**No. 21-867**

IN THE

# Supreme Court of the United States

MIDWEST AIR TRAFFIC CONTROL SERVICE, INC.,
*Petitioner*,

v.

JESSICA T. BADILLA, ET AL.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION


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## RELATED PROCEEDINGS

Respondents are not aware of any related judicial proceedings other than those identified in the Petition. *See* Pet. III.

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## INTRODUCTION

This case arises out of a 2010 accident in which a civilian cargo plane crashed on approach to the largest civilian airport in Afghanistan at the end of a routine supply flight, killing all on board. Petitioner provided air traffic control services at the airport under a subcontract with the U.S. government. Respondents, on behalf of six of the eight victims, claim that the accident was caused by the negligence of one of Petitioner's employees. And because Congress has expressly excluded government contractors from the Federal Tort Claims Act (FTCA), *see* 28 U.S.C. § 2671, Respondents brought their claims under state law.

In *Boyle* v. *United Technologies Corp.*, this Court fashioned a new common law defense—to insulate government contractors from state tort liability for breaching a duty of care "precisely contrary" to duties imposed by the contract. 487 U.S. 500, 509 (1988). The duty imposed by the contract in *Boyle* was to build a helicopter the escape hatch of which only opened outwards—a fatal flaw for helicopters designed to fly over (and potentially crash into) bodies of water. But because of the discretionary function exception to the FTCA, the government could not be held liable for its design choice. Thus, "[w]here the government has directed a contractor to do the very thing that is the subject of the claim," and could not itself be sued, *Boyle* "recognized this as a special circumstance where the contractor may assert a defense." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 n.6 (2001).

All five courts of appeals to address the issue, including the Second Circuit here, have extended *Boyle*'s defense to state tort suits implicating a second FTCA exception—for "[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); *see* Pet. App. 33a; *In re KBR, Inc. Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014); *Harris* v. *Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3d Cir. 2013); *Saleh* v. *Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); *Koohi* v. *United States*, 976 F.3d 1238 (9th Cir. 1992).

As in *Boyle*, these rulings each reflect the principle that courts should displace state tort claims against contractors if and only if (1) the government was in some way responsible for the tortious conduct; and (2) the government itself would be immune from liability under the FTCA. The Petition fails to acknowledge this consensus, but no appellate court has suggested—let alone held—otherwise.

Instead, the Petition rests the case for certiorari on minor variances in exactly *how* courts of appeals apply that principle. For instance, in *Saleh*, the D.C. Circuit held that state tort claims should be subject to judicial displacement "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority," and a tort results from "the contractor's engagement in such activities." 580 F.3d at 9.

The Second Circuit in this case framed the same inquiry in slightly different terms, holding 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." Pet. App. 33a; *see also Burn Pit*, 744 F.3d at 349–51 (adopting a similar framing); *Harris*, 724 F.3d at 480–81 (same).

The Petition attempts to portray these distinct formulations as a cert.-worthy conflict, stressing the Second Circuit's recognition that, under its reading, *Saleh* should have come out the other way. Pet. 19. But even if such context-specific variation could *ever* warrant certiorari, the critical point here is that *this* case isn't the right vehicle; Petitioner was not entitled to summary judgment under *any* of these tests.

First, Petitioner's alleged negligence did not arise out of "combatant activities"; it was committed during ordinary flight operations. As the leading judicial interpretation of § 2680(j) held, combatant activities must be "both necessary to *and* in direct connection with actual hostilities." *Johnson* v. *United States*, 170 F.2d 767, 769 (9th Cir. 1948) (emphasis added). Routine air traffic control services, even in a country in which combat is ongoing elsewhere, don't have such a "direct connection." *See Brokaw* v. *Boeing Co.*, 137 F. Supp. 3d 1082, 1106 (N.D. Ill. 2015) (holding that a 2013 crash of a cargo plane at Bagram Airfield did not "arise out of" combatant activities). If the tort at issue did not arise from a combatant activity at all, then, obviously, no *Boyle*-like displacement is appropriate.

Second, even if torts arising from routine air traffic control services could *ever* implicate the combatant activities exception, *Saleh* (the lower-court rule most favorable to Petitioner) still requires the contractor to be "integrated into combatant activities over which the military retains command authority." 580 F.3d at 9; *see also Burn Pit*, 744 F.3d at 349–51; *Harris*, 724 F.3d at 480–81. That relationship ensures that "the government directed [the] contractor to do the very thing that is the subject of the claim." *Malesko*, 534 U.S. at 74 n.6. Otherwise, the FTCA is irrelevant; any liability on the contractor's part is for *its* misdeeds.

