No. 09-1335 (L)

In the United States Court of Appeals
For the Fourth Circuit

CACI INTERNATIONAL INC., *et al.*, Defendants-Appellants,

v.

SUHAIL NAZIM ABDULLAH AL SHIMARI, *et al.*, Plaintiffs-Appellees.

On Appeal from the U.S. District Court for the Eastern District of Virginia
Case No. 1:08-cv-00827-GBL
The Honorable Gerald Bruce Lee

Nos. 10-1891 (L), 10-1921

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

v.

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

On Appeal from the U.S. District Court for the District of Maryland
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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STATEMENT OF AUTHORITY TO FILE

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE IDENTITY AND INTEREST OF *AMICUS CURIAE*

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. Chevron Corp.*, F.3d 1116 (9th Cir. 2010), *pet'n for certiorari filed*, June 6, 2011, 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), *Galvis Mujica v. Occidental Petroleum Corp.*, Nos. 10-55515, 10-55587, & 10-55516 (9th Cir.), and *Von Saher v. Norton Simon Art Museum*, 592 F.3d 954 (9th Cir. 2009).

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 these cases[1] cannot be preempted by federal foreign affairs preemption doctrines.[2]

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

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[1] In light of the substantial overlap between the two cases being here heard together, *amicus* submits one brief addressing both cases. The term "Defendants," when used without qualification, refers to defendants in both cases; similarly the term "Plaintiffs" refers to plaintiffs in both cases.

[2] In addressing the merits of Defendants' preemption arguments, *amicus* does not imply agreement with Defendants' claim that this issue is properly before the Court. L-3 Appellants' Br. 1-2, 39-43; CACI Appellants' Br. 7-10. That issue is simply beyond the scope of this brief.

Nahkla (collectively "L-3" or "L-3 Defendants") and Defendants CACI International Inc. and CACI Premier Technology, Inc. (collectively "CACI" or "CACI 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 courts below rejected Defendants' assertion that Plaintiffs' state tort claims were preempted. *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 736-41 (D. Md. 2010) [hereinafter "*Al-Quraishi* Order"]; *Al Shimari v. CACI Premier Technology, Inc*., 657 F. Supp. 2d 700, 731 (E.D. Va. 2009) [hereinafter "*Al-Shimari* Order"]. 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 the military contractor defense to preempt the state law claims here. That argument was adopted by the Panel Majority over a vigorous dissent. *Al Shimari v. CACI Int'l, Inc.*, 658 F.3d 413, 420 (4th Cir. 2011), *vacated and reh'g en banc granted* (4th Cir. Nov. 8, 2011); *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201, 203 (4th Cir. 2011) (adopting holding in *Al-Shimari* by reference), *vacated and reh'g en banc granted* (4th Cir. Nov. 8, 2011). The merits of that argument is outside the scope of this brief. *Amicus* herein addresses Defendants' second preemption argument unaddressed by the

Panel Majority—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 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 federal act that carries the force of law 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 that there be 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 have distinct requirements that cannot be conflated, and that are not met here.

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. 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 below in Part 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 Part 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), 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 is a field of traditional state responsibility or whether it conflicts with any federal law. *See* L-3 Appellants' Br. 44 (quoting *Saleh*, 580 F.3d at 11-13); CACI Appellants' Br. 36-37 (same). 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 courts properly rejected this novel foreign affairs preemption argument. The district court in

Al-Quraishi noted that it was "not convinced that the [foreign affairs] preemption defense discussed in *Saleh* comports with established precedent." *Al-Quraishi* Order at 741 n.11 (citing *Saleh*, 580 F.3d at 24-26, 30-32 (Garland, J., dissenting)).[3] Similarly, in *Al-Shimari*, the district court rejected Defendants' argument that state tort law was preempted, citing "the long line of cases where private plaintiffs were allowed to bring tort actions for wartime injuries." *Al-Shimari* Order at 711. In *Al-Quraishi*, 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. *Al-Quraishi* Order at 741 n.11.

Neither Defendants nor *Saleh* expressly state whether this "defense" purports to assert field preemption or conflict preemption. But Defendants' argument fails and *Saleh* should not be followed because the preemption Defendants seek cannot be reconciled with the Supreme Court's requirements for either field or conflict preemption. If Defendants and *Saleh*

[3] 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).

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* Part II. The argument fares no better as an assertion of conflict preemption, since Defendants and *Saleh* are unable to state a conflict with any governmental act with the power to preempt. *See infra* Part III. Nor does Supreme Court precedent permit the creation of a new, broader doctrine that would eviscerate the requirements of both field and conflict preemption.

Indeed, L-3 Defendants suggest not only that state tort law should be preempted but that somehow claims under the Alien Tort Statute, which are indisputably federal claims, are "preempted" under the same analysis. L-3 Appellant's Br. 49-51. This argument indicates that L-3 Defendants are not urging the application of an established preemption doctrine arising from the Supremacy Clause and the unique authority of the federal government, but a previously unknown doctrine, one that bars federal and state claims alike.

