No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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, 28 U.S.C. 2680(j).

PARTIES TO THE PROCEEDING
AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Midwest Air Traffic Control Service, Inc. Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Jessica T. Badilla; Ingrid S. Bulos; Consorcia A. Castillo; Josephine R. Elbanbuena; Michelle S. Medina; Nela A. Padura; and Acea M. Mosey, Erie County Public Administrator.

RELATED PROCEEDINGS

United States District Court (W.D.N.Y.):

Badilla v. *National Air Cargo, Inc.*, Civ. No. 12-1066 (Jan. 17, 2020)

United States Court of Appeals (2d Cir.):

Badilla v. *National Air Cargo, Inc.*, No. 20-608 (Aug. 9, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Midwest Air Traffic Control Service, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-48a) is reported at 8 F.4th 105. The order of the district court adopting the magistrate judge's report and recommendation (App., *infra*, 49a-84a) is reported at 433 F. Supp. 3d 428.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2021. On October 22, 2021, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including December 8, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2680(j) of Title 28 of the United States Code provides that the United States' waiver of sovereign immunity shall not apply to:

> Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

STATEMENT

This case presents a question of exceptional importance involving the preemption of state-law tort claims against federal contractors providing support to military operations. In *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), this Court, looking to the federal interests embodied in the discretionary-function exception of the Federal Tort Claims Act (FTCA), held that those interests preempted design-defect claims against a military contractor. Five courts of appeals have applied *Boyle*'s reasoning to the FTCA's combatant-activities exception and held that the interests embodied in the combatant-activities exception also preempt state-law claims against military contractors in certain circumstances. Yet those courts have embraced different articulations of the federal interest at stake and applied different tests to determine the appropriate scope of preemption. The resulting conflict creates the precise inconsistency in applicable law that federal preemption is intended to avoid, and it has a detrimental impact on military effectiveness.

In the decision below, the court of appeals expressly deepened the existing conflict, adopting the majority view of the federal interest at stake but announcing a novel test to determine the scope of preemption. Applying that test, the court of appeals concluded that respondents' state-law negligence claims against petitioner for air traffic control services provided in Afghanistan in support of United States military operations were not preempted. The outcome would have been different if the court had applied the test adopted by at least one of the other circuits, or the test proffered by the Solicitor General in previous cases.

As the Solicitor General recognized in briefs in those cases, the question presented warrants the Court's review. It has significant implications for the Nation's military operations, and the courts of appeals are unambiguously split along two separate axes. Moreover, this case is an ideal vehicle for resolution of the issue, as it does not present any of the vehicle problems that the Solicitor General identified in previous cases. The petition for a writ of certiorari should therefore be granted.

A. Background

1. Over the last thirty years, contractors have played a critical role in United States military operations overseas. Until the Gulf War, uniformed soldiers performed almost all combat support functions essential to the war efforts of the United States. But with ongoing budget reductions and the transition to an all-volunteer military, it became impossible for uniformed troops effectively to execute most combat operations without extensive support from contractors. Cf. Department of Defense, *Report of the Quadrennial Defense Review* 53-57 (May 1997) <tinyurl.com/dodmay1997>. The government thus turned to contractors for such critical tasks as "providing armed

security to convoys and installations, providing life support to forward deployed warfighters, conducting intelligence analysis, and training local security forces." Moshe Schwartz & Jennifer Church, Congressional Research Service, R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* 3 (2013) (2013 CRS Report).

The relationship between uniformed troops and civilian contractors has become both symbiotic and entrenched. By relying on contractors for various tasks, the military has been able to "free[] up uniformed personnel to conduct combat operations," "provid[e] expertise in specialized fields," and "quickly deliver[] critical support capabilities tailored to specific military needs." 2013 CRS Report 3. During the wars in Iraq and Afghanistan, contractors frequently outnumbered uniformed troops; at times, the ratio of contractors to troops in Afghanistan was as high as three-to-one. See Heidi M. Peters, Congressional Research Service, R44116, *Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007-2020*, at 7 tbl.1 (2021). As is relevant here, in the fall of 2009, there were approximately 104,100 contractors in Afghanistan, compared to 62,300 uniformed troops. See *ibid.*

2. In September 2009, the Navy awarded a five-year contract to Readiness Management Support L.C. for "Air Traffic Control and Landing Systems" in Southwest Asia. C.A. App. 1931-1932. With the support of three preapproved subcontractors, including petitioner Midwest Air Traffic Control Services, Inc., Readiness was required to "provid[e] air traffic management and electronic equipment maintenance services to support air traffic control operations, airfield management, aviation weather observing, forecasting and reporting," as well as operate and maintain "air to ground communications," "surveillance

and precision radar systems," "voice communications systems," and "aviation weather systems" at multiple locations in U.S. Central Command's area of responsibility in Southwest Asia. *Id.* at 1946 (parentheticals omitted).

