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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondents do not contest the two points most salient to this Court's decision on certiorari. They acknowledge, albeit grudgingly, that the courts of appeals are divided on the proper test for determining the preemptive effect of the combatant-activities exception as applied to federal contractors. And they do not dispute that the question presented is important to both the federal government and its contractors, as petitioner's amici confirm.

Instead, respondents put all of their eggs in one basket: they contend that this is not an optimal case in which to address the question presented because petitioner could not prevail under any test. That contention is doubly wrong.

As a preliminary matter, respondents are incorrect when they attempt to elevate their contention to the level of a vehicle problem. Respondents specifically assert that their claims cannot be preempted by the federal interests embodied in the Federal Tort Claims Act's combatant-activities exception because the conduct at issue was not a combatant activity and petitioner was not sufficiently integrated into combatant activities. But both assertions go to the application of the framework in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), which is itself the method for determining the reach of the federal interest in exempting combatant activities and the degree of connection required. Respondents are thus not raising any threshold issues; they are merely litigating the merits of the question presented.

In any event, respondents are also incorrect when they contend that their claims would not be preempted under any test. The court of appeals below expressly recognized that its test would have led to a different result if it had been applied in the D.C. Circuit. The reverse is also true. With its broader federal interest and looser causal connection, the D.C. Circuit's test would have triggered preemption here, as would the test proposed by the federal government, which is broader still. There can be no serious dispute that adoption of either test would be outcome-dispositive here.

Respondents' sole objection thus falters, and they provide no other reason for this Court to deny review. The Court should finally resolve the entrenched and expressly acknowledged circuit conflict on the question presented, and it should do so without further delay. The petition for a writ of certiorari should be granted.

A. Respondents Acknowledge A Conflict Among The Federal Courts Of Appeals

Respondents conceded below that the application of the combatant-activities exception to military contractors was the subject of a "substantial conflict in authorities," Resp. C.A. Br. 17, and they contended that the conflict warranted "further review and interpretation by the Supreme Court," *id.* at 26. Respondents now attempt to walk back that contention: while still acknowledging that there are "differences" in how the courts of appeals apply the reasoning of *Boyle* to the combatant-activities exception, respondents summarily characterize those "differences" as "minor variances." Br. in Opp. 2, 9. As the court below expressly recognized, however, the variances in the circuits' tests are far from minor; they can be outcome-dispositive (as they are here). See Pet. App. 34a-35a.

1. In applying the *Boyle* framework to the combatant-activities exception, the courts of appeals have defined the relevant federal interest in three different ways. The Ninth Circuit viewed the exception as narrowly recognizing 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* v. *United States*, 976 F.2d 1328, 1337 (1992), cert. denied, 508 U.S. 960 (1993). Under the D.C. Circuit's broader view, the interest is "the elimination of tort from the battlefield." *Saleh* v. *Titan Corp.*, 580 F.3d 1, 7 (2009), cert. denied, 564 U.S. 1037 (2011). And the Second, Third, and Fourth Circuits take a middle ground, viewing the interest as "foreclos[ing] 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); Pet. App. 32a-33a.

2. The courts of appeals are also divided on the test to determine the appropriate scope of preemption. According to the D.C. Circuit, state-law tort claims are preempted when the military contractor is "integrated into combatant activities over which the military retains command authority." *Saleh*, 580 F.3d at 9. The Third and Fourth Circuits apply the same test, although their narrower definition of the federal interest results in correspondingly narrower displacement. See *KBR*, 744 F.3d at 351; *Harris*, 724 F.3d at 480-481. In the decision below, the Second Circuit adopted a new test, holding that a claim is preempted only 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." Pet. App. 33a.

3. In weighing in on the question in earlier cases, the government has advanced a more expansive test than any of the circuits, under which a claim against a military contractor would 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. at 15, *Kellogg Brown & Root Services, Inc.* v. *Harris*, 574 U.S. 1120 (2015) (No. 13-817).

Respondents do not dispute any of this. There is plainly a mature circuit conflict on the question presented—a question that the government has repeatedly said warrants this Court's review. This case provides an ideal opportunity in which to resolve that conflict.

B. This Case Is An Optimal Vehicle For The Court's Review

Tacitly recognizing the circuit conflict, respondents attempt to erect barriers to this Court's consideration. Specifically, respondents assert, first, that the conduct at issue was not a combatant activity (Br. in Opp. 8-15), and second, that petitioner was not sufficiently integrated into combatant activities (Br. in Opp. 15-19). But both issues go to the framing and application of the test for preemption; they present no obstacle to the Court's ability to resolve what the appropriate test should be.[1] Respondents concede that this case, which comes to the Court on a fully developed record and "[m]ost[ly] * * * undisputed" facts, does not share any of the vehicle problems identified by the government in earlier cases. Br. in Opp. 5, 23; see Pet. 25-26. This case thus squarely presents an important question that the government, petitioner, and (until now) respondents have agreed warrants the Court's review.

