaintiffs are entitled to tolling here. *See Branch*, 955 F.2d at 1582 (reading equitable tolling principles into federal statute because to do so would "effectuate Congress' purpose for [the statute]"); *Ellis*, 160 F.3d at 708 (tolling necessary to ensure remedial effect intended by Congress).

Initial drafts of the TVPA went so far as to reject any limitations period whatsoever for the statute. *See* S. 1629, 101st Cong. Sec. 2(b), at 3 (1989) ("The court shall not infer the application of any statute of limitations or similar period of limitations in an action under this section."). While the TVPA ultimately did incorporate a 10-year limitations period, 28 U.S.C. § 1350 Note, Sec. 2(c), both houses of Congress stated unequivocally that equitable tolling should apply. In its Report on the TVPA, the Senate observed that "all equitable tolling principles"

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[17] Numerous other courts have similarly relied on the TVPA's legislative history to illuminate these statutes. *See, e.g.*, *Wiwa*, 226 F.3d at 105; *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995); *Hilao*, 103 F.3d at 778 n.5; *Barrueto v. Larios*, 205 F. Supp. 2d 1325, 1334 (S.D. Fla. 2002).

should apply under this law, and provided a list of "[i]llustrative, but not exhaustive," situations in which tolling was to be available. S. Rep. No. 102-249, at 10-11 (1991).[18] This list expressly covers the facts at issue here:

> *The statute of limitation should be tolled during the time the defendant was absent from the United States* or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. Excluded also from calculation of the statute of limitations would be the period when a defendant has immunity from suit. The statute of limitations should also be tolled for the period of time in which the plaintiff is imprisoned or otherwise incapacitated. It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.

Id. at 11 (emphasis added, footnotes omitted). The House Report on the TVPA likewise confirms that in certain instances equitable tolling "may apply to preserve a claimant's rights." H.R. Rep. No. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88.

Committee Reports such as these represent "the authoritative source" for determining legislative intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

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[18] Based on strikingly similar statutory language, courts applying the Foreign Sovereign Immunities Act have required that "victims of terrorism be given benefit of '*all principles of equitable tolling*, including the period during which the foreign state was immune from suit . . . .'" *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 69 (D.D.C. 1998) (quoting 28 U.S.C. § 1605(f)) (emphasis added).

Moreover, at least one federal court of appeals has relied on the above-quoted evidence in the TVPA legislative history to establish that equitable tolling applies during the period when a defendant was absent from the United States. In *Hilao*, the court held that the limitations period for consolidated ATCA claims against former Philippine dictator Ferdinand Marcos was tolled under the extraordinary circumstances present in that country — including Marcos's immunity from suit while in office, intimidation of human rights claimants, fear of reprisals on the part of potential plaintiffs, and lack of impartial forums. 103 F.3d at 772-73. The *Hilao* court cited the Senate Report on the TVPA as authority that equitable tolling under the statute included "periods in which the defendant was absent from the jurisdiction." *Id*. at 773; *see also Estate of Cabello*, 157 F. Supp. 2d at 1368.[19]

These equitable tolling principles also extend to the ATCA. The TVPA establishes "'an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act).'" *Abebe-Jira*, 72 F.3d at 848 (quoting TVPA legislative history); *see also Alejandre v. Republic of Cuba*, 996 F. Supp. 1239,

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[19] The expression of this principle in federal law is by no means limited to the ATCA and TVPA. For example, the statute governing contract actions brought by the United States or an officer or agency thereof provides that the period during which "the defendant or the res is outside the United States" shall be excluded from computation of the limitations period. 28 U.S.C. § 2416(a). The same rule applies in criminal actions relating to tax offenses. *See* 26 U.S.C. § 6531; *see also United States v. Myerson*, 368 F.2d 393, 395 (2d Cir. 1966) ("There is nothing unreasonable or arbitrary about the tolling of the statute of limitations during an offender's absence from the country.").

1251 (S.D. Fla. 1997) (TVPA "was enacted to enhance the remedies available under the ATCA"). Cases have further identified a "close relationship" between the ATCA and TVPA for limitations purposes, *see Papa*, 281 F.3d at 1012, and the legislative history of the TVPA "casts light on the scope of the Alien Tort Claims Act." *Xuncax v. Gramajo*, 886 F. Supp. 162, 172 n.2 (D. Mass. 1995).

