No. 05-56056

In The United States Court Of Appeals For The Ninth Circuit

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

vs.

OCCIDENTAL PETROLEUM CORP. *et al.*, Defendants-Appellees.

On Appeal From the Judgment of the United States District Court
For the Central District of California

The Honorable William J. Rea

District Court No. CV-03-2860 WJR

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

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STATEMENT OF CONSENT 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 IDENTITY AND INTEREST OF AMICUS CURIAE

EarthRights International (ERI) is a human rights organization based in Washington, D.C., which 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 March 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. ChevronTexaco Corp.*, No. 99-CV-2506 (N.D. Cal.) and *Bowoto v. ChevronTexaco Corp.*, No. CGC-03-417580 (San Francisco Superior Court), ERI is counsel in litigation alleging that a California corporation is liable under, *inter alia*, California state law for its complicity in murder and other abuses by members of the Nigerian security forces.

ERI therefore has an interest in ensuring that state-law tort claims for abuses committed abroad, in cooperation with foreign militaries, are not improperly

dismissed for perceived interference with federal foreign affairs powers.

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 would allow such an official to veto the adjudication of any state-law claim which that official believed would somehow affect U.S. foreign relations. No foreign affairs preemption case has ever afforded the Executive Branch officials such unlimited power, nor has any such case ever placed 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. 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 "field preemption" in the foreign policy arena, because in creating such causes of action the state has not engaged in its own foreign policy with any direct effects on foreign relations.

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 Is The Creation of Generally-Applicable Tort Causes Of Action.

The "foreign affairs" doctrine, first articulated by *Zschernig v. Miller*, 389 U.S. 429 (1968), asks whether the states are violating the federal "foreign affairs power," *see, e.g.*, *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49 (1st Cir. 1999) [hereinafter *Natsios*], *aff'd on other grounds by Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). More recently, the Supreme Court revisited this doctrine in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) [hereinafter "*Garamendi*"], and described *Zschernig* as a preemption case. *See id.* at 419.

Although doctrines such as the act of state doctrine (see Part V, *infra*) apply generally to guide the courts in cases affecting foreign policy, foreign affairs preemption only applies where state action is present. In another preemption context, the Ninth Circuit has held, "If there is no attempted state action, there is nothing to be pre-empted." *In re Greene*, 980 F.2d 590, 595 (9th Cir. 1992); *see also Montana v. Gilham*, 133 F.3d 1133, 1139 n.7 (9th Cir. 1997).

In every prior foreign affairs preemption case, the action complained of has either been state judicial action that directly implicates foreign relations, *see Zschernig*, 389 U.S. at 440 (state courts engaging in "judicial criticism" of foreign

regimes); *N.Y. Times Co. v. N.Y. Comm'n on Human Rights*, 361 N.E.2d 963, 968 (N.Y. 1977) (quasi-judicial city agency engaging in "inquiries into the righteousness of foreign law"); or the enactment of a statute or other policy that facially affects foreign affairs. *See Garamendi*, 539 U.S. at 408–12 (California statute that concerned insurance claims by Holocaust victims); *Deutsch v. Turner Corp.*, 317 F.3d 1005, 1016, 1030 (9th Cir. 2003) (California statute that allowed claims for WWII-era forced labor); *Natsios*, 181 F.3d at 45 (Massachusetts statute targeting companies doing business in Burma); *Miami Light Project v. Miami-Dade County*, 97 F. Supp. 2d 1174, 1180–81 (S.D. Fla. 2000) (ordinance targeting companies doing business in Cuba); *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365, 1378 (D.N.M. 1980) (state university policy targeting Iranians); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307–08 (Ill. 1986) (tax provision targeting South African coins).

Unlike these cases, the only 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, 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).

Because the creation of these causes of action is the only state action present here, the question in this case is whether the mere creation of facially neutral, garden-variety tort claims—which happen to be equally applicable to acts overseas as to domestic acts—may be preempted by federal foreign policy and, in particular, whether it may be preempted by a single statement by an Executive Branch official.