There was no such "integration" here. Unlike the joint interrogation operations at issue in *Saleh*, Petitioner has not pointed to, and cannot point to, any specific (or even implicit) military direction that was responsible for its alleged negligence. On the evening of the fatal crash, "no member of the U.S. military was even present in the tower." Pet. App. 36a. Thus, "[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 allegedly tortious] action." *Id*. at 35a. Under either prong of *Boyle*, as *any* of the five courts of appeals have applied it to the combatant activities exception, the Second Circuit was correct to reverse the grant of summary judgment to Petitioner and remand this case for further proceedings.

Insofar as the Petition is really asking this Court to *expand Boyle*, that invitation should be declined. In the 34 years since *Boyle* was decided, this Court has become far more skeptical of the raw judicial power it embodies—not only to displace state law by federal judicial fiat, but to do so where Congress expressly refused to provide a federal rule. Even *Boyle*'s author invoked it as his stock example of a decision he had come to regret. *See* Gil Seinfeld, *The Good, the Bad, and the Ugly: Reflections of a Counterclerk*, 114 MICH. L. REV. FIRST IMPRESSIONS 111, 115 & n.9 (2016).

More recently, this Court has repeatedly reiterated "the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking." *Rodriguez* v. *FDIC*, 140 S. Ct. 713, 718 (2020). To that end, "before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied." *Id*. at 717; *see Collins* v. *Virginia*, 138 S. Ct. 1663, 1678 (2018). Because those conditions are not satisfied here, certiorari should be denied.

## STATEMENT OF THE CASE

Most of the facts in this case are undisputed. Early in the evening of October 12, 2010, Transafrik International Flight 662 crashed while on approach to Kabul Afghanistan International Airport (KAIA)—at the end of the return leg of a short supply flight to Bagram Airbase. Although the Petition makes much of the fact that KAIA had been subject to insurgent attacks at *other* (unspecified) times, *see* Pet. 6, 9, there is no suggestion anywhere in the record or in the Petition that airport operations on or around October 12 were anything other than routine.

Flight 662 was operating under visual flight rules (VFR), under which "the pilot is responsible for seeing and avoiding obstacles, such as other aircraft and terrain." Pet. App. 8a. But even under VFR, as the Court of Appeals recognized below, the air traffic controller still has an obligation "not to put [a flight] in peril that a reasonable controller would—or at least should—have foreseen or anticipated." *Id*. at 43a. The Petition does not contest this holding.

Just after 7:30 p.m. local time, Darrell Smith (one of two air traffic controllers on duty at KAIA, and Petitioner's employee), cancelled Flight 662's landing clearance and asked its Captain, Henry Beltran Bulos, to turn left and extend the flight's downwind leg. Both instructions were intended to allow another inbound plane (a civilian passenger aircraft also on a routine flight) to land first. By extending the downwind leg, however, Smith unintentionally led Flight 662 directly into the side of a mountain approximately 10–12 miles east of KAIA, where it crashed—killing all eight crew members aboard. *See id*. at 9a–15a.

The Petition condenses to three sentences those key facts that *are* in dispute in the moments before the crash—noting only that, after Smith asked if Captain Bulos could continue downwind, Bulos said yes, and that the plane crashed "[a] short time later." Pet. 8. Both the district court and the Court of Appeals provided a far more thorough recounting of the radio communications between Smith and Captain Bulos.

As especially relevant here, Smith's cancellation of Flight 662's landing clearance and his instruction to Bulos to turn left eventually led Flight 662 out of the Class D airspace controlled by the KAIA tower—a fact apparently unbeknownst to Bulos and unmentioned by Smith. Pet. App. 55a–57a.[1] Just over one minute later, Smith again instructed Bulos to "continue downwind," and told Bulos that "I'll call your base," *i.e.*, that he would tell Bulos when to turn Flight 662 to its "base leg" to line up for landing. Pet. App. 13a. Shortly thereafter, Flight 662 crashed. *See id*.

