No. 10-1891 (L)

In the
United States Court of Appeals
for the
Fourth Circuit

L-3 SERVICES, INC., *et al.,* Defendants-Appellants.

v.

WISSAM ABDULLATEFF SA' AL-QURAISHI, *et al.,* Plaintiffs-Appellees,

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On Appeal from the United States District Court for the District of Maryland at Greenbelt
Case No. 8:08-cv-01696-PJM
The Honorable Peter J. Messitte

BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-1891 Caption: L-3 Services, Inc., v. al-Quraishi

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STATEMENT OF THE IDENTITY AND INTEREST OF *AMICUS CURIAE* AND AUTHORITY TO FILE

EarthRights International (ERI) has substantial organizational interest in the issues addressed in this brief, and these issues fall within *amicus*'s areas of expertise. ERI is a non-profit human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights abuses worldwide. ERI has been counsel in several transnational lawsuits alleging that corporations are liable under state common law for abetting human rights abuses, including *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.), *Bowoto v. ChevronTexaco Corp.*, No. 99-CV-2506 (N.D. Cal.), and *Wiwa v. Royal Dutch Petroleum Corp.*, No. 96 Civ. 8386 (S.D.N.Y.). ERI therefore has an interest in ensuring that the appropriate foreign affairs preemption analysis is applied to transnational tort claims under state law, and has filed amicus briefs on this issue in a number of cases including *Medellin v. Texas*, 552 U.S. 491 (2008), and *Mujica v. Occidental Petroleum Corp.*, No. 05-56056 (9th Cir.).

The Defendants refused consent to the filing of this brief. Accordingly, *amicus* seeks leave to file this brief by motion pursuant to F.R.A.P. Rule 29(b).

STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS CURIAE*

Amicus herein considers the circumstances under which state tort claims arising out of human rights abuses abroad can be preempted under federal foreign affairs preemption doctrines. Such preemption of generally applicable tort rules,

which are at the core of the state's traditional authority, could be appropriate only where the state law conflicts with a federal policy expressed in an act that carries the force of law. Accordingly the claims at issue in this case cannot be preempted by federal foreign affairs preemption doctrines.[1]

Defendants' other preemption argument, that the Court should recognize a government contractor preemption doctrine derived from *Boyle v. United Technologies Corp.*, 487 U. S. 500 (1988), is beyond the scope of this brief.

INTRODUCTION

Plaintiffs allege that the Defendants L-3 Services Inc. and Adel Nahkla (collectively "L-3" or "Defendants") tortured and otherwise abused Plaintiffs, who were detained in military prisons in Iraq. The Plaintiffs have brought state law tort claims and claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350.

The district court below rejected Defendants' assertion that Plaintiffs' state tort claims were preempted. *Al-Quraishi, et al., v. Nakhla, et al*, No. 08-1696 (D. Md. July 29, 2010) (J.A. 831-941) (hereinafter "Order") at 40-47. Defendants make two preemption arguments. First they contend that the logic of *Boyle v. United Technologies Corp.*, 487 U. S. 500 (1988), counsels in favor of extending

[1] In addressing the merits of Defendants' preemption arguments, *amicus* does not imply agreement with Defendants' claim that this issue is properly before the Court. Appellants' Br. at 1-2, 36-37. That issue is simply beyond the scope of this brief.

the military contractor defense to preempt the state law claims here. The merits of that argument is outside the scope of this brief. *Amicus* herein addresses Defendants' second preemption argument—that Plaintiffs' state common law claims are preempted by federal foreign affairs preemption, wholly apart from *Boyle* or any doctrine derived from it, and in the absence of any controlling statute or other binding law. Under well-established Supreme Court and other precedent, no such preemption can apply.

SUMMARY OF THE ARGUMENT

Foreign affairs preemption includes both "dormant," or "field," preemption and conflict preemption. Under U.S. Supreme Court precedent and a wealth of lower court authority, field preemption does not apply to state law, like the tort law at issue here, that is generally applicable rather than directed at a foreign policy matter, and that falls within an area of traditional state competence. Conflict preemption can only apply where state law conflicts with a federal policy that is embodied in an act with preemptive force; because no such policy has been identified here, foreign affairs preemption is inappropriate.

