Nos. 10-55515, 10-55587, & 10-55516

In The United States Court Of Appeals For The Ninth Circuit

LUIS ALBERTO GALVIS MUJICA, *et al.*, Plaintiffs-Appellants/Cross-Appellees,

vs.

OCCIDENTAL PETROLEUM CORP. *et al.*, Defendants-Appellees/Cross-Appellants

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On Appeal From the Judgment of the United States District Court
For the Central District of California
The Honorable Margaret M. Morrow and the Honorable William J. Rea
District Court No. CV-03-2860 WJR(JWJx)

BRIEF OF AMICUS CURIAE EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL (FILED WITH THE CONSENT OF ALL PARTIES)

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae EarthRights International (ERI) is a nonprofit corporation, which has no parent corporation nor stock held by any publicly held corporation.

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All parties have consented to the filing of this brief.

No party or counsel thereof authored this brief; no person other than *amicus* contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

EarthRights International (ERI) is a human rights organization based in Washington, D.C., that practices litigation and advocacy on behalf of victims of abuses worldwide. ERI is counsel in several transnational lawsuits asserting state-law claims that arise partly out of conduct overseas. In *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir.), and in *Doe v. Unocal Corp.*, No. BC 237980 (Los Angeles Superior Court), which were settled in 2005, ERI was counsel in litigation alleging that a California corporation was liable under, *inter alia*, California state law for its complicity in forced labor, rape, and murder carried out by Burmese soldiers. In *Bowoto v. Chevron Corp.*, No. 09-15641 (9th Cir.), which was tried in 2008, ERI was counsel in litigation alleging that a California corporation was liable under, *inter alia*, California state law for its complicity in murder and other abuses by members of the Nigerian security forces. In *Maynas Carijano v. Occidental Petroleum Corp.*, Nos. 08-56187 & 08-56270 (9th Cir.), ERI is counsel in litigation alleging that California corporations are liable under, *inter alia*, California state law for toxic pollution of indigenous communities in Peru.

ERI therefore has an interest in ensuring that state-law tort claims for abuses committed abroad, including those done in cooperation with foreign militaries, are not improperly dismissed for perceived interference with federal foreign affairs powers. ERI has filed numerous *amicus* briefs on federal foreign affairs preemption doctrines, including a brief to the Supreme Court in *Medellin v. Texas*, 552 U.S. 491 (2008), and at least five briefs to the federal Courts of Appeals.

STATEMENT OF THE ISSUE ADDRESSED BY AMICUS CURIAE

The narrow question amicus addresses is whether the foreign affairs preemption doctrine can appropriately be used to dismiss claims brought under generally-applicable state tort law in a federal court action, in the absence of a clear conflict with federal acts that carry the force of law. The district court's ruling that such claims can be preempted is unprecedented and should be reversed.

SUMMARY OF ARGUMENT

The foreign affairs doctrine is a doctrine of preemption of state action by federal action. In this case, which was brought in federal court, the only state action at issue is the creation of generally-applicable tort causes of action. Because the creation of such tort law falls within the traditional competence of the states, it cannot be preempted without a showing of a clear conflict with a federal statute or other federal action with the force of law.

Although the district court recognized that tort liability rules fall within the

traditional competence of the states, the court held that several generally-applicable tort causes of action were preempted not by federal action having the force of law, but rather pursuant to a statement of interest submitted by a sub-Cabinet Executive Branch official. In short, the district court's opinion could allow such an official to veto the adjudication of any state-law claim which that official believed would somehow affect U.S. foreign relations. The Supreme Court's foreign affairs preemption jurisprudence explicitly precludes affording Executive Branch officials such unlimited power, and does not place so much traditional state authority on such tenuous footing.

There can be no foreign affairs conflict preemption here, because there is no relevant federal action having the force of law, and thus no governmental act with the power to preempt. Moreover, even accepting the single Executive Branch statement here at face value, there is no basis for finding a conflict between state law and federal policy. Nor may facially neutral tort claims be preempted under any notion of foreign policy "field preemption," because in creating such causes of action the state has acted within an area of traditional state responsibility and has not engaged in its own foreign policy.

Since this decision is manifestly at odds with the delicate balance between state and federal prerogatives struck by the Supreme Court and this Court in existing foreign affairs preemption jurisprudence, it must be reversed.