As the Court of Appeals held, a material question of fact remains as to the precise import of this exchange—and how Bulos and Smith would each have understood their subsequent responsibilities until and unless Smith provided further instructions. Likewise, the court held that reasonable jurors could disagree as to whether, in both this exchange and more generally, Smith violated the duty of care he owed to Flight 662—and, if so, whether his negligence was a proximate cause of the crash. *See id.* at 45a–46a. The Petition does not contest these holdings, either.

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1. The amount of Class D airspace—a type of airspace for which an airport control tower is responsible—varies by airport. At KAIA, it encompassed the circle extending six nautical miles from KAIA and up to 9,500 feet above sea level. Pet. App. 5a.

Because the Second Circuit reversed a grant of summary judgment, and because its holdings as to Smith's legal duty and the two questions of material fact have not been contested here, this Court must assume, in this posture, that the Court of Appeals was correct on each of these points. Likewise, because Respondents opposed summary judgment below, this Court is bound to construe the evidence in the light most favorable to them—and to draw all reasonable inferences in their favor. *See Tolan* v. *Cotton*, 572 U.S. 650, 651 (2014) (per curiam) (citing *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

In other words, for purposes of the Petition, this Court must assume that Smith *did* violate the duty of care he owed to Flight 662; and that his negligence *was* a proximate cause of the crash. So framed, the only question is whether *Boyle* provides Petitioner with a complete defense as a matter of law even if Smith was negligent and even if his negligence was a proximate cause of the accident.

## REASONS FOR DENYING THE PETITION

As the Petition notes, in *Saleh*, *Harris*, and *Burn Pit*, this Court called for the views of the Solicitor General as to whether certiorari should be granted to reconcile the distinct ways that lower courts have applied *Boyle* to the FTCA's combatant activities exception. Each time, the government recommended that certiorari be denied—even when it disagreed with the court of appeals' *Boyle* analysis. Each time, this Court agreed. *KBR, Inc.* v. *Metzgar*, 574 U.S. 1120 (2015) (mem.); *Kellogg Brown & Root Servs., Inc.* v. *Harris*, 574 U.S. 1120 (2015) (mem.); *Saleh* v. *Titan Corp.*, 564 U.S. 1037 (2011) (mem.).

The Petition insists that, unlike those cases, this case *does* fairly raise the question presented. Pet. 12, 19, 24–26. But saying it thrice doesn't make it so. The Petition here is far *weaker* than those prior petitions—because Petitioner is not entitled to a *Boyle*-like defense under any of the lower courts' approaches.

Thus, unless the FTCA's combatant activities exception empowers courts to go even further in displacing state tort claims than the appellate ruling most favorable to Petitioner already has, this case would not allow the Court to reach the question presented—let alone answer it. But even if this Court could reach the question presented, certiorari should still be denied because the Court of Appeals correctly declined to extend *Boyle*.

## I. ROUTINE AIR TRAFFIC CONTROL OPERATIONS ARE NOT "COMBATANT ACTIVITIES" UNDER ANY OF THE LOWER COURTS' APPROACHES

Congress enacted the FTCA in 1946 to waive the federal government's sovereign immunity from a wide array of torts by federal officers acting within the scope of their employment. But the FTCA also expressly preserved the government's immunity from a dozen (now thirteen) carefully circumscribed classes of tort claims, including "[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).[2]

2. Not only does the FTCA expressly omit contractors from the immunity it preserves, but Congress has repeatedly rebuffed proposals to extend such immunity to contractors. *See Boyle*, 487 U.S. at 515 & n.1 (Brennan, J., dissenting).

In urging this Court to grant certiorari, Petitioner jumps to the differences in how the courts of appeals apply *Boyle* to the combatant activities exception—without pausing to analyze whether that exception is implicated at all. In fact, routine air traffic control operations are not "combatant activities"—whether undertaken by civilian contractors or military officers; whether conducted at civilian or military airports; and whether performed domestically or in countries in which hostilities are elsewhere afoot. Contractor torts arising out of ordinary air traffic control activities therefore do not implicate *Boyle* in the first place.[3]

In its authoritative early interpretation, *Johnson* focused on the plain text of the combatant activities exception, noting that the FTCA's record "is singularly barren" of any insight as to "the specific purpose of each exception"—including § 2680(j). *Johnson*, 170 F.2d at 769. Focusing on the words Congress chose, *Johnson* explained that "[t]he rational test would seem to lie in the degree of connectivity." *Id.* at 770:

> "Combat" connotes physical violence; "combatant," its derivative, as used here, connotes pertaining to actual hostilities; the phrase "combatant activities," of somewhat wider scope, and superimposed upon the purpose of the statute, would therefore include not only physical violence, but *activities both necessary to and in direct connection with actual hostilities*.