Defendants ask this Court to hold that Plaintiffs' state law claims are preempted even though the ordinary tort law at issue does not target foreign affairs and no conflict with any statute has been identified. That is, they ask this Court to ignore either the field preemption requirement of a state law targeted at foreign

policy or the conflict preemption requirement of a federal act having the power to preempt. Such a broad new doctrine would eviscerate the Supreme Court's careful distinctions between, and limitations on, field and conflict preemption, and should not be adopted here.

ARGUMENT

I. Field preemption and conflict preemption each have their own requirements which cannot be conflated, and which Defendants cannot meet.

As the Supreme Court explained in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) [hereinafter "*Garamendi*"], "foreign affairs" preemption can be seen as including two related doctrines: "field preemption" and "conflict preemption." *Id.* at 419 n.11. Field preemption considers whether state law intrudes upon federal prerogatives in the field of foreign policy, even in the absence of a conflict with any federal act having the power of law. *Id.* at 418–19 (2003). By contrast, conflict preemption, as the name implies, considers whether state law interferes with an affirmative federal act. *Id.*

Garamendi itself applied conflict preemption only; the Supreme Court found it unnecessary to consider whether the statute at issue could be invalidated even in the absence of any conflict with federal foreign policy, simply on the basis of intrusion into foreign affairs. *Id.* at 418-19. The Court suggested, however, that field preemption might be appropriate where a State "take[s] a position on a matter

of foreign policy with no serious claim to be addressing a traditional state responsibility." *Id.* at 420 n.11. If, however, the law is within a state's traditional competence, *Garamendi* suggests that a conflict should be required. *Id.*

Accordingly, as *amicus* details in Section II, field preemption is inapplicable to state law that does not attempt to create foreign policy and that is within an area of traditional state responsibility, such as ordinary tort law rules. As *amicus* describes in Section III, conflict preemption requires a governmental act with the power to preempt.

Defendants, however, seek to conflate these doctrines so as to avoid the separate requirements of each. They argue, based upon *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *pet. for certiorari pending*, that application of *any* state law, even generally applicable state tort rules, in a wartime context would create a conflict with federal "foreign policy interests" and is therefore preempted, irrespective of whether it conflicts with any federal law. Appellants' Br. at 38 (quoting *Saleh*, 580 F.3d at 11-13). Both Defendants and *Saleh* are clear that this argument is separate from any argument under *Boyle*. *Id.*; *Saleh*, 580 F.3d at 11. The district court properly rejected Defendants' foreign affairs preemption argument, noting that it was "not convinced that the [foreign affairs] preemption defense discussed in *Saleh* comports with established precedent." Order at 47,

n.11 (citing *Saleh*, 580 F.3d at 24-26, 30-32 (Garland, J., dissenting)).[2] The district court also held that such dismissal would be improper even if *Saleh* described a potentially valid ground for dismissal. It noted that Plaintiffs alleged that L-3's acts contravened U.S. policy, in which case the state law claims do not intrude into the government's ability to make war-time policy. Order at 47 n.11.

Neither Defendants nor *Saleh* expressly state whether this "defense" purports to assert field preemption or conflict preemption. In fact, however, Defendants' argument fails and *Saleh* should not be followed because the preemption L-3 seeks cannot be reconciled with the Supreme Court's requirements for either field or conflict preemption. If Defendants and *Saleh* mean to suggest that field preemption could apply to state law in an area of traditional concern that does not attempt to create foreign policy, it is inconsistent with *Garamendi* and every other case to apply field preemption. *See infra* Section II. The argument fares no better as an assertion of conflict preemption, since L-3 and *Saleh* do not purport to state a conflict with any governmental act with the power to preempt. *See infra* Section III. Nor does Supreme Court precedent permit the creation of a new, broader doctrine that would eviscerate the requirements of both field and

[2] As Judge Garland noted, *Saleh* "involve[d] the application of facially neutral state tort law. And there is no express congressional or executive policy with which such law conflicts. No precedent has employed a foreign policy analysis to preempt state law under such circumstances." *Saleh*, 580 F.3d at 26 (Garland, J., dissenting) (internal citations and footnotes omitted).

conflict preemption.

