No. 09-7125
Consolidated with Nos. 09-7127, 09-7134, 09-7135
ORAL ARGUMENT NOT YET SCHEDULED

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE VIII, *ET AL.*,
Plaintiffs-Appellants,

v.

EXXON MOBIL CORPORATION, *ET AL.*,
Defendants-Appellees / Cross Appellants.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NOS. 01-1357, 07-1022
HON. ROYCE C. LAMBERTH, CHIEF JUDGE

BRIEF OF THE NATIONAL FOREIGN TRADE COUNCIL, USA* ENGAGE, NATIONAL ASSOCIATION OF MANUFACTURERS, AND U.S. COUNCIL FOR INTERNATIONAL BUSINESS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES / CROSS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *amici curiae* National Foreign Trade Council, U.S. Council for International Business, and National Association of Manufacturers state that each is a nonprofit corporation. None has a parent corporation and, because they are all non-stock corporations, no publicly held corporation owns 10% or more of any of their stock. (USA*Engage is not a corporation; it is a unit of the National Foreign Trade Council.).

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*. All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Answering Brief of Appellees/ Cross-Appellants.

Ruling Under Review. The rulings under review are listed in the Answering Brief of Appellees/Cross-Appellants.

Related Cases. There are no related cases of which *amici* are aware. *Doe I* has previously been before this Court in *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (2007).

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CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

GLOSSARY

ATS	Alien Tort Statute, 28 U.S.C. § 1350
TVPA	Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, note

INTEREST OF *AMICI CURIAE*

Amici curiae represent the interests of companies, trade associations, and individuals who collectively represent a significant proportion of the business conducted in the United States and abroad. Foreign trade is critical to the Nation and to the operations of *amici*'s members. This Nation's international trade in goods and services exceeds well over $1 trillion annually. Foreign trade is also an important U.S. foreign policy tool. Through constructive commercial engagement, the U.S. government promotes and reinforces democratic ideals, economic opportunity, and respect for liberty and human rights.

Over the past two decades, many of *amici*'s members and other corporations have been sued under the Alien Tort Statute (ATS) and/or the Torture Victims Protection Act (TVPA) for allegedly aiding and abetting human rights violations by foreign governments. Those suits impose staggering litigation and reputational costs on U.S. businesses that operate in foreign countries under often difficult conditions. Such suits, moreover, undermine the ability of the U.S. government to pursue its foreign policies through constructive engagement.

The Supreme Court and other federal courts have recently begun confining the ATS and TVPA to proper boundaries and repairing much of the damage that such suits impose. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). As they have

done so, however, plaintiffs have started asserting essentially identical claims under state law. Those claims concern *amici* for many of the same reasons: They inflict irreparable economic harm; they interfere with foreign relations; and they impede policies designed to promote the very democratic and human-rights goals plaintiffs purport to advance. In many respects, moreover, state-law claims threaten even greater harm. A basic postulate of our constitutional system is that foreign relations are conducted by our national government, speaking with one voice. Allowing international human-rights litigation under a patchwork of different state laws—for injuries perpetrated against foreign nationals by other foreign nationals in a foreign country—threatens our Nation's economic and political relations. That is a matter of utmost concern to *amici* and their members.

The National Foreign Trade Council (NFTC) is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies that supported an open world trading system, NFTC and its affiliates now serve more than 250 member companies.

USA*Engage is a broad-based coalition representing organizations, companies, and individuals from all regions, sectors, and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state, and local level. Established in 1997, USA*Engage seeks to inform policymakers, opinion-leaders, and the public about the counterproductive nature

of unilateral sanctions, the importance of exports and overseas investment for American competitiveness and jobs, and the role of American companies in promoting human rights and democracy worldwide.

The National Association of Manufacturers is the Nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

The U.S. Council for International Business promotes open markets, competitiveness, innovation, sustainable development, and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing the International Chamber of Commerce, the International Organization of Employers, and the Business and Industry Advisory Committee to the Organization for Economic Cooperation and Development, it provides business views to policymakers and regulatory authorities worldwide, and works to facilitate international trade and investment.

Amici have substantial shared interests in cases like this, which implicate the Nation's ability to maintain clear and fair legal regimes in the areas of international trade and investment. *Amici* have direct experience with the costs and disruption imposed by the sorts of claims at issue here, as well as a strong interest in, and vital insight into, the legal issues they present. *Amici* have participated as parties or *amici curiae* before this Court, the Supreme Court, and other courts in similar matters with important ramifications for foreign trade. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Balintuno v. Daimler AG*, Nos. 09-2778 *et al.* (2d Cir. argued Jan. 11, 2010); *Riggs Nat'l Corp. v. Comm'r*, 295 F.3d 16 (D.C. Cir. 2002).

