No. 09-1313

In the Supreme Court of the United States

HAIDAR MUHSIN SALEH, ET AL., PETITIONERS

v.

CACI INTERNATIONAL INC,
CACI PREMIER TECHNOLOGY, INC., AND
TITAN CORPORATION

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

BRIEF FOR RESPONDENT TITAN CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that claims of mere abuse or harm are not actionable as violating a settled consensus of international law under the Alien Tort Statute, 28 U.S.C. 1350.

2. Whether the court of appeals correctly held that petitioners' common-law tort claims are preempted by federal law.

CORPORATE DISCLOSURE STATEMENT

Since the filing of the complaint, respondent Titan Corporation has been renamed L-3 Services, Inc. L-3 Services is wholly owned by L-3 Communications Corporation, which in turn is wholly owned by L-3 Communications Holdings, Inc. No publicly held company owns 10% or more of L-3 Communications Holdings' stock.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-83) is reported at 580 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2009. A petition for rehearing was denied on January 25, 2010 (Pet. App. 139-140). The petition for a writ of certiorari was filed on April 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Over the last decade, the American military has increasingly relied on contract employees because of shortages in the number of soldiers available to perform critical wartime tasks. In the wake of the invasion of Iraq, the military had a particularly acute need for translators fluent in Arabic. Accordingly, the government contracted with respondent Titan Corporation to provide translators in Iraq. Those translators were embedded in the military units to which they were assigned; they lived and worked alongside military personnel and were under the direct command and exclusive operational control of the military. Pet. App. 3, 93-98.

The military assigned several Titan translators to provide services at the Abu Ghraib prison in Baghdad. When the abuses of prisoners at Abu Ghraib came to light, the government undertook extensive investigations into the potential culpability of both military and contract personnel. A number of service members were court-martialed, but the government decided not to pursue criminal charges against any of the contract employees. The government also decided not to pursue any contractual remedies against either Titan or respondent CACI International (CACI), which had contracted to provide interrogators. Pet. App. 3-4.

2. In 2004, petitioners, Iraqi nationals detained at Abu Ghraib and their family members, brought suit against respondents. As is relevant here, the complaint included claims under the Alien Tort Statute (ATS), 28 U.S.C. 1350, and various common-law tort claims. Pet. App. 5-8; 84-85; 119-120.

Respondents moved to dismiss the complaint. The district court granted the motion as to the ATS claims, but denied it as to the common-law tort claims. Pet.

App. 107-117. With regard to the ATS claims, the district court reasoned that "the conduct of private parties described by [petitioners'] allegations was not actionable under the ATS's grant of jurisdiction as violative of the law of nations." *Id.* at 110. With regard to the common-law tort claims, the court determined that it required additional evidence before it could rule on respondents' defense that the claims were preempted by federal law. *Id.* at 114-115.

After discovery, respondents moved for summary judgment on the common-law tort claims, renewing their preemption defense. The district court granted summary judgment to Titan but denied it to CACI. Pet. App. 84-106. In ruling on respondents' preemption defense, the district court applied the rationale of this Court's decision in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), and looked to the policies underlying the combatant-activities exception of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(j). Pet. App. 89-91. The court reasoned that the combatant-activities exception safeguards the military chain of command by "eliminat[ing] the possibility that state law liability could cause a soldier to second-guess a direct order." *Id.* at 91. The court ultimately held that, as applied to contract employees serving in combat situations, preemption is appropriate where the employees "are under the direct command and exclusive operational control of the military chain of command such that they are functionally serving as soldiers." *Ibid.* The court reasoned that, in those circumstances, "preemption ensures that [contract employees] need not weigh the consequences of obeying military orders against the possibility of exposure to state law liability." *Ibid.* Applying that standard, the court determined that there was no dispute that Titan's

employees were "fully integrated into the military units to which they were assigned" or that "they performed their duties under the direct command and exclusive operational control of military personnel." *Id.* at 103. The court determined, however, that a material dispute of fact still existed as to whether CACI's employees were subject to exclusive military control. *Id.* at 104-105.