Because the application of facially neutral tort laws is an area of traditional state competence, which can only be preempted by a conflict with a federal policy embodied in an act that carries the force of law, and since there is no such act here, Plaintiffs' claims cannot be dismissed on foreign affairs preemption grounds.

II. As a subject of traditional state competence, facially neutral state tort law is not subject to dormant foreign affairs field preemption.

As noted above, *Garamendi* suggests that where state law is within a state's traditional competence and does not take a position on a matter of foreign policy, field preemption does not apply. 539 U.S. at 420 n.11.

This Court has never applied foreign affairs preemption, but other circuits have. Consistent with *Garamendi*, the Ninth Circuit has explained that field preemption is relevant when a state "establish[es] its own foreign policy," *Deutsch v. Turner Corp.*, 324 F.3d 692, 709 (9th Cir. 2005). More recently, the Fifth Circuit has rejected the notion that "generally applicable" state laws can be preempted by foreign affairs concerns in the absence of a specific conflict. *Dunbar v. Seger-Thomschitz*, __ F.3d __, 2010 U.S. App. LEXIS 17572, *12 (5th Cir. Aug. 20, 2010). In *Dunbar*, a case involving Holocaust-era claims, the court rejected an argument that the application of ordinary state statutes of limitation should be preempted, because the state "has not pursued any policy specific to

Holocaust victims." *Id.*[3]

Likewise, in *Medellin v. Texas*, 552 U.S. 491 (2008), the U.S. Supreme Court held that a generally applicable state law was not preempted even though its enforcement would manifestly interfere with foreign policy. In that case, the state's application of its statutory limitation on filing successive *habeas* petitions had led to a suit by Mexico against the United States at the International Court of Justice, a case which Mexico won; the foreign policy of the U.S. government was clearly opposed to the application of the state law. Nonetheless, the Supreme Court rejected preemption because it was not supported by any federal act having the force of law. *Id.* at 530. Even though the documented interference with federal foreign policy was far greater in *Medellin* than has been demonstrated here, the Supreme Court applied *conflict* preemption and *upheld* application of the state law—a result utterly inconsistent with any suggestion that generally applicable state law that interferes with foreign policy is preempted on that basis alone.

Indeed, every case finding field preemption has involved action by a state in an attempt to legislate foreign policy, not the mere application of facially neutral

[3] *See also* Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1711 (1997) (foreign affairs preemption should be limited to, at most, state laws that purposely interfere with foreign policy, not state laws that "are facially neutral and were not designed with the purpose of influencing U.S. foreign relations").

provisions in a context that might have foreign policy implications.[4] The only possible exception is *Saleh*; if that case is understood as a field preemption case at all, it is clearly an outlier and in conflict with the Supreme Court's guidance.

Neutrally applicable state tort laws, which take no position on any matter of foreign policy, clearly fall within a state's recognized "traditional authority to provide tort remedies." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (states have "the power to declare substantive rules of common law," including "the law of torts"). Accordingly, such laws are not subject to field preemption.

Defendants argue that the district court erred in concluding that this suit involves "traditional areas of state power," simply because in this case, the neutral tort principles at issue are applied in the context of warfare. Appellants' Br. at 39,

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[4] *See, e.g.*, *Zschernig v. Miller*, 389 U.S. 429, 441 (striking down state law resulting in inquiries into forms of government of foreign nations); *von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 964-65 (9th Cir. 2010) (preempting state law aimed at facilitating recovery of artwork lost during the Holocaust); *Deutsch*, 324 F.3d at 1020-27 (invalidating state law addressing slave labor during World War II); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-61 (1st Cir. 1999) (striking down state selective purchasing law targeting business in Burma), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill. 2d 221, 236-37 (1986) (invalidating state statute excluding South African coins from state tax exemptions); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1378 (D.N.M. 1980) (striking down state university policy of rejecting Iranian students); *see also Saleh*, 580 F.3d at 24, n.8 (Garland, J., dissenting) ("no precedent has employed a foreign policy analysis to preempt generally applicable state laws").

citing Saleh, 580 F.3d at 11. On the contrary, the above-cited authority makes clear that the relevant question is whether the state has enacted a law specifically designed to weigh in on a foreign policy matter that is outside its traditional state authority. Creating neutral tort rules does not "take a position on a matter of foreign policy," and in merely applying generally applicable rules, the state clearly has a "serious claim to be addressing a traditional state responsibility." *See Garamendi*, 539 U.S. at 420 n.11.[5]