ARGUMENT

I. The "foreign affairs" doctrine is a preemption doctrine, and the only state action at issue here is the creation of generally-applicable tort causes of action.

Broadly stated, the "foreign affairs" doctrine asks whether "an exercise of state power that touches on foreign relations must yield to the National Government's policy." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) [hereinafter "*Garamendi*"]. The question is one of federal "preemption," *id.*, of state action.

The state action at issue here is the creation of several generally-applicable tort causes of action—the plaintiffs' claims for "emotional distress" and "wrongful death." *Galvis Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1169, 1185 (2005). The only state action involved in creating the emotional distress causes of action, which are "common law theories," *Ardary v. Aetna Health Plans*, 98 F.3d 496, 500 (9th Cir. 1996), is the adoption of the common law; and although wrongful death is a statutory cause of action, *see* Cal. Civ. Code § 377.60 (2005), the rule allowing recovery for wrongful death is so well established that it has "become itself a part of our law." *Moragne v. States Marine Lines*, 398 U.S. 375, 390–91 (1970). There is nothing about California's creation of these tort claims that is directed to any specific international situation or foreign policy issue; instead, this tort law applies generally, subject to California's

conflicts-of-laws rules.

Thus, the question in this case is whether the mere creation of facially neutral, garden-variety tort claims—which in some cases may apply to acts overseas as well as to domestic acts—may be preempted by a single statement by an Executive Branch official. The answer is "no."

II. Generally applicable state tort causes of action must be evaluated under "conflict preemption" analysis.

As the Supreme Court explained in *Garamendi*, "foreign affairs" preemption can be seen as including two related doctrines, each with its own requirements: "field preemption" and "conflict preemption." 539 U.S. at 419 n.11; *accord Saher v. Norton Simon Museum of Art of Pasadena*, 592 F.3d 954, 960–61, 63–64 (9th Cir. 2010). 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. *Garamendi*, 539 U.S. at 418–19. Conflict preemption, as the name implies, considers whether state law interferes with an affirmative federal act. *Id*. Although *amicus* submits that the district court below applied the conflict preemption doctrine incorrectly, it was correct to consider only conflict preemption and not field preemption in this case.

Garamendi 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. *Id.* at 418–19. In footnote

eleven, however, the Court suggested that field preemption should apply only 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. In contrast, where "a State has acted within . . . its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict." *Id.* (internal citations omitted); *see also Saher*, 592 F.3d at 964 (noting that "central question" in determining whether field preemption applied was whether state "addressed a traditional state responsibility").

Garamendi's footnote eleven is consistent with the general presumption that the federal government "does not intend to pre-empt areas of traditional state regulation." *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (noting that preemption is not presumed when the federal government acts "in a field which the States have traditionally occupied"). Thus, this Court should "require a conflict" before preempting action within the "traditional competence" of the states. *Garamendi*, 539 U.S. at 420 n.11 (internal citations and punctuation omitted).

The district court applied only conflict preemption principles, because the state-law causes of action fall within "an area of 'traditional competence' for state regulation—tort law." *Galvis Mujica*, 381 F. Supp. 2d at 1187 (quoting *Garamendi*, 539 U.S. at 420 n.11). The state action at issue is the creation of

ordinary tort causes of action, *see supra* Part I, and tort law is well within the domain of the states. Because there is "no general federal common law," "the power to declare substantive rules of common law," including "the law of torts," lies with the states. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Supreme Court has expressly recognized "the States' traditional authority to provide tort remedies." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *accord Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1116 (9th Cir. 2000). Neutrally applicable state tort laws, which take no position on any matter of foreign policy, clearly fall within a state's traditional authority.

The district court correctly found that plaintiffs' claims are within traditional state authority even though they arose abroad. "Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred." *Filartiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). This rule was part of the common law before California even existed, and has long been part of American law. *See, e.g., McKenna v. Fisk*, 42 U.S. 241, 248–49 (1843).

Since plaintiffs' garden-variety tort claims fall within the core of states' traditional competence, these claims cannot be preempted unless all of the requirements of conflict preemption are met. As discussed below, that is not the case here.

