Nos. 10-1891 & 10-1921

In the United States Court of Appeals for the Fourth Circuit

WISSAM ABDULLATEFF SA'EED AL-QURAISHI, ET AL.,
APPELLEES,

v.

L-3 SERVICES, INC. & ADEL NAKHLA,
APPELLANTS.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NO. 08-1696)
(THE HONORABLE PETER J. MESSITTE, J.)

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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The D.C. Circuit in *Saleh* provided an alternative basis for its holding, finding preemption based on the Constitution's exclusive commitment of war-making powers to the political branches of the federal government separate from the Congressional intent expressed in the combatant activities exception to the Federal Tort Claims Act. *See Saleh v. Titan Corp.*, 580 F.3d 1, 12–13 (D.C. Cir. 2009) (petition for cert. pending, No. 09-1313 (Apr. 26, 2010)). Addressing only this "foreign affairs" preemption, EarthRights International (ERI) argues that *Saleh* is contrary to other jurisprudence in this area. ERI's brief paints an erroneous picture of Supreme Court preemption by (1) ignoring the Constitutional commitment of war-making powers to the federal government and the concomitant exclusion of States from war-making; (2) excluding consideration of *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and the broader relationship among the Court's decisions addressing preemption and national security; and (3) mischaracterizing negative inferences from these decisions as "holdings."

ARGUMENT

1. ERI attempts to dissect preemption doctrine into rigidly distinct categories of "conflict," "field," and "foreign affairs" preemption, in part by excluding consideration of *Boyle*. (ERI.Br.2.) While the courts have occasionally utilized such taxonomy in a non-rigid fashion, *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) ("We recognize, of

course, that the categories of preemption are not rigidly distinct.") (internal quotations omitted), the Court has clearly articulated, and its holdings evince, that there is not an inflexible threshold that must be met to find state law preempted. *See also id.* (field preemption may be understood as a species of conflict preemption). State law is more readily displaced when uniquely federal interests are implicated in an area outside traditional state concern. *See Boyle*, 487 U.S. at 507 (uniquely federal interests mean the "conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied'") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Under such circumstances, state law is preempted even "in the absence of either a clear statutory prescription" or "direct conflict between federal and state law." *See Boyle*, 487 U.S. at 504; *Saleh*, 580 F.3d at 12 (scope of displacement is inversely proportional to state interests and directly proportional to the strength of the federal interest). *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), on which ERI heavily relies, reaffirms that the "clarity or substantiality" of the conflict required to preempt state law within the states' traditional competence varies with the "strength or the traditional importance of the state concern asserted" and recognizes "[w]hether the strength of the federal foreign policy interest should itself be

weighed is, of course, a further question." 539 U.S. at 419 n.11 (citing *Rice*, 331 U.S. at 230, and *Boyle*, 487 U.S. at 507-08).

2. This case involves core federal interests that readily displace state law claims by foreign battlefield detainees against interrogators and linguists in the military's detention and interrogation centers in Iraq. The cases cited by ERI are not to the contrary. Federal wartime policy-making, as opposed to more generalized foreign affairs concerns discussed by ERI, is constitutionally and traditionally the *exclusive* province of the political branches of the federal government because "matters concerning war are part of the inner core of this [foreign affairs] power." *Deutsch v. Turner Corp.*, 324 F.3d 692, 711-12 (9th Cir. 2003) (Reinhardt, J.); *see also* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1713-14 (1997) ("This case [for preemption] is strongest when states impinge on traditional federal foreign relations prerogatives like war-making and treaty-making.").[1]

On the other side of the balance, as *Saleh* recognized, the state interest is negligible. *Saleh*, 580 F.3d at 11 ("[T]he interests of any U.S. state (includ-

[1] ERI misses the point when it asserts that *Department of Navy v. Egan*, 484 U.S. 518 (1988), *United States v. Stanley*, 483 U.S. 669 (1987), and *Chappell v. Wallace*, 462 U.S. 296 (1983) are inapposite. (ERI.Br.10 n.5). Those cases illustrate the importance of these core powers and how even federal causes of action that impinge on them must give way when they conflict.

ing the District of Columbia) are *de minimis* in this dispute—all alleged abuse occurred in Iraq against Iraqi citizens."); *see also id.* at 9 ("[W]e are still puzzled at what interest D.C., or any state, would have in extending its tort law onto a foreign battlefield.").

3. ERI concedes, as it must, that Constitutional provisions may preempt state law directly, in the same way that statutes and Executive Agreements do. (ERI.Br.11.) But ERI ignores that the Constitution expressly allocates war-making powers exclusively to the federal government and bars the states.[2] Contrary to ERI's argument, no further statute "with preemptive force" (ERI.Br.3) is required: "[B]ecause the issue is the lack of state power, it is immaterial whether the federal government enacted a prohibition." *Deutsch*, 324 F.3d at 715.