3. Petitioners appealed the final judgment in favor of Titan; CACI filed an interlocutory appeal from the denial of summary judgment on its preemption defense. The court of appeals affirmed in part and reversed in part, upholding the dismissal of the ATS claims and holding that the common-law tort claims were preempted as to both respondents. Pet. App. 1-83.

a. As to the ATS claims—before the court of appeals only with regard to Titan—the court of appeals noted at the outset that petitioners had chosen, "for whatever reason," to limit their factual allegations on appeal to claims of "abuse" or "harm," and did not make any specific allegations of torture or war crimes. Pet. App. 4. Noting this Court's admonition in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), that "judicial restraint" is required in recognizing new categories of actionable norms under the ATS, the court of appeals had "little difficulty" in upholding the dismissal of petitioners' claims against Titan. Pet. App. 32. The court explained that "[petitioners'] claim that any 'abuse' inflicted or supported by Titan's translator employees on plaintiff detainees is condemned by a settled consensus of international law" was "stunningly broad" and "an untenable, even absurd, articulation of a supposed consensus of international law." *Id.* at 33. The court added that, even if petitioners had adequately alleged torture, the suit might still run afoul of *Sosa*'s requirement of a violation

of an international norm, because any such torture here would be by private actors. *Id.* at 34. While noting "it may be that 'war crimes' have a broader reach," *id.* at 34 n.13, the court reiterated that petitioners "have not brought to our attention any specific allegations of such behavior," *ibid.* The court concluded by noting that there were numerous other potential bases for upholding the dismissal of petitioners' ATS claims, including that the contractors would be entitled to immunity, *id.* at 34-35; that Congress had legislated in the area without creating an available cause of action, *id.* at 35-36; and that recognizing a cause of action here "would impinge on the foreign policy prerogatives of our legislative and executive branches," *id.* at 36.

b. As to the common-law tort claims, the court of appeals, like the district court, applied the rationale of *Boyle* and looked by analogy to the combatant-activities exception of the FTCA, 28 U.S.C. 2680(j). Pet. App. 9-29. The court of appeals explained that it was undisputed that the case involved combatant activities and implicated a significant federal interest. *Id.* at 13. As a result, the only question was whether the conflict between the application of state tort law and the policies underlying the FTCA's combatant-activities exception was significant enough to warrant preemption. *Id.* at 13-14. The court explained that, where, as here, the contract employees at issue were "in fact integrated and performing a common mission with the military under ultimate military command," *id.* at 13, "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," *id.* at 14-15. The court added that the costs of imposing tort liability would be passed through to the government (and thus to

the American taxpayer), *id.* at 16, and that imposing state-law tort liability on contract employees would mean that the military would be "haled into lengthy and distracting court or deposition proceedings," *ibid.*

Based on those considerations, the court of appeals held that the district court's "exclusive operational control" test "does not protect the full measure of the federal interest embodied in the combatant activities exception," because federal interests can be implicated even when a contractor exerts some measure of control alongside that exercised by the military. Pet. App. 18. Instead, the court of appeals 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 19. Applying that standard, the court determined that the claims against both Titan and CACI were preempted. *Id.* at 29.

The court of appeals proceeded to hold, in the alternative, that "even in the absence of *Boyle* the plaintiffs' claims would be preempted * * * because, under the circumstances, the very imposition of *any state law* created a conflict with federal foreign policy interests." Pet. App. 25, 28. Relying primarily on *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), and *American Insurance Ass'n* v. *Garamendi*, 539 U.S. 396 (2003), the court reasoned that "[t]he states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making." Pet. App. 25.

c. Judge Garland dissented with regard to the common-law tort claims only. Pet. App. 38-83. He agreed with the majority that *Boyle* supplied the correct analyt-

ical framework for the preemption analysis, *id.* at 48; that the area implicated uniquely federal interests, *id.* at 49; and that, at least in theory, it might be proper to find preemption under *Boyle* for some combatant activities, *id.* at 74-75. He contended, however, that the applicable test for preemption with regard to combatant activities should be narrower than that applied by the majority, *id.* at 75-79, and concluded that the duties imposed by tort law would be congruent with the policies underlying the FTCA's combatant-activities exception. *Id.* at 74. As to the majority's alternative basis for preemption, he contended that the cases relied upon by the majority were inapposite. *Id.* at 56-69.