Consistent with its subcontract with Readiness, petitioner was tasked with providing air traffic services for United States military operations in Kabul, Afghanistan. D. Ct. Dkt. 155-31, at 3. The government deemed petitioner's personnel to be "mission essential personnel," providing "essential contract[or] service" under Department of Defense regulations. C.A. App. 1946. That designation referred to the provision of "vital systems * * * in support of military missions" and "mission-essential functions * * * that must be performed under all circumstances"—including "during crisis situations"—in order "to achieve [Department of Defense] component missions or responsibilities." 48 C.F.R. 252.237-7023 (2010). As the prime contract explained in greater detail, the relevant air traffic services "provide[d] mission critical capabilities supporting joint services military personnel, host nation military, and coalition forces," and were subject to change as the government's "mission requirements evolve[d]." C.A. App. 1946-1947.

The military treated petitioner's personnel consistent with their designation as "mission essential personnel." Under the terms of the prime contract, contractor personnel may be authorized to wear military clothing and to carry weapons. C.A. App. 2019. In Kabul, moreover, contractor personnel were required to reside on base under the direction of United States military officers. *Id.* at 1809. And during operations in Afghanistan, contractor personnel who were "authorized to accompany U.S. Armed Forces in the field" were "subject to the jurisdiction of the Uniform Code of Military Justice." *Id.* at 2018.

B. Facts And Procedural History

1. This case arises from the fatal crash of a civilian cargo flight, Transafrik International Flight 662, into a mountain near the Kabul Afghanistan International Airport on October 12, 2010.

At the time, Kabul Airport belonged to the government of Afghanistan, and the North Atlantic Treaty Organization (NATO) supervised its air traffic control tower. During the day, NATO and Afghan civilian controllers operated the control tower; at night, petitioner's personnel took over operations (but were not responsible for any training). App., *infra*, 3a.

Before petitioner's contract, because there were not enough NATO civilian air traffic controllers, Air Force controllers filled those positions. C.A. App. 464. While petitioner's personnel replaced those uniformed controllers, they still took direction from Air Force officers, who retained "operational control." *Id.* at 492-493, 571-572. The Air Force designed that arrangement to achieve the "continuity and experience" it deemed "desirable in an air traffic control force." *Id.* at 464-465.

Although Kabul Airport was officially designated as a civilian airport, it was a "pivotal hub" for the military; the movement of troops, supplies, and armed combat aircraft were among the airport's "prime missions." C.A. App. 558. Approximately 75% of the air traffic at Kabul Airport was combat-related, and the remaining 25% was civilian. App., *infra*, 53a-54a; see C.A. App. 488. Unsurprisingly, given its predominantly military operations, the airport faced regular attacks from insurgents. C.A. App. 298-299.

2. On the evening of October 12, 2010, Flight 662 departed from Bagram Air Base, a United States military base approximately thirty miles to the north, to Kabul Airport. The eight people on board the flight included the six decedents represented by respondents here, all of

whom were from the Philippines. Three days before the flight, another Transafrik pilot had sent an e-mail to airline employees—including the pilot who would captain Flight 662—noting that the plane was having difficulties with its terrain avoidance warning system; the plane did not have a working ground proximity warning system. App., *infra*, 6a-7a.

Although the flight was departing after sunset and under hazy conditions, the pilot decided to operate under visual flight rules. A pilot flying under visual rules is responsible for seeing and avoiding obstacles, such as other aircraft and terrain. By contrast, a pilot flying under instrument rules must rely on air traffic control for obstacle avoidance and must reach a greater altitude and distance from the airport so as to allow the plane to appear clearly on radar, considerably extending the length of a short flight like this one. Whether to fly under visual or instrument rules is the pilot's choice. App., *infra*, 8a.

Under visual rules, the flight would take approximately ten minutes. App., *infra*, 8a. Consistent with practices under visual rules, petitioner's air traffic controller at Kabul Airport did not assign an altitude to Flight 662 when he cleared the aircraft for landing. *Id.* at 10a-11a. The United States military had not provided any equipment to the control tower that could have calculated the aircraft's proximity to any specific terrain feature. *Id.* at 67a. Although the radar equipment in the tower could provide information about the positions of planes relative to one another, it was temporarily down at the time Flight 662 was cleared for landing. *Id.* at 11a.