*Id.* (emphasis added) (footnote omitted).

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3. Although the FTCA does not allow tort claims against the United States "arising in a foreign country," 28 U.S.C. § 2680(k), Petitioner has not argued that this provision is relevant here.

By tying the FTCA's preservation of sovereign immunity to "combatant" activities rather than "military" activities, Congress necessarily limited that immunity to cases in which the underlying tort was directly connected to combat operations. If § 2680(j) swept more broadly, there would have been even less of a justification for the additional exception that this Court read into the FTCA just four years later—for "injuries [that] arise out of or are in the course of activity incident to [a military servicemember's] service." *Feres* v. *United States*, 340 U.S. 135, 146 (1950). Whatever else might be said about *Feres*, it extends the federal government's sovereign immunity well beyond the understood scope of § 2680(j). *See Doe* v. *United States*, 141 S. Ct. 1498, 1499 (2021) (Thomas, J., dissenting from the denial of certiorari).

The Petition does not offer a different definition of "combatant activities." Nor does it offer any specific argument as to why or how *Johnson*'s definition is satisfied here. In his report and recommendation to the district court, Judge McCarthy (the only judge to specifically reach this issue below) concluded that Respondents' lawsuit implicates the combatant activities exception because, even if *Petitioner* was not engaged in combatant activities, Respondents' claim "'arises from combatant activity *of the military*.'" Pet. App. 69a (quoting *Aiello* v. *Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 715 (S.D.N.Y. 2011)).

But the only *combatant* activities of the military at issue here were the more general hostilities elsewhere in Afghanistan at that time. Subjecting Petitioner to state tort liability for Smith's alleged negligence would not implicate the *government*'s conduct of those activities one whit. After all, it is undisputed that, on the night of October 12, the KAIA tower was staffed

entirely by civilians; it was managing only civilian flights; and it was under no attack or imminent threat of attack. Nor has Petitioner introduced any evidence that, on the night of the accident (or at any point in the days or weeks immediately before or after), flight operations were anything other than routine; or that Smith was following anything other than standard operating procedures at Afghanistan's largest civilian airport. Whatever hypotheticals might be conjured in which air traffic control services *would* be "in direct connection with actual hostilities." *Johnson*, 170 F.2d at 770, that just wasn't the reality on October 12.[4]

It may well be that a loose logical or logistical chain could be constructed from combat operations elsewhere in Afghanistan to air traffic control operations at KAIA. But under *Johnson*, the FTCA specifically rejects such an indirect link between the underlying tort and "combatant activities." *Boyle* only reinforces that reading by focusing on whether holding the *contractor* liable would undermine the *government*'s discretion. Here, though, Petitioner has offered no explanation for how the government's combatant activities elsewhere in Afghanistan would have been undermined by Respondents' tort claims.

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4. According to the Petition, "[a]pproximately 75% of the air traffic at [KAIA] was combat-related." Pet. 6. That assertion is misleading at best. Air Force Lt. Col. Gregory Adams testified that, in his estimation, 75% of air traffic at KAIA "was combat *and other operations*, including the movement of troops and their supplies." Pet. App. 53a–54a (emphasis added). Those "other operations" included cargo flights by "civilian contract carriers," such as Flight 662. Adams Transcript at 51–52. Indeed, nothing in the record speaks directly to how much of KAIA's air traffic was "in direct connection with actual hostilities." *Johnson*, 170 F.2d at 770. But whatever the answer, it's nowhere close to 75%.

*Johnson* itself rejected a similar argument. In that case, plaintiffs sued the United States alleging that Navy ammunition supply ships returning from World War II's Pacific Theater had polluted their clam farms while anchored in Discovery Bay, Washington. In holding that plaintiffs' claims did not "aris[e] from" the Navy's combatant activities in the Pacific, the Ninth Circuit distinguished between "[a]iding others to swing the sword of battle" and "returning [the sword] to a place of safekeeping." *Id*.

