No. 09-1313

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

BRIEF OF *AMICI CURIAE* PROFESSORS OF FEDERAL COURTS, INTERNATIONAL LAW, AND U.S. FOREIGN RELATIONS LAW IN SUPPORT OF PETITIONERS

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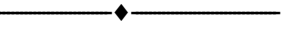
INTEREST OF *AMICI CURIAE*

This brief of *amici curiae* is respectfully submitted in support of petitioners by law professors with expertise in federal courts, international law, and U.S. foreign relations law.[1] Many of the *amici* have been honored to appear as *amici* in other cases before this Court. *Amici* submit this brief because they believe the present case raises issues of vital importance to proper implementation of the Alien Tort Statute (ATS), the Federal Tort Claims Act (FTCA), and federal immunity defenses, areas in which *amici* have considerable scholarly expertise. In particular, *amici* believe that the D.C. Circuit opinion in this case manifests a fundamental misunderstanding of the scope of affirmative defenses that are relevant to petitioners' ATS claims.

A list of the *amici* appears in the Appendix.



SUMMARY OF ARGUMENT

The words "Abu Ghraib" conjure horrific images that have left a deep stain on this nation's honor and

[1] Counsel of record received at least ten days notice of the intent to file this brief. Electronic messages from all counsel consenting to its filing are being sent with this brief to the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person other than *amicus curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

reputation. Petitioners in this case allege that Titan Corp. is partially responsible for the abuses committed at Abu Ghraib. The D.C. Circuit attempted to shield Titan from liability by invoking a new federal common law immunity defense that has no basis in any federal statute or Supreme Court decision. The Supreme Court should grant the petition for certiorari. If Titan is going to escape liability for its role in the Abu Ghraib scandal, it should not be because a lower federal court created a new judge-made defense that extends the federal government's sovereign immunity to private contractors, in contravention of clear statutory text denying immunity to those contractors.

Petitioners in this case raised state tort law claims as well as federal common law claims under the Alien Tort Statute (ATS). This brief addresses only the ATS claims. The D.C. Circuit rejected petitioners' ATS claims for two reasons. The Court held, first, that petitioners failed to state a valid claim under the ATS because the law of nations does not bind private actors, and second, that their ATS claims are preempted by the government contractor defense. This brief does not address the question whether the law of nations binds private actors. This *amicus* brief demonstrates that – assuming petitioners have a valid claim against Titan under the ATS – there is no recognized affirmative defense barring that claim.

If Titan has a valid affirmative defense to petitioners' ATS claims, it must either be a statutory

defense or a federal common law defense. The only relevant statutory defense is the sovereign immunity defense codified in the Federal Tort Claims Act (FTCA). However, the FTCA expressly denies sovereign immunity to private contractors, such as Titan. Therefore, Titan has no statutory defense because it is not shielded by the government's sovereign immunity. The only relevant common law defense is the government contractor defense announced by this Court in *Boyle v. United Technologies Corp*. However, *Boyle* establishes a preemption defense, not an immunity defense. Federal preemption defenses apply only to state law claims, not federal claims. Even assuming that the government contractor defense bars petitioners' state law claims, it cannot bar petitioners' ATS claims because those are federal common law claims. A federal common law defense cannot "preempt" a federal common law claim: the doctrine of preemption is simply inapplicable in this context.

The D.C. Circuit relied on a new, never-before-recognized federal common law immunity defense by mixing elements of federal sovereign immunity with the *Boyle* preemption defense. This Court should not countenance the lower court's attempt to create a new judge-made immunity defense to shield Titan from liability for the egregious war crimes committed at Abu Ghraib. Neither the statutory sovereign immunity defense nor the common law government contractor defense bars petitioners' ATS claims.

———♦———

ARGUMENT

I. Federal Sovereign Immunity Does Not Shield Titan from Liability

Almost two centuries ago, Chief Justice Marshall declared "that no suit can be commenced or prosecuted against the United States" without its consent. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821). This Court has affirmed this principle in numerous cases since then. *See, e.g.*, *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Lee*, 106 U.S. 196, 205 (1882); *Hill v. United States*, 50 U.S. (9 How.) 386, 389 (1850); *see also* Larry W. Yackle, Federal Courts 411-17 (3rd ed. 2009) (discussing federal sovereign immunity). However, this Court has never held that the federal government's sovereign immunity shields private contractors from liability for tortious conduct.