Minutes later, the radar equipment was again operational, and the air traffic controller was able to see Flight 662's relative position to another incoming flight—a civilian flight not yet cleared for landing. The tower asked the pilot of Flight 662 if he could extend the downwind leg of

the flight to provide spacing for the other aircraft to land first. The pilot said that he could do so. A short time later, the plane flew into a mountain approximately ten miles east of the airport, killing everyone on board. App., *infra*, 11a-15a.

3. On October 2, 2012, respondents, the administrators of the estates of six of the eight victims, filed suit against petitioner and others in New York state court. As is relevant here, the complaint alleged that petitioner's personnel were negligent in various respects, including by failing to instruct Flight 662 to keep a "safe and proper separation" from the surrounding terrain. App., *infra*, 15a-16a; see C.A. App. 142-143. After the case was removed to federal court, petitioner moved for summary judgment, arguing, in relevant part, that the combatant-activities exception of the Federal Tort Claims Act preempted respondents' tort claims.

The motion was referred to a magistrate judge, and the magistrate judge recommended granting the motion. App., *infra*, 51a. As is relevant here, in evaluating petitioner's preemption defense, the magistrate judge applied the analysis set forth in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). App., *infra*, 59a-71a. There, this Court held that product-liability claims against military contractors are preempted where "a significant conflict exists between an identifiable federal policy or interest and the operation of state law." *Boyle*, 487 U.S. at 507 (internal quotation marks, brackets, and citation omitted). In so holding, this Court looked to the discretionary-function exception in the Federal Tort Claims Act, 28 U.S.C. 2680(a), to inform the definition of the federal interests and the scope of the preemption defense.

Here, the magistrate judge focused on the federal interest embodied in a different exception to the FTCA—the combatant-activities exception, which bars claims

"arising out of the combatant activities of the military or naval forces * * * during time of war." 28 U.S.C. 2680(j). The magistrate judge followed the reasoning of *Saleh* v. *Titan Corp.*, 580 F.3d 1 (2009), cert. denied, 564 U.S. 1037 (2011), in which the District of Columbia Circuit applied *Boyle*'s reasoning to the combatant-activities exception. App., *infra*, 66a-67a.

Under that framework, the magistrate judge explained that the relevant federal interest embodied in the exception is "eliminating tort concepts from the battlefield," and that this "suggests that *any* non-federal substantive negligence law will cause significant conflict with that interest." App., *infra*, 66a (internal quotation marks and citation omitted; emphasis added). Quoting *Saleh*, the magistrate judge concluded that, "[d]uring 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." *Id.* at 63a (quoting 580 F.3d at 9) (alteration in original).

As applied to the facts here, the magistrate judge determined that petitioner was engaged in "combatant activities" at Kabul Airport, which "include not only physical violence, but activities both necessary to and in direct connection with actual hostilities," because "it is undisputed that [the airport] was subject to insurgent attacks." App., *infra*, 68a, 70a (citation omitted). Even under a narrower preemption rationale, however, the magistrate judge noted that preemption would be proper because "the core of the plaintiffs' claim"—that petitioner "failed to provide terrain separation services" to Flight 662—"at least partially implicates the military's decision to not equip the [Kabul Airport] air traffic control tower with resources to

provide that service or to adopt guidelines that made terrain separation the responsibility of the controllers." *Id.* at 67a.

The district court adopted the magistrate judge's report and recommendation. App., *infra*, 49a-51a.

4. The court of appeals vacated and remanded. App., *infra*, 1a-48a.

The court of appeals began its analysis by noting that, under *Boyle*'s "limited holding," state-law tort claims against military contractors are preempted "only where the federal Government has mandated the action that allegedly violated state law." App., *infra*, 21a. The court recognized that "several of [its] sister [c]ircuits have to varying degrees extended the application of *Boyle* to the FTCA's combatant activities exception." *Id.* at 22a. But the court declined to hold that the combatant-activities exception preempts all tort claims that arise from a contractor's "involvement in combatant activities of the U.S. military," *ibid.*, asserting that "[e]ven those who favor broad protection for military contractors question the legal basis for a judicial expansion of *Boyle* beyond the 'special circumstances' of that case," *id.* at 29a (citations omitted).