As one court put it in the context of another civilian cargo plane crash that took place while fighting was ongoing in Afghanistan, "[a]dmittedly, [the cargo contractor] was carrying military equipment and operating in a war zone, but it was not aiding the military in swinging the 'sword of battle'; in essence, it was helping [the airline] carry the sword for the military's later use." *Brokaw*, 137 F. Supp. 3d at 1106. In *Brokaw*, the equipment at issue included five combat vehicles; indeed, improper securing of the vehicles is what *caused* the crash. *See id*. at 1088–90. Here, there was no military equipment onboard; by all accounts, the plane was free of cargo. *See* Pet. App. 6a.

If anything, the absence of a direct connection to combatant activities in this case is driven home by the contrast with prior cases in which courts of appeals applied *Boyle* to the FTCA's combatant activities exception. In *Koohi*, for example, the tort claim arose *directly* out of the military's accidental shoot-down of a civilian commercial airliner. *See* 976 F.2d at 1337. In *Saleh*, the claims arose *directly* out of the military's detention and interrogation of suspected insurgents at Abu Ghraib prison in Iraq—so much so that the plaintiffs didn't even dispute that their claims arose from "combatant activities." *See* 580 F.3d at 6–9.

And in both *Harris* and *KBR*, the tort claims arose directly out of the contractors' construction not just of *military* facilities, but of forward operating bases for combat troops in active combat zones—a connection that both courts of appeals stressed. *See Burn Pit*, 744 F.3d at 351 ("Performing waste management and water treatment functions to aid military personnel in a combat area is undoubtedly 'necessary to and in direct connection with actual hostilities.'" (quoting *Johnson*, 170 F.2d at 770)); *Harris*, 724 F.3d at 481 ("Maintaining the electrical systems for a barracks in an active war zone is analogous to supplying ammunition to fighting vessels in a combat area and is certainly 'necessary to and in direct connection' to the hostilities engaged in by the troops living in those barracks." (quoting *Johnson*, 170 F.2d at 770)). Here, in contrast, no combat troops had any relationship to the underlying events whatsoever; the military didn't even investigate the crash.

These distinctions are more than just factual ones. The D.C. Circuit in *Saleh* justified application of *Boyle* to the FTCA's combatant activities exception to vindicate the principle that "tort duties of reasonable care do not apply on the battlefield." 580 F.3d at 7; *id.* ("The very purposes of tort law are in conflict with the pursuit of warfare."); *see also Koohi*, 976 F.2d at 1337 (noting the incompatibility between wartime and duties of care). But tort principles of reasonable care should (and *do*) apply in the air traffic control towers of civilian airports—even in countries in which hostilities are ongoing. After all, these are most definitely *not* places in which "risk-taking is the rule." *Saleh*, 580 F.3d at 7. Again, Petitioner's failure to proffer any evidence of abnormal operations at KAIA on or around October 12 only proves the point.

Moreover, although Petitioner insisted in the lower courts that Smith owed no duty of care to Flight 662, that was only because the flight was operating under visual flight rules—not because it took place in Afghanistan. As noted above, the Second Circuit disagreed, holding as a matter of law that Smith "was obligated not to put Flight 662 in peril that a reasonable controller would—or at least should—have foreseen or anticipated." Pet. App. 43a. Tellingly, the Petition does not contest this holding.

Instead, the best Petitioner can do is argue that, in general, its personnel were deemed "mission essential" by the U.S. government, and cite to the prime contract's declaration that the provision of air traffic control services at KAIA "provide[d] mission critical capabilities supporting joint services military personnel, host nation military, and coalition forces." Pet. 5. But the reason why KAIA's air traffic control tower was staffed by military personnel in the first place was not so it could play a role in nearby combat operations. Rather, it was to train Afghan controllers so that they could take over regular responsibility for both civilian and military operations at the airport. *See* Pet. App. 53a. In other words, and unlike in *Saleh*, Petitioner's employees were not augmenting soldiers performing a combat function; they were augmenting soldiers training local civilians to assume a civilian function. As *Johnson* made clear 74 years ago, the plain text of the FTCA requires much, much more.

