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**In The
Supreme Court of the United States**

HAIDAR MUHSIN SALEH,
ILHAM NASSIR IBRAHIM, et al.,

Petitioners,

v.

CACI INTERNATIONAL
AND TITAN CORPORATION,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by finding, contrary to all other circuits that have addressed the issue, that Petitioners' claims for torture and other war crimes cannot be brought against private actors under the Alien Tort Statute.
2. Whether the Court of Appeals erred by creating a "battle-field preemption" doctrine that extends derivative sovereign immunity to contractors in conflict with this Court's decisions in *Boyle v. United Technologies Corp.* and *Wyeth v. Levine*.

PARTIES TO THE PROCEEDINGS

The following persons have appeared below as plaintiffs in *Saleh et al. v. Titan Corp. et al.*, appellants in the Court of Appeals as to the district court's grant of summary judgment to the Titan defendants, and appellees as to the district court's denial of summary judgment to the CACI defendants: Haidar Muhsin Saleh, Haj Ali Shallal Abbas Al-Uweissi, Jilal Mehde Hadod, Umer Abdul Mutalib Abdul Latif, Ahmed Shehab Ahmed, Ahmed Ibrahiem Neisef Jassem, Ismael Neisef Jassem Al-Nidawi, Kinan Ismael Neisef Al-Nidawi, Estate of Ibrahiem Neisef Jassem, Mustafa (last name under seal), Natheer (last name under seal), Othman (last name under seal), and Hassan (last name under seal).

The following persons have appeared below as plaintiffs in *Ibrahim et al. v. Titan Corp. et al.*, appellants in the Court of Appeals as to the district court's grant of summary judgment to the Titan defendants, and appellees as to the district court's denial of summary judgment to the CACI defendants: Ilham Nassir Ibrahim, Saddam Saleh Aboud, Nasir Khalaf Abbas, Ilham Mohammed Hamza Al Jumali, Hamid Ahmed Khalaf, Al Aid Mhmod Hussein Abo Al Rahman, Ahmad Khalil Ibrahim Samir Al Ani, Israa Talb Hassan Al-Nuamei, Huda Hafid Ahmad Al-Azawi, Ayad Hafid Ahmad Al-Azawi, Ali Hafid Ahmad Al-Azawi, Mu'Taz Hafid Ahmad Al-Azawi, and Hafid Ahmad Al-Azawi.

PARTIES TO THE PROCEEDINGS – Continued

The following entities have appeared as defendants in district court, and appellees in the Court of Appeals: Titan Corporation, L-3 Communications Titan Corporation, and L-3 Services, Inc.

The following entities have appeared as Defendants in the district court, appellants in the Court of Appeals as to the denial of their motion for summary judgment, and intervenors in the Court of Appeals as to the plaintiffs' cross-appeal: CACI International, Inc. and CACI Premier, Inc.

There were no amici below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-83) is reported at 580 F.3d 1. The opinion of the district court on summary judgment (App. 84-06) is reported at 556 F. Supp. 2d 1. The opinion of the district court on the motion to dismiss in *Saleh v. Titan* (App. 107-17) is reported at 436 F. Supp. 2d 55. The opinion of the district court on the motion to dismiss in *Ibrahim v. Titan* (App. 118-40) is reported at 391 F. Supp. 2d 10.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331, as Petitioners' case presented federal questions; under 28 U.S.C. §1350, as Petitioners' case presented torts committed against aliens in violation of the law of nations; under 28 U.S.C. §1332, as diversity jurisdiction exists here; and under 28 U.S.C. §1367, as the court had supplemental jurisdiction over Petitioners' common-law causes of action. The judgment of the three-judge panel of the court of appeals was entered on September 11, 2009. Petitioners' timely-filed petition for rehearing *en banc* was denied by the court of appeals on January 25, 2010. The

jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Tenth Amendment to the U.S. Constitution, which states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

This case also involves Article I, Section 10, clause 3 of the U.S. Constitution, which states that:

[n]o State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

This case also involves Article VI of the U.S. Constitution, which provides in pertinent part that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

Constitution or Laws of any State to the
Contrary notwithstanding.

The Alien Tort Statute (“ATS”), 28 U.S.C. §1350 provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The ATS is reproduced at App. 142.

The Federal Tort Claims Act (“FTCA”), 28 U.S.C. §1346 *et seq.*, reproduced at App. 141, provides in part that:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2671, reproduced at App. 141, defines “Federal Agency,” as used in section 1346, to include “the executive departments, the judicial and legislative branches, the military departments, independent

establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.” 28 U.S.C. §2680(a), reproduced at App. 142, excludes from section 1346’s waiver of sovereign immunity:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. §2680(j) of the Act, reproduced at App. 142, excludes from section 1346’s waiver of sovereign immunity from tort liability “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”

The War Crimes Act, 18 U.S.C. §2441, provides in part that:

(a) Offense. – Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances. – The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition. – As used in this section the term “war crime” means any conduct –

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

The full text of the Act is reproduced at App. 148.

Other relevant statutory and regulatory provisions are set forth in the Appendix.

STATEMENT

Petitioners, victims of war crimes at Abu Ghraib prison, brought suit against two government contractors. Their claims have been dismissed before any merits adjudication on the grounds that Respondents are immune from suit based on their status as government contractors. The majority created a blanket immunity by (1) ruling that Petitioners’ claims for murder, torture and other war crimes under the Alien Tort Statute could not be brought against non-state parties, and (2) creating a novel “battle-field pre-emption” doctrine that places the more than 200,000

contractor employees supporting the military in Iraq and Afghanistan wholly outside the existing tort system.

This Court should issue the writ. First, as discussed in Section I, the majority's ATS ruling creates a clear circuit split. Second, as discussed in Section II, the majority's creation of "battle-field preemption" failed to follow *Boyle v. United Technologies*, 487 U.S. 500 (1988), and ignored the preemption jurisprudence culminating in *Wyeth v. Levine*, 129 S.Ct. 1187 (2009). The majority's new judicial doctrine directly contradicts the Executive's expressed preference to rely on the existing structure of tort liability as a tool to deter contractor misconduct.