Field preemption is thus inapplicable here, where no state has pursued any policy specific to military conflict or human rights abuses in Iraq. The application

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[5] Defendants assert that the presumption against preemption in areas of traditional state authority does not apply in the context of military affairs. Appellants' Br. at 39. The cases they cite, however, are inapposite. Appellees' Br. at 46-47. None addresses the federal preemption of state law at all. *Dep't of Navy v. Egan*, addressed the "narrow question" of whether one federal entity, the Merit Systems Protection Board, had statutory authority to review the security clearance determinations of another federal entity, the Department of the Navy, and found that the Board lacked such authority. 484 U.S. 518, 520 (1988). In *Chappell v. Wallace*, 462 U.S. 296 (1983) and *United States v. Stanley*, 483 U.S. 669 (1987), the Court considered whether *servicemen* could bring federal claims against military or other federal officers for injuries that arose incident to the plaintiffs' service. The Court held that such servicemen could not bring damages actions, declining to create a *Bivens* remedy where it might disrupt the unique demands of the military chain of command. The Court, however, recognized that military personnel *could* bring claims in civilian courts for constitutional wrongs suffered in the course of military service seeking redress designed to halt or prevent the constitutional violation rather than the award of money damages. *Stanley*, 483 U.S. at 683 (citing *Chappell*, 462 U.S. at 304). Defendants fail to explain how these cases apply here, where the court is asked to preempt a neutral state tort law against private individuals whose application in this case would actually support federal policy.

of the state tort laws at issue can only be preempted upon a showing of a conflict with federal policy enshrined in law.

III. Conflict preemption does not apply in the absence of a federal act with the power to preempt state law.

Defendants' suggestion that Plaintiffs' claims are preempted even in the absence of a conflict with any federal law (and without any reliance on *Boyle*) also fails under conflict preemption doctrine. *See* Appellants' Br. at 38-39.

Conflict preemption requires, as its starting point, a federal act that has the power to preempt, or is "fit to preempt," state law. *Garamendi*, 539 U.S. at 416. Under the Supremacy Clause, certain sources — the "Constitution," the "laws of the United States," and "treaties" — are the "supreme law of the land," and can preempt state law. U.S. Const., art. VI, § 2. Executive agreements may also have preemptive force. In *Garamendi*, the Court first established the President's constitutional authority: "[R]esolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs." 539 U.S. at 420. Next, the Court found that, pursuant to this authority, the President had made executive agreements that embodied a "consistent Presidential foreign policy" preference that was inconsistent with the state law, even though the agreements did not expressly

preempt the state law. *Id.* at 421.[6]

The Supreme Court, however, has emphasized the need for a constitutional foundation for the preempting act, and clarified that not all issues that touch on foreign policy fall within the President's unilateral authority. In *Medellin*, the President himself had attempted to intervene in a state criminal case, in order to enforce the judgment of the International Court of Justice that was binding on the United States. The Court, however, found that a directive issued by the President was not binding on Texas.

The Court primarily focused on searching for a possible basis — either a ratified treaty, *see* 552 U.S. at 524-30, or some independent power of the President, *id.* at 530-32 — that would give the President the authority to displace state law. The Court recognized that the President has the lead role in making "sensitive foreign policy decisions," and that the case, presented "plainly compelling" federal foreign policy interests. *Id.* at 523-24. Nonetheless, it held that "[s]uch considerations . . . do not allow us to set aside first principles. The President's authority to act, as with the exercise of any governmental power, 'must stem either

[6] The President's power to make such agreements has "been exercised since the early years of the Republic," and the practice "has received congressional acquiescence throughout its history." *Garamendi*, 539 U.S. at 415. Such agreements are "legally binding," *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994), and have long been held to have "the full force of law." *United States v. Walczak*, 783 F.2d 852, 856 (9th Cir. 1986) (citing *United States v. Pink*, 315 U.S. 203 (1942)); *accord Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 437 (D.C. Cir. 1981).

from an act of Congress or from the Constitution itself.'" *Id.* at 524 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)). The President generally has the power to execute federal law, not to unilaterally create it. *Medellin*, 552 U.S. at 526 (quoting *Youngstown*, 343 U.S. at 587 ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.")).