B. Equitable Tolling Effectuates Congress' Intent that the U.S. Not Become a "Haven" for Torturers

The statute of limitations should be tolled until at least August 1989 (Vides-Casanova) and October 1989 (Garcia) for the additional reason that failing to do so would conflict with Congress' intent to deter foreign torturers from entering the United States.

As construed in the modern era, both the TVPA and the ATCA expressly contemplate the factual scenario presented by this case, in which an alien or U.S. citizen asserts human rights claims in a U.S. court against a defendant entering from abroad.[20] Under the TVPA, for example, a plaintiff must allege torture or extrajudicial killing carried out under "actual or apparent authority, or color of law, *of any foreign nation*," and must first exhaust "adequate and available remedies" in

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[20] As noted above, the TVPA was designed to enhance, without limiting, the remedies available under the ATCA. *See Wiwa*, 226 F.3d at 104 (by passing TVPA, "Congress expressly ratified our holding in *Filartiga* [*i.e.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)] that United States courts have jurisdiction over suits by aliens alleging torture under color of law of a foreign nation, and carried it significantly further"); H.R. Rep. No. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N., at 86 ("While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens *who may have been tortured abroad*.") (emphasis added).

the place where the claim arose. 28 U.S.C. § 1350 Note, Sec. 2(a), (b) (emphasis added). Plaintiffs invoking the ATCA have likewise almost invariably addressed human rights violations committed outside the U.S., since "[j]udicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent." S. Rep. No. 102-249, at 3 (1991).

The Second Circuit's landmark decision in *Filartiga* observed that the torturer, "like the pirate and slave trader before him," has become "*hostis humani generis*, an enemy of all mankind." 630 F.2d at 890. The legislative history of the TVPA similarly reflects the deep concern of Congress that torturers should "no longer have safe haven in the United States." S. Rep. No. 102-249, at 3 (1991). In the words of Sen. Arlen Specter, a prominent TVPA supporter,

> one reason for enacting [the TVPA] is to discourage torturers from ever entering this country. There is no question that torture is one of the most heinous acts imaginable, and its practitioners should be punished and deterred from entering the United States.

138 Cong. Rec. S4176, at 4176 (daily ed. Mar. 3, 1992). Page after page of the TVPA's legislative history reveals Congress' aim to denounce and deter foreign torturers.[21] For example:

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[21] Where, as here, statements of individual legislators are consistent with statutory language and other legislative history, "they provide evidence of Congress' intent." *Brock v. Pierce County*, 476 U.S. 253, 263 (1986).

- "[The TVPA] puts torturers on notice that they will find no safe haven in the United States." 137 Cong. Rec. H34785, at 34785 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli).
- "[The TVPA] sends a distinct and forceful message that the U.S. will not host torturers within its borders." *Id*. (statement of Rep. Yatron).
- "[A]pproval [of the TVPA] will serve as a strong message and deterrent to those who engage in torture. The TVPA alerts the world that the United States is not a safe haven for torturers." 135 Cong. Rec. H22713, at 22715 (daily ed. Oct. 2, 1989) (statement of Rep. Bereuter).
- "Mr. Speaker, the continued perpetration of torture is nauseating and an affront to civilized society. It would be equally revolting, however, if a torturer was physically present in the United States but could not be sued by the victim because of inadequacies or ambiguity in our present law." *Id*. at 22716 (statement of Rep. Leach).
- "[The TVPA] is an important clarification of the legal status of torture victims in United States courts. No longer can torturers find safe haven from their crimes in the United States." 134 Cong. Rec. H28611, at 28614 (daily ed. Oct. 5, 1988) (statement of Rep. Fascell).

If the statute of limitations were permitted to run on ATCA and TVPA claims while human rights defendants such as Generals Garcia and Vides-Casanova remained outside the U.S., these crucial legislative goals would be stymied. Under such a legal regime, foreign torturers would merely have to wait until the statute of

limitations expired before entering the U.S., safe in the knowledge that they could no longer be sued for their human rights violations. This is not what Congress intended. Because equitable tolling in these circumstances is necessary to effectuate Congress' aim that the U.S. not become a "haven" for torturers, it should be applied.