III. "Conflict preemption" does not permit preemption of the generally-applicable tort causes of action at issue.

Under *Garamendi*, foreign affairs conflict preemption requires several elements. First, the court must identify an actual exercise of federal preemptive authority—federal action that has the power to preempt, or is "fit to preempt state law"—in *Garamendi*, this took the form of an executive agreement. 539 U.S. at 416. Second, the court must determine that there is a "clear conflict" between the "express federal policy" and the state action. *Id.* at 420. In *Garamendi*, such a conflict was present because the California statute furthered an alternative method of resolution for Holocaust-era claims than had been adopted in the executive agreement. Third, if any doubt remains about the "clarity of the conflict," the court should examine the strength of the state's interests. *Id.* at 425.

The district court erred at each step. The court appeared to give a statement of interest from a State Department official the power to preempt, even though such a statement does not carry the force of law. Next, the district court failed to identify a "clear conflict" between state law and federal foreign policy, deferring to the statement of interest but failing to identify how the policies articulated therein conflicted with the adjudication of the claims here. Last, the district court failed to give sufficient weight to the interests of the State of California.

The foreign affairs preemption doctrine is rarely applied and not especially well-developed, and in some cases the Court may need to wrestle with difficult

issues of precisely what federal acts carry preemptive power and exactly when a conflict is presented. This is not such a case; it is abundantly clear that a letter from a sub-Cabinet State Department official that does not even identify any actual conflicting federal policy falls far short of the federal action necessary to preempt state law.

A. The district court failed to identify any exercise of federal authority that is "fit to preempt" state law.

In *Garamendi*, the Supreme Court preempted state law only after determining that it was in conflict with an "exercise of the federal executive authority," 539 U.S. at 421—an executive agreement—and that the agreement was "fit to preempt state law." *Id.* at 416. The district court here failed to identify a similar exercise of authority with preemptive force, relying only on a single statement submitted by a sub-Cabinet State Department official.

1. A statement of interest is not fit to preempt state law because it does not carry the force of law.

The statement of interest on which the district court relied is not an exercise of federal executive authority that could preempt state law. A federal official has merely expressed opinions regarding the potential effects of this case on U.S. foreign policy interests. *See Galvis Mujica*, 381 F. Supp. 2d at 1188. Such an opinion lacks the force of law and, consequently, preemptive power.

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 therefore preempt state law. U.S. Const. art. VI, § 2. Generally-applicable state tort law can therefore only be preempted pursuant to an action of the political branches carrying the force of law; federal acts that do not have the force of law cannot preempt. *S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 812 n.5 (9th Cir. 1993); *see Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) ("We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication."); *see also Garamendi*, 539 U.S. at 442 (Ginsburg, J., dissenting) (no authority grants Executive Branch officials "the power to invalidate state law simply by conveying the Executive's views on matters of federal policy").[1]

Even with respect to acts of the President, the Supreme Court 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. *See Medellin v. Texas*, 552 U.S. 491 (2008); *accord Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 906 (9th Cir. 2010) (citing *Medellin*, 552 U.S at 531-32) (holding that not every executive pronouncement constitutes a proper invocation of preemptive power). In *Medellin,* the violation of the treaty rights of Mexican citizens arrested in the United States had led to a suit

[1] Nothing in the majority opinion in *Garamendi* conflicts with this point.

by Mexico against the United States at the International Court of Justice (ICJ), which Mexico won. 552 U.S. at 497–98. The President himself attempted to intervene in a Texas criminal case to enforce the ICJ's judgment, which was binding on the United States. *Id.* at 498, 503. The Supreme Court, however, found that the President's directive was not binding on Texas. *Id.* at 498–99, 523–32.

The *Medellin* Court primarily focused on searching for a possible basis—either a ratified treaty, *see id.* 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 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. *Id.* 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.")); *accord Hamdan v. Rumsfeld*, 548 U.S. 557, 591–92 (2006).

Thus, *Medellin* made clear that even a presidential directive to a state that

implicated important foreign affairs interests lacked the force of law and was not sufficient to preempt state law. *Id.* at 525, 532. Mere federal executive branch foreign policy—even a policy specifically directed at displacing state law—cannot preempt, 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.

Indeed, notwithstanding the President's constitutional authority as Commander in Chief, U.S. Const. art. II, § 2, cl. 1, both *Youngstown* and *Hamdan* rejected Presidential assertions of the authority to make law regarding matters related to an ongoing war. *Youngstown*, 343 U.S. at 583, 590 (rejecting President Truman's claim of authority to seize steel mills to support national defense, including prosecution of Korean War); *Hamdan*, 548 U.S. at 567 (rejecting procedures President established to try prisoner captured during war). If the President himself cannot make law despite an overt attempt to do so in these wartime contexts, then surely a sub-Cabinet official may not do so in the circumstances here.

