No. 21-867

In the Supreme Court of the United States

MIDWEST AIR TRAFFIC CONTROL SERVICE, INC.,
PETITIONER

v.

JESSICA T. BADILLA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Petitioner is a U.S. military subcontractor that provided air traffic control services at Kabul Afghanistan International Airport. Respondents brought state-law tort claims alleging that an air traffic controller employed by petitioner acted negligently in instructing a civilian cargo plane that was travelling from the U.S. Bagram Air Base to the airport, causing a fatal crash. The question presented is whether those tort claims are preempted by the interests embodied in the Federal Tort Claims Act's combatant activities exception, 28 U.S.C. 2680(j).

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

This case involves state-law tort claims against petitioner for injuries allegedly caused by its negligent performance under a contract with the U.S. military in Afghanistan. The court of appeals reversed the dismissal of the claims on preemption and other grounds and remanded for further proceedings.

1. This case arises out of the fatal crash of a civilian cargo plane near Kabul Afghanistan International Airport (KAIA) in October 2010. Pet. App. 2a, 6a-15a. At the time, KAIA was a central hub for certain U.S. and

North Atlantic Treaty Organization (NATO) operations in Afghanistan. *Id.* at 53a-54a. But KAIA was designated as a civilian airport. *Id.* at 54a. The air traffic at KAIA consisted of a mix of military aircraft, civilian aircraft supporting the military (such as cargo planes transporting supplies and personnel under contract with the U.S. military), and other civilian aircraft, including passenger flights. *Id.* at 3a, 53a-54a; C.A. App. 558-559.

The airport and its air traffic control tower belonged to Afghanistan, but NATO supervised operation of the tower, primarily to train Afghan civilians as tower controllers. Pet. App. 3a; see *id.* at 53a (the "main purpose" of NATO and military supervision of the control tower "was to train Afghans to take over responsibility for the tower"). Petitioner provided some of the air traffic control services at KAIA as a subcontractor under a prime contract that another company had with the U.S. military. *Id.* at 4a, 51a-52a. The prime contract obligated Midwest to "provide all personnel, supervision, logistics support, and other items necessary to perform [air traffic control] services as defined in this [statement of work]." *Id.* at 4a (citation omitted; brackets in original). The contract further required that "[a]ll work performed by the Contractor in support of this [statement of work] shall be in accordance with applicable Federal Aviation Administration (FAA) or International Civil Aviation Organization [] standards and Department of Defense [] regulations as applicable." *Ibid.* (citation omitted; first two sets of brackets in original).

NATO and Afghan controllers conducted training and operated KAIA's air traffic control tower during the day. Pet. App. 3a. Petitioner's personnel took over the tower's air traffic control operations at night and

were not responsible for training Afghan civilian controllers. *Ibid.* Petitioner's controllers reported both to Midwest supervisors and to U.S. Air Force officers; the latter retained ultimate operational control of the tower while petitioner's employees were on duty. *Id.* at 4a-5a.

One of petitioner's controllers was directing air traffic at KAIA on the night of October 12, 2010. Pet. App. 10a. Transafrik International Flight 662, a cargo plane leased to a U.S. airline that flew chartered cargo planes, was returning to its base of operations in Kabul from the U.S. Bagram Air Base, which was about 30 miles north of KAIA. *Id.* at 6a-7a, 54a. The Bagram-to-KAIA flight was the plane's last scheduled sortie of the day. *Id.* at 6a. There were eight people on board, all of whom were Transafrik crew members and residents of the Philippines; the plane was "likely empty of cargo." *Ibid.* The plane's terrain-avoidance and ground-proximity warning systems were inoperable. *Id.* at 6a-7a. Although the flight departed after sunset, the plane's pilot chose to operate according to Visual Flight Rules (VFR), under which the pilot, rather than the control tower, is responsible for identifying and avoiding obstacles. *Id.* at 6a, 8a. Flight 662 could not depart earlier because Boeing 747s, which were used to transport Afghans to Saudi Arabia for the Hajj, were parked on Transafrik's ramp at KAIA during the day. *Id.* at 8a-9a.

The air traffic control tower was equipped with a radar presentation that served as a visual aid to sequence aircraft for landing, but the tower lacked equipment that would alert a controller to an aircraft's proximity to terrain, such as the mountains surrounding KAIA. Pet. App. 3a. As Flight 662 approached KAIA,

petitioner's controller, after initially clearing the plane to land, asked the pilot to instead extend the cargo plane's flight path, thereby delaying its approach to enable a civilian passenger plane to land first. *Id.* at 12a. The pilot agreed. *Id.* at 12a-13a. Shortly thereafter, the cargo plane crashed into a mountain east of the airport, killing everyone on board. *Id.* at 6a, 15a. Everyone in the control tower at that time was employed by petitioner. *Id.* at 10a.