In order to limit the import of *Boyle* to "its direct conflict rationale," App., *infra*, 31a, the court of appeals proceeded to deepen an existing circuit conflict by rejecting the reasoning of every federal court of appeals to have spoken on the preemption question. *Id.* at 31a-35a. As a first step in its analysis, the court identified the relevant federal interest as "foreclosing state regulation of the military's battlefield decisionmaking." *Id.* at 32a. In so doing, the court of appeals rejected the "narrow view" taken by the Ninth Circuit in *Koohi* v. *United States*, 976 F.2d 1328 (1992), cert. denied, 508 U.S. 960 (1993), and the "broad view" of the D.C. Circuit in *Saleh*, *supra*. App., *infra*, 25a, 32a. Instead, the court of appeals adopted a

formulation of the federal interest used by the Third Circuit in *Harris* v. *Kellogg Brown & Root Services, Inc.*, 724 F.3d 458 (2013), cert. denied, 574 U.S. 1120 (2015), and the Fourth Circuit in *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326 (2014), cert. denied, 574 U.S. 1120 (2015). App., *infra*, 32a.

Next, the court of appeals explained that the federal interest does not conflict with state law "unless (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." App., *infra*, 33a. This time, the court of appeals disagreed not only with the D.C. Circuit's test for determining the appropriate scope of preemption, but also with the tests of the Third and Fourth Circuits. *Id.* at 32a-35a.

Applying its novel test to the facts of this case, the court of appeals held that the combatant-activities exception did not preempt respondents' tort claims. App., *infra*, 35a. While seemingly assuming that petitioner was involved in the military's combatant activities, the court nevertheless found no preemption—because "[t]he government did not issue a specific instruction that compelled [petitioner's] directions to Flight 662," because "no member of the United States military was even present in the tower the evening of the fatal crash," and because "the military's decision to stock the [Kabul Airport] tower" with equipment unable to provide terrain separation services "did not alone permit tower controllers to divert flights * * * without any warning or awareness of the flight's proximity to the surrounding terrain." *Id.* at 36a-37a.

The court of appeals remanded the case to the district court to determine at trial whether petitioner had breached its duty of care and proximately caused the crash. App., *infra*, 38a-48a.

5. Without opposition from respondents, the court of appeals granted petitioner's motion for a stay of the mandate pending the disposition of this petition for certiorari.

REASONS FOR GRANTING THE PETITION

The decision below deepens an entrenched and expressly acknowledged conflict among the courts of appeals regarding the extent to which state-law tort claims against contractors are preempted by the federal interests embodied in the combatant-activities exception of the Federal Tort Claims Act. The court of appeals reversed the order granting petitioner's motion for summary judgment based on its novel interpretation of the preemptive scope of the exception. Under the alternative tests put forth by the D.C. Circuit or the Solicitor General, however, respondents' claims would clearly have been preempted.

The Solicitor General has repeatedly told this Court that the question presented is one of significant importance to the federal government that warrants the Court's review in an appropriate case. This is that case. The question was squarely presented and passed upon below, and this petition raises none of the complications that existed in previous petitions on the question. The petition for a writ of certiorari should be granted.

A. The Decision Below Deepens An Existing Circuit Conflict And Is At Odds With The United States' Proposed Test For Preemption

As the court of appeals acknowledged, the decision below deepens a conflict among federal courts of appeals as to the proper test for determining when the federal interests embodied in the combatant-activities exception of the FTCA preempt state-law tort claims. Each of the courts of appeals to have considered the issue has correctly held that *Boyle*'s framework applies and that the combatant-

activities exception codifies a uniquely federal interest. But those courts have expressed three different views of the relevant federal interest and two different tests for determining the scope of preemption. The resulting conflict, on a manifestly important question, cries out for the Court's review.

1. This Court has long recognized that certain areas of the law are "so committed by the Constitution and laws of the United States to federal control" that any state law purporting to govern claims in those areas must be "preempted and replaced" by federal law, even "absent explicit statutory directive." *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504 (1988). As is relevant here, federal law governs certain questions involving "uniquely federal interests," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964), including where "the authority and duties of the United States as sovereign are intimately involved," *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). The Court applied those principles in *Boyle* to hold that state-law claims against federal contractors are preempted in certain circumstances. See 487 U.S. at 512.

In *Boyle*, a Marine died following a domestic helicopter crash, and his father sued the military contractor that designed the helicopter, alleging a design defect. See 487 U.S. at 502-503. The Court held that federal law preempted certain state-law tort claims against military contractors. See *id.* at 512. The Court explained that such preemption is appropriate if "a significant conflict exists between an identifiable federal policy or interest and the operation of state law." *Id.* at 507 (internal quotation marks, brackets, and citation omitted). The Court further explained that "[t]he 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." *Ibid.* (internal quotation marks and citation omitted).