Garamendi, of course, concluded that executive agreements may preempt state law, even though they are not listed in the Supremacy Clause. But 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)). The President's power to make such agreements has "been exercised since the early years of the Republic," and, at least with respect to agreements settling claims of American nationals against foreign governments, the practice "has received congressional acquiescence throughout its history." *Garamendi*, 539 U.S. at 415–16. The Court's subsequent opinion in *Medellin* made clear the narrow nature of the holding in *Garamendi*, which relied on the President's "narrow and strictly limited authority to settle international claims" pursuant to executive agreement, 552 U.S. at 532, not a generalized executive foreign affairs lawmaking power.

Thus, aside from powers granted by statute, treaty, or 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. *Medellin* held that unlike executive agreements, issuing directives to state courts was "not supported by a 'particularly longstanding practice' of congressional acquiescence." *Id.* at 532 (quoting *Garamendi*, 539 U.S. at 415). As in *Medellin*, no one has "identified a single instance" in which "Congress has

acquiesced in" an attempt by the Executive to prohibit the states from recognizing claims based-upon garden-variety tort principles. *See id*.

The Supreme Court's decision in *Barclays Bank* is also instructive. There, in the analogous foreign commerce clause context, the Court rejected the contention that amicus briefs or letters from the administration to a state governor had the power to preempt, finding they "lack the force of law." 512 U.S. at 328–30 & n.30. Indeed, the Supreme Court considered this point so indisputable that it used it in another context as an example of a "broken circle" of logic: "[T]hat Executive agreements may displace state law . . . and that unilateral presidential action (renunciation) may displace Executive agreements, does not produce the 'logical' conclusion that unilateral presidential action may displace state law." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) (citation omitted).

Here, the district court pointed to no federal act—statute, treaty, executive agreement, or otherwise—carrying the force of law. Instead, the district court preempted state law based solely on the statement of interest, which the President has not enshrined in any executive agreement. Under *Medellin*, a directive of the President himself that specifically purports to preempt state law is insufficient to do so; thus a statement of interest, signed by sub-Cabinet official and that did not

by its terms purport to preempt, plainly is not fit to do so.[2] This Court should not effectively amend the Supremacy Clause to give mere statements by Executive officials the ability to preempt state law.

2. Because Garamendi *is, at most, a limited exception to the Tenth Amendment principle that only express Congressional action can limit the historic powers of the states, it cannot be extended to permit preemption by a mere statement of the Executive Branch.*

Affording preemptive power to the litigation position of a sub-Cabinet executive official would countenance an extraordinary usurpation of state authority by the Executive Branch and the courts. The Tenth Amendment protects States from undue encroachment of federal authority; states retain a "residuary and inviolable sovereignty." *New York v. United States*, 505 U.S. 144, 188 (1992); *see also United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting government argument that would place no limits on federal authority in areas where states traditionally have been sovereign).

Limits on state authority of the kind asserted by the district court typically can only be created by Congress. To infringe historic state powers, Congress must make its intent "unmistakably clear in the language of [a] statute." *Gregory v.*

[2] Although *Garamendi* relied on statements made by sub-Cabinet officials to shed light on the policy animating the executive agreements, *see* 539 U.S. at 411, 422, it did not suggest that such a statement alone has preemptive force, or that the statute at issue would have been preempted in the absence of an executive agreement, and *Medellin* shows that there could be no such preemption.

Ashcroft, 501 U.S. 452, 460 (1990). Courts may not "give the state-displacing weight of federal law to mere congressional ambiguity." *Id*. at 464. *Gregory* required a plain statement of intent to preempt historic state powers specifically to "avoid a potential constitutional problem." *Gregory*, 501 U.S. at 464.

Garamendi can be seen as an exception to the rule requiring explicit congressional direction to override historic state powers, since the Court noted that a clear conflict with the policy reflected in the executive agreement is "alone enough" to require preemption of state law. 539 U.S. at 425. Given, however, the Tenth Amendment concerns at stake, this Court should reject the district court's unprecedented expansion of *Garamendi* to permit preemption by mere statements of sub-Cabinet Executive Branch officials.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550–51 (1985), the Supreme Court explained that state sovereignty is protected against federal intrusion by states' representation in the federal political process. Allowing federal courts to override historic state powers without explicit congressional direction "would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Gregory*, 501 U.S. at 464. These concerns counsel strongly against any expansion of *Garamendi*.