2. Respondents, the administrators of the estates of six of the eight victims, filed an action for damages against petitioner in New York state court, alleging that petitioner's controller acted negligently in his interactions with the pilot of the cargo plane on the night of the crash. Pet. App. 15a-16a. After the case was removed to federal court, petitioner moved for summary judgment, arguing, among other things, that respondents' negligence claims were preempted by federal law. *Id.* at 17a.[1]

Adopting a magistrate judge's recommendation, the district court determined that the claims were preempted by the federal interests embodied in the combatant activities exception in the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, which excludes from the FTCA's waiver of the sovereign immunity of the United States "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," 28 U.S.C. 2680(j). Pet. App. 59a-71a. The district court

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[1] The district court granted respondents' unopposed motion to dismiss their claims against the lessor of the plane, and it dismissed respondents' claims against National Air Cargo, the operator of the plane and the other remaining defendant, pursuant to a stipulation. Pet. App. 16a-17a & n.5; see *id.* at 6a.

further concluded that petitioner alternatively was entitled to summary judgment because petitioner owed no duty of care to the crash victims under the circumstances, *id.* at 71a-82a, and because the controller's actions were not a proximate cause of the accident, *id.* at 83a.

3. The court of appeals reversed and remanded. Pet. App. 1a-48a.

a. The court of appeals first held that the district court erred in holding that respondents' claims were preempted by the federal interests embodied in the FTCA's combatant activities exception, 28 U.S.C. 2680(j). Pet. App. 19a-37a. The court noted that the FTCA excludes government contractors from the statute's definition of "federal agenc[y]." *Id.* at 20a (quoting 28 U.S.C. 2671) (brackets omitted). The court recognized, however, that several courts of appeals, applying this Court's reasoning in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), have concluded that the uniquely federal interests embodied in the FTCA's combatant activities exception may conflict with, and consequently may preempt, state-law claims against military contractors in appropriate circumstances. Pet. App. 22a-26a.

The court of appeals agreed with the unanimous view of its sister circuits that the federal interests reflected in the combatant activities exception displace state-law claims against military contractors in at least some circumstances. Pet. App. 31a-35a. The court explained that the purpose of the exception is to "foreclose state regulation of the military's battlefield conduct and decisions." *Id.* at 32a (quoting *Harris* v. *Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 480 (3d Cir. 2013), cert. denied, 574 U.S. 1120 (2015)). In the court's view, a

state-law claim against a contractor would be preempted where "the challenged action can reasonably be considered the military's *own* conduct or decision and the operation of state law would conflict with that decision." *Id.* at 33a.

The court of appeals then articulated a two-part framework for determining when a state-law claim will be preempted. Pet. App. 33a. Under the court's framework, a claim will be preempted where "(1) the claim arises out of the contractor's involvement in the military's combatant activities, and (2) the military specifically authorized or directed the action giving rise to the claim." *Ibid.* Applying that test, the court concluded that respondents' negligence claims were not preempted. *Id.* at 35a. The court did not address, under the first step of the framework it adopted, whether respondents' claims arose out of petitioner's involvement in the military's combatant activities. Instead, advancing directly to the second step of that framework, the court held that the claims were not preempted because "[t]he record on summary judgment does not establish as a matter of law in [petitioner's] favor that the military authorized or directed [the controller's] action." *Ibid.*; see *id.* at 36a (noting that the military "did not issue a specific instruction that compelled [the controller's] directions to Flight 662"). The court observed that the military had "at a very general level" authorized petitioner to conduct air traffic control on the military's behalf in accordance with international air traffic control standards. *Id.* at 36a. But it held that preemption arises only when the military "specifically authorizes or directs the contractor action," not when the military "generally permits the contractor to undertake a range of actions." *Ibid.*

b. The court of appeals also reversed the district court's rulings on the issues of duty and proximate cause. Pet. App. 38a-48a. Noting that "[t]he parties and the District Court proceeded as if New York law applies," the court held that, under New York law, air traffic controllers owe a "circumscribed" duty of care to pilots operating under visual flight rules that requires the controller "not to lead a VFR flight into a danger that the controller is or should be aware of." *Id.* at 38a-39a, 42a. The court remanded for factfinding on the question whether petitioner's controller breached that duty on the night of the crash. *Id.* at 46a. The court similarly concluded that the question whether the controller's actions were a proximate cause of the accident involved "question[s] of fact" and could not be decided as a matter of law in this case. *Id.* at 46a; see *id.* at 47a.