ARGUMENT

Petitioners contend that the court of appeals erred by holding that their claims are not actionable as violating a settled consensus of international law under the ATS and that their common-law tort claims are preempted by federal law. The court of appeals' decision is correct in each respect and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. With regard to their ATS claims, petitioners contend (Pet. 14-19) that this Court should grant review to resolve a purported circuit conflict on whether state action is required to pursue an ATS claim based on allegations of torture and war crimes. Because any such conflict is not implicated by the decision below, that issue does not warrant further review in this case.

a. In the decision under review, the court of appeals noted at the outset that petitioners had chosen to limit their factual allegations on appeal to claims of "abuse" or "harm," and thus did not make any specific allegations of torture or war crimes. Pet. App. 4. The court of appeals

accordingly analyzed the question of whether petitioners' claims are actionable under the ATS on that premise, ultimately holding that there is no universally recognized norm barring any "abuse" or "harm" of prisoners, regardless of whether the alleged misconduct involved a public or private actor. *Id.* at 32-33. Petitioners make no attempt to challenge that legal holding: *viz.*, that simple "abuse" or "harm" does not rise to the level of violating a settled international consensus (and claims based on "abuse" or "harm" are therefore not actionable under the ATS). Nor would there be any basis for doing so, because no court of appeals has held that such claims are actionable.

Petitioners suggest (Pet. 14 n.4) that the premise of the court of appeals' analysis was incorrect because they alleged specific instances of torture and war crimes in their complaint. Petitioners do not dispute, however, that they argued below that "assault and battery [is prohibited] by the law of nations." Pet. App. 33 n.12. Unsurprisingly, the court of appeals relied on petitioners' own representations concerning the nature of their claims, stressing that petitioners had not made a single specific factual allegation of torture or war crimes in their briefs on appeal. See *id.* at 4. The court explained that it was "entitled * * * to take [petitioners'] cases as they present them to us." *Ibid.*

As a result, the court of appeals proceeded to address only the question of whether any abuse or harm "is condemned by a settled consensus of international law," Pet. App. 33, and held with "little difficulty" that petitioners' position was "an untenable, even absurd, articulation of a supposed consensus of international law," *id.* at 32-33. Although the court of appeals (relying on its own earlier decisions) expressed its doubts as to whether private ac-

tors could be liable on claims of torture under the ATS, it did so in dicta—"[a]ssuming, *arguendo*, that [petitioners] had adequately alleged torture (or war crimes)." *Id.* at 34. And in rejecting the contention that claims of mere abuse or harm are actionable under the ATS, the court of appeals relied primarily on an earlier decision *involving state action*: specifically, claims concerning alleged abuse by the Libyan police. See *id.* at 33 (citing *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002)). It is therefore clear that the court of appeals rejected petitioners' claims on the premise that petitioners were pursuing only claims of abuse or harm, not that they had alleged private conduct.

To the extent that petitioners now contend that they are in fact pursuing claims of torture and war crimes (and that the relevant legal question in this case is therefore whether their claims of torture and war crimes are actionable under the ATS), that contention is forfeited because it was not preserved below and is evidently fact-bound, turning on the appropriate characterization of these particular plaintiffs' claims. Because petitioners ask this Court to decide a different legal question from the one that was pressed and passed upon below, further review on the ATS question is unwarranted.

b. In any event, there is no genuine conflict among the courts of appeals on the question on which petitioners now seek review—*i.e.*, whether state action is required to pursue an ATS claim based on allegations of torture. In an opinion written by then-Judge Scalia, the District of Columbia Circuit previously held that there was no international consensus that private acts of torture and other crimes were actionable under the ATS. See *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 206-207 (D.C. Cir. 1985). Assuming, *arguendo*, that petitioners

had adequately argued torture to the court of appeals, the decisions that petitioners argue create a split of authority are in agreement that private torture is not actionable under the ATS. See, *e.g.*, Pet. App. 34; *Kadic* v. *Karadzic*, 70 F.3d 232, 243-244 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); *Sinaltrainal* v. *Coca-Cola Co.*, 578 F.3d 1252, 1265-1266 (11th Cir. 2009). And while the Second Circuit held that genocide, crimes against humanity, and war crimes are actionable when performed by the belligerent militia of a self-declared but unrecognized state, see *Kadic*, 70 F.3d at 237, that case involved different norms, different degrees of state action, and assessments of international consensus made at a different time, and therefore does not squarely conflict with D.C. Circuit holdings; indeed, this Court has intimated as much. See *Sosa*, 542 U.S. at 732 n.20. And insofar as petitioners advance the debatable contention that *Kadic* and later decisions stand for the proposition that torture *in furtherance of war crimes* is always actionable against private parties, the court of appeals acknowledged that "it may be that 'war crimes' have a broader reach"—but reiterated that petitioners had failed to present specific allegations of war crimes. See Pet. App. 34 n.13.[1]