First, the requirement that the President must take the public, high profile step of negotiating and signing an executive agreement—or at least must take *some*

action—affords a measure of political protections to states. Those protections would be eviscerated if a lower-level official can preempt state law by simply filing a statement of interest. "Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances." *Medellin*, 552 U.S. at 515.

Second, if a state goes too far in intruding upon foreign relations, the federal political branches can protect themselves, but if the courts go too far in preempting state law, states are largely helpless. *See,* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1693–94 (1997). ("the hurdles to political branch correction of untoward state foreign relations activity are relatively insignificant. . . . the erroneous federalization of [state] law . . . will not trigger the political branches' special means to monitor and control adverse foreign relations activity."

B. The district court failed to identify a "clear conflict" between federal and state law, as required by *Garamendi*.

The district court purported to preempt based on the conflict analysis of *Garamendi* but failed to follow the Supreme Court's lead in identifying the exercise of federal power that conflicted with the state's action. *Garamendi* found that federal policy had been expressed in executive agreements, and that a "clear conflict" with these agreements was "raised by state statute." 539 U.S. at 420.

Here, the district court failed to identify any "clear conflict" between the state tort causes of action and federal authority. The district court proceeded through the analysis backwards: after first determining that California had a "weak interest" in applying its law here, the district court proceeded to weigh the state interests against the federal interests, mentioning (almost as an afterthought) some unspecified "conflict with foreign policy." 381 F. Supp. 2d at 1188. This differs from the Supreme Court's careful analysis in *Garamendi*, which examined exactly whether and how the California statute interfered with the workings of the particular executive agreement at issue. *See* 539 U.S. at 424. Indeed, *Garamendi*'s analysis does not call for weighing the "interests" of the state and the federal government; instead, it calls for first *finding a conflict* between federal and state law and only then considering state interests in determining whether the conflict is sufficiently strong to require preemption. *Id.* at 419 n.11. The district court essentially skipped the determination of whether a conflict existed, diving directly into the strength of California's interests.

C. The claims presented here do not conflict with federal authority.

Even if the government's statement of interest is given preemptive force, preemption is inappropriate because the position espoused in the statement does not clearly conflict with the resolution of the claims at issue here. *See* Appellants' Opening Brief ("AOB") at 46–49. Nothing in this case conflicts with "our foreign

policy [] to encourage other countries to establish responsible legal mechanisms for addressing and resolving alleged human rights abuses." 381 F. Supp. 2d at 1188 (quoting the Statement of Interest). A civil action against these corporate defendants will not in any way discourage Colombia from taking appropriate legal action against the same defendants, let alone against the military officers involved.

Nor need this Court worry about proceedings in U.S. courts having "at least the potential for reaching disparate conclusions" compared with proceedings in Colombian courts. *Id.* The statement does not identify any ongoing proceedings. Moreover, even the existence of an ongoing action in the courts of another country could not be grounds for preemption. "Concurrent jurisdiction in two courts does not necessarily result in a conflict . . . . Parallel proceedings . . . should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other." *China Trade & Dev. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (internal citations and quotation marks omitted). The district court's unprecedented opinion could permit preemption of *any* case in which a claim could also be brought abroad.

Nor is this case likely to anger the Colombian government. Where a law affects a domestic rather than a foreign corporation, that fact weighs strongly against the conclusion that a foreign nation may retaliate against the United States. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 195 (1983).

In short, even if the statement of interest is given the force necessary to preempt state law, it does not conflict with the claims at issue here.

D. The district court failed to give sufficient weight to California's interests.

Even if there were some federal action with preemptive force, and even if the adjudication of ordinary state-law claims somehow clearly conflicted with that federal action, the district court erred by failing to give sufficient weight to the interests of California.

Under *Garamendi*, the fact that a state has legislated within its "traditional competence" may give it a "claim to prevail" in a conflict preemption case. 539 U.S. at 420 (internal quotation marks omitted). In such a case, therefore, it is "reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." *Id*. In *Garamendi*, if California was acting within its traditional competence at all, its interest was considered relatively insignificant, because there was "no serious doubt that the state interest . . . is concern for the several thousand Holocaust survivors said to be living in" California, which was the *same* interest motivating the federal government's action. *Id.* at 425–26. But here, California's interest is strong, and any conflict must be serious in order to require preemption.