Applying that framework, the Court first determined that there was a "significant conflict" between state law and the federal interests embodied in the FTCA's discretionary-function exception, which exempts from the FTCA's waiver of sovereign immunity "[a]ny claim * * * based upon the exercise or performance * * * [of] a discretionary function." 487 U.S. at 511 (quoting 28 U.S.C. 2680(a)) (first alteration in original). The Court reasoned that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision." *Ibid.*

Although the FTCA by its terms does not apply to federal contractors, see 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." 487 U.S. at 512. Permitting suits against federal contractors "would produce the same effect sought to be avoided by the FTCA exemption," because the "financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself." *Id.* at 511-512.

2. In applying the *Boyle* framework to the combatant-activities exception, the courts of appeals have defined the relevant federal interest in three different ways.

a. The Ninth Circuit has taken a "narrow view" of the federal interest. App., *infra*, 25a. In *Koohi* v. *United States*, 976 F.2d 1328 (1992), cert. denied, 508 U.S. 960 (1993), the Ninth Circuit reasoned that "one purpose of the combatant activities exception is to recognize 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." *Id.* at 1337. The Ninth Circuit was considering a tort suit brought by the heirs of deceased passengers and crew on an Iranian civilian aircraft. See *id.* at 1330. The plaintiffs sued the manufacturer of an air defense system that United States naval personnel used to shoot down the aircraft. See *ibid.* In rejecting the plaintiffs' claims, the court reasoned that the purpose of the defense system "was not to protect the lives of enemy forces or persons associated with those forces," and concluded that the downed aircraft—though a civilian craft—was associated with such forces. *Id.* at 1337. Because imposing liability on the manufacturers "would create a duty of care where the combatant activities exception is intended to ensure that none exists," the court determined that "preemption is appropriate." *Ibid.*

b. By contrast, in *Saleh* v. *Titan Corp.*, 580 F.3d 1 (2009), cert. denied, 564 U.S. 1037 (2011), the D.C. Circuit adopted a "broad view" of the federal interest, App., *infra*, 25a, agreeing that the combatant-activities exception encompassed the interest recognized in *Koohi* but concluding that the interest protected by the exception was more expansive. See 580 F.3d at 7. The court defined the relevant interest as "the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Ibid.* The court considered that policy interest to be "equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control." *Ibid.* As the court observed, "all of the traditional rationales for tort law—deterrence of risk-taking behavior, compensation of victims, and punishment

of tortfeasors—are singularly out of place in combat situations, where risk-taking is the rule." *Ibid.* The court therefore concluded that "the federal government occupies the field when it comes to warfare," leading to "a more general conflict preemption" than the preemption at issue in *Boyle*. *Ibid.*

c. Finally, the Third and Fourth Circuits—joined by the Second Circuit in the decision below—have adopted a "middle ground" view, App., *infra*, 25a, holding that the relevant federal interest is "to foreclose state regulation of the military's battlefield conduct and decisions." *Harris* v. *Kellogg Brown & Root Services, Inc.*, 724 F.3d 458, 480 (3d Cir. 2013), cert. denied, 574 U.S. 1120 (2015); accord *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 348 (4th Cir. 2014), cert. denied, 574 U.S. 1120 (2015); App., *infra*, 32a-33a.

Notably, in adopting that definition of the federal interest, the Third Circuit directly addressed the decisions of the Ninth and D.C. Circuits, recognizing their divergent views. The Third Circuit contended that limiting the interest to the one posited by the Ninth Circuit would be "too narrow." *Harris*, 724 F.3d at 480. In the Third Circuit's view, that articulation failed to take account of the FTCA's reference to claims "arising out of" combatant activities, which should at least "prevent suits against the military for harm it causes through friendly fire" and not just for the harm it intends. *Ibid.* Turning to the D.C. Circuit, the Third Circuit agreed that the combatant-activities exception "represents a federal policy to prevent state regulation of the military's battlefield conduct and decisions," but it declined to "go as far as the D.C. Circuit's holding" that the combatant-activities exception "reveals a policy of 'elimination of tort from the battlefield.'" *Ibid.* (quoting *Saleh*, 580 F.3d at 7). According to the Third Circuit, that "broader statement loses sight of

the fact" that the combatant-activities exception "does not provide immunity to nongovernmental actors," with the result that Congress did not intend to "eliminate all tort law." *Ibid.*

Both the Fourth Circuit and then the Second Circuit below found the Third Circuit's analysis "persuasive" and "adopt[ed] its formulation." *KBR*, 744 F.3d at 348; see App., *infra*, 32a.