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[1] As the court of appeals noted, "[d]espite the apparent breadth" of the formulation in *Kadic*, the holding was not as broad. Pet. App. 32. "[A] quasi-state entity such as Radovan Karadzic's militia"—technically a private party—"is easily distinguishable from a private actor such as Titan." *Ibid.* None of the other appellate decisions cited by petitioners (Pet. 15-17) actually held a private actor liable for war crimes without state action. See *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 247-248 (2d Cir. 2009) (affirming dismissal of ATS claims), petition for cert. filed, No. 09-1262 (Apr. 15, 2010); *Sinaltrainal*, 578 F.3d at 1258 (affirming dismissal of ATS claims); *Abdullahi* v. *Pfizer, Inc.*, 562 F.3d 163, 173

Finally, this case is distinguishable from the cases on which petitioners rely for a more fundamental reason. In contrast with the latter cases, this case involves a war being waged by the United States; those cases, by contrast, involve the actions of foreign sovereigns or belligerents. As the court of appeals noted, even if there might be a cause of action in some circumstances against private actors for torture or war crimes under the ATS, important considerations counsel against recognizing such a cause of action where the wartime activities of the United States are at issue. See Pet. App. 35-37. In any event, because this case does not present the issue on which the circuits are purportedly in conflict, that issue does not merit further review here.

2. With regard to their common-law tort claims, petitioners contend (Pet. 19-41) that this Court should grant review to consider whether their claims are preempted by federal law. That issue also does not merit further review.

a. To begin with, petitioners do not dispute that the preemption question presented by this case is one of first impression in the courts of appeals. No other court of appeals has addressed the question of preemption of claims against service contractors arising out of combatant activities. For that reason, petitioners' repeated

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(2d Cir. 2009), petition for cert. filed, No. 09-34 (July 8, 2009) (finding state action and allowing claims of medical experimentation to proceed under the ATS); *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1309 (11th Cir. 2008) (affirming defense verdict on ATS claim); *Khulumani* v. *Barclay National Bank Ltd.*, 504 F.3d 254, 258-264 (2d Cir. 2007) (allowing ATS claims for apartheid to proceed); *Bigio* v. *Coca-Cola Co.*, 239 F.3d 440, 443 (2d Cir. 2000) (affirming dismissal of ATS claims based on expropriation).

contention (Pet. 5, 20, 21, 42) that the court of appeals' holding in this case is "novel" misses the mark; it is "novel" for the simple reason that the question had not previously been addressed by another court of appeals.[2]

The only other court of appeals to have considered the question of preemption of claims against contractors arising out of combatant activities did so in the context of a procurement contract for a weapons system, and likewise held that the claims were preempted. In an opinion written by Judge Reinhardt, the Ninth Circuit held that imposing tort liability on the contracting manufacturer "would create a duty of care where the combatant activities exception is intended to ensure that none exists." *Koohi* v. *United States*, 976 F.2d 1328, 1337 (9th Cir. 1992), cert. denied, 508 U.S. 960 (1993). Like the court of appeals in this case, the Ninth Circuit applied the rationale of the Court's decision in *Boyle* and looked by analogy to the combatant-activities exception of the FTCA, 28 U.S.C. 2680(j). See *Koohi*, 976 F.2d at 1336.

b. The only court of appeals decision on which petitioners rely that even touches on the "legal posture of defense contractors accompanying [a military] force," Pet. 21 n.8, involves not preemption, but the political question doctrine. See *Carmichael* v. *Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009), cert. denied, No. 09-683 (June 28, 2010).[3] And in that case, as

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[2] Notably, the only district court to have considered the issue since the court of appeals' decision has agreed with it. See *Taylor* v. *Kellogg Brown & Root Servs., Inc.*, No. 2:09-cv-341, 2010 WL 1707530, at *9 (E.D. Va. Apr. 16, 2010), appeal docketed, No. 10-1543 (4th Cir. May 14, 2010).