Even in Afghanistan in 2010, then, routine air traffic control operations at KAIA were not combatant activities because they were not "in direct connection with actual hostilities." *See Brokaw*, 137 F. Supp. 3d at 1106; *cf. United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir. 1964) (holding the government liable for

the midair collision of an Air Force fighter and a commercial plane caused in part by defects in military air traffic control). Regardless of how *Boyle* applies to the FTCA's combatant activities exception, Respondents' state law tort claims would not "arise from" combatant activities even if they were brought directly against the United States—and so they cannot possibly conflict with the federal policy interests reflected in that exception. *See Boyle*, 487 U.S. at 508 ("But conflict there must be.").[5]

## II. PETITIONER WAS NOT "INTEGRATED" INTO COMBATANT ACTIVITIES OF THE MILITARY UNDER ANY OF THE LOWER-COURT HOLDINGS

Even if routine air traffic control operations could have a "direct connection to actual hostilities," and even if Petitioner's conduct here did, that's not enough to satisfy *Boyle*. Again, this conclusion follows from *Saleh*—the appellate decision most favorable to Petitioner. Under the D.C. Circuit's reasoning, *Boyle* justifies federal judicial lawmaking to displace state tort claims only when "a private service contractor is integrated into combatant activities over which the military retains command authority," and the tort claim arises out of "the contractor's engagement in such activities." 580 F.3d at 9.

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5. In the Second Circuit, Respondents contested Judge McCarthy's holding that Petitioner's negligence arose out of combatant activities, arguing that the error was an independent basis for reversal. Brief for the Plaintiffs-Appellants at 29–31, *Badilla* v. *Midwest Air Traffic Control Servs., Inc.*, 8 F.4th 105 (2d Cir. 2021) (No. 20-608-cv). The Second Circuit's ruling relied upon other grounds, but this argument was clearly preserved for consideration here. *See Murr* v. *Wisconsin*, 137 S. Ct. 1933, 1949 (2017) ("The judgment below . . . may be affirmed on any ground permitted by the law and record.").

In contrast, as *Saleh* stressed, "a service contractor might be supplying services in such a discrete manner—perhaps even in a battlefield context—that those services could be judged separate and apart from combat activities of the U.S. military." *Id*.; *see Bixby* v. *KBR, Inc.*, 748 F. Supp. 2d 1224, 1242 (D. Or. 2010) (displacement is not warranted when "the harm can be traced, not to the government's actions or decisions, but to the contractor's independent decision to perform the task in an unsafe manner"). This distinction is central to *Boyle*; if the contractor's tortious conduct did *not* result from the government's authorization or direction, there is no risk that holding the contractor liable will require courts to second-guess the *government*'s decisionmaking.[6]

The lack of integration between Petitioner and the military puts this case in the latter category. As the Second Circuit explained, "[t]here was evidence that the military retained some authority at KAIA's tower and, at a very general level, approved [International Civil Aviation Organization] standards. But we see no evidence that the Government directed Smith's actions at issue here." Pet. App. 36a. Critically, "[t]he Government did not issue a specific instruction that compelled Smith's directions to Flight 662 (allegedly in violation of his state-law duty of care)." *Id*. (citing *Boyle*, 487 U.S. at 509). Nor has Petitioner argued that Smith's alleged mishandling of Flight 662 was based

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6. This precise distinction animates the related doctrine of "derivative sovereign immunity," which insulates from suit government agents "who simply performed as the Government directed." *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 167 (2016) (citing *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940)). Where agents act on their own, or under authority that was not validly conferred, no immunity is available. *See id*.

on even *implicit* guidance or instructions from the government. In the lower courts, Petitioner simply disputed that Smith mishandled the flight at all.

This case is therefore a far cry from *Saleh*, in which the contractors were "inextricably embedded in the military structure." 580 F.3d at 8; *see also id.* at 4 ("Titan's employees were 'fully integrated into [their] military units,' essentially functioning 'as soldiers in all but name.'" (quoting *Ibrahim* v. *Titan Corp.*, 556 F. Supp. 2d 1, 3, 10 (D.D.C. 2007)) (alterations in original)). Indeed, the D.C. Circuit was convinced in *Saleh* that "these cases are really indirect challenges to the actions of the U.S. military," in a context in which "direct challenges obviously are precluded by sovereign immunity." *Id.* at 7. There is no comparable end-run here; it's not just that the U.S. military had nothing to do with Smith's negligent instructions to Captain Bulos; it's that holding Petitioner liable for Smith's negligence would not undermine any decision or policy choice by the *government*. *See id.* at 9 ("[A] supply contractor that had a contract to provide a product without relevant specifications would not be entitled to the preemption defense if its sole discretion, rather than the government's, were challenged.").