SUMMARY OF ARGUMENT

I. Recognizing that participation of individual States in foreign affairs would undermine the uniformity necessary for effective foreign policy, the Constitution's Framers assigned responsibility for foreign relations to the federal government. They understood that allowing States to dictate foreign policy would draw the Nation into unnecessary conflicts with foreign governments and undermine the harmonious relations essential to peace and commercial intercourse. As a result, federal law displaces state laws that threaten the effective exercise of the Nation's foreign policy. Here, plaintiffs' state-law claims must give way because they portend precisely such an effect. Plaintiffs are Indonesian nationals who, invoking the local laws of the District of Columbia and Delaware, seek redress for injuries allegedly inflicted by Indonesian soldiers on Indonesian soil during an Indonesian civil war. The suit is inconsistent with the U.S.-supported Aceh peace initiative: It wrests disputes arising from the Aceh conflict from the Indonesian institutions assigned to address them, and impairs the economic development that is an integral part of the peace agreement. For those and other reasons, the U.S. and Indonesian governments have both objected to this lawsuit. Allowing this suit to proceed nonetheless would severely impair the federal government's conduct of this Nation's foreign policy.

II. Even apart from preemption, plaintiffs' state-law claims rest on the faulty premise that the state laws at issue extend overseas to address injuries suffered abroad, by foreign nationals, at the hands of other foreign nationals, during an ongoing foreign civil war. Whether the issue is framed in terms of a "zone-of-interests" test or extraterritoriality, there is simply no indication that the District of Columbia's common law or Delaware's wrongful-death statute were intended to apply to the extraterritorial claims here—particularly given the serious foreign-relations implications at stake. Federal courts should not reach out to devise novel and expansive extraterritorial constructions of state law absent a clear indication from the State's judiciary or legislature that the law applies in such a manner. No such indication exists here.

To the contrary, the District of Columbia and Delaware both would reject such an expansion, particularly in view of the severe constitutional doubts it would raise. No less than federal courts, District of Columbia and Delaware courts observe the principle that constructions that raise serious constitutional doubt should be avoided. Extending state-law causes of action to the extraterritorial claims at issue here would raise precisely such doubts. A State may not apply its laws extraterritorially where the case has no significant contacts with the forum. That is the situation here: This case concerns injuries allegedly inflicted by Indonesian soldiers, against Indonesian citizens, in Indonesia, during an Indonesian

civil war. Applying District of Columbia or Delaware law in those circumstances would be arbitrary and fundamentally unfair. Moreover, for the reasons stated above, it would also violate the Supremacy Clause. Under well-settled principles, state law should be construed to avoid those constitutional concerns.

ARGUMENT

Recognizing their adverse impact on matters committed to the political branches, the Supreme Court and other federal courts in recent years have reined in more extravagant applications of the Alien Tort Statute (ATS) and Torture Victims Protection Act (TVPA). *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). In this case, for example, the district court dismissed plaintiffs' ATS and TVPA claims, citing (among other things) the impact on international relations and Executive Branch foreign policy. But plaintiffs around the country—like plaintiffs here—have responded by attempting to assert essentially identical claims under state law. Those efforts to repackage formerly federal claims with a state-law label cannot be sustained.

The Constitution vests exclusive authority over foreign relations in the political branches of the national government. Plaintiffs' effort to extend state law to alleged injuries inflicted on foreign nationals, by other foreign nationals, in a foreign country, in the midst of a foreign civil war, threatens to impede and

damage this Nation's foreign policies. Plaintiffs' claims are, as a result, preempted by federal law. Indeed, where, as here, interference with foreign relations requires dismissal of *federal* claims, it follows *a fortiori* that state-law claims arising out of the same facts cannot stand.

Moreover, there is no reason to believe that the state laws invoked by plaintiffs extend extraterritorially in these circumstances. The rationales underlying the presumption against extraterritorial application of domestic law, well-established in the federal context, apply with even greater force to state law. There is no evidence the District of Columbia or Delaware intended these causes of action to apply abroad to injuries sustained by foreign nationals, at the hands of foreign soldiers, in a foreign land, where foreign policy issues are at stake. And the doctrine of constitutional doubt weighs dispositively against such an expansion.