3. The courts of appeals are also divided on the test to determine the appropriate scope of preemption resulting from the conflict between the relevant federal interest and the operation of state tort law.

a. In *Saleh*, the D.C. Circuit held that federal law would displace state-law tort claims arising out of a military contractor's support of the military's combat activities when the contractor is "integrated into combatant activities over which the military retains command authority." 580 F.3d at 9. Applying that rule, the court determined that federal law preempted the tort claims by Iraqi nationals against private military contractors that provided interrogation and interpretation services to the United States military at the Abu Ghraib military prison. There was "no dispute" that the contractors were "integrated and performing a common mission with the military under ultimate military command," which resulted in preemption even when Army personnel "condemned the behavior" at issue. *Id.* at 6-7.

The Third and Fourth Circuits purported to adopt the D.C. Circuit's test for determining the scope of preemption, see *Harris*, 724 F.3d at 480-481; *KBR*, 744 F.3d at 351, but their reliance on a "more narrowly defined federal interest" than the one identified by the D.C. Circuit resulted "in a correspondingly more modest displacement of state law," App., *infra*, 33a. As the court of appeals ex-

plained in the decision below, there is no "significant conflict" between the Third and Fourth Circuits' more narrowly defined interest and state law unless (1) "the challenged action can reasonably be considered the military's own conduct or decision" and (2) "the operation of state law would conflict with that decision." *Ibid.*

Consistent with the narrower scope of preemption under the Third and Fourth Circuits' test, both courts applied the test and declined to hold that the state-law claims were preempted. In *Harris*, the Third Circuit determined that federal law did not preempt plaintiffs' tort claims against a contractor that performed maintenance services at a military barracks in Iraq. See 724 F.3d at 481. The plaintiffs argued that the contractor's failure to meet certain standards of care in installing or maintaining a water pump resulted in electrified water in the shower, which killed a staff sergeant. See *id.* at 463. Such a claim was not preempted, the court explained, because, while the contractor's maintenance work "qualifie[d] as integration into the military's combatant activities," the military did not have "command authority" over the way in which the contractor was required to install and maintain the pump. *Id.* at 481.

For similar reasons, the Fourth Circuit vacated the district court's determination that tort claims against a contractor for its waste-management and water-treatment activities were preempted. *KBR*, 744 F.3d at 351. The court determined that such activities "function[ed] to aid military personnel in a combat area" and thus qualified as "combatant activities." *Ibid.* (citation omitted). But the court concluded that, "although it is evident that the military controlled [the contractor] to some degree," the extent of that control was unclear and should not have been resolved before discovery. *Ibid.*

b. The Second Circuit's decision in this case exacerbated the existing circuit conflict by adopting a new test for determining the appropriate scope of preemption. Contrary to the D.C. Circuit's approach in *Saleh*, the Second Circuit held that "the combatant activities exception does not displace state-law claims against contractors unless (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." App., *infra*, 33a. The Second Circuit left no doubt that it was disagreeing with the D.C. Circuit. For example, it noted that, under its new test, "the plaintiffs' claims in *Saleh* * * * would not be preempted on summary judgment because the challenged contractor actions" the court addressed "were neither authorized nor directed by the military." *Id.* at 34a-35a. And throughout its analysis, the court favorably cited judicial opinions, briefs, and scholarship critical of *Saleh*—making many favorable references to the dissenting and district-court opinions in that case. See, *e.g.*, *id.* at 29a-30a.

4. The test adopted by the Second Circuit in the decision below is also at odds with the stated views of the Solicitor General. In no fewer than three of the cases discussed above, this Court has called for the views of the Solicitor General on whether to grant review on the question presented here. In those briefs, the government recognized the importance of the issue, stated that certiorari was warranted in an appropriate case, and proffered its view of the correct test, which differed from the tests adopted by the courts of appeals in those cases (and from the test adopted by the court of appeals in the decision below). See U.S. Br., *Saleh* v. *Titan Corp.*, 564 U.S. 1037 (2011) (No. 09-1313); U.S. Br., *KBR, Inc.* v. *Metzgar*, 574 U.S. 1120 (2015) (No. 13-1241); U.S. Br., *Kellogg Brown &*

Root Services, Inc. v. *Harris*, 574 U.S. 1120 (2015) (No. 13-817).

In each of those cases, the government explained that the court of appeals correctly held that the "combatant-activities exception codifies federal interests that would be frustrated if state-law tort liability applied without limitation to battlefield contractors under the military's auspices." U.S. Br. 13, *Harris*, *supra*; accord U.S. Br. 14, *Metzgar*, *supra*; U.S. Br. 11-12, *Saleh*, *supra*. But the government ultimately rejected the tests those courts adopted to determine the appropriate scope of preemption.