1. California has a strong interest in creating general tort law.

Because the state action here is the creation of generally-applicable tort claims, *see supra* Part I, the district court should have evaluated California's interest in creating those causes of action generally, not in the facts of this particular case. *See Garamendi*, 539 U.S. at 425–26 (evaluating California's interests in creating the statute at issue, not the particular facts presented by the parties' claims); *see also Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 784–85 (9th Cir. 2001) (holding that "state-law torts of false arrest, false imprisonment, and malicious prosecution" were based on "interests . . . deeply rooted in local feeling" and therefore not preempted by federal labor law).

California has, of course, a very strong interest in creating generally-applicable tort law. *See supra* Part II; AOB at 50. Thus, even if there were a conflict with federal action, that conflict would need to be quite serious in order to oust California's interests. The vague assertions of federal policy made in the statement of interest are insufficient.

2. California has a compelling interest in addressing torts committed abroad by its citizens.

Even if the district court were correct to look to California's interests in this particular case, rather than California's interest in creating the causes of action at issue, the district court erred in concluding that the state interests were weak.

As the Appellants note, the fact that the primary defendant is a California corporation affords California a significant interest in this case. *See* AOB at 51-52.

"California has a strong interest in the allegedly fraudulent conduct of its corporations and residents, and in protecting its residents *and others* from such fraud." *In re Pizza Time Theatre Sec. Litig.*, 112 F.R.D. 15, 18 (N.D. Cal. 1986) (emphasis added). The same is true for tortious conduct, which California has an interest in regulating and deterring. *See Hurtado v. Superior Court*, 11 Cal. 3d 574, 583 (1974) ("As to defendants the state interest in creating wrongful death actions is to deter conduct.").

A California corporation's torts, especially if committed elsewhere, reflect poorly on California and other California businesses. This is particularly so in cases like this one allegedly involving human rights abuses. If California law did not provide redress for those harmed, California would suffer further reputational injury. Indeed, the district court itself elsewhere acknowledged that "[t]here may be a substantial degree to which the alleged actions of an American corporation abroad is a domestic concern as well." 381 F. Supp. 2d at 1194 n.24.

That plaintiffs reside, and the torts arose, abroad does not diminish California's interests. A state "has a legitimate interest in the orderly resolution of disputes among those within its borders." *Filartiga*, 630 F.2d at 885; *see also* AOB at 52. Indeed, this is one reason for the rule that a tort creates an obligation enforceable wherever the tortfeasor is found. *Id*. The transitory tort doctrine fulfills one of the main purposes of tort law: to provide injured parties redress so

that they do not resort to extra-legal means. So long as the defendant is present in the jurisdiction, a state faces a risk to public order if those harmed cannot turn to the law for assistance.

The state's interest is particularly strong in cases like this one involving allegations of egregious human rights abuses, where the underlying events justifiably incite intense emotions and a strong desire for accountability. Not surprisingly, victims of such abuses have on rare occasion resorted to extra-legal means when legal remedies were not available. Two famous historical incidents are illustrative. In 1921, Soghomon Tehlirian, an Armenian whose family was slaughtered in Turkey's genocide against Armenians during the First World War, assassinated one of the architects of that genocide in Berlin. Samantha Power, *A Problem from Hell: America and the Age of Genocide* 1, 3–4 (2002); Hannah Arendt, *Eichmann in Jerusalem* 265 (1964). Similarly, in Paris in 1926, Shalom Schwartzbard executed a former Ukrainian army official responsible for pogroms during the Russian civil war. Arendt, *supra*, at 265. Both Tehlirian and Schwartzbard insisted on being tried, both used their trials to showcase the crimes committed against their people, and both were acquitted. *Id.* at 265–66; Power, *supra*, at 17.

In short, where law is unavailable to redress the worst kinds of abuses, some victims will be tempted to take matters into their own hands—not only to achieve

the justice that law will not afford, but also to bring the crimes of the perpetrator before the law. While few victims might do so, the state has a compelling interest in ensuring that it never happens at all. Given this, there is no question that a state has an overriding interest in providing a forum for victims of abuse to sue perpetrators present within the state, and that such suits can only be preempted upon a showing of a clear and strong conflict.

