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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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This much is common ground: for over a decade, the courts of appeals have been divided over the proper test for determining when federal law preempts state-law claims against contractors providing support to military operations. This Court has now called for the views of the Solicitor General on that question in four separate cases.

In a previous set of cases before the Court, the United States expressed the view that the question of preemption in this context is of "significant importance for the Nation's military" and "warrants th[e] Court's review in an appropriate case." U.S. Br. at 7, 21, *KBR, Inc.* v. *Metzgar*, 574 U.S. 1120 (2015) (No. 13-1241); see U.S. Br. at 7, 19, *Kellogg Brown & Root Services, Inc.* v. *Harris*, 574 U.S. 1120 (2015) (No. 13-817). The government recommended

that the Court deny review in those cases, however, citing the lack of a circuit conflict and vehicle concerns.

In light of the decision below, there can no longer be any genuine dispute that the question presented has divided the courts of appeals. And this case, which comes to the Court on a fully developed record after summary judgment, is free of the vehicle problems the government identified in the previous cases. This is the case the Court has been looking for.

But wait. Nearly one year (!) after the Court invited her views, the Solicitor General has delivered what can only be described as a hot mess of a brief. In it, the government claims to have unearthed a new obstacle to the Court's consideration of the question presented. Specifically, the government asserts that, because respondents' claims do not "arise out of" the military's combatant activities within the meaning of the combatant-activities exception in the Federal Tort Claims Act (FTCA), this case is an unsuitable vehicle in which to address the question.

That is an imaginary impediment to review. It amounts to nothing more than a merits argument—and one the government can make only by tacitly departing from its longstanding, expansive view of preemption in this area. Indeed, if the government really means what it says, it wants to make it *easier* for plaintiffs to assert claims against *the United States* that arise from the Nation's battlefield conduct. That is a bewildering position for the Solicitor General of *the United States* to take. And if the Solicitor General really wants to back away from the position taken by her predecessors, she should at least be willing to say so.

To its credit, the government does acknowledge that the courts of appeals "have not all adopted the same formulation in defining the scope of preemption in this context." Br. 11. The government asserts that it is "unclear"

whether the differences in those formulations "make a substantial difference in practice," Br. 18, but the court of appeals below expressly stated that they do. It is beyond dispute that those differences are outcome-dispositive here.

Particularly at a time when cases presenting true circuit conflicts seem rare on the ground, this should not be hard. This case presents a longstanding conflict on a question that all parties agree is important. There is no obstacle to reaching the question presented, and the case arises on a fully developed factual record. If the Court does not grant review here to provide clarity on the scope of preemption of claims against contractors providing support to military operations—after over a decade of disagreement in the lower courts—it may never have a better opportunity. The petition for a writ of certiorari should be granted.

A. The Decision Below Implicates A Conflict Among The Courts Of Appeals

In the decision below, the court of appeals expressly deepened the existing conflict on the proper approach for determining when the federal interests embodied in the combatant-activities exception of the FTCA preempt state-law claims. See Pet. 12-22. Tellingly, the government buries the conflict at the back of its brief. See Br. 17-19. The government acknowledges (Br. 11) that the courts of appeals have formulated different tests for assessing preemption in this context. But it attempts to downplay the significance of the conflict, arguing that "the degree to which there is divergence among the courts of appeals * * * is uncertain." Br. 17. That attempt falls flat.

The government first argues that, "broadly speaking," the Third, Fourth, and D.C. Circuits have adopted the

same test for determining the scope of preemption, and that the Ninth Circuit's decision in *Koohi* v. *United States*, 976 F.2d 1328 (1992), cert. denied, 508 U.S. 960 (1993), "comports with that standard." Br. 17-18. There is a good reason the government needs to view the cases through such a "broad[]" lens: the approaches to preemption adopted by those circuits plainly diverge when viewed with closer focus. As the Second Circuit explained in the decision below, those circuits have taken opposing views of the relevant federal interest at issue, with the D.C. Circuit taking a "broad view"; the Ninth Circuit taking a "narrow view"; and the Third and Fourth Circuits, now joined by the Second Circuit, taking a "middle ground" view. Pet. App. 25a. While the Third and Fourth Circuits nominally adopted the D.C. Circuit's preemption test from *Saleh* v. *Titan Corp.*, 580 F.3d 1 (2009), cert. denied, 564 U.S. 1037 (2011), their reliance on a "more narrowly defined federal interest" results "in a correspondingly more modest displacement of state law." Pet. App. 33a.

Even zooming out to the government's higher level of generality, crucial differences between the cases remain. In the government's view, the Third, Fourth, and D.C. Circuits all "require that the military have exerted specific control over the actions of the contractor that gave rise to the plaintiffs' claim." Br. 18. But the D.C. Circuit rejected a test that required "direct [military] command and exclusive operational control." *Saleh*, 580 F.3d at 8 (citation omitted). Instead, it extended preemption to situations in which a contractor "perform[ed] a common mission with the military under *ultimate* military command." *Id.* at 6-7 (emphasis added). And the Fourth Circuit similarly held that the relevant inquiry was whether the contractor "was integrated into the military chain of command." *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 351 (4th Cir. 2014).