STATEMENT OF FACTS

Respondents CACI International, Inc. ("CACI") and Titan Corporation ("Titan") provided interrogation and translation services under government contract at the Abu Ghraib prison in Iraq. *Titan* J.A. 384-403; *CACI* J.A. 319-88.¹ Petitioners, civilian detainees,² allege CACI and Titan employees repeatedly punched and kicked them, beat them with sticks,

¹ "CACI J.A." and "*Titan* J.A." refers to the Joint Appendices filed in the Court of Appeals. "*Titan* J.A.S." refers to the sealed supplement of the Joint Appendix filed in the Court of Appeals.

² It is unclear why the majority referred to Petitioners as "enemy combatants," a term nowhere supported by record evidence and never ascribed to them by the U.S. government or military. Petitioners and other prisoners at Abu Ghraib were civilian detainees protected by the Geneva Conventions. *Titan* J.A. 530.

guns and cables; slammed them into cell walls; raped, sexually assaulted, and sexually humiliated them; subjected them to electric shocks; deprived them of food and sleep; threatened them with dogs; shackled them in painful positions for hours; urinated on them; confined them in coffin-sized boxes; exposed them to extreme heat and cold; forced them to watch the beating and rape of other prisoners, including their family members; and threatened them with rape and execution. *Titan* J.A. 201-07, 216-28, 261-67, 271-74, 278-83, 287-302. Several Petitioners were tortured into unconsciousness; several were murdered. *Titan* J.A. 216-18, 223-24, 291, 294, 299.

The military found CACI and Titan employees violated the laws of war. The military's initial investigation conducted by General Taguba found that "between October and December 2003, at the Abu Ghraib Confinement Facility (BCCF), numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees." *Titan* J.A. 630. General Taguba identified certain CACI and Titan employees as perpetrators of the sadistic, blatant and wanton criminal abuses. *Titan* J.A. 631, 633, 640. The military conducted additional investigations, and identified additional CACI and Titan employees who had assaulted detainees. *Titan* J.A. 525, 556-64.

The military lacked the power to court martial CACI and Titan employees, although it did court martial certain soldiers who conspired with them. Evidence adduced during these military proceedings

demonstrated CACI employees were ringleaders in the Abu Ghraib abuse scandal. *CACI* J.A. 480-82, 500-02, 507-19, 531-89; *Titan* J.A. 622-26, 643-719; *Titan* J.A.S. 1318-74.

1. PROCEEDINGS BELOW

None of Petitioners' allegations was adjudicated by the district court. Instead, on August 12, 2005, the district court (Judge James Robertson) ruled under Fed. R. Civ. P. 12(b)(6) that Petitioners' war crimes claims (including murder and torture) raised under the Alien Tort Statute failed to state a claim because Petitioners did not allege state action, only action by private parties. App. 109-11, 121-24. The district court held that "the question is whether the law of nations applies to *private actors* like the defendants in the present case. . . ." and found that "in the D.C. Circuit the answer is no." App. 122 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985)) (emphasis in original.) The district court found this Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) did not overrule these D.C. Circuit holdings, and did not resolve the circuit split. App. 110, 122.

The district court further held that Respondents were potentially eligible to invoke "the government contractor defense" created by this Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). App. 115-16, 128-34. The district court ruled merits

discovery could *not* proceed, and ordered the parties to conduct discovery regarding Respondents' contractual responsibilities, reporting structures, supervisory structures, and structures of command and control. App. 115-16, 133-35.

Respondents thereafter moved for summary judgment. Respondent Titan argued that it merely loaned its employees to the military, and therefore could not be held to have any liability arising from their misconduct. Respondent Titan submitted evidence establishing that Titan failed to create the contractually-required oversight structure, and did not supervise its employees located at Abu Ghraib prison. Respondent CACI admitted that CACI management was present at Abu Ghraib, and had the authority to stop their employees from torturing detainees. Respondent CACI claimed that their employees were nonetheless under the military's command and control.

Petitioners argued that permitting claims challenging extracontractual and illegal conduct furthered, not conflicted with, the military's position that the torture at Abu Ghraib was illegal, unauthorized, and not designed to serve any military purpose. Petitioners submitted evidence from military regulations and field manuals establishing that the military was not responsible for supervising CACI and Titan's corporate employees. App. 162-65. Petitioner submitted testimony from military personnel that they did not supervise CACI and Titan employees at Abu Ghraib, *CACI* J.A. 463-93, *Titan* J.A. 724-35, and

from Titan and CACI employees stating that they were not under military command, *CACI* J.A. 389-90, *Titan* J.A. 514-21.

The district court denied Respondent CACI summary judgment, holding that “a reasonable trier of fact could conclude that CACI retained significant authority to manage its employees.” App. 105. The district court granted Respondent Titan’s motion for summary judgment, holding “Titan has shown that its linguists were fully integrated into the military units to which they were assigned and that they performed their duties under the direct command and exclusive operational control of military personnel.” App. 103.

Respondent CACI successfully sought interlocutory appeal. Petitioners cross-appealed the district court’s grant of summary judgment to Titan.

On appeal, a divided panel of the U.S. Court of Appeals for the District of Columbia dismissed Petitioners’ claims against both CACI and Titan. The majority (Judges Silberman and Kavanaugh) held that “the very purposes of tort law are in conflict with the pursuit of warfare.” App. 16. The majority coined the term “battle-field preemption,” and ruled 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.” App. 19. The majority found irrelevant that the misconduct at issue violated

the express terms of the contract and the law. App. 15-16, 23. The majority also dismissed the plaintiffs' torture and other war crimes claims under the ATS, holding that private actors cannot be held liable under the ATS. The majority acknowledged that this holding created a split among the circuits. App. 31.