Congress codified the rules governing federal sovereign immunity by enacting the Federal Tort Claims Act (FTCA) in 1946. Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C.). The original statute stated that the term "'Federal agency' includes the executive departments and independent establishments of the United States . . . *Provided*, That this shall not be construed to include any contractor with the United States." § 402(a), 60 Stat. at 842-43. By specifically excluding government contractors from the definition of "federal agency," Congress made it abundantly clear that the federal government's sovereign

immunity does not shield private contractors from liability for tortious conduct. This statutory rule codified the understanding that has prevailed since Marshall's time: federal sovereign immunity protects the federal government, not government contractors.

In the present case, the D.C. Circuit stated that Titan would be protected by sovereign immunity if it "acted under color of law." *Saleh v. Titan*, 580 F.3d 1, 15-16 (D.C. Cir. 2009). The FTCA specifies that "the term 'Federal agency' includes . . . 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. § 2671 (2006). Thus, the D.C. Circuit's statement implies that, if Titan was acting under color of law, it would be covered by the statutory reference to "corporations primarily acting as instrumentalities or agencies." *Id*. However, nothing could be further from the truth.

It is instructive to compare the present case to *United States v. Orleans*, 425 U.S. 807 (1976). *Orleans* presented the question whether the Warren-Trumbull Council for Economic Opportunity, Inc., a nonprofit corporation, was "a federal instrumentality or agency for purposes of Federal Tort Claims Act liability." *Id*. at 809. It was undisputed that the Warren-Trumbull Council "was created for the purpose of carrying out" a federal statutory program; "received no funds from any source other than the" federal government; and "conducted only programs formulated and funded by the federal government." *Id*. at 811 (internal quotations omitted). In short, the

corporation in *Orleans* was entirely dependent on federal funding and its sole mission was to implement federal programs. Even so, the Court held that it was not a federal agency or instrumentality within the meaning of the FTCA. *Id*. at 819.

In contrast to the Warren-Trumbull Council, Titan is a genuine independent contractor, not a corporation created for the purpose of implementing federal programs. In March 2005, more than a year after the key events at Abu Ghraib, Titan pled guilty to violating the Foreign Corrupt Practices Act for "making $2.1 million in payments to the election campaign of Mathieu Kerekou, president of the West African nation of Benin." Paul Burnham Finney, *Itineraries; Shaking Hands; Greasing Palms*, New York Times, May 17, 2005. Shortly thereafter, L-3 Communications acquired Titan "for about $2 billion in cash." Andrew Ross Sorkin, *L-3 to Acquire Titan, Expanding Share of Military Market*, New York Times, June 4, 2005. L-3 Communications was formed in 1997 when Lockheed Martin decided to form "an independent company out of 10 noncore high-technology business units . . . [that] produce products and components for communications customers." Company News; *Lockheed Martin Units Becoming Independent Company*, New York Times, Feb. 4, 1997. According to L-3's own web site, the company provides products and services not only to the U.S. Government, but also "to military and commercial customers in several diverse niche markets" and to "allied foreign governments." L-3

Communications, Electronic Systems, http://www.l-3com.com/business-segments/businesssegments.aspx?id=4 (last visited May 20, 2010); L-3 Communications, Government Services http://www.l-3com.com/business-segments/businesssegments.aspx?id=3 (last visited May 20, 2010). In sum, L-3 Communications, which now owns Titan, was not created for the purpose of carrying out federal programs; it receives funds from a variety of sources other than the federal government; and it conducts numerous activities that are not federally funded.[2] Given that the Warren-Trumbull Council, the corporation at issue in *Orleans*, was not a federal agency or instrumentality for purposes of the FTCA, it necessarily follows that L-3/Titan does not qualify as a federal agency or instrumentality under the FTCA. Therefore, contrary to the D.C. Circuit's suggestion, even if Titan was acting under color of law – a point on which *amici* offer no opinion – Titan would still not have a viable sovereign immunity defense under the FTCA.

The D.C. Circuit mistakenly relied on its own prior decision in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), to support its conclusion that Titan would be entitled to sovereign immunity if it was acting under color of law. *See Saleh*, 580 F.3d at 15-16. In *Sanchez-Espinoza*, plaintiffs raised claims under the ATS against President Reagan, the

[2] Under Rule 201 of the Federal Rules of Evidence, this Court is entitled to take judicial notice of the facts about L-3 and Titan summarized in this paragraph.

Secretary of State, the Secretary of Defense, the CIA Director, and other senior U.S. government officials. *Sanchez-Espinoza*, 770 F.2d at 205 n.1. Then-Judge Scalia, writing for the court, held that ATS claims for money damages against government officials for actions taken in their official capacities were barred by federal sovereign immunity. *Id*. at 207. However, *Sanchez-Espinoza* did not involve any claim against a private military contractor.[3] Therefore, *Sanchez-Espinoza* provides no support for Titan's argument that it is entitled to sovereign immunity under the FTCA.