IV. "Field preemption" is inappropriate for generally-applicable tort law causes of action, which do not involve the establishment of foreign policy.

The district court did not apply field preemption, and that doctrine cannot apply. As noted above, *see supra* Part II, where state law is within a state's traditional competence and does not take a position on a matter of foreign policy, field preemption is inapplicable. *Garamendi*, 539 U.S. at 420 n.11; *accord Movsesian*, 629 F.3d at 907; *Deutsch v. Turner Corp.*, 324 F.3d 692, 709 (9th Cir. 2005) (field preemption is relevant when a state "establish[es] its own foreign policy") (quoting *Zschernig v. Miller*, 389 U.S. 429, 441 (1968)); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 579 (5th Cir. 2010) (rejecting notion that "generally applicable" state laws were preempted by foreign affairs concerns).

Thus, in *Medellin*, the Supreme Court held that a generally applicable state law was not preempted even though the interference with federal foreign policy was far greater than has been demonstrated here. The Supreme Court applied

conflict preemption and *upheld* application of the state law, 552 U.S. at 523–32—a result utterly inconsistent with any suggestion that generally applicable state law that interferes with foreign policy is preempted on that basis alone.

Indeed, in *Movsesian*, this Court upheld even a law that was not neutrally applicable. There, the law at issue specifically addressed insurance policies held by "Armenian Genocide victim[s]." 629 F.3d at 903–04 (quoting Cal. Civ. Proc. Code § 354.4). Yet, it was not preempted because "California's attempt to regulate insurance clearly falls within the realm of traditional state interests" and had at most only an incidental effect on foreign affairs. *Id.* at 908.

Cases finding field preemption have virtually always involved action by a state in an attempt to legislate foreign policy, not the application of facially neutral provisions in a context that might have foreign policy implications.[3] The mere creation of an ordinary tort cause of action—the only state action at issue here—has no direct, and virtually no indirect, impact on foreign relations. *E.g.*, *In re "Agent Orange" Product Liab. Litig.*, 373 F. Supp. 2d 7, 81 (S.D.N.Y. 2005). California's tort rules are not directed at, and take no position on, issues

[3] *See, e.g.*, *Zschernig*, 389 U.S. at 441 (striking down state law resulting in inquiries into, and judicial condemnation of, forms of government of foreign nations); *Saher*, 592 F.3d at 964-65 (preempting state law aimed at facilitating recovery of artwork lost during the Holocaust); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-61 (1st Cir. 1999) (striking down state boycott of firms doing business in Burma); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1378 (D.N.M. 1980) (striking down state university policy of rejecting Iranian students to express condemnation of Iran).

concerning foreign affairs, and in applying such generally applicable rules, the state is addressing a traditional state responsibility. The only direct impacts of this case will be on the two defendants, both American corporations. Field preemption does not and cannot apply.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to reverse the district court's ruling that a showing of an actual conflict with federal law can be founded on a single letter from the State Department that does not carry the force of law.

DATED: September 15, 2011

Respectfully submitted,

/s/ Marco Simons

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 29(c)(7) AND 32(a)(7)

Case Nos. 10-55515, 10-55587, 10-55516

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, pursuant to Fed. R. App. P. 29(d), this brief contains 6,140 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to WordPerfect 12, the word processor used to prepare the brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using WordPerfect 12, in Times New Roman, a proportionally spaced font, in a typeface of 14 points.

DATED: September 15, 2011

Respectfully submitted,

/s/ Marco Simons
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CERTIFICATE OF SERVICE

I, the undersigned, say: I am employed by EarthRights International, whose address is 1612 K Street NW #401, Washington, DC 20006; I am over the age of eighteen and I am not a party to this action.

I further declare that on September 15, 2011, I electronically filed the **BRIEF OF AMICUS CURIAE EARTHRIGHTS INTERNATIONAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have caused to be mailed the foregoing document by First Class Mail, postage prepaid to the following non-CM/ECF participants:

Rupa Bhattacharyya
UNITED STATES DEPARTMENT OF JUSTICE
P.O. Box 882
Washington, DC 20044

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on September 15, 2011, at Washington, DC.

/s/ Jonathan Kaufman
Jonathan Kaufman
Declarant