DISCUSSION

Petitioner asks this Court to grant review to address whether state-law tort claims against a government contractor "that arise out of the uniquely federal sphere of the military's combat operations are preempted by the interests embodied in the Federal Tort Claims Act's combatant-activities exception." Pet. I. But as explained below, respondents' claims do not arise out of the military's combatant activities; rather, they arise out of air traffic control operations at a civilian airport in an incident involving civilian air traffic. The court of appeals thus did not err in vacating the district court's judgment concluding that respondents' claims are preempted by the federal interests embodied in the FTCA's combatant activities exception. Because respondents' claims do not arise out of the military's combatant activities, this case does not squarely present the question raised by petitioner. And even if it did, the

extent of any meaningful conflict among the courts of appeals on that question is uncertain, and this case arises in an interlocutory posture. Further review is not warranted.

A. The Federal Interests Embodied In The FTCA's Combatant Activities Exception Do Not Preempt Respondents' State-Law Claims

The FTCA's combatant activities exception bars any claim against the United States "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. 2680(j). A claim against a government contractor cannot be preempted by the federal interests embodied in that exception unless the claim, at a minimum, is one "arising out of the combatant activities of the military." *Ibid.* Respondents' claims do not satisfy that threshold element on the record here.

1. This Court has recognized that federal law must govern certain questions involving "uniquely federal interests," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964), such as where "the authority and duties of the United States as sovereign are intimately involved" or where "the interstate or international nature of the controversy makes it inappropriate for state law to control," *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). The resolution of such questions is "so committed by the Constitution and laws of the United States to federal control that state law is pre-empted." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504 (1988).

This Court applied those principles in *Boyle* to hold that in certain circumstances state-law claims against a federal procurement contractor are preempted. 487 U.S. at 512. *Boyle* held that "'displacement of state

law'" is appropriate in cases implicating uniquely federal interests if "a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law," or if "the application of state law would frustrate specific objectives of federal legislation." *Id.* at 507 (citations and internal quotation marks omitted; brackets in original). The Court further recognized that "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary preemption" because areas of uniquely federal interest are not "'field[s] which the States have traditionally occupied.'" *Ibid.* (citation omitted).

Applying those principles, the Court in *Boyle* concluded that application of state tort law to particular design specifications for military equipment approved by the government would conflict with the federal policy embodied in the discretionary function exception in the FTCA, which exempts from the FTCA's waiver of sovereign immunity "[a]ny claim * * * based upon the exercise or performance * * * [of] a discretionary function," 28 U.S.C. 2680(a). The "selection of the appropriate design for military equipment," the Court explained, "is assuredly a discretionary function within the meaning of this provision" because it involves "judgment as to the balancing of many technical, military, and even social considerations." *Boyle*, 487 U.S. at 511. Although the FTCA and its exceptions do not apply to suits against contractors, 28 U.S.C. 2671, the Court concluded that it would "make[] little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production."

Boyle, 487 U.S. at 512.[2] Such liability "would produce the same effect sought to be avoided by the FTCA exemption," in that the "financial burden of judgments against the contractors would be passed through, substantially if not totally, to the United States itself." *Id.* at 511-512. And it would "directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price." *Id.* at 507. "Either way, the interests of the United States will be directly affected." *Ibid.*[3]

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[2] *Boyle* also requires, as a prerequisite to preemption, that the contractor warned the government of dangers in the use of the equipment that was produced according to the specifications approved by the government. 487 U.S. at 512.