I. Plaintiffs' State-Law Claims Are Preempted Because They Impermissibly Intrude Into Matters of Foreign Relations Reserved to the National Government

The Constitution's Framers understood that a balkanized approach to foreign relations would inevitably lead to conflict and discord. For that reason, they lodged authority over foreign affairs in the federal government. In this case, plaintiffs ask this Court to project District of Columbia and Delaware law into a dispute over actions by Indonesian soldiers against Indonesian citizens in Indonesia during an Indonesian civil war—despite grave warnings by both the U.S. and

Indonesian governments that this lawsuit would disrupt a U.S. government-supported peace process. In those circumstances, the Supremacy Clause requires local law to give way to federal authority over foreign relations.

A. The Constitution Entrusts the Federal Government with Authority over Foreign Affairs

Few points were less contentious at the time of the Founding than the need for a unified, national voice in matters of foreign relations. The Nation's most influential Framers all recognized that imperative. "If we are [to be] one nation in any respect," James Madison urged, "it clearly ought to be in respect to other nations." *The Federalist No. 42*, at 232 (Scott ed., 1894). John Jay agreed: "It is of high importance to the peace of America, that she observe the laws of nations . . . and to me it appears evident, that this will be more perfectly and punctually done by one National Government than it could be" by "thirteen separate States." *The Federalist No. 3*, at 20-21. Jefferson likewise saw the need to make States "one as to everything connected with foreign nations." Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787), *quoted in* Charles Warren, *The Making of the Constitution* 382 (1928). And Hamilton recognized that "[t]he peace of the *whole*, ought not to be left at the disposal of a *part*." *The Federalist No. 80*, at 435.

Accordingly, "one of the main objects of the Constitution [was] to make us, so far as regarded our foreign relations, one people, and one nation." *Holmes v.*

Jennison, 39 U.S. (14 Pet.) 540, 575 (1840). That design permeates the Constitution's text. Article I grants Congress power to "provide for the common Defence," to "regulate Commerce with foreign Nations," to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," and to "declare War." U.S. Const. art. I, § 8. Article II makes the President "Commander in Chief of the Army and Navy," charges him to "receive Ambassadors and other public Ministers," and empowers him, with the advice and consent of the Senate, to "make Treaties" and "appoint Ambassadors [and] other public Ministers and Consuls." *Id.* art. II, §§ 2, 3. By contrast, the Constitution expressly *denies* States authority over foreign affairs, prohibiting them from "enter[ing] into any Treaty, Alliance, or Confederation," "grant[ing] Letters of Marque and Reprisal," or—absent consent of Congress—"enter[ing] into any Agreement or Compact . . . with a foreign Power" or "engag[ing] in [offensive] War." *Id.* art. I, § 10.

Consistent with that basic structure, the Supreme Court has repeatedly emphasized the need for federal supremacy in foreign affairs. "In respect of our foreign relations generally, state lines disappear." *United States v. Belmont*, 301 U.S. 324, 331 (1937). "[F]ederal power in the field affecting foreign relations [must] be left entirely free from local interference." *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941). That federal authority is absolute: "Power over external affairs is

not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942); *see also Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

That exclusive federal mandate is born of necessity. In purely domestic matters, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). But when States meddle in foreign affairs, "[t]he nation as a whole would be held to answer if a State created difficulties with a foreign power." *Pink*, 315 U.S. at 232; *see Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875). Consequently, "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nationals, we are but one people, one nation, one power." *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

The President's and Congress's exclusive authority over international affairs also reflects the Framer's assessment of institutional competence. "Projection by a State of its legal norms onto conduct that took place within the sovereign territory of a foreign nation presents . . . serious problems of extraterritoriality, disuniformity, and interference with United States foreign policy." JA1182 n.1 (U.S. Br. as *Amicus Curiae* in *Exxon Mobil Corp. v. Doe*, No. 07-81 (U.S. Sup. Ct. May

2008)). The federal political branches—responsible for the Nation's security and foreign commerce—are best suited to address such issues. Judicial bodies, by contrast, are not. "[T]he very nature of executive decisions as to foreign policy is political, not judicial." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). "They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Id.*

B. Plaintiffs' State-Law Claims Cannot Be Reconciled with the Federal Government's Exclusive Control over Foreign Relations

In view of those principles, plaintiffs' state-law claims are preempted. As the Supreme Court has explained, "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003). That principle stems directly from the "'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government." *Id.* Because foreign affairs is "'an area of uniquely federal interest, . . . [t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption.'" *Id.* at 419 n.11; *see also Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985). Although state laws with a mere "incidental effect on foreign affairs" may be enforced, those

that "impair the effective exercise of the Nation's foreign policy" are preempted. *Garamendi*, 539 U.S. at 418-19 (quotation marks omitted).