A well-reasoned and persuasive dissent (Judge Garland) pointed out the flaws in the majority's new "battle-field preemption" doctrine.³ The dissent found that "[n]o Executive Branch official has defended such conduct or suggested that it was employed to further any military purpose. To the contrary, both the current and previous Administrations have repeatedly and vociferously condemned the conduct at Abu Ghraib as contrary to the values and interests of the United States. So, too, has the Congress." App. 38. The dissent noted *Boyle* pre-emption "has never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy," App. 52, and that there was "no evidence in the record of these cases . . . that the brutality the plaintiffs allege was authorized or directed by the United States." App. 79. The dissent cited the 2004 Article 15-6 Investigation report stating that "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees"

³ The dissent does not address ATS claims on the grounds that the state-law claims should go forward, and "plaintiffs do not contend that their Alien Tort Statute claims would provide them with different relief." App. 82.

at Abu Ghraib, and quoted both Executive and Legislative Branch condemnations of the “despicable acts” at Abu Ghraib prison. App. 39.

The dissent examined whether a principled basis exists to sustain the majority’s “battle-field preemption” and found none. *First*, the dissent reviewed the text of the FTCA, and agreed “the FTCA’s policy is to eliminate *the U.S. government’s* liability for battle-field torts. That, after all, is what the FTCA says.” But, the dissent continued, “it is not plain that the FTCA’s policy is to eliminate liability when the alleged tortfeasor is a contractor rather than a soldier. That, after all, is *not* what the FTCA says.” App. 60 (noting that the FTCA’s and the Westfall Act’s definitions of “federal agency” specifically exclude contractors.) The dissent explained the majority’s holding contradicts the FTCA, and “grants private contractors *more* protection than our soldiers and other government employees receive.” App. 61. *Second*, the dissent agreed that war and foreign policy are the province of the Executive, but pointed out that the “court has removed an important tool from the Executive’s foreign policy toolbox.” App. 66. The dissent also found that “the position DOD took in its rulemaking on contractor liability may reflect the government’s general view that permitting contractor liability will advance, not impede, U.S. foreign policy by demonstrating that the United States is committed to ensuring that its contractors are subject to proper oversight and held accountable for their actions.” App. 65 (internal quotations omitted.)

Petitioners unsuccessfully sought *en banc* review, App. 140, and thereafter filed this Petition in a timely manner.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in this case: *First*, as explained in Section I, the majority ignored the policy of the legislative and executive branches and created a clear circuit split by holding that torture and other war crimes claims cannot be asserted against private parties such as CACI and Titan. Given that Petitioners' claims arise from the Abu Ghraib prison scandal that disgraced our nation, and that war crimes are always issues of national and global importance, this Court should deem this particular circuit split on war crimes as worthy of resolution.

Second, this Court should review the majority's "battle-field preemption" premised on its finding that "the very purposes of tort law are in conflict with the pursuit of warfare." The majority's preemption ruling failed to adhere to this Court's *Boyle* decision that limits preemption to instances of direct conflict between federal interests and state tort claims (Section II.A), and contravenes the Constitution and well-established preemption jurisprudence of this Court (Section II.B). Finally, as explained in Section II.C, this ruling substituted judicial for military judgment on how to manage contractors, and disrupted the military's intentional reliance on the tort system as

one tool to deter misconduct by corporate defense contractors.

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER TORTURE AND OTHER WAR CRIMES CLAIMS REQUIRE STATE ACTION UNDER ATS.

The majority's dismissal of Petitioners' ATS torture and other war crimes claims created a clear circuit split with the Second and Eleventh Circuits, as the majority itself acknowledged. App. 31. As the majority concedes, Petitioners' torture claims would be cognizable under *Sosa* had they been brought against state actors. App. 34 ("Although torture committed by a state is a recognized violation of a settled international norm, that cannot be said of private actors.")⁴ The majority, however, held that the status

⁴ The district court did not permit discovery or adjudicate the factual validity of Petitioners' allegations of torture and other war crimes. As a result, the majority had to accept Petitioners' allegations as true. App. 38, 44 (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993)); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Gibson v. City of Chicago*, 910 F.2d 1510, 1520-21 (7th Cir. 1990); *Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 426, 429 (3d Cir. 1988); *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 831 n.2 (9th Cir. 1983). Although the majority questioned whether Petitioners raised the torture and war crime allegations in the appellate briefing on the government contractor defense, Petitioners did so. As but one example, Petitioners cited and appended evidence regarding sexual assaults by Titan translator, Adel Nakhla, in which Nakhla confessed to military investigators that he had voluntarily

(Continued on following page)

of CACI and Titan as non-state actors prevents Petitioners' claims from falling within the parameters set by *Sosa*.

This erroneous holding created an important circuit split worthy of this Court's review. Permitting redress through the ATS is one way in which the United States fulfills its obligations to other nations and under international law. It is essential to this nation's security and standing in the world that our judicial system fulfill our obligations. Here, Congress and the Executive unequivocally condemned Respondents' misconduct, and expressed confidence that our system of justice would result in accountability. App. 38-40. Immediately after the events giving rise to this lawsuit, President Bush expressly condemned the misconduct at Abu Ghraib and affirmed our nation was committed to fulfilling its obligations under international law to provide a full accounting and remedy for the victims.⁵ Failing to correct the majority's error will create unnecessary and serious problems for the Executive's diplomatic efforts.

The Second Circuit held that war crimes may be asserted against non-state actors under the ATS. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy Co.*, 582 F.3d 244, 254-55 (2nd Cir. 2009)

participated in forcing three naked prisoners to engage in sexual contact. *Titan* J.A. 622-26.