[3] Even without reliance on the FTCA's discretionary function exception, unlimited application of state-law tort liability to particular design features of military equipment would be out of place in light of the unique federal interests and powers implicated by such claims. See Bradford R. Clark, Boyle *As Constitutional Preemption*, 92 Notre Dame L. Rev. 2129, 2130, 2134-2141 (2017) (advocating an alternative rationale for the decision in *Boyle* grounded in constitutional preemption). The "Constitution's text, across several Articles, strongly suggests a complete delegation of authority to the Federal Government to provide for the common defense." *Torres* v. *Texas Dep't of Pub. Safety*, 142 S. Ct. 2455, 2463 (2022); *Perpich* v. *Department of Defense*, 496 U.S. 334, 351 (1990) (recognizing "the supremacy of federal power in the area of military affairs"). The Constitution, for example, expressly grants Congress the powers to "raise and support Armies" and to "provide and maintain a Navy." U.S. Const. Art. I, § 8, Cls. 12-13. At the same time, it "divests the States of like power." *Torres*, 142 S. Ct. at 2463 (citing U.S. Const. Art. I, § 10); see also U.S. Const. Art. VI, Cl. 2 (Supremacy Clause). Unrestrained application of state tort law to the performance of specialized military equipment procurement contracts would thus necessarily intrude on a field "committed by the Constitution" to "federal control." *Boyle*, 487 U.S. at 504.

2. All five courts of appeals to consider the issue—including the Second Circuit in the decision below—have concluded that this Court's reasoning in *Boyle* also applies to the FTCA's combatant activities exception in certain circumstances. See Pet. App. 31a-35a; *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 347-351 (4th Cir. 2014), cert. denied, 574 U.S. 1120 (2015); *Harris* v. *Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 480 (3d Cir. 2013), cert. denied, 574 U.S. 1120 (2015); *Saleh* v. *Titan Corp.*, 580 F.3d 1, 5-7 (D.C. Cir. 2009), cert. denied, 564 U.S. 1037 (2011); *Koohi* v. *United States*, 976 F.2d 1328, 1336-1337 (9th Cir. 1992), cert. denied, 508 U.S. 960 (1993). These courts have reasoned that such suits likewise implicate an area of uniquely federal interests—the U.S. military's conduct of combat operations abroad—and that such interests would be frustrated if state-law tort liability applied without limitation to military contractors operating in a war zone.

Although these courts have not all adopted the same formulation in defining the scope of preemption in this context, see pp. 17-19, *infra*, all agree—and petitioner does not dispute, see Reply Br. 6—that the scope of the FTCA's combatant activities exception necessarily informs that analysis. At a minimum, that means a claim against a contractor cannot be preempted by the federal interests embodied in the FTCA's combatant activities exception where the claim does not "arise out of" the military's combatant activities. See 28 U.S.C. 2680(j); Pet. App. 33a ("[W]e conclude that the combatant activities exception does not displace state-law claims against contractors unless * * * the claim arises out of the contractor's involvement in the military's combatant activities."); *Saleh*, 580 F.3d at 9 ("During wartime, where a private service contractor is integrated into

combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted.") (emphasis added); *Harris*, 724 F.3d at 481 (adopting the *Saleh* test and determining that a claim alleging negligent maintenance of water pump systems at a military base in a war zone "arises from combatant activities of the military"); *In re KBR*, 744 F.3d at 351 (likewise adopting *Saleh* test); see also *Koohi*, 976 F.2d at 1337 (holding that preemption was appropriate where imposition of liability on a contractor "would create a duty of care where the [FTCA's] combatant activities exception is intended to ensure that none exists").

The FTCA's combatant activities exception "paint[s] with a far broader brush" than certain other FTCA exceptions. *Dolan* v. *United States Postal Serv.*, 546 U.S. 481, 489 (2006); see *id.* at 489-490 (contrasting the combatant activities exception in Section 2680(j) with Section 2680(b), which preserves immunity for "just three types of harm" associated with mail delivery). The phrase "'arising out of,'" used in the combatant activities exception, is well understood to be "among the broadest in law." *Al Shimari* v. *CACI Int'l, Inc.*, 679 F.3d 205, 236 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting) (citation omitted); see, *e.g.*, *United States* v. *Shearer*, 473 U.S. 52, 54-55 (1985) (plurality opinion) (broadly interpreting the "sweeping language" of the FTCA exception encompassing "[a]ny claim arising out of [an] assault [or] battery," 26 U.S.C. 2680(h), to include a claim that officials negligently failed to prevent an assault); *Harris*, 724 F.3d at 480 ("[T]he phrase 'arising out of' suggests that this immunity is quite broad."). And several courts of appeals have recognized that the phrase "combatant activities" is likewise "of

somewhat wider scope"; it includes "not only physical violence, but activities both necessary to and in direct connection with actual hostilities," such as "supplying ammunition to fighting vessels in a combat area during war." *Johnson* v. *United States*, 170 F.2d 767, 770 (9th Cir. 1948); accord *Harris*, 724 F.3d at 481; *In re KBR*, 744 F.3d at 351. Thus, as the Fourth Circuit has explained, a claim arising out of a contractor's "[p]erform[ance of] waste management and water treatment functions to aid military personnel in a combat area" "undoubtedly" qualifies. *In re KBR*, 744 F.3d at 351.