The interference with foreign affairs here is obvious. Plaintiffs' allegations concern acts allegedly committed by Indonesian soldiers against Indonesian nationals during a civil war in Indonesia. But the 2005 peace agreement that ended that civil war established a "comprehensive" resolution to the conflict. *See* JA63-JA69. The agreement mandated that "civilian crimes committed by military personnel in Aceh" be "tried in civil courts in Aceh." JA65. It created a "Commission of Truth and Reconciliation" charged with "formulating and determining reconciliation measures." *Id.* And it granted Aceh a significant percentage of revenue "from all current and future hydrocarbon deposits and other natural resources" as an inducement to the peace process. *Id.*

Support for that peace agreement is an important component of U.S. foreign policy toward Indonesia. The United States "congratulated Indonesia on the successful signing" of the agreement and expressed "firm support for Indonesia's peace-building efforts in Aceh." JA80; *see also* JA81. Since then, it has "remain[ed] actively engaged in conflict prevention and resolution efforts in Aceh." U.S. Dep't of State, *Background Note: Indonesia* (Aug. 2010), *at* http://www.state.gov/r/pa/ei/bgn/2748.htm. It has pledged to "continue to work vigorously to bring human rights abuses in Aceh to an end through diplomatic and

other means." JA641. And the two countries share a "comprehensive partnership" to support their "common goal of maintaining peace, security, and stability in the region and engaging in a dialogue on threats to regional security." *Background Note: Indonesia*, *supra*.

State-law claims seeking to hold a multinational corporation liable in a U.S. court for alleged human rights violations committed by Indonesian soldiers during that civil war will fundamentally impair the federal government's ability to pursue those policies. This lawsuit seeks to wrest proceedings that the Indonesian peace agreement assigns to the courts and reconciliation commission of that country from those institutions' control. It moves to U.S. soil the complaints of Indonesian nationals, about the conduct of other Indonesian nationals, in Indonesia, that are specifically addressed by that agreement. And by threatening to impose massive costs on foreign corporations involved in resource development in Aceh, the lawsuit discourages the foreign investment that the peace agreement relies on to provide an economic foothold for the Acehnese people.

For those and other reasons, the federal government has objected to this suit. Early in the case, the State Department advised that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States." JA506. Indonesia, it noted, "may respond to the litigation by curtailing cooperation . . . on issues of substantial importance to the

United States," such as "the fight against international terrorist activity." JA507-08. "[T]he litigation's potential effects on Indonesia's economy," moreover, "could in turn adversely affect important United States interests." JA507. The litigation "appears likely to further discourage foreign investment, particularly in extractive industries in remote or unstable areas that require security protection." JA509. That "poses a risk of weakening the Indonesian economy," contrary to the U.S. foreign policy goals of "increasing opportunities for U.S. business abroad." JA510.

The State Department's submission attached a letter from the Indonesian Ambassador likewise opposing the suit. JA512. That letter noted that "the extra territorial jurisdiction of a United States Court over an allegation against . . . the Indonesian military, for operations taking place in Indonesia," offended the Indonesian government. *Id.* It recognized that "adjudication in the United States court will definitely compromise the serious efforts of the Indonesian government to guarantee the safety of foreign investments, including in particular those from the United States, and thus will adversely affect Indonesia's struggle to secure economic recovery, a struggle which is supported by the United States." *Id.* Indonesia continued to oppose this lawsuit even after the federal claims were dismissed. *See* JA83-JA84. That consistent opposition confirms that the state laws

at issue undermine this Nation's foreign relations. *See Zschernig v. Miller*, 389 U.S. 429, 437 n.7 (1968).

The importance of the U.S.-Indonesian relationship is difficult to overstate. "The United States has important economic, commercial, and security interests in Indonesia." *Background Note: Indonesia*, *supra*. The two governments have "noted with satisfaction the continuing development of U.S.-Indonesia economic and trade relations." JA80. And Indonesia "remains a linchpin of regional security due to its strategic location astride a number of key international maritime straits." *Background Note: Indonesia*, *supra*. This suit threatens those important foreign-policy interests.