II. Generally Applicable State Tort Causes Of Action Must Be Evaluated Under *Garamendi* "Conflict Preemption" Analysis.

Although the Supreme Court in *Garamendi* applied a form of conflict preemption, it stated that the decision in *Zschernig* represents a doctrine of field preemption in the field of foreign affairs. 539 U.S. at 419. The district court correctly found that this field preemption is inapplicable here 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). This Court should adopt the district court's decision on this point.

The district court was correct that actions within the "traditional

competence" of a state—including the creation of ordinary tort causes of action—can only be preempted upon a clear conflict between the policy adopted in "[t]he exercise of the federal executive authority" and the policy adopted by the state. *Garamendi*, 539 U.S. at 421. The district court took its cue from footnote eleven of *Garamendi*, which suggested that the *Zschernig* concept of foreign affairs field preemption should apply only where a state "simply . . . take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility"; in such a case, the degree of conflict with federal policy is immaterial, since "the Constitution entrusts foreign policy exclusively to the National Government." 539 U.S. 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).[1]

Although technically *dicta*, the dichotomy espoused in footnote eleven is consistent with the cases that have followed *Zschernig*. *Zschernig* has only been applied where states have, in fact, reached out into the foreign policy arena. In the

[1] In this footnote, the *Garamendi* Court specifically analyzed the distinction between the *Zschernig* majority, which struck down the state statute without reference to a specific conflict, and Justice Harlan's concurrence, which justified the result on a conflict with a treaty. *See* 389 U.S. at 462 (Harlan, J., concurring). What *Garamendi* characterized as "field preemption" was the notion that, "even in the absence of a treaty, a State's policy may disturb foreign relations." *Zschernig*, 389 U.S. at 441.

recent decision *Cruz v. United States*, 387 F. Supp. 2d 1057 (N.D. Cal. 2005), Judge Breyer reviewed these cases and concluded that "state enactments" that ran afoul of *Zschernig* "not only used state commercial power as a tool of foreign policy, their mere existence articulated state condemnation of a foreign nation's conduct by passing the statutes." *Id.* at 1076 (collecting cases). *See infra* Part IV.

Footnote eleven is also consistent with the 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 follow the Supreme Court's suggestion and "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).

Under this rule, only conflict preemption applies in this case because it concerns only matters of traditional state authority: the state action at issue here 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).

The district court also correctly assumed 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). The rule that transitory torts may be adjudicated essentially anywhere that the defendant may be found 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 absent both an actual exercise of federal preemptive authority and a "clear conflict." As discussed below, neither is present here.

III. *Garamendi* "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 federal action that 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 failed at each step. The district court appeared to give a statement of interest from a State Department official the power to preempt state law, despite the fact that 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 in this case. Last, the district court failed to give sufficient weight to the interests of the State of California.

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—that is, 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 specific acts—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. Constitution, 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 state law. *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."). As the First Circuit has found, "the simple act of intervening in on-going litigation," and making "unsupported pronouncements" as

to policy, does not have preemptive force in the absence of "hard evidence of conflict." *Kargman v. Sullivan*, 552 F.2d 2, 6 (1st Cir. 1977); *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").[2]

Garamendi, of course, did conclude that executive agreements may preempt state law, despite the fact that they are not listed in the Supremacy Clause. But such agreements 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 decision in *Cruz* is instructive. There, Judge Breyer analyzed both *Garamendi* and this court's decision in *Deutsch*, noting that, "anticipating the holding in *Garamendi*, [*Deutsch*] reached its conclusion regarding preemption by relying centrally on a series of treaties and executive agreements." *Cruz*, 387 F.