II. The Government Contractor Defense Does Not Apply to Petitioners' ATS Claims

The D.C. Circuit relied heavily on this Court's decision in *Boyle v. United Techs. Corp*., 487 U.S. 500 (1988), to support its holding that petitioners' state

[3] Plaintiffs in *Sanchez-Espinoza* did raise claims against "two organizations – Alpha 66, Inc., and Bay of Pigs Veterans Association, Brigade 2506, Inc. – which are alleged to operate paramilitary training camps in the United States." 770 F.2d at 205. The court said in a footnote that, insofar as those organizations "were acting as agents of the United States . . . their actions are arguably brought within . . . our ensuing analysis pertaining to action by officers of the United States," thereby implying that those organizations might be shielded by the government's sovereign immunity. *Id*. at 207 n.4. However, the court did not hold that the two named organizations were entitled to sovereign immunity, nor did it state or imply that private contractors are entitled sovereign immunity under the FTCA.

tort law claims are preempted by the government contractor defense. *See Saleh*, 580 F.3d at 5-13. In that context, the lower court correctly noted that the government contractor defense is a preemption defense, not an immunity defense. *See id*. at 5 ("[P]laintiffs' D.C. tort law claims are preempted. . . ."); *id*. at 7-8 ("[A] significant conflict exists between the federal interests [at stake] and D.C. tort law. . . ."); *id*. at 7 ("[T]he instant case presents us with a more general conflict preemption. . . ."). Similarly, this Court in *Boyle* made clear that the government contractor defense is a preemption defense, not an immunity defense. *See Boyle*, 487 U.S. at 504 (noting that certain "areas, involving uniquely federal interests, are so committed . . . to federal control that state law is pre-empted and replaced, where necessary, by federal law" (internal quotations and citation omitted)); *id*. at 507 (noting that preemption occurs where "a significant conflict exists between an identifiable federal policy or interest and the operation of state law" (internal quotations and citation omitted)); *id*. at 512 ("[S]tate law which holds Government contractors liable for design defects in military equipment does in some circumstances present a significant conflict with federal policy and must be displaced."). Indeed, the Court in *Boyle* explicitly rejected the dissent's allegation that the Court was extending "the immunity of federal officials . . . to nongovernment employees." *Id*. at 505 n.1.

After holding that the government contractor defense preempted petitioners' state law claims, the D.C. Circuit in *Saleh* went on to hold that the same government contractor defense preempted petitioners' ATS claims. *Saleh*, 580 F.3d at 16 ("If we are correct in concluding that state tort law is preempted on the battlefield . . . the application of international law to support a tort action on the battlefield must be equally barred."). Unfortunately, the lower court's analysis conflates the fundamental distinction between a preemption defense and an immunity defense. Immunity defenses apply only to particular types of defendants. State sovereign immunity protects state governments and agencies. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Federal sovereign immunity protects the federal government and its agencies. *See* 28 U.S.C. § 2671. Foreign sovereign immunity protects foreign governments. *See* 28 U.S.C. § 1604; *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007). Official immunity doctrines protect government officers. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In sum, the availability of an immunity defense hinges on the identity of the defendant.

In contrast, the availability of a preemption defense does not depend on the identity of the defendant; it hinges on the existence of some type of conflict between federal law and state law. Typically, a defendant raises a federal preemption defense in response to a state law claim. *See, e.g.*, *Wyeth v.*

Levine, 129 S.Ct. 1187 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). *Amici* are not aware of any case in which this Court has upheld a federal preemption defense to a *federal* claim.

This Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), makes clear that plaintiffs' ATS claims are federal claims, not state law claims. Under the *Sosa* framework, "the norm that is enforced in ATS litigation comes from international law . . . [but] domestic, federal common law" provides the source of the plaintiff's private right of action. William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 Rutgers L. J. 635, 639 (2006). Hence, ATS claims are properly characterized as federal common law claims, inasmuch as the right of action is a creature of federal common law. *See Sosa,* 542 U.S. at 729 (noting that the Alien Tort Statute is one of the "limited enclaves in which federal courts may derive some substantive law in a common law way"); *id*. at 732 (stating that federal courts may "recognize private claims under federal common law for violations of . . . international law norm[s]"); *see also* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 Harv. L. Rev. 869, 873 (2007) ("The Court in *Sosa* held that the ATS authorized federal courts to recognize federal common law causes of action for a narrow class of CIL violations."); Beth Stephens, *Sosa v. Alvarez-Machain: The Door is Still Ajar for Human Rights Litigation in U.S. Courts*, 70 Brooklyn L. Rev.