For those very reasons, the district court dismissed plaintiffs' ATS claim, concluding that it would improperly require the court to "evaluate the policy or practice of a foreign state," and (as the State Department warned) would have "untoward consequences of endangering United States' relations with Indonesia." JA650, JA652. If such concerns preclude plaintiffs from pursuing a federal claim, *a fortiori* they must preclude state-law claims based on the same facts. A federal claim by definition arises under a statute enacted by Congress and signed into law by the President. Consequently, federal causes of action at least are created with the approval of the political branches to which the Constitution entrusts foreign relations. But neither Congress nor the Executive Branch has any role in the

development of state-law causes of action. Such claims therefore must be viewed with even greater skepticism. There is no reason foreign-relations concerns should displace a federal cause of action while leaving an otherwise identical state-law claim wholly unaffected.

Finally, when considering whether state law is preempted by the exclusive federal authority over foreign affairs, courts should "consider the strength of the state interest, judged by standards of traditional practice." *Garamendi*, 539 U.S. at 420. Here, those interests are minimal. A State has no legitimate interest in regulating overseas conduct of members of a foreign government's military on foreign soil during a foreign civil war against foreign citizens. "[T]he interests of any U.S. state (including the District of Columbia) are *de minimis*" in those circumstances. *Saleh v. Titan Corp.*, 580 F.3d 1, 12 (D.C. Cir. 2009); *contrast Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 842-43 (D.C. Cir. 2009) (foreign sovereign "has a strong governmental interest in both deterring attacks within its sovereign borders and ensuring compensation for injuries to its domiciliaries"). Compared to the federal government's compelling interest in maintaining productive and amicable foreign relations with Indonesia and supporting the Aceh peace process, the States' interests are trivial.

C. Contrary Arguments Lack Merit

Plaintiffs do not dispute that, if a federal cause of action cannot proceed because it interferes with national foreign policy, an otherwise identical state-law claim cannot either. The interference with foreign policy does not subside simply because a plaintiff chooses to repackage an action growing out of the same facts with a state-law label.

1. Plaintiffs' *amici* nevertheless urge that only policies embodied in federal *statutes* are preemptive, and that Executive Branch foreign policies—no matter how clearly expressed—are not. *See* Earthrights International Br. 7-11. That is incorrect. Under the Constitution, the primary responsibility over foreign affairs lies with the President. "[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Garamendi*, 539 U.S. at 415 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)). As John Marshall put it, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations," and "any act to be performed by the force of the nation is to be performed through him." 10 Annals of Cong. 613 (1800) (statement of then-Congressman John Marshall); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); *Haig v. Agee*, 453 U.S. 280, 291 (1981). "[I]n

the field of foreign policy the President has the 'lead role.'" *Garamendi*, 539 U.S. at 422 n.12; *see also Pink*, 315 U.S. at 240 (Frankfurter, J., concurring).

Because "the President possesses considerable independent constitutional authority to act on behalf of the United States on international issues, . . . conflict with the exercise of that authority is a comparably good reason to find preemption of state law" even in the absence of a federal statute. *Garamendi*, 539 U.S. at 424 n.14. "[T]he existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby*, 530 U.S. at 388. Rather, because state laws pose a "threat to the President's power to speak and bargain effectively with other nations," *id.* at 382, state laws impairing the Nation's foreign relations may be preempted even when "the President . . . is acting without express congressional authority," *Garamendi*, 539 U.S. at 424 n.14; *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Waterman S.S. Corp.*, 333 U.S. at 109. State-law claims that "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments" are preempted. *Garamendi*, 539 U.S. at 424.[1]

[1] *Medellin v. Texas*, 552 U.S. 491 (2008), is not to the contrary. There, the President had acted *contrary* to the will of Congress by essentially trying to implement a treaty despite Congress's determination that the treaty was not self-executing. *See id.* at 526. The President's acts thus fell within the "third category" of the familiar *Youngstown* framework because they were "'incompatible with the

In any event, even apart from their intrinsic preemptive force, the Executive Branch's foreign policy pronouncements warrant great deference for the light they shed on a case's impact on foreign relations. Under *Sosa v. Alvarez-Machain*, "federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." 542 U.S. 692, 733 n.21 (2004). If the Executive Branch's practical assessment of a lawsuit's impact is critical to whether a *federal* claim can be pursued, as in *Sosa*, that assessment should carry no less weight with respect to parallel claims under state law. The Executive Branch's views are thus weighty evidence that a state intrusion into foreign relations cannot stand.