⁵ President's Statement on the U.N. International Day in Support of Victims of Torture, June 26, 2004.

petition for cert. filed Apr. 15, 2010 (No. 09-1262), citing *Kadić v. Karadžić*, 70 F.3d 232, 244 (2nd Cir. 1995); *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254, 270, n.5, 282 and 289 (2nd Cir. 2007); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 173 (2d Cir. 2009) *petition for cert. filed July 8, 2009* (No. 09-34) (affirming that ATS claims may be brought against private actors “when tortious activities violate norms of ‘universal concern’ that are recognized to extend to the conduct of private parties – for example, slavery, genocide, and war crimes”); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447-48 (2nd Cir. 2000) (same). In *Kadić*, the court held that “in the modern era” international law does not confine its reach to state action, and “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” 70 F. 3d at 239. Looking to the law of nations for guidance, including Common Article 3 of the 1949 Geneva Conventions, the court found that “[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II.” *Id.* at 243. The court found that if torture were committed in furtherance of war crimes, then no state action should be required for liability. *Id.*

The Eleventh Circuit reached the same conclusion. See *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266-67 (11th Cir. 2009) (stating that “plaintiffs need not plead state action for claims of torture and murder perpetrated in the course of war crimes”);

Romero v. Drummond Co., Inc., 552 F.3d 1303, 1316, (11th Cir. 2008), *reh'g en banc denied*, 2009 U.S. App. LEXIS 2880 (11th Cir. Feb. 18, 2009) (holding “individuals may be liable, under the law of nations, for some conduct, such as war crimes, regardless of whether they acted under color of law of a foreign nation”). *See also Aldana v. Del Monte*, 416 F.3d 1242 (11th Cir. 2005).⁶

Numerous district courts have followed the Second and Eleventh Circuits in finding that non-state actors can be held liable for certain violations of international law. *See, e.g., In re: Xe Services Alien Tort Litig.*, 665 F. Supp. 2d 569, 584-85 (E.D.Va. 2009); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999).⁷

The Second and Eleventh Circuit’s analysis is consistent with the decision taken by both Congress

⁶ The majority’s conclusion that plaintiffs cannot allege that the private-actor defendants are acting “under color of law” without simultaneously bestowing on them sovereign immunity is also counter to precedent of this Court and other circuits, which have found that private-actors were acting “under color of law” for purposes of liability under 42 U.S.C. §1983 or the ATS, but were not state actors entitled to sovereign immunity. *See, e.g., Dennis v. Sparks*, 449 U.S. 21 (1980); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2nd Cir. 2000).

⁷ Others have not. *See, e.g., Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D.Va. 2009).

and the Executive that non-state actors who torture prisoners in the course of an armed conflict are guilty of war crimes. 18 U.S.C. §2441(b); 48 C.F.R. §252.225-7040(e)(2)(ii). *See also* 10 U.S.C. §948a(7), §948b, §948c, §950t; 68 Fed. Reg. 39381-39387 (2003) (defining non-state actors' wrongful acts, including torture, as war crimes triable by military commission.)

The reasoning in *Sosa* supports the holdings of the Second and Eleventh Circuits, not the majority opinion. In *Sosa*, this Court found that the law of nations included “a second, more pedestrian element regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.” 542 U.S. at 715. *Id.* (finding that there was “a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships.”)

The Court cited favorably the 1795 opinion issued by Attorney General Bradford that finds ATS liability extends to private actors whose acts violate the law of nations. *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 59 (1795) (stating that “there can be no doubt that the company or individuals” injured by private American citizens who joined a French attack on the British colony of Sierra Leone “have a remedy by a civil suit in the courts of the United States” under the ATS.) *See also Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 156-7 (1795) (private actors who had unlawfully captured a Dutch ship had violated the law of nations and were liable for the value of the captured assets.)

The Court in footnote 20 cited both *Kadić* and Judge Edwards' concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.D.C. 1984), and set forth as "a related consideration" whether "violation of a given norm" can extend to private parties. This suggests the Court assumed ATS claims may be brought against private parties unless the underlying norm supporting the ATS claim could not be brought against private parties.

The availability of redress for war crime victims serves this nation's security and diplomatic interests. This Court should not permit a circuit split among appellate courts to impact an issue of such national and global importance as the proper resolution of the Abu Ghraib war crimes scandal. This Court should grant the writ and conclusively resolve this issue.

II. THIS COURT SHOULD ISSUE THE WRIT TO PREVENT THE JUDICIARY FROM UNILATERALLY OVERTURNING THE CONGRESSIONAL AND EXECUTIVE DECISION NOT TO EXTEND SOVEREIGN IMMUNITY TO CONTRACTORS.

Congress and the Executive have not immunized from tort liability corporate defense contractors who are supporting ongoing military operations abroad in Iraq and Afghanistan. Congress expressly excluded such contractors from the scope of the immunities reserved by the Federal Tort Claims Act ("FTCA"). The Executive promulgated regulations and adopted policies that relied on tort liability as a tool to deter

misconduct by defense contractors deployed in war zones. The majority's creation of a novel "battle-field preemption" doctrine, which immunizes from tort liability corporate defense contractors supporting the military in Iraq and Afghanistan, has intruded on the constitutional prerogatives exercised by these other branches.

The majority reasoned that "the very purposes of tort law are in conflict with the pursuit of warfare" and coined the term "battle-field preemption" to describe its holding. App. 16. The scope and impact of this new doctrine is staggering. Under the majority's test, contractors do *not* need to show that the military placed the employees in the military chain of command, or otherwise authorized the wrongful actions of contractor employees – a showing Respondents could not make. All that has to be shown is that contractor employees "were subject to military direction, even if not subject to normal military discipline." App. 13. This covers all contractor employees supporting the military in Iraq and Afghanistan, as all were subject to some form of military direction by virtue of being contracted to work with the military. *See* App. 167-68 (Department of Defense procurement regulation states that contractor personnel accompanying the armed forces must comply with instructions from the Combatant Commander, and the government may require the contractor to remove any employee who fails to follow military instructions.)