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

Supp. 2d at 1074. By contrast, the state law in *Cruz* could not be preempted in the absence of a "treaty or executive agreement that reflects federal policy on how to dispose of [plaintiffs'] claims." *Id.*

As in *Cruz*, the district court here pointed to no federal act—statute, treaty, executive agreement, or otherwise—carrying the force of law. Instead, the district court relied solely on the statement of interest. 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, its analysis does not suggest that such a statement alone may have preemptive force, or that the statute at issue would have been preempted in the absence of an executive agreement. Yet, in contrast to *Garamendi*, the district court here preempted state law based on an Executive Branch official's preferences, which the President has not been willing to enshrine in any executive agreement. 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 sub-Cabinet executive officials 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. 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 Metro. Transit Auth.*, 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*, for several reasons.

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 in a federal court. Second, "the hurdles to political branch correction of untoward state foreign relations activity are relatively insignificant." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1693 (1997). In contrast, "the erroneous federalization of tort or contract law . . . will not trigger the political branches' special means to monitor and control adverse foreign relations activity." *Id.* at 1694. Thus, if a state goes too far in intruding upon foreign relations, the political branches can protect themselves; if this Court goes too far in preempting state law,

states are largely helpless.

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 an executive agreement, 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 what the "clear conflict" was 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*, examining 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. Even If A Mere Statement Of The Executive Branch Could Have Preemptive Effect, The District Court Erred in Finding Preemption Because Plaintiffs' Claims 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.

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 here 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 would 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 The Interests Of California.

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); *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. Thus, even if there were a conflict with federal action present here, 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 to substantiate such a serious conflict.

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

Even if the district court was 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.

The fact that the primary defendant is a California corporation affords California a significant interest in this case. "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 equally true for tortious conduct, which California has an interest in regulating and deterring. *See also Hurtado v. Superior Court*, 522 P.2d 666, 672 (Cal. 1974) ("[T]he 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 conceded 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 is irrelevant. A state "has a legitimate interest in the orderly resolution of disputes among those within its borders." *Filartiga*, 630 F.2d at 885. Indeed, this is why 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 serious human rights abuses, where the underlying events justifiably incite intense emotions and a strong desire for accountability. Not surprisingly, victims of egregious abuses have on 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 show 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 a legal tribunal. While few victims might be so tempted, 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. Even If "Field Preemption" Analysis Is Used Here, Such Preemption Is Inappropriate For Generally-Applicable Tort Law Causes Of Action, Which Have Only Indirect Effects In Foreign Countries And Do Not Involve The Establishment Of Foreign Policy.

As noted above, *see supra* Part II, "field preemption" under *Zschernig v. Miller* is inapplicable here because the state action in this case falls within an area

of traditional state competence. But even if *Zschernig* field preemption analysis is relevant to ordinary state tort causes of action, such claims pass the *Zschernig* test.

Zschernig field preemption is limited to situations in which, through actions that have a direct impact on foreign relations, a state "establish[es] its own foreign policy." 389 U.S. at 441. In applying Oregon's reciprocal inheritance statute, the Oregon probate courts were inquiring into whether foreign communist regimes would confiscate property, and whether diplomatic statements on this subject were credible. *Id.* at 435. In short, Oregon law made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. Because the law, as the Oregon courts applied it, had a "direct impact upon foreign relations," *id.*, it had to yield before the federal government's power to conduct foreign policy. But in an earlier Supreme Court case, *Clark v. Allen*, 331 U.S. 503 (1947), the Court upheld a similar reciprocal inheritance law against a foreign affairs challenge, holding that although the law would have "some incidental or indirect effect in foreign countries," the same would be "true of many state laws which none would claim cross the forbidden line." *Id.* at 517. Thus, state laws whose transnational effects apply "without respect to whether the [relevant] country might be considered friend or foe" are not preempted. *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 904 (3d Cir. 1990).