Given the broad text of Section 2680(j), air traffic control services would likewise implicate the combatant activities exception in many circumstances. Respondents argue, however, that the air traffic control operations at issue here do not implicate the exception at all. See Br. in Opp. 8-15. In the particular circumstances of this case, the United States agrees that the interests reflected in the combatant activities exception are not sufficiently implicated to trigger any potential preemption of claims against petitioner.

KAIA was designated as a civilian airport that belonged to Afghanistan. Pet. App. 3a. Significantly, the record reflects that the reason for military supervision of KAIA's air traffic control tower was primarily to "train[] Afghan civilians as tower controllers." *Ibid.*; see also *id.* at 53a. Petitioner notes (Pet. 5) that the U.S. government deemed petitioner's personnel to be "mission essential" under Department of Defense regulations and the terms of the prime contract. But as just explained, military personnel supervised the KAIA tower largely for the purpose of training Afghan civilians to serve as tower controllers, not to perform a combat-related function as such. Petitioner's employees

thus supported military personnel in performing that undoubtedly essential, but not closely combat-related, function.

The record indicates that the traffic handled by air traffic controllers at KAIA did include a substantial amount of traffic related to U.S. military operations. See, *e.g.*, C.A. App. 558 (air traffic at KAIA included "military forces" engaged in "active combat operations" as well as aircraft carrying troops and military supplies); see also *id.* at 487 (KAIA air traffic included aircraft "involved in actual combat duties"). But the record also indicates that controllers served a "dual" role that involved directing civilian air traffic unrelated to combat operations as well. *Id.* at 558. And nothing in the record suggests that the controllers' duties and obligations were affected by the character of the air traffic at KAIA at particular times. To the contrary, petitioner's controllers appear to have been subject to the same rules, regulations, and operating procedures regardless of whether a particular incoming or departing plane was military or civilian. See pp. 2-3, *supra*; Pet. App. 5a.

Moreover, on the night in question, both the cargo plane that crashed, Flight 662, and the passenger plane whose unanticipated arrival precipitated the crash were civilian planes and flights. Pet. App. 6a, 11a-12a. Indeed, petitioner has not pointed to evidence that there were any military flights arriving at or departing from KAIA that night. Although the cargo plane's role was presumably to furnish transportation in support of military operations, the record is likewise silent as to what materials (if any) Flight 662 had delivered to Bagram Air Base earlier in the day and what role (if any) those materials may have played in military operations. And

on the fatal Bagram-to-KAIA leg, Flight 662 was returning to its home base in Kabul, manned by a civilian crew and apparently empty of all cargo and supplies. *Id.* at 6a.

Petitioner emphasizes (Reply Br. 6-7) that KAIA was at times subject to attacks by insurgents. But there is no indication in the record that KAIA was under attack or threat of attack the night of the crash. Nor has petitioner pointed to any evidence that, on the night of the crash (or at any point in the days immediately before or after), flight operations at KAIA were anything other than routine, or that the actions of the allegedly negligent controller were governed by anything other than standard FAA and international operating procedures at Afghanistan's primary civilian airport.

For these reasons, in the particular circumstances of this case as it comes to the Court, respondents' claims do not sufficiently implicate the interests embodied in the FTCA's combatant activities exception to trigger any potential preemption of those claims against the military contractor responsible for directing air traffic at KAIA. The result could be different if the relevant circumstances were different, such as in the case of a claim against a contractor directing air traffic at a military base or utilizing special standards to safeguard military traffic. And the result could also be different in a case against the United States under the FTCA where U.S. military personnel were themselves performing air traffic control services based on a judgment of combat-related necessity (*e.g.*, at U.S. airports during or in the wake of attacks such as those on September 11, 2001).[4]

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[4] The FTCA bars claims arising in a foreign country, 28 U.S.C. 2680(k), and therefore would bar claims against the United States

B. Further Review Is Not Warranted At This Time

This case does not warrant the Court's review. For the fact-specific reasons explained above, the court of appeals reached the correct result. And because respondents' claims do not arise out of the military's combatant activities in the first instance, this case would be an unsuitable vehicle in which to address the question presented. Moreover, the extent to which there is any conflict among the circuits on the question presented is uncertain. This case is also in an interlocutory posture, which further weighs against review.