According to the military's Central Command, by September 2009, there were 113,731 contractor

employees in Iraq and 104,101 contractor employees in Afghanistan, compared to troop levels of 130,000 and 63,950 respectively. The corporations contractually responsible for overseeing and supervising these 217,832 contractor employees receive more than *five billion* dollars *per year* from the United States treasury. The majority decision places these 217,832 employees outside this nation's "legal system that in the 'ordinary course . . . provide[s] a remedy for those who were wrongfully injured.'" App. 66. Indeed, these corporate employees now have "*more* protection than our soldiers and other government employees receive." App. 61 (emphasis in original.)⁸

This Court should review this novel judicially-created "battle-field preemption" theory for three reasons: *First*, the majority fails to follow the "limiting principles" set forth in *Boyle v. United Technologies*, and fails to identify any direct conflict between the defendants' state and federal duties. *Second*, the majority's judicial overreaching contravenes the Constitution both on federalism and separation of powers grounds (U.S. Const. art. I, §7, cls. 2-3; art. VI, cl. 2; amend. X), and violates controlling Supreme Court preemption jurisprudence, including *Wyeth v. Levine*, 129 S.Ct. at 1206-08. *Third*, the majority failed to

⁸ The extensive litigation created by the uncertain legal posture of defense contractors accompanying the force is yet another reason for this Court to issue the writ. *See, e.g.*, the petition for the writ submitted regarding *Carmichael v. Kellogg, Brown & Root Service, Inc.*, 572 F.3d 1271 (11th Cir. 2009).

give due deference to Congressional and Executive decisions to use the existing tort law system as a tool to deter misconduct by contractors.

A. The Majority Fails To Follow *Boyle v. United Technologies*.

The majority opinion's creation of "battle-field preemption" failed to adhere to the Court's *Boyle v. United Technologies Corp.* decision. There, the Court held that the discretionary function exception to the FTCA, 28 U.S.C. §2680(a), preempted state law tort suits against military contractors if and only if "a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law, or the application of state law would frustrate specific objectives of federal legislation." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) (internal citations and quotation marks omitted.)

The Court identified three factual scenarios when a direct conflict between the federal policy interests and the application of state legal standards could not be found. Those are when the facts reveal (1) that the federal contractor's tortious acts breached its federal duties (either statutory or contractual), (2) that the federal contractor could comply with both its contractual obligations and the state prescribed duty of care because those duties were identical, and (3) in "an intermediate situation, in which 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.” *Boyle* at 509. The Court cautioned that if the facts fit within one of these three scenarios, the contractor cannot invoke the government contractor defense to preempt state tort claims. *Id.*

The Court held that contractors may invoke the judicially-created defense *only* when “the state-imposed duty of care that is the asserted basis of the contractor’s liability . . . is *precisely contrary* to the duty imposed by the Government contract . . . ” *Id.* The Court cautioned that even in those instances, preemption is not automatic because it would be unreasonable to say that there is always a “*significant* conflict” between the state law and a federal policy. Instead, the Court found on the facts before it that the defense could be invoked because imposing tort liability laws for design defects on a government contractor that manufactured military equipment pursuant to reasonably precise specifications from the United States created a significant conflict with federal interests. However, even in the face of this significant conflict, the Court added an additional requirement: the contractor must have warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.⁹ *Id.*

⁹ *Boyle* has been extended outside the military procurement context by some circuits. See, e.g., *Hudgens v. Bell Helicopters*, 328 F.3d 1329, 1345 (11th Cir. 2003).

Until the majority's decision, federal circuit courts who have been asked by contractors to apply the government contractor defense have refused to do so if defendant failed to establish a *direct* conflict between its contractual duties and the duties imposed by state tort laws. For example, in *Malesko v. Correctional Svcs. Corp.*, 229 F.3d 374 (2nd Cir. 2000) (*rev'd on other grounds, Correctional Svcs. Corp. v. Malesko*, 122 S.Ct. 515 (2001)), an inmate at a federal "halfway house" sued the government contractor that operated that facility for allegedly violating his constitutional rights and causing him to suffer a heart attack by forbidding him from using the elevator to reach his fifth-floor room, and failing to refill his heart medication prescription. The Second Circuit held that the contractor could not invoke the defense because "[s]tripped to its essentials, the government contractor defense is to claim, 'The Government made me do it,'" and there was no evidence "that the government played any role in formulating or approving" the policies that led to the plaintiff's heart attack. *Malesko*, 229 F.3d at 382 (quoting *In re Joint E. & S. Dist. New York Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990) (internal quotes and cites omitted.)) This Court affirmed that the government contractor defense applied only "[w]here the government has directed a contractor to do the very thing that is the subject of the claim. . . . The record here would provide no basis for such a defense." *Correctional Svcs. Corp. v. Malesko*, 122 S.Ct. at 523, n.6. See also *Dorse v. Eagle-Picher Industries, Inc.*, 898 F.2d 1487

(11th Cir. 1990); *In re Hawaii Asbestos Cases*, 960 F.2d 806, 813 (9th Cir. 1992).

As noted by the dissent, “*Boyle* ha[d] never been applied to protect a contractor from liability resulting from the contractor’s violation of federal law and policy.” App. 52. The discretionary function exception to FTCA does not even bar suits *against the United States* for tortious conduct that violates binding federal law. *See, e.g., Berkovitz v. United States*, 108 S.Ct. 1954, 1958-59 (1988) (holding that “the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive.”)

Given that Respondents CACI and Titan were legally and contractually required to refrain from abusing detainees,¹⁰ and that CACI and Titan

¹⁰ The military regulations that governed interrogation in Iraq incorporate the Geneva Conventions, and prohibit any abuse of detainees. App. 160-61. Petitioners’ allegations set forth conduct that, if established at trial, would violate Article 147 of the Fourth Geneva Convention, which defines “grave breaches” of the Convention to include torture, murder, “inhuman treatment,” and “willfully causing great suffering or serious injury to body or to health.” App. 159. The Fourth Geneva Convention prohibits civilian detainees from being subjected to any “acts of violence and threats thereof,” or any “measure of brutality whether applied by civilian or military agents.” App. 156-57. The Convention forbids “[a]ny measures of such character as to cause the physical suffering” of civilian internees. App. 157.

provided no evidence that the United States authorized or approved their employees' violation of these legal and contractual duties, it was impossible for the majority to identify an actual conflict as required by *Boyle*. CACI and Titan were not prevented from complying with their contracts by imposition of state law standards, and they could have complied with federal law and contract without breaching any state tort standards. Forcing CACI and Titan to abide by tort law duties preventing them from beating and sexually assaulting defenseless civilian detainees would have promoted, not interfered with, legal and contractual compliance. Thus, the majority failed to follow *Boyle* when it immunized the contractor misconduct at Abu Ghraib prison, the very conduct that shamed this nation.