1. Respondents first assert (Br. in Opp. 10-15) that the combatant-activities exception is not implicated at all because air traffic control operations are not "combatant activities." Respondents misapprehend how *Boyle* works. The *Boyle* framework is *itself* the method for determining the reach of the federal interest embodied in the combatant-activities exception and the degree of connection required for preemption of state-law claims against federal contractors. No court of appeals requires a threshold showing that the type of conduct at issue is a "combatant

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[1] Respondents apparently recognize that there is no real obstacle to this Court's review. In a recent interview, respondents' counsel opined that it was unlikely the Court will deny certiorari outright. See Patty Nieberg, *Contractor Plane Crash Case Looks to SCOTUS on Immunity Issue*, Bloomberg Law (Apr. 4, 2022) <news.bloomberglaw.com/us-law-week/contractor-plane-crash-case-looks-to-scotus-on-immunity-issue> (Nieberg).

activity" before undertaking the *Boyle* preemption analysis.

More generally, the relevant question cannot be whether the conduct at issue is itself a combatant activity, because the statute refers to claims "*arising out of* the combatant activities of the military." 28 U.S.C. 2680(j) (emphasis added). Noting that broad language, which "denote[s] *any* causal connection," the D.C. Circuit likened the reach of the combatant-activities exception to that of field preemption. *Saleh*, 580 F.3d at 6. Similarly, the Third and Fourth Circuits have recognized that "the phrase 'arising out of' suggests that this immunity is quite broad." *Harris*, 724 F.3d at 480; see *KBR*, 744 F.3d at 348; see also *Al Shimari* v. *CACI International, Inc.*, 679 F.3d 205, 236 (4th Cir. 2012) (Wilkinson, J., dissenting).

Consistent with *Boyle* and the statutory language, the circuits' various tests for preemption themselves account for whether the claims are adequately connected with combatant activities. Indeed, the first prong of the court of appeals' novel test asks whether "the claim arises out of the contractor's involvement in the military's combatant activities," taking into account the interest in "foreclosing state regulation of the military's battlefield decisionmaking." Pet. App. 32a-33a. Respondents may argue that the answer here should be no. But at most, that argument goes to the merits; it does not prevent the Court from determining the proper test for preemption.

In any event, the conduct at issue is adequately connected to combatant activities by any standard. It is undisputed that Kabul Airport "was the subject of insurgent attacks on [a] monthly basis"; that "the movement of troops and armed combat aircraft were among [the airport's] prime missions"; and that "the safe and efficient operation of the [airport's] air traffic control tower, a pivotal hub, was central to the combat mission of the United

States." Pet. App. 54a. Indeed, respondents themselves acknowledge that a causal connection "could be constructed from combat operations elsewhere in Afghanistan to air traffic control operations at [the airport]." Br. in Opp. 11.

In arguing that such a connection is too "loose" to qualify, see Br. in Opp. 11, respondents advocate for a test more stringent than any court has adopted. It is difficult to see why operating a mission-critical airfield that is subject to regular enemy attacks is any less connected to combatant activities than the construction of military facilities in combat zones. See *KBR*, 744 F.3d at 351; *Harris*, 724 F.3d at 481. Both activities provide necessary support to military engaged in actual hostilities, and it would be implausible to suggest that the hostilities must be occurring at the exact moment the tort claim arises. Cf. Br. in Opp. 11, 13 (citing the absence of "abnormal operations" "on October 12"). It is thus unsurprising that, as respondents concede (Br. in Opp. 15 n.5), the court of appeals did not decide the case based on the first prong of its test. See Pet. App. 35a.

2. Respondents proceed to refashion the foregoing argument (Br. in Opp. 15-19) into an argument under the first prong of the test adopted by other circuits: namely, whether the contractor was "integrated into combatant activities." See *KBR*, 744 F.3d at 351; *Harris*, 724 F.3d at 480-481; *Saleh*, 580 F.3d at 9. Respondents make the sweeping claim that petitioner was not sufficiently integrated into combatant activities under any of the circuits' tests. Once again, that claim goes to the merits of the preemption question. And once again, in claiming to apply the existing tests, respondents badly misconstrue them. Respondents seek to narrow the D.C. Circuit's standard beyond recognition, while effectively conceding that the

test proposed by the federal government would lead to a different outcome.

Purporting to apply the D.C. Circuit's test, respondents argue (Br. in Opp. 16, 18) that their claims are not preempted because petitioner's allegedly tortious conduct did not "result from the government's authorization or direction" and was not "carried out in reliance upon explicit or implicit government commands." But that is not what the D.C. Circuit requires. In *Saleh*, the D.C. Circuit rejected the district court's focus on whether the military had "direct command and exclusive operational control" over the contractors' actions. 580 F.3d at 8. Instead, the D.C. Circuit asked whether the contractors "were in fact integrated and performing a common mission with the military under ultimate military command." *Id.* at 6-7. The fact that the contractors' employees "were expected to report to their civilian supervisors[] as well as the military chain of command" did not "detract meaningfully from the military's operational control." *Id.* at 4-5. That was true even though the plaintiffs did not allege that the defendants' actions were "'directed' or 'authorized' by U.S. military personnel." Pet. App. 24a (discussing *Saleh*); cf. *id.* at 33a (adopting that requirement).