[3] Insofar as petitioners rely (Pet. 24) on *Malesko* v. *Correctional Services Corp.*, 229 F.3d 374 (2d Cir. 2000), rev'd on other grounds,

here, the court of appeals held that claims against a military contractor were not actionable because of potential interference with the government's wartime activities. See *id.* at 1275.

Notably, in response to an invitation from the Court, the Solicitor General recently filed a brief recommending against certiorari in *Carmichael* on the ground that courts grappling with the complex issues posed by claims arising from the conduct of military contractors operating in war zones "have just begun to flesh out how a variety of statutory, common law, and constitutional defenses should be applied in these novel and challenging circumstances." U.S. Br. at 10, *Carmichael*, *supra* (May 28, 2010). With specific reference to the decision of the court of appeals in this case, the government concluded that the Court's "consideration of the applicability of various defenses in suits against contractors supporting military operations in war zones would benefit greatly from further percolation." *Id.* at 21-22. The government cited the "obvious benefits to deferring consideration of cases arising in this context until lower courts have more fully considered [the] legal doctrines that may bar a suit or otherwise limit liability." *Id.* at 14.

c. In the absence of a circuit conflict, petitioners contend at great length that this Court should grant review simply because the decision below was incorrect. This is not the truly exceptional case, however, in which the Court's review is warranted even absent a circuit

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534 U.S. 61 (2001), that decision is readily distinguishable, because it dealt with domestic, non-military government contracts—and ultimately held that the claims at issue could go forward because the claims did not conflict with the policies underlying the discretionary-function exception. See 229 F.3d at 382.

conflict. To the contrary, this case presents the paradigmatic situation in which further percolation would be beneficial. As the government explained in its brief in *Carmichael*, lower courts considering the defenses available to government contractors have shown "an understandable discomfort with readily subjecting the actions of government contractors who provide services to the U.S. military in war zones to private civil suits under state tort law" and "evince genuine concerns about second-guessing military judgments, burdening the military and its personnel with onerous and intrusive discovery requests, and otherwise interfering with and detracting from the war effort." U.S. Br. at 13, *Carmichael*, *supra*. In the government's view, moreover, those concerns are generally "well-founded." *Ibid.* But the government explained that further percolation would help to establish "the appropriate doctrinal framework under which to determine whether a particular claim may proceed and, if so, to what extent." *Id.* at 13-14.

The same is true with specific reference to the preemption defense that served as the basis for the court of appeals' rejection of petitioners' common-law tort claims. Indeed, the government's brief in *Carmichael* itself illustrates the benefits of further percolation on that issue. In his dissenting opinion below, Judge Garland repeatedly relied on his own interpretation of comments from the Department of Defense that, in his view, took the position that military contractors were subject to civil liability under domestic law. See, *e.g.*, Pet. App. 62-63, 65, 81; see also Pet. 18 (relying on the same comments). In its brief in *Carmichael*, however, the government disavowed that interpretation, explaining that the comments were "not intended to opine on the state of the law." See U.S. Br. at 12 n.4, *Carmichael*, *supra*.

Further percolation, moreover, would not leave the conduct of military contractors unchecked. As the government explained in its brief in *Carmichael*, "[i]rrespective of the availability of private tort remedies, contractors remain subject to applicable federal criminal law and contractual remedies, the enforcement of which is under the purview of the United States Government." U.S. Br. at 14 n.7, *Carmichael*, *supra*. In fact, in the specific context of the abuses at Abu Ghraib, the U.S. Army Claims Service long ago announced that it would compensate detainees who establish that they have legitimate claims for relief. See Pet. App. 4.

d. Finally, this case would constitute a poor vehicle for consideration of the preemption issue because it is far from clear whether resolution of that issue in petitioners' favor would lead to a different outcome. Putting to one side the factual deficiencies in petitioners' claims, it is uncertain whether petitioners could prevail under any narrower standard for preemption than the standards applied by the lower courts. And petitioners would also have to prevail on the issue of whether respondents, as nongovernmental entities whose employees are integrated into military operations, are entitled to sovereign immunity. See Pet. App. 10. In any event, because there is no circuit conflict with regard to the preemption of identical or similar claims, the preemption question does not warrant further review at this time, much less in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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