That the U.S. statement of interest may not expressly call for dismissing all causes of action is not conclusive. In *Zschernig*, the government advised that the state law at issue there *did not* "unduly interfere[ ] with the United States' conduct of foreign relations," but the Supreme Court ordered the case dismissed nonetheless. 389 U.S. at 434. As the Court observed in *Garamendi*, "the Court [in

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expressed or implied will of Congress.'" *Id.* at 524-25 (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637-38). Here, by contrast, Congress has not enacted legislation contrary to the President's foreign policy toward Indonesia and the Aceh peace process. Congress, moreover, has expressly authorized the Executive Branch to submit Statements of Interest expressing the views of the United States about the likely impact of ongoing litigation. *See* 28 U.S.C. § 517. Finally, the President's action in *Medellin* intruded on a core competency of the States—the prosecution of a criminal, within the State's boundaries, for crimes committed within the State. This case, by contrast, reaches well beyond any core state competency and reflects an effort to extend state law to address injuries suffered by foreign nationals at the hands of other foreign nationals abroad.

Zschernig] was not deterred from exercising its own judgment to invalidate the law as an 'intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.'" 539 U.S. at 417. In any event, the United States has already recognized that "[s]tate-law claims, such as those asserted here, may also be subject to dismissal based upon federal preemption." JA1182 n.1. And all of the reasons the government gave for dismissing the federal claims apply with equal force to the state-law claims.

2. The observation that the state laws at issue are generally applicable tort laws (Earthrights International Br. 5-7) is likewise immaterial. Preemption "pursuant to the foreign affairs doctrine" occurs even when "claims involve an area of 'traditional competence' for state regulation—tort law." *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1187-1188 (C.D. Cal. 2005), *remanded by* 564 F.3d 1190 (9th Cir. 2009). "[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 (citations omitted); *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (common-law torts preempted).

Besides, this case does *not* involve an *ordinary* application of state tort law. It concerns an extraordinary proposal to extend state tort law well beyond the domestic context to injuries sustained in foreign lands, by foreign nationals, at the

hands of other foreign nationals—with the concomitant impact on foreign-relations matters for which courts have "neither aptitude, facilities nor responsibility." *Waterman S.S. Corp.*, 333 U.S. at 111. Moreover, while the federal interest need not be strong to preempt a claim where the State's interest is weak, *see Garamendi*, 539 U.S. at 419 n.11; *Saleh*, 580 F.3d at 12, here the national interest is overwhelming while the state interests are *de minimis*. The governments of the District of Columbia, Delaware, and other States "may not tell this Nation or [Indonesia] how to run their foreign policies." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 455 (1979).

II. Plaintiffs' State-Law Claims Fail Because the State Laws Do Not Apply Extraterritorially in These Circumstances

Plaintiffs' state-law claims also fail for an independent reason: The state laws at issue do not apply extraterritorially to the circumstances here. Whether framed in terms of the "zone of interests" those laws protect, *see* Exxon Br. 51-56, or in terms of extraterritoriality, *see* pp. 23-28, *infra*, neither District of Columbia nor Delaware law extends to suits by Indonesian citizens injured by Indonesian soldiers in Indonesia during an Indonesian civil war. Indeed, such an extension would raise serious constitutional doubts. As a result, District of Columbia and Delaware law cannot be extended to encompass the claims here.

A. The State Laws at Issue Do Not Apply Extraterritorially

1. Laws have a geographic scope. The Supreme Court has thus repeatedly made clear that federal law is presumed *not* to apply extraterritorially absent a clear indication of congressional intent. In *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (*ARAMCO*), for example, the Supreme Court held that Title VII of the Civil Rights Act of 1964 did not apply extraterritorially to torts committed by U.S. employers against U.S. citizens employed abroad. *Id.* at 248, 259. Courts, it explained, must "assume that Congress legislates against the backdrop of the presumption against extraterritoriality." *Id.* at 248. In light of that presumption—and notwithstanding the contrary position of the relevant agency and Title VII's broad remedial purposes—the Court held that plaintiffs had "failed to present sufficient affirmative evidence that Congress intended Title VII to apply abroad." *Id.* at 249, 259.

Likewise, in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), the Supreme Court held that Section 10(b) of the Securities Exchange Act does not apply extraterritorially to "provide[ ] a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges." *Id.* at 2875, 2877. As in *ARAMCO*, the Court applied the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the

territorial jurisdiction of the United States.'" *Id.* at 2877 (quoting *ARAMCO*, 499 U.S. at 248). "When a statute gives no clear indication of an extraterritorial application," the Court instructed, "it has none." *Id.* at 2878.