Ordinary tort causes of action fall into the category of the "many state laws"

which may have incidental or indirect effects in foreign countries, but do not "cross the forbidden line." *Clark*, 331 U.S. at 517. The mere creation of these causes of action—the only state action at issue here—has no direct, and virtually no indirect, impact on foreign relations. In the few instances in which courts have confronted the argument that ordinary tort causes of action have an impact on foreign relations, they have rejected it. *See, e.g.*, *In re "Agent Orange" Product Liab. Litig.*, 373 F. Supp. 2d 7, 81 (S.D.N.Y. 2005) (noting that the "the ordinary application of New York tort law" poses no risks of impermissible interference in foreign affairs); *Mukaddam v. Permanent Mission of Saudi Arabia*, 111 F. Supp. 2d 457, 473 (S.D.N.Y. 2000) (finding application of "a statute of general application" to a foreign government permissible if it "does not curtail the rights of foreign citizens or attempt to structure a relationship between New York, its residents, and any other country"); *United Nuclear Corp. v. Gen. Atomic Co.*, 629 P.2d 231, 266 (N.M. 1980) (holding that, because "the causes of action involved in this case are universally accepted by American jurisdictions," the *Zschernig* doctrine "has nothing to do with this case"); *Amarel v. Connell*, 248 Cal. Rptr. 276, 282 (Cal. Ct. App. 1988) (finding *Zschernig* inapplicable to laws which are "neutral in their application").

Every lower court case that has followed *Zschernig* has found a *direct* impact on foreign relations before striking down state action. *See Deutsch*, 317

F.3d at 1030[3] (striking down statute specifically directed toward foreign forced labor claims during WWII); *Natsios*, 181 F.3d at 45 (invalidating state boycott of firms that do business in Burma); *Miami Light Project*, 97 F. Supp. 2d at 1180–81 (finding that a county's boycott of firms doing business in Cuba was likely invalid); *Tayyari*, 495 F. Supp. at 1378 (invalidating state university discrimination against Iranian students, designed to express condemnation of Iran); *Springfield Rare Coin Galleries*, 503 N.E.2d at 307–08 (invalidating state tax provision which discriminated against South African coins to express disapproval of South Africa); *N.Y. Times Co.*, 361 N.E.2d at 968–69 (invalidating agency's ruling that discriminated against advertisements for employment in South Africa).[4]

In contrast, California tort law is not directed at issues concerning foreign affairs, let alone at a particular foreign country. The only direct impacts of this

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[3] *Deutsch*, which preceded *Garamendi* and therefore did not reference the distinction between field and conflict preemption, is better understood as a conflict preemption case. *See supra* Part III(A)(1).

[4] The only other decision invalidating a state law under *Zschernig* is *Bethlehem Steel Corp. v. Board of Commissioners*, 80 Cal. Rptr. 800 (Cal. Ct. App. 1969), which voided a "Buy American" act that discriminated generally against foreign nations. But this ruling was the result of the court's finding that the law was "an impermissible attempt by the state to structure national foreign policy to conform to its own domestic policies." *Id.* at 805. Other courts have unanimously rejected the holding of *Bethlehem Steel. See Trojan Techs.,* 916 F.2d at 904; *N. Am. Salt Co. v. Ohio Dep't of Transp.*, 701 N.E.2d 454, 462 (Ohio Ct. App. 1997); *K.S.B. Technical Sales Corp. v. N. Jersey Dist. Water Supply Comm'n*, 381 A.2d 774 (N.J. 1977).

case will be on the two defendants, both of which are American corporations. Indeed, other cases have allowed state action with far more effects on foreign relations than are present here. *See, e.g.*, *Opusunju v. Giuliani*, 669 N.Y.S.2d 156, 159 (N.Y. Supreme Ct. 1997) (finding that the renaming of a New York street corner for a slain Nigerian dissident did not "have a 'direct impact upon foreign relations'"); *Bd. of Trustees v. Mayor of Baltimore*, 562 A.2d 720, 748 (Md. 1989) (ruling that a law forbidding public pension funds from being invested in companies that did business with South Africa had only an indirect effect on foreign affairs).

In short, in this case, no state has done anything that can be conceived of as creating its own foreign policy, nor that has a direct impact on foreign nations. *Zschernig* field preemption has never been applied in such a case and it should not be applied here.