The air traffic services at issue here would plainly satisfy the D.C. Circuit's test. See Pet. 19-22. Petitioner's employees were "performing a common mission with the military under ultimate military command." *Saleh*, 580 F.3d at 7. They were hired to replace Air Force controllers and provide air traffic services, thereby "supporting joint services military personnel, host nation military, and coalition forces." C.A. App. 492-493, 571-572, 1946-1947. Petitioner's personnel were also "subject to military direction," *Saleh*, 580 F.3d at 6-7, as they took direction from Air Force officers who retained "operational control" at Kabul Airport, C.A. App. 492-493, 571-572, and

they were required to reside on base under the direction of United States military officers, *id.* at 1809. Under *Saleh*, respondents' claims would be preempted.

In attempting to resist that conclusion, respondents simply highlight the existence of the circuit conflict. For example, respondents argue (Br. in Opp. 19) that their claims are not preempted because there was no contractual obligation with the federal government that petitioner would have violated by complying with its duty of care under state tort law. But the D.C. Circuit rejected precisely that standard: "the relevant question is not so much whether the substance of the federal duty is inconsistent with the hypothetical duty imposed by the state," but instead whether "the imposition *per se*" of the state tort law is "in conflict with the pursuit of warfare." *Saleh*, 580 F.3d at 7. As the D.C. Circuit recognized, the federal government's "interest in combat" is "*always* precisely contrary to the imposition of a non-federal tort duty." *Ibid.* (emphasis added; internal quotation marks and citation omitted). Just as "the plaintiffs' claims in *Saleh* * * * would not be preemspted" under the Second Circuit's test, Pet. App. 34a-35a, respondents' claims here *would* be preempted under the D.C. Circuit's test.

As respondents effectively concede, the outcome of this case would also have been different if the court of appeals had applied the test advanced by the federal government in earlier cases—a test respondents disparage for "misappl[ying] *Boyle*." Br. in Opp. 18 n.7; see Pet. 19-21. In response to calls for the Solicitor General's views in three cases, the government has consistently taken the position that the combatant-activities exception broadly applies to "claims seeking redress for injuries caused by combat support activities," including where the contractor "allegedly violated the terms of the contract or took steps not specifically called for in the contract." U.S. Br.

at 15-16, *Harris*, *supra*; see U.S. Br. at 15-16, *KBR, Inc.* v. *Metzgar*, 574 U.S. 1120 (2015) (No. 13-1241); U.S. Br. at 16-17, *Saleh* v. *Titan Corp.*, 564 U.S. 1037 (2011) (No. 09-1313).[2] As respondents correctly note, that approach "would insulate contractors from liability even when their conduct does *not* result from military decisions or orders," Br. in Opp. 18 n.7 (citation omitted)—which is precisely what respondents allege is the case here.

At bottom, respondents are litigating the core merits questions that this Court would have to address once certiorari is granted. Of course, respondents are free to advance those arguments should the Court grant review. For now, it suffices to say that there is a significant dispute as to the proper test for preemption (and the correct outcome under that test). The Court's review is accordingly warranted.

3. Most ambitiously, respondents contend (Br. in Opp. 20-23) that this Court should not extend *Boyle* beyond the confines of the discretionary-function exception. But that contention boils down to a disagreement with *Boyle* itself—which respondents criticize as "difficult to square with this Court's more recent hostility to federal common lawmaking." Br. in Opp. 21.

As respondents recognize (Br. in Opp. 1-2), every court of appeals that has considered the question has extended *Boyle* to the combatant-activities exception, albeit with inconsistent and conflicting approaches. But to the extent respondents suggest that the Court should revisit *Boyle*, that is all the more reason to grant review. As with

[2] In light of the government's concededly consistent position across those cases, see Nieberg, *supra* (quoting respondents' counsel), calling for the views of the Solicitor General for a fourth time would be unlikely to add anything new. Instead, it would merely lead to delay in resolving a question that the government has already said warrants the Court's review.

the conflict in the lower courts on the proper application of the combatant-activities exception to military contractors, only this Court can resolve any purported inconsistency between *Boyle* and its more recent decisions. By challenging *Boyle*, respondents simply underscore why the case for certiorari here is so overwhelming.

* * * * *

The courts of appeals are divided on the question presented, as the court below expressly recognized. And the question is one of great importance, as the government has repeatedly contended and amici have confirmed. Unable to dispute any of this, respondents instead seek to repackage premature merits arguments as vehicle problems. The Court should not be fooled. There are no barriers to review of the question presented in this case. The Court should grant certiorari and provide necessary and overdue guidance to the lower courts and to the many parties the question affects.

Respectfully submitted.

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