Nor does ERI address the fact that Congress has actively legislated in the field, enacting comprehensive legislation dealing with the subject of war crimes, torture, and the conduct of U.S. citizens acting in connection with

[2] *See* U.S. Const., art. II, § 2, cl. 1 (making President Commander-in-Chief); *id.* cl. 2 (authorizing President to make treaties with advice and consent of Senate); *id.* art. I, § 8, cl. 1 (authorizing Congress to "provide for the common Defence"); *id.* cl. 11 (authorizing Congress to declare war); *id.* cl. 12 (authorizing Congress to raise and support armies); *id.* cl. 13 (authorizing Congress to "provide and maintain a Navy"); *id.* cl. 14 (authorizing Congress to regulate "the land and naval forces"). Moreover, most of the Constitution's express limitations on states' foreign affairs powers also concern war. *See Deutsch*, 324 F.3d at 711 & n.10.

military activities abroad,[3] while declining to create a civil tort cause of action that plaintiffs could employ. *See Deutsch,* 324 F.3d at 714 (explaining that absent "some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes"). In the Torture Victim Protection Act (TVPA), for example, Congress provided a cause of action whereby U.S. residents could sue foreign actors for torture, but Congress expressly provided that neither American government officers nor private U.S. persons were subject to suit under this statute. *See Saleh*, 580 F.3d at 13 n.9. After Abu Ghraib, Congress extended the UCMJ to cover military contractors, 10 U.S.C. § 802, but did not create a tort cause of action that would apply here. In addition, regulations enacted by the Coalition Provisional Authority—which are analogous to the Executive Agreements found to preempt state law in cases upon which ERI relies—exempt L-3 employees from Iraqi tort law (Opp.20 & n.5), which the district court found to apply to plaintiffs' common-law claims (J.A.916).

[3] *See* Torture Victim Protection Act, 28 U.S.C. § 1350; Military Commissions Act of 2009, 10 U.S.C. § 948a *et seq.*; the federal criminal torture statute, 18 U.S.C. §§ 2340-2340A; the War Crimes Act of 1996, 18 U.S.C. § 2441; the Foreign Claims Act, 10 U.S.C. § 2734; and the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq*.

4. The Supreme Court's preemption cases also reject ERI's attempted distinction (ERI.Br.7-11) between targeted state law and generally applicable state law. "[I]t is a black-letter principle of preemption law that generally applicable state laws may conflict with and frustrate the purposes of a federal scheme just as much as a targeted state law." *Saleh*, 580 F.3d at 12 n.8 (citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion)).

Moreover, the Court has preempted state law that passed muster on its face but conflicted with the powers of the federal government as applied (and did so despite that the United States argued against preemption). *See Zschernig v. Miller*, 389 U.S. 429, 433-34 (1968). If facially Constitutional state laws may be preempted based upon their manner of application, then generally applicable tort law may similarly be preempted when applied in a manner that impermissibly conflicts with and frustrates the purposes of a federal scheme. Such is the case here. Application of state tort law to wartime battlefield detention and interrogation "during a period of armed conflict in connection with hostilities," (JA 75 ¶ 497), would frustrate the exclusive allocation of war-making powers to the federal government for reasons previously explained by L-3 (L-3.Br. 15-17, 36-41; L-3.Reply 20-24.) And this has never been the province of the States. *Saleh*, 580 F.3d at 11 ("Unlike tort

regulation of dangerous or mislabeled products, the Constitution specifically commits the Nation's war powers to the federal government, and as a result, the states have traditionally played no role in warfare."). To the contrary, regulation of wartime detention and interrogation is constitutionally committed to the political branches of the federal government.

5. That Iraqi law governs plaintiffs' non-ATS claims (JA 916) heightens the absurdity of allowing plaintiffs to impose civil tort regulation on defendants' participation in the military's detention and interrogation operations during the Iraq war. Even the dissent in the D.C. Circuit recognized the absurdity of applying Iraqi law and conceded that if such foreign law were found to apply—as the district court did here—preemption would be appropriate. *Saleh*, 580 F.3d at 30 & n.20.

6. ERI uses negative inferences from cases finding preemption to paint an erroneous picture of foreign affairs preemption, a picture not supported by holdings of those decisions. All but two of the foreign affairs decisions upon which ERI relies to assert that the state law claims here are not subject to foreign affairs preemption held the opposite. The obvious differences between this case and the two cases finding no preemption illustrate why preemption is appropriate here. *Medellin v. Texas*, 552 U.S. 491 (2008), involved an "unprecedented," *id.* at 532, attempt by the President to intervene in state criminal proceedings arising out of a murder *committed in*

Texas. The state criminal proceedings in *Medellin* are the paradigmatic example of an area traditionally occupied by the states. On the other side of the balance, the foreign affairs interest did not touch on the core war-making powers involved here, but instead were near the edges of foreign affairs preemption. Similarly, in *Dunbar v. Seger-Thomschitz*, 2010 U.S. App. LEXIS 17572 (5th Cir. Aug. 20, 2010), the Fifth Circuit refused to preempt the application of the general Louisiana statute of repose to a claim brought under state law against a Louisiana resident over property in Louisiana, where the source of alleged preemption was "U.S. foreign policy" as articulated in a "non-binding" international declaration.[4]

[4] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to which plaintiffs repeatedly refer (ERI.Br.13-15), did not involve preemption of state law at all, though it did involve an assertion of war powers. *Youngstown* was about the widespread confiscation of United States citizens' property within the United States by the Executive, which could not be further removed from allegations of mistreatment of aliens within military detention facilities in a foreign war zone.

CONCLUSION

Plaintiffs' claims are preempted by the Constitution's exclusive allocation of war-making powers to the federal government.

Respectfully submitted,

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October 21, 2010

CERTIFICATE OF COMPLIANCE

I, Ari S. Zymelman, hereby certify that:

1. I am an attorney representing Appellant L-3 Services, Inc.

2. This brief is in proportionally spaced 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the Table of Contents, Table of Authorities, and Certificates of Compliance and Service) contains 1893 words.

/s/ Ari S. Zymelman
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2010, I caused a true copy of the foregoing Response to Amicus Brief of EarthRights International to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on the below-listed counsel of record:

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