With respect to the decision below, moreover, the government candidly admits that the court of appeals "articulate[d] a different formulation" of the preemption test from the Third, Fourth, and D.C. Circuits. Br. 18. But the government argues that "it is not clear that this different articulation would make a substantial difference in practice." *Ibid.* The court of appeals evidently disagreed: it stated that, under its new test, "the plaintiffs' claims in *Saleh* * * * would not be preempted on summary judgment because the challenged contractor actions * * * were neither authorized nor directed by the military." Pet. App. 35a. The application of that test, as opposed to the D.C. Circuit's test, was plainly outcome-dispositive here, because petitioner's employees were "performing a common mission with the military under ultimate military command." *Saleh*, 580 F.3d at 6-7.

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

In previous cases in which this Court called for the views of the Solicitor General, the government cited the cases' procedural posture as reasons to deny review. See U.S. Br. at 20-21, *Harris*, *supra*; U.S. Br. at 22-23, *Metzgar*, *supra*. In the wake of the decision below, the courts of appeals are now even more starkly divided. And the government does not contest that the procedural complications present in the previous cases are absent here. See Pet. 25-26.

Still, the government contends that this case is an unsuitable vehicle to decide the question presented because "respondents' claims do not arise out of the military's combatant activities." Br. 7. As we will now explain, that is not a vehicle problem; it is a merits argument. And in taking that merits position, the government is receding, seemingly substantially, from its longstanding, expansive

view of preemption in this context. Nothing the government says constitutes a good reason for denying review.

1. In its previous briefs before this Court, the government took the position that federal law preempts state-law claims in this context if two broad conditions are met: first, "a similar claim against the United States [must] be within the FTCA's combatant-activities exception because it arises out of the military's combatant activities"; and second, "the contractor [must have been] 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, *Metzgar*, *supra*; U.S. Br. at 15, *Harris*, *supra*; see also U.S. Br. at 19, *Al Shimari* v. *CACI International, Inc.*, 679 F.3d 205 (4th Cir. 2012) (No. 09-1335).

Oddly, the government never even mentions that test in its brief here. (Is it still the government's test? Who knows?) But citing the FTCA's combatant-activities exception, the government does assert that "a claim against a contractor cannot be preempted by the federal interests embodied in [that] exception where the claim does not 'arise out of' the military's combatant activities." Br. 11 (citing 28 U.S.C. 2680(j)). The government proceeds to argue that respondents' claims are not preempted because they "do not arise out of the military's combatant activities." Br. 7. Our best guess, therefore, is that the government is arguing that respondents do not satisfy the first step of its test, while surreptitiously moving to an agnostic position on what the second step of the test should be.

It would ordinarily go without saying that petitioner's supposed failure to satisfy the government's preferred merits test is not a basis on which to decline review. In an effort to avoid that conclusion, however, the government contends (Br. 16) that the "arising out of" requirement is

a "threshold condition" for the preemption defense that is logically "antecedent" to the issues the courts of appeals have addressed: namely, the definition of the federal interest at issue and the proper test for determining whether a state-law claim is preempted. See Pet. 14-19. The government adds that "the absence of a decision below on that antecedent issue itself weighs against review." Br. 11.

Notably, no circuit has required a threshold showing that a claim "arises out of" the military's combatant activities before proceeding to apply the circuit's respective test for preemption. And that is unsurprising. As petitioner has explained in response to a similar argument by respondents (Reply Br. 6), the circuits' various tests *themselves* account for whether the claims are adequately connected with combatant activities.

Accordingly, the government's "arising out of" requirement is not a discrete threshold question. It is simply one part of a competing preemption test that the government contends is superior to the tests applied by the courts of appeals. And when the government asserts that respondents' claims do not satisfy the first step of that framework, the government is simply applying its test to the facts. That is hardly an impediment to review; it is simply a merits argument that is bound up in the broader question presented. The vehicle concern the government identifies is thus no concern at all.[1]

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[1] The government also cites the "interlocutory posture" of this case as a reason to deny review, Br. 19, but this Court routinely grants review in cases that arise from a court of appeals' reversal of a district court's grant of summary judgment, and proceedings below have been stayed pending the disposition of this petition, eliminating any concern about the posture. See Pet. 26.

2. In taking its position on the merits, the government is silently and substantially receding from the expansive test for preemption it consistently articulated in previous cases.

In those cases, the government contended that the connection between a plaintiff's claim and the military's combatant activities was sufficient for purposes of preemption if the claim arose out of "combat support activities" provided by the contractor to the military in a theater of war. U.S. Br. at 15-16, *Metzgar*, *supra*; U.S. Br. at 15-16, *Harris*, *supra*. "The relevant inquiry," the government explained, "is not whether the plaintiffs' claim includes some non-combatant element, but (at a minimum) whether the conduct giving rise to the cause of action has its foundation in combatant activities of the U.S. armed forces." U.S. Br. at 19, *Al Shimari*, *supra*.