The presumption that U.S. law does not extend beyond U.S. borders rests on solid foundations. A sovereign seeking to regulate conduct ordinarily "is primarily concerned with domestic conditions." *ARAMCO*, 499 U.S. at 248. Accordingly, courts should be reluctant to assume a sovereign intends its laws to apply abroad. *Morrison*, 130 S. Ct. at 2877. The presumption also reflects important practical considerations. It "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord." *ARAMCO*, 499 U.S. at 248; *see Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993). Consequently, when a plaintiff seeks recovery under federal law for injuries sustained abroad, courts must ask at the outset whether the asserted cause of action extends overseas. *See, e.g.*, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963); *Sale*, 509 U.S. at 170-74. When the answer is "no," the plaintiff has failed to state a claim. *Id.*

2. The same inquiry must be undertaken for state-law claims as well. No less than the national sovereign, state sovereigns should be presumed to be "primarily concerned with domestic conditions." *ARAMCO*, 499 U.S. at 248.

Indeed, unlike the federal government, States have neither responsibility nor authority over foreign relations. *See* pp. 9-12, *supra*. The presumption that a sovereign acts with local concerns in mind, and does not intend to regulate conduct overseas, thus has even greater force for state law. And the practical considerations undergirding presumptive geographic limits have particularly special force for state law. Federal laws, because they are passed by Congress and signed by the President, are at least enacted by the political branches charged with conducting the Nation's foreign affairs; some cognizance of international ramifications can be presumed. Not so with state law. And, while a single federal statute could nonetheless lead to "unintended clashes" and "international discord" if applied abroad, *ARAMCO*, 499 U.S. at 248, the prospect of 50 different States and the District of Columbia all applying their own local laws to overseas conduct is a recipe for foreign-relations disaster. *See Pink*, 315 U.S. at 232; *Chy Lung*, 92 U.S. at 279.

The fact that some of the claims here are common-law actions only underscores the need to presume a limited geographic scope. Because courts lack both a democratic mandate and institutional competence to address foreign policy, they should "look for legislative guidance before exercising innovative authority over substantive law" affecting international affairs. *Sosa*, 542 U.S. at 726. Applying state tort law to injuries arising from the actions of Indonesian soldiers during a civil war in Indonesia would be "innovative," to say the least.

Judicial caution is especially important where, as here, a *federal* court is called upon to interpret state law. A federal court's obligation is "to rule upon state law as it presently exists and *not to surmise or suggest its expansion*." *Tritle v. Crown Airways*, 928 F.2d 81, 84 (4th Cir. 1990). "Absent some authoritative signal from the legislature or the courts" of a State, federal courts have "no basis for even considering the pros and cons of innovative theories of . . . liability." *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 694 (1st Cir. 1984). "[P]laintiffs who seek innovations in state law" thus are "ill advised to choose a federal court as their forum." *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1234 (7th Cir. 1993). For those reasons, plaintiffs' effort to extend District of Columbia and Delaware law to redress overseas injuries sustained during an Indonesian civil war must be rejected.

3. Plaintiffs convinced the court below to apply District of Columbia and Delaware law based on choice-of-law principles. But cases like *ARAMCO* and *Morrison* make clear that determining whether a sovereign intends its law to apply extraterritorially is not a choice-of-law question. "[T]he Court [in *ARAMCO*] did not even consider approaching the question in terms of choice of law." *Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218, 225 (3d Cir. 1991); *see id.* at 225 n.6 ("In no way did [*ARAMCO*] hold that one looks to choice of law principles in determining whether a federal statute applies overseas."). Whether a State's law

extends abroad is an antecedent *scope-of-law* question. The common law is not "a brooding omnipresence in the sky" that automatically extends around the globe, but rather "the articulate voice of some sovereign" that generally intends to regulate within a particular boundary. *See S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). If the sovereign does not intend its law to reach the conduct, the law does not so reach; choice-of-law principles are irrelevant.

The geographic scope of state law thus should be addressed before choice of law. *Unless* the sovereign intends its law to apply overseas, there is simply no "conflict" of laws to resolve. Choice-of-law principles address situations where multiple sovereigns' laws can apply to a transaction and the court must choose among competing applicable laws. *See Restatement (Second) of Conflict of Laws* § 1 cmts. a-b (1971). Where state law of its own force does not extend abroad, there is no "choice of law" decision to make.