C. Defendants Fail to Show that the Limitations Period Should Begin to Run Before They Became U.S. Residents

Defendants Vides-Casanova and Garcia have stipulated that they became permanent residents of the U.S. in August and October 1989, respectively. R17-1656-57; *see also* R21-2247. In a futile effort to start the limitations clock running prior to these dates, defendants' brief baldly states that their "whereabouts and travels to the U.S.A." were widely reported. Initial Br. 11. However, "'unsupported assertions in a brief cannot substitute for evidence in the record.'" *United States v. Gilbert*, 198 F.3d 1293, 1305 (11th Cir. 1999) (citation omitted). Since plaintiffs failed to establish such facts at trial, they fall far short of showing clear error — as they must — in order to obtain reversal of the district court's ruling on this basis.

V. DEFENDANTS HAVE SUFFERED NO PREJUDICE COGNIZABLE IN EQUITY

Defendants fail to identify any unfair prejudice that would require reversal of the district court's ruling on the statute of limitations. Indeed, their arguments underscore why equitable doctrines should be applied in plaintiffs' favor.

"[A]bsence of prejudice is a factor to be considered" in determining whether equitable tolling applies, once "a factor that might justify such tolling is

identified." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984); *see also Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 562 (7th Cir. 1996) ("Considerations weighing in favor of equitable tolling must be balanced against the possibility of prejudice to the defendants occasioned by the delay."). Defendants suffered no prejudice here. Their primary defense at trial was denial of torture — that it occurred in 1979-83 in El Salvador, that they knew about it, or that they could have controlled the troops who engaged in it. Defendants do not, however, establish that any specific source of evidence supporting this defense became unavailable to them through the passage of time, or even that they actively sought to obtain such evidence.[22]

Moreover, in their former role as the leaders of a dictatorship, defendants had unfettered access to any witness in the Salvadoran military, and to any other source of information controlled by the Salvadoran state. At trial, they introduced into evidence numerous documents of the government of El Salvador, and testified at length in their own defense based on an intimate knowledge of the command responsibility issues in the case. Plaintiffs had no such advantages. That the jury refused to accept defendants' version of the facts does not show legally cognizable prejudice.

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[22] Testimony from the witnesses cited by defendants (President Duarte, President Magana, and unnamed "superiors") would be relevant solely to defendants' *own actions*. The lack of such testimony cannot prejudice defendants. *See Azer v. Connell*, 306 F.3d 930, 938 (9th Cir. 2002) (no prejudice where additional evidence "is largely evidence of what the defendants did").

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the district court's ruling on the issue of statute of limitations be affirmed.

Dated: April 9, 2003

Respectfully submitted,

By:_____

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CERTIFICATE OF COMPLIANCE

Plaintiffs' brief is in compliance with the type-volume limitation of Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure. It contains 12,550 words, excluding the materials referred to in 11th Circuit Rule 28-1(a), (b), (c), (d), (e), (f), (g), (m), and (n).

Peter J. Stern

PROOF OF SERVICE

I, the undersigned, say:

1. I am and was at all times mentioned, a citizen of the United States, over the age of eighteen (18) years and not a party to or interested in the within action or proceeding and that my business address is Morrison & Foerster LLP, 425 Market Street, San Francisco, California 94105.

2. That on April 9, 2003, I served 2 copies of the BRIEF OF PLAINTIFFS-APPELLEES by mailing via UPS Overnight Mail in a sealed envelope with postage thereon fully prepaid and addressed to:

Kurt R. Klaus, Jr., Esq.
3191 Coral Way, Suite 502
Miami, Florida 33125

3. On the same date, I filed with the Clerk of the 11th Circuit Court of Appeals the BRIEF OF PLAINTIFFS-APPELLEES by mailing via UPS Overnight Mail the original and six (6) copies in a sealed envelope with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 9th day of April, 2003, at San Francisco, California.

_____

Brian D. Keeton