Nor is there anything to Judge McCarthy's conclusion that the integration prong is satisfied because the military's decision to not equip KAIA with terrain-avoidance radar may have helped to cause the accident. Pet. App. 67a. That argument confuses the *Boyle* defense with the separate question of proximate causation (which, again, Petitioner has not contested in this Court). Respondents are not seeking to hold Petitioner liable for the *government*'s negligence in failing to equip KAIA with terrain-avoidance radar;

they are seeking to hold Petitioner liable for *its* negligence in Smith's instructions to Bulos—which, again, must be treated as a proximate cause of the crash for purposes of the Petition. *See ante* at 7.

At a more fundamental level, Judge McCarthy's analysis missed the *point* of why each court of appeals that has applied *Boyle* to the combatant activities exception has insisted on some kind of "integration" between the contractor and the government—to ensure that, as in *Boyle* itself, the judge-made federal defense insulates contractors only from those torts that they carried out in reliance upon explicit or implicit government commands, rather than those resulting from frolic or detour. *See Boyle*, 487 U.S. at 509 (displacement will not be warranted where "the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed"). In contrast, by Judge McCarthy's logic, as the Court of Appeals explained, "any tort claim against a military contractor would involve an indirect challenge to the military's decision not to prevent the action that gave rise to the claim." Pet. App. 36a–37a.[7]

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7. This is also why, to whatever extent it is relevant, the never-adopted integration test proposed by the Solicitor General in prior *amicus* briefs, *see* Pet. 19–21, also misapplies *Boyle*. By suggesting that *Boyle* governs torts arising out of the military's combatant activities that a contractor commits "within the scope of its contractual relationship with the federal government," the government's approach "would insulate contractors from liability even when their conduct does *not* result from military decisions or orders." *Harris*, 724 F.3d at 480 (emphasis added). Without that nexus, though, the *contractor*'s tort can't be said to have arisen from the *military*'s combatant activities. Displacing a state tort claim in such a case would separate the *Boyle*-like defense from both the text of § 2680(j) and the policy it reflects.

Simply put, this is *not* the "special circumstance" *Boyle* identified—in which "the government has directed a contractor to do the very thing that is the subject of the claim." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 n.6 (2001) (citing *Boyle*, 487 U.S. 500). Rather, it is the exact case *Saleh* distinguished—in which "a service contractor might be supplying services in such a *discrete* manner—perhaps even in a battlefield context—that those services could be judged separate and apart from combat activities of the U.S. military." 580 F.3d at 9 (emphasis added).

*Saleh* wasn't alone in distinguishing such a fact pattern; *Boyle* itself contrasted cases in which "[t]he contractor could comply with both its contractual obligations and the state-prescribed duty of care." 487 U.S. at 509. In that context, "[n]o one suggests that state law would generally be pre-empted." *Id.*[8] And yet, nowhere does the Petition identify a contractual obligation Petitioner would have violated if Smith had complied with the duty of care identified by the Second Circuit. Thus, under *any* of the formulations courts of appeals have adopted in extending *Boyle* to the FTCA's combatant activities exception, displacement of Respondents' state tort claims is not warranted.

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8. Two years before the events giving rise to this case, the Department of Defense had specifically advised contractors that "[t]he public policy rationale behind *Boyle* does not apply when a performance-based statement of work is used in a services contract, *because* the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors." Defense Federal Acquisition Regulations Supplement, 73 Fed. Reg. 16,764, 16,768 (Mar. 31, 2008) (emphasis added). Even before *Saleh*, *Harris*, *Burn Pit*, and the Second Circuit's decision here, then, this understanding of how *Boyle* applies to combatant activities was already clear.

## III. *BOYLE* SHOULD NOT BE EXTENDED

The above analysis drives home why this case is far from the "overwhelming" vehicle for resolving the question presented that the Petition asserts it to be. *See* Pet. 26. Under any of the standards that courts of appeals have identified for extending *Boyle* to the FTCA's combatant activities exception, Respondents' state law tort claims would not be subject to judicial displacement. The Second Circuit was therefore correct to reverse the grant of summary judgment and remand for further proceedings—regardless of which extension of *Boyle* should govern. If, as the Petition argues, the case for certiorari turns on this putative circuit split, then the fact that the Petition does not actually implicate any material division among the lower courts ought to be fatal.