Although the government did not set forth a precise articulation of the federal interest at stake, it asserted that the test for the scope of preemption adopted by the D.C. Circuit, as well as the Third and Fourth Circuits, was "both imprecise and too narrow." U.S. Br. 14, *Harris*, *supra*; accord U.S. Br. 14, *Metzgar*, *supra*; U.S. Br. 15 *Saleh*, *supra*. The government criticized that test as resting on a "misunderstanding about the role of private contractors in active war zones" and reflecting an "unduly narrow conception of the federal interests embodied in the FTCA's combatant-activities exception." U.S. Br. 14, *Harris*, *supra*; accord U.S. Br. 14, *Metzgar*, *supra*; U.S. Br. 15-16, *Saleh*, *supra*. The government further explained that the combatant-activities exception—which reaches claims "*arising out of* the combatant activities of the military * * * during time of war," 28 U.S.C. 2680(j) (emphasis added)—plainly "applies not only to claims challenging the lawfulness of combatant activities, but also to claims seeking redress for injuries caused by combat support activities." U.S. Br. 14-15, *Harris*, *supra*; accord U.S. Br. 15, *Metzgar*, *supra*; U.S. Br. 16, *Saleh*, *supra*.

The government proceeded to articulate a test that would result in broader preemption than any of the tests adopted by the courts of appeals. In the government's view, claims against a military contractor should be preempted if (1) "a similar claim against the United States would be within the FTCA's combatant-activities exception because it arises out of the military's combatant activities" and (2) "the contractor was acting within the scope of its contractual relationship with the federal government at the time of the incident out of which the claim arose." U.S. Br. 15, *Harris*, *supra*.

According to the government, under that test, "federal preemption would generally apply even if an employee of a contractor allegedly violated the terms of the contract or took steps not specifically called for in the contract, as long as the alleged conduct at issue was within the general scope of the contractual relationship between the contractor and the federal government." U.S. Br. 15-16, *Harris*, *supra*. By contrast, "preemption would not apply to conduct of a contractor employee that is unrelated to the contractor's duties under the government contract," because such a claim would not "arise out of" the combatant activities at issue. *Id.* at 16.

* * * * *

In short, the decision below deepens the conflict among the federal courts of appeals regarding the preemptive reach of the federal interests embodied in the combatant-activities exception to the FTCA. The inconsistent tests for preemption lead to different results, as recognized by the court below. See App., *infra*, 34a-35a. Respondents' claims are unambiguously preempted under either the test adopted by the D.C. Circuit in *Saleh*, or the Solicitor General's proposed test. Under the *Saleh* test, petitioner's air traffic services were integrated into

combatant activities and essential to supporting combat operations. See pp. 4-5, *supra*. And petitioner performed those essential functions at the direction of, and in close coordination with, United States military personnel. App., *infra*, 4a-5a. Under the Solicitor General's proposed test, moreover, it is clear both that uniformed soldiers performing the same work would be covered by the combatant-activities exception and that petitioner's work fell within the scope of its contract. *Id.* at 4a-15a. The entrenched circuit conflict on the question presented is ripe—indeed, overdue—for this Court's review.

B. The Question Presented Is Important And Warrants Review In This Case

The question presented is of enormous importance both to federal contractors and to the federal government. All five courts of appeals to have considered the question have agreed that, like the claims at issue in *Boyle*, claims against military contractors for actions taken in support of combat activities implicate uniquely federal interests, necessitating that a federal rule of decision govern such claims. And they have agreed that the principles underlying the combatant-activities exception require that state-law tort claims must sometimes be preempted. But while the courts of appeals recognize the need for a uniform federal rule of decision, they have been unable to provide one. Only this Court can provide such a rule, and it should do so in this case.

1. Few areas are more thoroughly and obviously "committed by the Constitution and laws of the United States to federal control," *Boyle*, 487 U.S. at 504, than warmaking. The Constitution vests all war powers in the federal government, authorizing Congress "[t]o declare War," "raise and support Armies," "provide and maintain

a Navy," and "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8; and designating the President "Commander in Chief of the Army and Navy of the United States," U.S. Const. Art. II, § 2.

In carrying out those uniquely federal duties, Congress and the President have authorized the Department of Defense to hire both service members and contractors, and the Department has long turned to contractors to support its essential military operations. See pp. 3-4, *supra*. As one commentator has noted, "[t]he modern military's reliance on contractors is now placed at some risk by the application of the FTCA's combatant exception because these tort actions, while seeking compensation for real and tragic losses, are really indirect challenges to actions of the U.S. military." Major Jeffrey B. Garber, *The (Too) Long Arm of Tort Law: Expanding the Federal Tort Claims Act's Combatant Activities Immunity Exception to Fit the New Reality of Contractors on the Battlefield*, Army Lawyer 12, 16 (Sept. 2016) (internal quotation marks and citation omitted).