B. The Majority's "Battle-Field Preemption" Doctrine Fails To Adhere to the Constitution and Supreme Court Preemption Jurisprudence.

Instead of following *Boyle*, and identifying a direct conflict between state tort law and the defendants' contractual obligations, the majority held that there is a "per se" conflict because "the very purposes of tort law are in conflict with the pursuit of warfare." App. 16. The majority found "even in the absence of *Boyle* the plaintiffs' claims would be preempted . . . [because] states . . . constitutionally and traditionally have no involvement in federal wartime policy-making." App. 25. The majority found

Congress occupied the field and impliedly preempted any and all tort claims against contractors supporting the military in Iraq and Afghanistan. The majority cited as evidence Congress occupied the field: (1) the FTCA's combatant activities exception to the United States' waiver of sovereign immunity, and (2) the Constitution's delegation of foreign affairs and war making powers to the federal government.

The majority failed to follow this Court's recent affirmation that "the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," particularly in a field that States have traditionally occupied. *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009), quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The presumption against preemption is grounded in fundamental Constitutional law principles. See *Wyeth*, 129 S.Ct. at 1206-08 (Thomas, J., concurring in judgment); U.S. Const. art. I, §7, cls. 2-3; art. VI, cl. 2; amend. X. Our structure of government requires that the Federal Government demonstrate "respect for the States as 'independent sovereigns in our federal system' [which] leads [the Court] to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Wyeth*, 129 S.Ct. at 1195, n.3, quoting *Medtronic, Inc.*, 518 U.S. at 485.

1. The FTCA Combatant Activities Exception Does Not Occupy the Field Regarding Private Parties' Tort Liability.

“Implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution.” *Wyeth*, 129 S.Ct. at 1205-06 (Thomas, J., concurring in judgment). Such wandering is found in the majority’s FTCA holding. Indeed, the majority simply “reads into the Act something that is not there.” *United States v. Olson*, 126 S.Ct. 510, 512 (2005).

That is, the majority reads the FTCA’s “combatant activities” exception, 28 U.S.C. §2680(j), as a Congressional expression of a policy to eliminate tort from the battlefield, stating “the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield.” App. 15. The Court found “the policies of the combatant activities exception are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military’s control.” *Id.*

As the dissent explained, however, Congress expressly excluded contractors from the FTCA. The FTCA applies only to civil claims against the United States for injuries “caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U.S.C. §1346(b)(1), App. 141. The

statute excludes contractors from its scope. 28 U.S.C. §2671 (“the term ‘Federal agency’ . . . *does not include any contractor* with the United States.”) (emphasis added.) As the dissent held, “it is not plain that the FTCA’s policy is to eliminate liability when the alleged tortfeasor is a contractor rather than a soldier. That, after all, is *not* what the FTCA says.” App. 60 (citing *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991)). A provision of a statute that by its own terms does not apply to contractors cannot “occupy the field” regarding contractors’ liability in wartime.

Field preemption occurs only when there is “a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or when Congress acts in “a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Here, Congress cannot be reasonably inferred to have “occupied” a field (government contractors’ tort liability) that it expressly declined to enter. *C.f. Hines v. Davidowitz*, 312 U.S. 52, 55-57 (1941) (holding that “where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal

law, or enforce additional or auxiliary regulations”); *Pennsylvania v. Nelson*, 350 U.S. 497, 500 (1956) (holding that federal anti-sedition statute preempts state law, but notes that “the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct.”)

The FTCA does not even protect government employees, let alone government contractors, from tort liability. Congress passed a separate statute, the Westfall Act, to protect government employees from tort liability. That Act also excludes government contractors from its scope. The Westfall Act permits government employees to enjoin the United States immunities if, and only if, the Attorney General certifies that the employees acted within the scope of his office or employment. 28 U.S.C. §2679(d)(1), App. 143-44. Neither CACI nor Titan sought Westfall certification.

The majority ignores Congressional intent evidenced in the Westfall Act by bestowing on CACI and Titan an immunity that exceeds the conditional immunity available to government employees and soldiers who are able to establish that they acted within the scope of their employment. *See Wyeth*, 129 S.Ct. at 1199 (disregarding “an untenable interpretation of congressional intent”). As support for its reasoning, the majority cites *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), in which the Ninth Circuit relied on the FTCA combatant activities exception to

preempt claims against a government contractor. The facts there involved a compliant contractor, and a mistake made by the military itself, not by the contractor. The contractor did not engage in any wrongdoing, and complied with the terms of the government contract. However, the U.S. Navy used a weapons system built by the contractor when it mistakenly shot down an Iranian civilian aircraft. The Court found permitting tort claims to proceed would unduly burden the military, which had acted mistakenly but not wrongfully. The Court commented there is “no duty of reasonable care is owed to those against whom force is directed as a result of *authorized* military action.” *Koohi*, 976 F.2d at 1337 (9th Cir. 1992) (emphasis added.)

The court’s reasoning in *Koohi* was premised on the military as the actor, and acting in a lawful and authorized fashion by “firing a missile in perceived self-defense,” which is “a quintessential combatant activity.” 976 F.2d at 1333 n.5. Here, Petitioners’ claims are premised on contractor misconduct that is prohibited by contract and law. The court in *Koohi* did not reason that the combatant activities exception “occupied the field” regarding contractors’ liability, nor did it abandon *Boyle*’s fundamental requirement of a conflict between contractors’ state and federal duties. Rather, the Ninth Circuit identified a direct conflict between applying tort liability standards and the military’s ability to contract for the manufacture of weaponry.