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.

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*, 615 F.3d 574, 579 (5th Cir. 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.*[4]

Likewise, in *Medellin v. Texas*, 552 U.S. 491 (2008), the Supreme Court held that a generally-applicable state law was not preempted even though its enforcement would manifestly interfere with foreign policy. In

[4] *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").

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 that 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 Defendants' suggestion that generally applicable state law that interferes with foreign policy may be 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 provisions in a context that might have foreign policy implications.[5] The only possible exception is *Saleh*; if that case is

[5] *See, e.g., Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (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 708-16 (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)

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 this suit does not involve "traditional areas of state power," simply because, in this case, the neutral tort principles at issue are applied in the context of warfare. L-3 Appellants' Br. 45-46 (citing *Saleh*, 580 F.3d at 11); *see also* CACI Appellants' Br. 38 (same). 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

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(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) (noting that "no precedent has employed a foreign policy analysis to preempt generally applicable state laws").

foreign policy matter that is outside its traditional state authority, not whether an otherwise neutral law is applied in a context that may have foreign policy implications. 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.[6]

[6] Defendants assert that the presumption against preemption in areas of traditional state authority does not apply in the context of military affairs. L-3 Appellants' Br. 45-46; CACI Appellants' Br. 38. The cases they cite, however, are inapposite. Other than *Saleh*, the only case cited by CACI Defendants for this principle is *Deutsch*. But *Deutsch* did not involve a neutrally applicable tort law, but instead a state law providing a specific remedy for slave labor during World War II—a goal held by the Ninth Circuit to be state legislation of foreign policy. *See Deutsch*, 324 F.3d at 708-16. None of the cases cited by L-3 Defendants even addresses the federal preemption of state law at all. *Department of Navy v. Egan*, 484 U.S. 518 (1988), 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. *Id.* at 520. In *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987), the Court considered whether *servicemembers* could bring federal claims against military or other federal officers for injuries that arose incident to the plaintiffs' service. The Court held that such servicemembers 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). L-3 Defendants fail to explain how these cases apply here, where this Court is asked to preempt a neutral state tort law against private individuals whose application in this case would actually

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 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* L-3 Appellants' Br. 44.

A. Supreme Court jurisprudence requires a clear and unmistakable federal act with the power to preempt state law in order for conflict preemption to apply.

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 discussing conflict preemption in *Garamendi*, the Court first established the President's constitutional authority: "[R]esolving Holocaust-era insurance claims that

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support federal policy.

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.[7]

Conflict preemption, therefore, only applies to actions of the political branches carrying the force of law; federal activity lacking legal force cannot preempt state law. *See, e.g. S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 812 n.5 (9th Cir. 1993); *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

[7] 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).

matters of federal policy").[8]

Moreover, the federal act that that preempts state law must be clear and unmistakable. *See, e.g. Garamendi*, 539 U.S. at 421(presenting a situation in which the federal Executive had adopted a "national position" that was "unmistakabl[e]," as evidenced by Executive agreements); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (holding that state tax law could only be at variance with "one voice standard" for the purpose of preemption analysis if it violated a "*clear* federal directive" (emphasis added)).

The requirement that conflict preemption be based on acts that carry the force of law holds true even where the state law in question has serious foreign policy implications. The Supreme Court made this clear in *Medellin*, where the President had attempted to intervene in a state criminal case on the basis of its interference in federal foreign policy. There, the President himself issued a memorandum to the Attorney General mandating that state courts comply with the United States' obligations under a decision of the International Court of Justice. 552 U.S. at 503. Although the Court recognized that the President has the lead role in making "sensitive foreign policy decisions," and that the case presented "plainly compelling" federal

[8] Nothing in the majority opinion in *Garamendi* conflicts with this point from the dissent.

foreign policy interests, 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. *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.")).

The Supreme Court has thus 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. Indeed, in *Medellin*, 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 circumstances in which the policy positions of the Executive Branch could preempt state law are narrow and exacting. 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.

B. In the absence of an act that is fit to preempt state law, this Court may not bar the application of state law on conflict preemption grounds.

Defendants ask this Court to apply the language of the court in *Saleh,* to hold that preemption is warranted here because "under the circumstances, the very imposition of *any state law* create[s] a conflict with federal foreign policy interests." L-3 Appellants' Br. 44 (quoting *Saleh*, 580 F.3d at 13) (emphasis in original). Yet doing so here would contravene the clear

command of the Supreme Court that, in order for conflict preemption to apply, the federal policy with which the state law conflicts must be located in a legally binding act that is fit to preempt state law. Defendants ask this Court to discount the careful jurisprudential limitations on the doctrine of conflict preemption developed through *Garamendi* and affirmed in *Medellin*. 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, simply cannot meet the high threshold required by Supreme Court. L-3 Appellants' Br. 44-45; CACI Appellants' Br. 44.