That is the situation here. There is every reason to believe that the District of Columbia and Delaware laws at issue were established "primarily . . . with domestic conditions" in mind. *ARAMCO*, 499 U.S. at 248. There is no evidence whatsoever that the District of Columbia or Delaware intended those laws to apply abroad to redress the injuries of foreign citizens injured abroad by foreign soldiers during a foreign civil war. Indeed, it is extraordinarily unlikely that District of Columbia and Delaware courts would, absent legislative guidance, extend their

laws so far into an international domain in which they have "neither aptitude, facilities nor responsibility." *Waterman S.S. Corp.*, 333 U.S. at 111. And, even if such an extension were plausible, *federal* courts should refrain from embarking upon such extraordinary innovations. *See* pp. 25-26, *supra*.

B. Principles of Constitutional Doubt Reinforce the Conclusion that Neither District of Columbia Nor Delaware Law Applies Here

The canon of constitutional doubt confirms that District of Columbia and Delaware state-law causes of action do not extend to the circumstances here. It is well established that courts will avoid constructions that create serious constitutional doubts about a law's validity. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Because extending District of Columbia or Delaware law to these circumstances would raise such doubts, neither law should be construed to extend so far.

District of Columbia and Delaware courts adhere to the principle that laws must be construed to avoid serious constitutional doubts. District of Columbia courts repeatedly invoke the axiom that the District's laws "should be construed so as to preserve [their] constitutionality if it is possible to do so," *Thomas v. United States*, 914 A.2d 1, 18 (D.C. 2006), and regularly reject interpretations that "raise serious constitutional questions," *Tyler v. United States*, 705 A.2d 270, 279 (D.C. 1997) (Schwelb, J., concurring); *see also In re Johnson*, 699 A.2d 362, 369 (D.C. 1997); *Owens-Corning Fiberglas Corp. v. Henkel*, 689 A.2d 1224, 1234 (D.C.

1997). Delaware courts likewise "endeavor to give a statute a construction which renders the statute constitutionally valid." *DiSabatino v. State*, 808 A.2d 1216, 1227 (Del. Super. 2002), *aff'd*, 810 A.2d 349, 2002 WL 31546525 (Del. Nov. 7, 2002). Those principles apply to judge-made common-law remedies no less than legislative enactments. *See Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1289 (N.Y. 1991) (Titone, J., concurring) (courts should "shape the common-law rule so as to avoid a constitutional clash").

Applying District of Columbia or Delaware local law to the overseas events at issue here would raise grave constitutional doubts. First, as Exxon explains (at 52-54), due process bars extraterritorial application of state law unless the State has a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985); *see also Home Ins. Co. v. Dick*, 281 U.S. 397, 408 n.5 (1930). Applying District of Columbia or Delaware law here would violate that rule. Plaintiffs are Indonesian Acehnese villagers with no contact to the District of Columbia or Delaware. They seek compensation for alleged injuries inflicted by members of the Indonesian military under contract with an ExxonMobil subsidiary whose principal place of business is Indonesia. There is simply no significant contact between the conduct alleged and the District

of Columbia or Delaware sufficient to satisfy due-process requirements. *See Saleh*, 580 F.3d at 12.

Those constitutional concerns are aggravated by plaintiffs' demand for punitive damages. The Supreme Court has exercised special vigilance over the extraterritorial application of state law in the punitive damages context. "[N]o single State," it has explained, may "impose its own policy choice on neighboring States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (quoting *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881)). Allowing local law "'to operate beyond the jurisdiction of that State . . . [would] throw[] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.'" *Id.* at 571 n.16 (quoting *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914)). Despite those principles, the district court applied District of Columbia and Delaware law extraterritorially here *precisely because* those state laws authorize punitive damages while Indonesian law does not. JA788. Invoking District of Columbia or Delaware law to punish conduct occurring in Indonesia that injured Indonesian citizens based on the actions of Indonesian soldiers under contract with a foreign corporation raises grave due-process concerns.

Finally, any effort to apply state law here also raises grave constitutional doubts under the Supremacy Clause. The application of state law here would

intrude on federal authority, impede Executive Branch policies, and interfere with foreign relations. *See* pp. 12-17, *supra*. Consistent with the principle of constitutional doubt, District of Columbia and Delaware courts would construe their laws to steer well clear of those infirmities as well.

CONCLUSION

The judgment of the district court should be affirmed.

November 12, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d), and also with the type-volume limitations set forth in this Court's Order of June 8, 2010, because this brief contains 6,967 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 12, 2010, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 12, 2010

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