In contrast, CACI and Titan employees were not combatants, and were prohibited from participating in combat in any way by the terms of the federal contract. Torturing unarmed civilians detained in a prison outside the battlefield is not combat.¹¹ As the Fourth Circuit stated in *United States v. Passaro*, 577 F.3d 207 (4th Cir. 2009), upholding a CIA contractor's conviction for fatally assaulting an Afghan prisoner,

[n]o true “battlefield interrogation” took place here; rather, Passaro administered a beating in a detention cell. . . . To accept [Passaro’s] argument would equate a violent and unauthorized “interrogation” of a bound and guarded man with permissible battlefield conduct. To do so would ignore the high standards to which this country holds its military personnel.

Id. at 218. *See also Al Shimari v. CACI Premier Technology*, 657 F. Supp. 2d 700, 720 (E.D.Va. 2009) (noting that “unlike soldiers engaging in actual combat, the amount of physical contact available to civilian interrogators against captive detainees in a secure prison facility is largely limited by law, and, allegedly, by contract”). *C.f. Johnson v. United States*, 170 F.2d 770 (9th Cir. 1948).

¹¹ Contrary to the majority’s assumption, detention centers are not synonymous with “the battlefield.” Indeed, detention centers or prisons have to be kept outside “the battlefield” under Article 83 of the Fourth Geneva Convention. App. 158 (“The Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war.”)

2. The Constitutional Delegation of Power Over War Making and Foreign Affairs to the Federal Government Does Not Provide a Basis for Immunizing Contractors from Tort Suit.

The majority relies on the Constitutional delegation of foreign affairs and war making power to the federal government as an independent basis for its “battle-field preemption.” See Article I, §10 of the U.S. Constitution (prohibiting States from raising armies and going to war, and entering into agreements with a foreign power). Unlike every implied preemption case based on the federal foreign affairs power that has come before this Court, however, the majority did not preempt a specific state law intruding on foreign policy or war making, but rather preempted the *entire body of common tort law*. Asking the federal judiciary to apply facially-neutral, common-law tort rules to CACI and Titan does not constitute the states becoming involved in “federal wartime policy-making” as is claimed by the majority. App. 25. The state laws at issue are common law torts, not state legislative initiatives designed to control the Executive’s conduct. As the dissent notes, “no precedent has employed a foreign policy analysis to preempt generally applicable state laws.” App. 57. See also Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1711 (1997).

The majority’s “battle-field preemption” amounts to nothing short of full immunity for all contractors

supporting the military during a time of war. The majority relies on *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) and *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). But in those cases, this Court struck down state legislation that directly challenged and conflicted with a clearly ascertainable, published federal law or agreement with a foreign sovereign. See *Garamendi*, 539 U.S. at 408-09 (preempting state legislation designed to force payment by defaulting insurers to Holocaust survivors in a manner contrary to an executive agreement); *Crosby*, 530 U.S. at 367 (preempting state law placing sanctions on doing business with Burma in excess of limitations enacted in federal statute).

These targeted state legislative forays into policymaking that threatened to disrupt relations with foreign sovereigns are not comparable to the body of common law tort at issue here. In *Garamendi*, for example, the Court noted the state law was “quite unlike a generally applicable ‘blue sky’ law,” *id.* at 425, such as a generally applicable tort law. As the dissent noted, App. 58, the Court has sharply limited preemption of state laws in the area of foreign affairs, characterizing *Garamendi* as nothing more than a “claims-settlement case[] involv[ing] a narrow set of circumstances,” *Medellin v. Texas*, 552 U.S. 491, 531 (2008).

The majority ignored precedents from this Court permitting claims arising during war to proceed under common law torts. See, e.g., *Mitchell v. Harmony*,

54 U.S. 115 (1851) (U.S. soldier may be sued for trespass for wrongfully seizing a citizen's goods while in Mexico during the Mexican War); *Ford v. Surget*, 97 U.S. 594 (1878) (soldier was not exempt from civil liability for trespass and destruction of cattle if his act violated the usages of civilized warfare); *The Paquete Habana*, 175 U.S. 677 (1900) (Court imposed damages for seizure of fishing vessels during a military operation).

The majority also ignored the fact that the Executive recently reaffirmed the use of the existing system of tort liability as one mechanism to deter misconduct from its hundreds of thousands of contractors and their employees who are supporting military operations in Iraq and Afghanistan. The reality is a far cry from the majority's attempt to suggest that military policy is being subjected to "fifty-one separate sovereigns."

First, Petitioners are not suing the military; they are suing CACI and Titan for conduct that the military did not authorize. Second, this Court has repeatedly recognized that state tort *remedies* may be useful to further federal standards of care. In *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984), in which this Court held "[f]ederal preemption of the standards of care can coexist with state and territorial tort remedies," and found that although the federal government had occupied the field of nuclear safety regulation, the federal government's "exclusive authority to set safety standards did not foreclose the use of state tort remedies" for those injured in nuclear

incidents. *Silkwood*, 464 U.S. at 253. The Court affirmed this holding in *Medtronic, Inc. v. Lohr*, 518 U.S. 496 (1996), holding that a statutory preemption clause did not deny states “the right to provide a traditional damages remedy for violations of common law duties when those duties parallel federal requirements.” *See id.* at 513 (O’Connor, J., concurring in part and dissenting in part) (state tort claims are not preempted “the extent that they seek damages for [defendant]’s alleged violation of federal requirements”). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519 (1992) (stating that “there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions.”); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 375 (3rd Cir. 1999).