533, 556 (2004-05) ("*Sosa* confirmed that federal courts adjudicate ATS claims as an exercise of their power to recognize federal common law claims for violations of certain international law norms."). Since the government contractor defense is a federal preemption defense, *see Boyle*, 487 U.S. at 504-12, and since federal preemption defenses apply only to state law claims, not federal claims, Titan cannot invoke the government contractor defense to defeat petitioners' federal common law claims under the ATS.

The D.C. Circuit tried to circumvent this problem by noting that "federal executive action is sometimes treated as 'preempted by legislation,'" *Saleh*, 580 F.3d at 16, thus suggesting, by way of analogy, that a federal statute could preempt petitioners' federal common law claims. *Amici* agree that, in theory, a federal statutory defense could defeat a federal common law claim. A federal defense can preempt a state law claim because federal law is hierarchically superior to state law under the express terms of the Supremacy Clause. U.S. Const. art. VI. *See* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 250-54 (2000). For similar reasons, a federal statutory defense can defeat a federal common law claim because a federal statute is hierarchically superior to federal common law. *See, e.g.*, *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313 (1981) ("We have always recognized that federal common law is 'subject to the paramount authority of Congress.'") (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 107 (1972)

("[N]ew federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance."). However, as discussed above, Titan does not have a viable statutory defense under the FTCA. *See* Part I, *supra*. Moreover, there is no other federal statute that provides Titan a viable defense to petitioners' ATS claims.

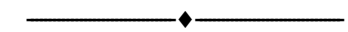
Broadly speaking, any viable preemption defense relies on the *lex superior* principle. That principle states that a conflict between a higher-ranking law and a lower-ranking law must be resolved in favor of the higher-ranking law. Thus, a preemption defense is available if, and only if, a defendant can identify a conflict between a lower-ranking law that provides the basis for a plaintiff's claim and a higher-ranking law that shields defendant from liability. Titan has failed to identify any such conflict in this case. As noted above, this Court's decision in *Sosa* makes clear that petitioners' ATS claims are federal common law claims. *See Sosa,* 542 U.S. at 729-32. Similarly, this Court's decision in *Boyle* makes clear that the government contractor defense is a federal common law defense. *See Boyle*, 487 U.S. at 504 ("[S]tate law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts – so-called 'federal common law.'"). Hence, assuming that there is a conflict between petitioners' ATS claims and the government contractor defense – a question on which *amici* express no view – it would be a conflict between one federal common law rule and another federal

common law rule. Clearly, there is no hierarchical, *lex superior* relationship between two federal common law rules. Therefore even if the government contractor defense bars petitioners' state law claims, that defense cannot bar petitioners' ATS claims because the federal common law rule creating the government contractor defense is not hierarchically superior to petitioners' federal common law causes of action under the ATS.

The D.C. Circuit attempted to skirt this insurmountable problem by suggesting that Titan's preemption defense is "drawn from congressional stated policy" embodied in the FTCA. *Saleh*, 580 F.3d at 16. However, for the reasons noted above, the FTCA itself does not provide Titan a statutory defense to any of petitioners' claims because the FTCA protects only government defendants, not private contractors. Moreover, absent a statutory defense, the most that Titan can squeeze out of the FTCA is a federal common law defense based on congressional policies; this is the government contractor defense associated with *Boyle*. But that federal common law defense cannot defeat petitioners' federal common law claims because there is no *lex superior* relationship between the government contractor defense and the ATS claims.

In sum, the D.C. Circuit attempted to shield Titan from liability by invoking a new, never-before-recognized federal common law immunity defense

that blends elements of the *Boyle* preemption defense with the statutory sovereign immunity defense codified in the FTCA. However, federal courts are not free to create new defenses by mixing ingredients the way a bartender mixes drinks. Titan does not have a viable sovereign immunity defense under the FTCA because it is a government contractor, not a government agency. Titan does not have a viable preemption defense under *Boyle* because petitioners' ATS claims are federal claims, not state claims. This Court should firmly reject the D.C. Circuit's misguided attempt to shield Titan from liability by blending elements of two recognized affirmative defenses, neither one of which, by itself, provides Titan a viable defense to petitioners' ATS claims.



CONCLUSION

This Court should grant the petition for certiorari. The Court should not permit a lower federal court to create a new federal common law defense for the sole purpose of immunizing Titan from liability for the egregious torts committed by its employees at Abu Ghraib.

Respectfully submitted,

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