1. As explained above, this case does not satisfy a threshold condition for any potential preemption based on the interests embodied in the FTCA's combatant activities exception. The court of appeals did not address whether respondents' claims "arise[] out of the contractor's involvement in the military's combatant activities." Pet. App. 33a. But the absence of a decision below on that antecedent issue itself weighs against review. See pp. 11-12, *supra*.

It also renders this case a poor vehicle to address the question presented by petitioner: "Whether state-law tort claims that arise out of the uniquely federal sphere of the military's combat operations are preempted by the interests embodied in the Federal Tort Claims Act's combatant-activities exception." Pet I. A ruling that petitioner's controllers' work was outside the scope of the unique federal interests protected by the combatant activities exception would pretermit the question whether and to what extent the combatant activities exception preempts tort claims directed at a civilian

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abroad even if the combatant activities exception did not apply. But that would not be true were military operations to occur in the United States.

contractor's activities. This Court would be better served by addressing the contours of preemption of state-law claims against military contractors in a case in which the activities at issue more obviously implicate the interests embodied in the FTCA's combatant activities exception—and when the court of appeals has considered and addressed that question in the first instance.

Indeed, in this respect, this case is an inferior vehicle to the prior cases in which this Court has denied a writ of certiorari on the question presented, all of which involved claims with a far closer nexus to the military's combatant activities than the record reflects here. In *Koohi*, for example, the plaintiff's claim arose out of the military's own direction of force against a civilian commercial airliner that flew into a combat zone. See 976 F.2d at 1337. In *Saleh*, the plaintiffs did not dispute that their claims—which arose from the military's detention and interrogation of Iraqi nationals at Abu Ghraib prison in Iraq—arose from "combatant activities." 580 F.3d at 6-7. And *Harris* and *In re KBR* both involved contractors providing support services on forward operating bases in active combat zones—in *Harris*, maintaining the base's electrical systems, see U.S. Amicus Br. at 17, *Kellogg Brown & Root Servs., Inc.* v. *Harris*, 574 U.S. 1120 (2015) (No. 13-817), and in *In re KBR*, performing waste management, see U.S. Amicus Br. at 18, *KBR, Inc.* v. *Metzger*, 574 U.S. 1120 (2015) (No. 13-1241).

2. Moreover, contrary to petitioner's assertion (Pet. 17-19), the degree to which there is divergence among the courts of appeals as to the proper formulation for preemption of state-law claims against military contractors that do arise out of combat activities is uncertain. The D.C., Third, and Fourth Circuits have, broadly speaking, all adopted substantially the same

framework. All hold that a state-law claim will be preempted "where a private service contractor is integrated into combatant activities over which the military retains command authority." *Saleh*, 580 F.3d at 9; see *Harris*, 724 F.3d at 480; *In re KBR*, 744 F.3d at 349. And the Ninth Circuit's earlier decision in *Koohi* comports with that standard. See 976 F.2d at 1336-1337 (holding that claims against manufacturers of air-defense system for downing of civilian aircraft were preempted).

The court of appeals here did articulate a different formulation. It held that a claim arising out of the contractor's involvement in the military's combatant activities will be preempted when "the military specifically authorized or directed the action giving rise to the claim." Pet. App. 33a. But it is not clear that this different articulation would make a substantial difference in practice. The D.C., Third, and Fourth Circuits require that the military have exerted specific control over the actions of the contractor that gave rise to the plaintiffs' claim. *Saleh*, 580 F.3d at 10 (citation omitted); see *In re KBR*, 744 F.3d at 351 (preemption applies to "activities stemming from military commands"); *Harris*, 724 F.3d at 481 (claim not preempted because the "relevant contract and work orders did not prescribe how [the contractor] was to perform the work required of it"). Likewise, the Ninth Circuit emphasized that the combatant activities exception "recognize[s] that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of *authorized* military action." *Koohi*, 976 F.2d at 1337 (emphasis added). As a result, contrary to the court of appeals' view (Pet. App. 34a-35a; see also Pet. 19), it is not clear that the Third, Fourth, Ninth, or D.C.

Circuits would have reached a different result in the circumstances of this case by applying the Second Circuit's formulation.

3. This case is also in an interlocutory posture. The court of appeals remanded for further fact-finding as to whether petitioner breached a duty of care owed to respondents and whether the actions of petitioner's controller were a proximate cause of the crash. Pet. App. 38a-48a. The resolution of those issues may also ultimately render this Court's review unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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