Given the ubiquity and importance of contractors in modern American military operations, and the bedrock constitutional principle that warmaking is a function reserved to the federal government, the scope of state tort liability for battlefield contractors is a significant question that merits this Court's review.

2. The Solicitor General has previously indicated that the Court should resolve the question presented here. In its briefs, the government has recognized that the question is of "significant importance for the Nation's military operations." U.S. Br. 21, *Metzgar*, *supra*. The government has further explained that subjecting military contractors to the "laws of fifty different States for actions taken within the scope of their contractual relationship

supporting the military's combat operations would be detrimental to military effectiveness." *Ibid.* Allowing for state-law tort actions would expose the decisions of military personnel and contractors engaged in combatant activities to second-guessing by courts and juries. As the D.C. Circuit observed, "[t]he very purposes of tort law are in conflict with the pursuit of warfare." *Saleh*, 580 F.3d at 7; see pp. 15-16, *supra*. Preemption is necessary to prevent "state or foreign regulation of federal wartime conduct" and to "free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Saleh*, 580 F.3d at 7.

Moreover, the government has noted that imposing liability on contractors would result in both financial and litigation burdens on the United States. As in *Boyle*, "expanded liability would ultimately be passed on to the United States, as contractors would demand greater compensation in light of their increased liability risks." U.S. Br. 21, *Metzgar*, *supra*. And litigating such claims would likely result in plaintiffs and contractors "seek[ing] to interview, depose, or subpoena for trial testimony senior policymakers, military commanders, contracting officers, and others, and to demand discovery of military records." *Ibid.*

Thus, as the Solicitor General has explained, because the courts of appeals have "now adopted" preemption tests that "do[] not sufficiently safeguard the significant national interests at stake," the question presented "warrants this Court's review in an appropriate case." U.S. Br. 7, *Harris*, *supra*; accord U.S. Br. 7, *Metzgar*, *supra*. Indeed, the Solicitor General took that position even before the circuits diverged on the proper test for the scope of preemption. The broadened and deepened conflict only underscores the need for this Court's intervention.

3. While recognizing the importance of the question presented and the need for the Court's eventual review, the Solicitor General advised the Court that previous cases were not appropriate vehicles in which to address the question. See U.S. Br. 18-21, *Harris*, *supra*; accord U.S. Br. 22-24, *Metzgar*, *supra*. This case presents none of the difficulties the Solicitor General identified in those previous cases, and it provides an excellent vehicle in which to resolve the deepening circuit conflict.

In recommending that this Court deny review in previous cases, the Solicitor General noted that "no square conflict exist[ed]" at the time because the Third and Fourth Circuits applied the same test articulated by the D.C. Circuit, despite their narrower articulation of the federal interest. U.S. Br. 19, *Harris*, *supra*; accord U.S. Br. 20-21, *Metzgar*, *supra*. As explained, however, the narrower articulation of the federal interest by the Third and Fourth Circuits (which the Second Circuit also adopted) results in a narrower scope of preemption. See pp. 17-19, *supra*. Indeed, respondents conceded as much before the Second Circuit, noting that "[t]he split evident in the Circuit Courts regarding Congress's underlying rationale for the 'combatant activities' exception and the creation of varying 'tests' to be applied underscores the need for [c]ongressional action or further review and interpretation by the Supreme Court." C.A. Resp. Br. 26. That need is even clearer now that the Second Circuit has expressly rejected the D.C. Circuit's test, making the circuit conflict undeniable. See pp. 18-19, *supra*.

The Solicitor General also pointed to the fact that previous cases came to this Court on motions to dismiss and "did not definitively resolve" whether the political-question doctrine might result in dismissal of the suit. U.S. Br. 20, *Harris*, *supra*; accord U.S. Br. 22, *Metzgar*, *supra*.

Those complications are absent here. The court of appeals definitively rejected petitioner's preemption argument on a motion for summary judgment (after discovery and development of a full factual record), and it remanded the case for the district court to proceed to trial on respondents' state-law claims. See App., *infra*, 17a, 48a. Those proceedings have been stayed pending the disposition of this petition. Nor has petitioner raised the political-question doctrine. This case thus provides an ideal vehicle to address the question presented.

Put simply, the case for certiorari here is overwhelming. The Court should grant review to resolve the circuit conflict and adopt a preemption standard that adequately protects the significant interests of federal contractors and the federal government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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