Nor can this Court ignore this clear limitation simply because the acts at issue here arose during wartime. *See* L-3 Appellants' Br. 44 (citing *Saleh*, 580 F.3d at 11, 13). The Supreme Court addressed, and repudiated, a similar argument in *Youngstown*, when it 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).[9] None of the

[9] 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

foreign affairs preemption cases cited by Defendants (and by the court in *Saleh*) suggest that the Supreme Court's carefully calibrated balance between state and federal authority does not apply in wartime; indeed, none even addresses the issue.[10]

In short, Defendants have cited no authority that would allow this Court to deviate from the ordinary rules governing preemption. Even if the Court could ignore the threshold requirement that there be some federal act with the power to preempt, there would be no reason to do so here. No federal act or clear unmistakable federal policy exists that could present a conflict with the state law implicated here.

Indeed, Defendants do not even attempt, for example, to argue that the Federal Tort Claims Act (FTCA) could present a conflict in this case. Nor could they: the FTCA, by its terms, expressly states that it will *not* apply to the benefit of private contractors such as Defendants. 28 U.S.C. § 2671 (defining the scope of the statute as excluding "any contractor with the United

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preempted where the President has not purported to create law.

[10] *See* L-3Appellants Br. 44 (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 the Al-Quraishi Plaintiffs demonstrated in their brief before the Fourth Circuit Panel, none of these cases raised wartime issues. Al-Quraishi Plaintiffs' Br. at 45-46.

States"). Even the Executive Branch, whose interests Defendants claim to have in mind when they propose a radical new immunity for government contractors, is in agreement on this uncontroversial point. Brief for the U.S. as Amicus Curiae, *Saleh v. Titan Corp.*, No. 09-1313 (U.S. May 27, 2011) ("U.S. Br. (*Saleh*)") at 13. ("To be sure, the FTCA does not directly apply to the actions of private contractors or render the United States liable for their actions. See 28 U.S.C. 2671.").

Because Defendants can cite no federal act with the power to preempt, they instead choose to argue by absence. Defendants insist that the *lack* of a federal act providing liability for torture under color of U.S. law somehow signals a national policy position *against* liability. *See* L-3 Appellants' Brief 47. ("Congress's extensive legislation in the areas of torture and war crimes strongly suggests that its failure to create a cause of action that plaintiffs can pursue was purposeful."). Yet Defendants cite no precedent for this novel suggestion that it is the *absence* of a federal statute on point, rather than the *presence* of one, that suffices to generate a conflict with state law.

To the extent that the United States government has a policy position on liability for torture, it is decidedly *for* such liability. Although Defendants make much of the brief submitted by the United States Government in *Saleh*, citing it as evidence of a federal policy immunizing government contractors

for torture during times of war, *see* L-3 Appellants' Brief 47-49, they have misread the Government's position.[11] The Government's brief states in no uncertain terms that the policy of both the Federal Executive and of Congress has been in favor of liability for torture. *See* U.S. Br. (*Saleh*) 7. ("The United States Government unequivocally opposes torture and has repudiated it in the strongest terms. Federal law makes it a criminal offense to engage in, attempt to commit, or conspire to commit torture outside the United States."). The brief goes on to emphasize that both the Congress and the President have unambiguously declared that the United States shall not engage in torture or inhuman treatment. *Id*. (citing 42 U.S.C. 2000dd ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."), Exec. Order No. 13,491, § 3, 3 C.F.R. 200 (2009) (directing that individuals detained during armed conflict "shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds,

[11] Although the Government took the position that Supreme Court review of the panel decision in *Saleh* was not yet warranted, it did so because it sought, from the Circuit courts, "further percolation of the full array of defenses implicated in this complex and developing area of the law". U.S. Br. (*Saleh*) at 7. The Government also emphasized that, regarding the decision in *Saleh*, "the court's holding is unclear and imprecise and, depending on how it is read, potentially misguided in certain respects."). *Id*.

mutilation, cruel treatment, and torture)").

To the extent that Congress has addressed the role of government contractors operating in conjunction with U.S. forces abroad, it has been to circumscribe their power, not to immunize them. As the Government's brief notes, "[s]ignificantly . . .Congress has now expressly barred civilian contractors from performing interrogation functions, and has required private translators involved in interrogation operations to undergo substantial training and to be subject to substantial oversight." U.S. Br. (*Saleh*) 9 (citing National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1038, 123 Stat. 2451; 75 Fed. Reg. 67,632 (2010)). That Congress has specifically acted not to immunize the activities of these contractors, but to cut back on the scope of their activity in areas traditionally performed by government agents, casts serious doubt upon the suggestion that Congress intended for civilian contractors to be considered one and the same with the U.S. Government for the purpose of immunity under the FTCA. It also confirms that, to the extent that the Government has a policy position on the liability of government contractors who commit torture, it is a policy position that comports—rather than conflicts—with state tort law providing for this liability.

Defendants have shown a lesser basis for federal preemptive power

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. If the President could not preempt state law in *Medellin* or *Youngstown*, then surely preemption is not warranted here.

CONCLUSION

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

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1335 **Caption:** Al Shimari, et al. v. CACI International Inc, et al.

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