This Court noted in *Silkwood* that its conclusion was reinforced by “Congress’ failure to provide any federal remedy for persons injured” as a result of violations of federal safety standards, because “[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.” 464 U.S. at 251. In cases where this Court has found preemption, it “does not normally preempt state law and simply leave the field vacant. Instead, it substitutes a federal common law regime.” App. 73, citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943). *See also Miree v. DeKalb County*, 433 U.S. 25, 32 (1977) (permitting private lawsuits premised on defendants’

breach of duties to the federal government, and noting that “such lawsuits might be thought to advance federal aviation policy by inducing compliance with FAA safety provisions.”¹²

C. The Majority Prevents the Military from Relying on Existing Tort Law Liability as a Deterrent To Prevent Contractor Misconduct.

Finally, this Court should issue the writ because the majority improperly substituted their policy preferences for the policy choices made by the military. It

¹² The majority’s “battle-field preemption” theory would prevent the application of federal common law, because the majority claims preemption even of international law, which would be the source of the applicable federal common law. *But see Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (“[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (noting that “it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination”); *The Nereide*, 9 Cranch 388, 423 (1815) (Marshall, C.J.) (“[T]he Court is bound by the law of nations which is a part of the law of the land”). *See also Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) (“[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.”)

is beyond dispute that the judiciary lacks the expertise to decide how best to wage war. Here, the military has promulgated policies and regulations that contradict the judicial view that the “very purposes of tort law are in conflict with the pursuit of warfare.” App. 16. In fact, the military uses the existing tort law system as a tool to deter misconduct by its many contractors. Department of Defense regulations explicitly invoke tort liability, warning that “[i]nappropriate use of force could subject a contractor or its subcontractors or employees to prosecution or *civil liability* under the laws of the United States and the host nation.” App. 167 (emphasis added.)

The defense contracting industry has tried to persuade the military to adopt the majority’s view that the battlefield is no place for tort law. But in 2008, the military rebuffed that effort, and instead reaffirmed the need for tort liability, stating: “The clause *retains the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors. . . .*” The military continued “to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, this rule should *not* send a signal that would invite courts to shift the risk of loss to innocent third parties.” App. 173. (emphasis added.)

The military viewed the existing judicial “government contractor defense” as having limited

application in Iraq and Afghanistan, where the majority of contracts are service contracts: “the public policy rationale behind *Boyle* does not apply when a performance-based statement of work is used in a services contract. . . .” App. 174. CACI’s and Titan’s contracts are such services contracts using performance-based statements of work. *See CACI J.A.* 323, 353.

The majority did not solicit input from the military before ruling that battlefield needs require preemption of the entirety of our state common law tort system. Instead, the majority found that CACI and Titan employees were integrated into the military chain of command, and therefore subject to battlefield preemption. As the dissent explains, the majority’s attempt to distinguish between contractors in the chain of command subject to battlefield preemption, and contractors outside the chain of command not subject to preemption fails because the Department of Defense’s “position is that contractors are *not* within the military chain of command.” (emphasis in original) App. 63. *See* App. 76 (corporations required to supervise their employees; corporate employees are “not under the direct supervision of military personnel in the chain of command”); App. 77 (“Management of contractor activities is accomplished through the responsible contracting organization, not the chain of command. Commanders do not have direct control over contractors or their employees”); App. 77-78 (“Maintaining discipline of contractor employees is the *responsibility of the contractor’s*

management structure, not the military chain of command. . . . It is the contractor who must take direct responsibility and action for his employee's conduct."); App. 78 (stating that "[c]ontract employees are disciplined by the contractor" and that "[c]ommanders have no penal authority to compel contractor personnel to perform their duties"). The military's own investigations of the contractors' misconduct at Abu Ghraib expressly found that CACI interrogators were not in the military chain of command. CACI JA 464-65 (*See also* Vice Adm. Albert T. Church, Review of Department of Defense Interrogation Operations (2005) at 311 ("the relationship between a contract interrogator and military intelligence leadership is not a direct one. If there is any disagreement regarding quality of work or interpretation of the contract's terms, the dispute must be mediated by the contracting officer (or his or her officially designated on-site representative) and the senior contractor employee present.") The majority also ignored the district court's findings of fact that CACI employees were supervised by CACI's own site manager at Abu Ghraib, who had the full authority to forbid, at pain of termination, CACI employees from carrying out interrogations that violated the law or CACI's code of ethics. App. 99-101.

The majority's finding that civilian contractors are within the military chain of command conflicts with this Court's recognition in *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) that "[t]he military constitutes a specialized community governed by a separate

discipline from that of the civilian.” *See also United States v. Brown*, 348 U.S. 110, 112 (1954); *Parker v. Levy*, 417 U.S. 733, 743 (1974); *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). *See also McMahon v. Presidential Airways*, 502 F.3d 1331, 1348 (11th Cir. 2007) (noting that “a private contractor is not in the chain of command.”)

The majority should be reversed because it failed to defer to the military’s policy choice to place corporate employees outside the chain of command, and adopted the very immunity the military refused to adopt. The majority ignored the findings of fact made by the military and the district court on corporate employees being outside the military chain of command. The majority, by adopting the “battlefield preemption” doctrine, forced the military to integrate corporate employees into the military chain of command when the military has made a valid policy decision not to do so. Corporations sending employees to Iraq or Afghanistan likely will cease providing supervision, as their legal exposures arising from employee misconduct have been eliminated by the majority’s “battlefield preemption.” This Court needs to review the majority’s decision in order to prevent policy-making by the judicial branch that greatly burdens the military by shifting the duty to supervise more than 200,000 contractor employees from the contractors to the military.

CONCLUSION

This Court should issue the writ. The majority created a circuit split on the critical issue of whether victims of torture and other war crimes may proceed against private parties. The majority created a novel “battle-field preemption” that failed to adhere to the limitations set forth in *Boyle*, and ignored the preemption jurisprudence culminating in *Wyeth*. The majority’s “battle-field preemption” created significant practical problems, as it exempted more than 200,000 corporate employees into the chain of command over the objection of the military and in contradiction to *Orloff*, *Brown*, *Parker*, *Schlesinger* and *Chappell*. This Court should issue the writ and prevent such judicial activism from overruling a rational military choice to use existing tort liability as one tool to deter corporate misconduct.

Respectfully submitted,

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