Here, it is undisputed that petitioner's conduct arose out of its "performance under a contract with the U.S. military in Afghanistan," and "the traffic handled by air traffic controllers" at Kabul Airport "include[d] a substantial amount of traffic related to U.S. military operations." U.S. Br. 1, 14. That would have sufficed under the government's previous approach—as respondents have effectively conceded in disparaging that approach. See Br. in Opp. 18 n.7.

The government now contends, however, that preemption is available only to contractors that perform not just an "essential * * * function," but a "*closely* combat-related" one. Br. 14 (emphasis added). While the government says that air traffic control services "implicate the combatant activities exception in many circumstances," it says that they do not "[i]n the particular circumstances of this case." Br. 13.

Which circumstances? Based on the government's brief, it is impossible to say for certain. But the government seems to be applying its preemption test with a significantly higher level of granularity than in its previous briefs. In particular, the government focuses on whether the particular cargo plane was military or civilian in nature; whether the plane had carried military materials that day; whether any military flights were arriving at the airport on the night of the crash; and whether the airport was under attack that night. See Br. 14-15.[2] But the government's previous briefs did not articulate a need to perform an action-by-action—here, a flight-by-flight—analysis. And it is hard to see why such an analysis makes any sense, given the government's recognition that "[t]he phrase 'arising out of' is well understood to be 'among the broadest in law.'" Br. 12 (citation omitted).

What the government leaves unsaid is the effect its shift would have on claims *against the government* under the FTCA. The government's focus on whether the claim "arises out of" the military's combatant activities is drawn from the same requirement in the FTCA's combatant-activities exception. See Br. 11. By proposing that the Court require a close connection between the claim and the military's combatant activities, the government is thus effectively arguing that it should be harder for *it* to invoke the combatant-activities exception in suits under the FTCA. Coming from the government, that is a surprising argument to say the least.

3. In any event, the government is incorrect that respondents' claims can proceed even under the narrower

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[2] By contrast, the government suggests the outcome might be different if the contractor was operating at a military base; the contractor was using "special standards to safeguard military traffic"; or military personnel were themselves performing services "based on a judgment of combat-related necessity." Br. 14-15.

test for preemption it now espouses. Petitioner's provision of air traffic control services at Kabul Airport was "closely combat-related" under any reasonable understanding of that phrase. U.S. Br. 14.

As the government concedes, although Kabul Airport was designated as a civilian airport, it was a "central hub" for U.S. military operations: "a substantial amount of [air] traffic" during the relevant time—indeed, some 75%, see C.A. App. 488—was "related to" those operations. Br. 1-2, 14. At the airport, petitioner's contractual role was to "staff, operate[,] and manage" the air traffic control tower "in support of Operation Enduring Freedom." D. Ct. Dkt. 155-31, at 2; see Pet. App. 52a. The military deemed petitioner's services "mission critical," C.A. App. 1946, and "the safe and efficient operation of the [airport's] air traffic control tower * * * was central to the combat mission of the United States," Pet. App. 54a.

In addition, as the government also concedes, petitioner's conduct was subject to direct supervisory control by military officers for military and civilian flights alike. Br. 3; see, *e.g.*, C.A. App. 267-268, 290-292, 492-493, 1809. The military selected the specific air traffic control standards that petitioner's controllers were required to apply. See Pet. App. 4a, 36a. As the government also concedes, petitioner's controllers were "subject to the same rules, regulations, and operating procedures regardless of whether a particular incoming or departing plane was military or civilian." Br. 14.

Even focusing on the specific flight that crashed, the cargo plane's "role" during its last sortie to Bagram Air Base "was presumably to furnish transportation in support of military operations." U.S. Br. 14. Regardless of whether the plane was "empty of all cargo and supplies" when it returned, *id.* at 15, the connection between petitioner's provision of air traffic control services to that

flight and the military's combatant activities is at least as close as the waste-management services at issue in *KBR*, and the electrical services at issue in *Harris* v. *Kellogg Brown & Root Services, Inc.*, 724 F.3d 458 (3d Cir. 2013)—support services that the government believes *are* "closely combat-related." Br. 14, 17. If you're confused, you're not alone. The government's application of its own test is incoherent and incomprehensible.

* * * * *

The government suddenly seems queasy about the prospect of expansive preemption of state-law claims against contractors that provide support to military operations. While the government is free to argue for whatever preemption test it prefers, its disagreement with petitioner's position on the merits is not a basis for denying review. The government has previously stated that the question presented is of significant importance to the military and warrants review in an appropriate case. In the face of a deepening and long-festering circuit conflict, and having invited the government to express its views on the question in four separate cases over thirteen years, this Court's intervention is long overdue.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2023