Aside from powers derived from statutes and treaties, or powers expressly granted by the Constitution, the only other "narrow set of circumstances" in which *Medellin* recognized preemptive authority involves "the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *Id.* at 531. That circumstance is clearly inapplicable here.

Thus, *Medellin* made clear that that a presidential directive to a state lacked the force of law and was not sufficient to preempt state law. *Id.* at 525, 532. That is, *Medellin* reaffirmed that mere federal executive branch foreign policy—even a policy specifically directed at displacing state law—cannot preempt state law, unless such policy is enshrined in federal law with the power to preempt. Because there was no federal policy enacted by Congress or made by the President in an executive agreement, and no express constitutional basis for the President to

preempt state law, the President lacked the unilateral power to "set aside neutrally applicable state laws." *Id.* at 532.

According to Defendants, preemption is warranted here because "under the circumstances, the very imposition of *any state law* create[s] a conflict with federal foreign policy interests." Appellants' Br. at 38, *quoting Saleh*, 580 F.3d at 13. The limitation on conflict preemption — that the federal policy must be located in a legally binding act — refutes Defendants' suggestion that Plaintiffs' claims are barred by mere "foreign policy interests," even if they do not conflict with any law reflecting Congressional intent to create immunity. Appellants' Br. at 38.

Nor can this Court ignore this clear limitation simply because the acts at issue here arose during wartime. *See* Appellants' Br. at 38 (citing *Saleh*, 580 F.3d at 11, 13). For example, *Youngstown* rejected executive assertions of the authority to make law regarding matters related to an ongoing war. *Youngstown*, 343 U.S. at 583, 590; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (rejecting procedures President established to try prisoner captured during war as outside the authority of the President).[7] None of the foreign affairs preemption cases cited by Defendants (and the court in *Saleh*) suggest that the Supreme Court's carefully calibrated balance between state and federal authority does not apply in wartime;

[7] Moreover, both *Youngstown* and *Hamdan* dealt with *overt* presidential action. If the President himself lacks the power to unilaterally make law in such circumstances, it is difficult to see how state law can be preempted where the President has not purported to create law.

indeed, none even address the issue.[8] In short, Defendants have cited no authority that would allow this Court to deviate from the ordinary rules governing preemption.[9]

As in *Medellin*, the only alleged conflict here is between the state law and executive *policy*. Even assuming that they have correctly identified the policy on which they rely, Appellants do not attempt to locate any legally binding source of that policy. And under *Medellin,* such a conflict is insufficient to preempt state law.

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[8] See Appellants Br. at 38 (citing *Saleh*, 580 F.3d at 11 (in turn citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363(2000); *Garamendi*, 539, U.S. 396, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447-49 (1979); *Zschernig v. Miller*, 389 U.S. 429 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941)). As Appellees demonstrate, none of these cases raised wartime issues. Appellees' Br. at 45-46.

[9] Even if the Court could ignore the threshold requirement that there be some federal act with the power to preempt, which it cannot, there would be no reason to do so here. A far lesser basis for federal preemptive power has been shown here than in cases in which the Supreme Court has refused to preempt state law. For example, in *Medellin*, the President himself intervened, preemption was expressly argued by the Executive, and the direct involvement of the United States in a foreign policy conflict was clear. Likewise, in *Youngstown*, the Court rejected President Truman's claim of authority to seize steel mills, and presumably to thus supplant neutrally applicable state property law, even though the Government argued the seizure was necessary to prevent immediate jeopardy to national defense, including prosecution of the Korean War. 343 U.S. at 583, 590. None of that exists here; indeed, under Plaintiffs' allegations, it is L-3's acts, not Plaintiffs' claims that contravene U.S. policy. Order at 47, n.11. If the President could not preempt state law in *Medellin* or *Youngstown*, then surely dormant preemption is not warranted here.

CONCLUSION

For the foregoing reasons, this Court should reject Defendants' foreign affairs preemption argument.

DATED: September 28, 2010

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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(s) Marco Simons

Attorney for EarthRights International

Dated: September 28, 2010

CERTIFICATE OF SERVICE

I certify that on 9/28/2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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