To whatever extent the Petition should instead be understood as an implicit request from Petitioner and its *amici* to extend *Boyle* beyond the parameters of these lower-court rulings, this Court should decline that invitation. Even when it was decided, *Boyle* did not provide a general grant of judicial authority to engage in lawmaking to vindicate *all* of the FTCA's exceptions as applied to government contractors, but rather a specific rule to protect the unique policy interests reflected in the discretionary function exception—immunizing the federal government for conduct by its officers committed to their discretion by law. *See* 487 U.S. at 511–12; *see also Saleh*, 580 F.3d at 24 (Garland, J., dissenting) ("The Supreme Court has never extended *Boyle* beyond the discrete conflicts that application of the discretionary function exception targets.").

It is in *that* context that the risk of subjecting contractors to tort liability for following contract specifications most directly undermines the FTCA. The concern is not that the costs of such liability will be passed on to the government indirectly; indeed, that's the likely result of *any* tort judgment against government contractors. Rather, it's that holding the contractors liable in those cases will directly circumscribe the federal government's conduct—cabining the very discretion both committed to it by law and immunized from tort liability by the FTCA. *See Saleh*, 580 F.3d at 22–23 (Garland, J., dissenting). In that context, *Boyle*'s exercise of federal judicial lawmaking power vindicates a unique (and uniquely limited) form of conflict preemption derived from the FTCA. But as Judge Garland presciently warned, "[o]nce we depart from the limiting principle of *Boyle*, it is hard to tell where to draw the line." *Id*. at 23.

And even on those limited terms, *Boyle* is difficult to square with this Court's more recent hostility to federal common lawmaking. As Justice Gorsuch explained for the Court in *Rodriguez*, "Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." 140 S. Ct. at 717; *see also Collins*, 138 S. Ct. at 1678–79 (Thomas, J., concurring). At the very least, "the objective for courts in every case requiring the creation of federal common law must be 'to find the rule that will best effectuate the federal policy.'" *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1410 (2018) (Alito, J., concurring) (quoting *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957)).

Here, the underlying federal policy excludes contractors from the benefits of the United States' sovereign immunity not just once, but twice. The FTCA generally excludes contractors from the statutory scheme, *see* 28 U.S.C. § 2671, and the combatant activities exception specifically preserves the government's sovereign immunity for torts arising out of the combatant activities of "the military or naval forces, or the Coast Guard," but *not* of private military contractors. *Id.* § 2680(j).

Respondents certainly don't dispute that the government has become far more dependent upon contractors since that language was written 76 years ago—especially when it comes to the use of private military contractors accompanying the armed forces in the field. But even if that increased dependency bolsters the case for reconsidering whether to extend the government's immunity to such non-governmental actors, that's a policy debate, not a legal argument. And policy debates are for the political branches. *See Pereida* v. *Wilkinson*, 141 S. Ct. 754, 766–67 (2021).

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Ultimately, this is a negligence case. Respondents will still have to prove to a jury that, in his communications with Captain Bulos, Smith breached his duty of care to Flight 662—and that his breach was a proximate cause of Flight 662's demise. Under *Boyle*, though, what matters is that Smith's communications with Flight 662 had nothing to do with the ongoing hostilities elsewhere in Afghanistan; and that, insofar as Smith *was* negligent, his negligence was neither in furtherance of any of Petitioner's obligations under its subcontract with the government nor at the direction or under the supervision of any government official.

Against that backdrop, the Petition insists that it "raises none of the complications that existed in previous petitions" with respect to this Court's ability to reach the question presented. Pet. 12. That's true so far as it goes, but it deflects attention away from the far more significant complications unique to *this* case. Because Petitioner's alleged negligence did not arise from combatant activities, and because, even if it did, Petitioner was not integrated into combatant activities over which the military retained command authority, no federal judicial displacement of Respondents' state law tort claims is warranted—under any reading of *Boyle*.

Granting the Petition would therefore not present this Court with an opportunity to resolve the tension the Petition identifies for the simple and ineluctable reason that nothing turns on it here. Instead, all that granting certiorari would do is provide this Court with an opportunity to reiterate what should have been clear all along—that, if *Boyle* ever justifies judicial displacement of state law tort claims against federal contractors, it is only, as in *Boyle* itself, when those claims would directly undermine the FTCA's discretionary function exception.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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