V. Foreign Affairs Preemption Is Not A Substitute For The Act Of State Doctrine.

The district court erred in this case by treating foreign affairs preemption as a substitute for the act of state doctrine even as it found that the act of state doctrine did not apply. The act of state doctrine, not foreign affairs preemption, is the sole test for determining when courts must abstain from adjudicating the legality of acts of foreign nations.

A. The Act Of State Doctrine Governs When A Court May Adjudicate The Legality Of Acts Of Foreign Nations.

The act of state doctrine governs when U.S. courts may inquire into the validity of the acts of foreign nations. Where applicable, "the act of state doctrine precludes courts from questioning the legality of actions that a foreign government has taken within its own borders." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 799 (9th Cir. 2003). In general, the doctrine applies if "(1) there is an 'official act of a foreign sovereign performed within its own territory'; and (2) 'the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act.'" *Credit Suisse v. U.S. District Court*, 130 F.3d 1342, 1346 (9th Cir. 1997) (quoting *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990)) (alterations in original). The doctrine is a "flexible one," however, and other factors may be taken into consideration. *See Liu v. Republic of China*, 892 F.2d 1419, 1432–33 (9th Cir. 1989).

B. Where The Act of State Doctrine Does Not Apply, It Is Inappropriate To Use Foreign Affairs Preemption To Dismiss Claims Because They Involve Acts Of Foreign Sovereign Nations.

Although the district court concluded that the act of state doctrine did not bar adjudication of these claims, *see Galvis Mujica*, 381 F. Supp. 2d at 1191, it relied on the fact that this case involves acts by foreign soldiers to dismiss these

claims under a *different* doctrine—foreign affairs preemption. *See id.* at 1188 (relying on State Department's concerns about "second-guessing the actions of the Colombian government and its military officials"). This was error, because the act of state doctrine is the sole basis on which claims may be dismissed due to concerns for adjudicating the acts of foreign nations.

The act of state doctrine results from the sense of the courts that "'engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *W.S. Kirkpatrick & Co.*, 493 U.S. at 404 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). It applies in state court as well as federal. *Sabbatino*, 376 U.S. at 427.

In *W.S. Kirkpatrick*, the Supreme Court considered claims brought under federal and New Jersey law that a corporation had committed torts overseas by paying bribes to Nigerian officials. 493 U.S. at 402. As in the present case, the plaintiff was suing under state law and complaining of complicity in the unlawful acts of foreign officials; where the act of state doctrine did not technically apply, the Supreme Court categorically rejected the argument that "the policies underlying our act of state cases—international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations"—required dismissal. *Id.* at 408 (internal quotation marks omitted). Instead, the Court made clear that the

default rule was that such cases must be heard by the courts:

> Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments . . . .

Id. Thus, where the act of state doctrine does not apply, concerns that adjudicating a case involving the acts of a foreign nation will hinder the Executive Branch's conduct of foreign relations are misplaced.

The district court erred in relying on the fact that this case involves the adjudication of acts committed by foreign soldiers in order to invoke the foreign affairs preemption doctrine. In light of the long and well-established pedigree of the act of state doctrine, in comparison to the rarely-applied and poorly-defined contours of the foreign affairs preemption doctrine, the act of state doctrine should govern with respect to any concerns that adjudicating cases involving acts of foreign nations might interfere with foreign affairs.

CONCLUSION

For the foregoing reasons, amicus urges this Court to adopt the district court's position that ordinary state tort claims can only be preempted, if ever, upon a showing of an actual conflict with federal law, and reverse the district court's ruling that such a conflict can be founded on a single letter from the State

Department that does not carry the force of law.

DATED: January 3, 2006

Respectfully submitted,

Marco Simons
Richard Herz
EARTHRIGHTS INTERNATIONAL
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Case No. 05-56056

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

DATED: January 3, 2006

Respectfully submitted,

_____

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EARTHRIGHTS INTERNATIONAL
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PROOF 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.

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