No. 24-924

IN THE

Supreme Court of the United States

WINSTON TYLER HENCELY,

Petitioner,

v.

FLUOR CORPORATION; FLUOR ENTERPRISES, INC.; FLUOR INTERCONTINENTAL, INC.; FLUOR GOVERNMENT GROUP INTERNATIONAL, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF VETERANS OF FOREIGN WARS AND IRAQ AND AFGHANISTAN VETERANS OF AMERICA IN SUPPORT OF PETITIONER

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March 28, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*

The Veterans of Foreign Wars of the United States (VFW) is a congressionally chartered veterans service organization established in 1899 that, with its Auxiliary, represents over 1.5 million members.[1] Since the VFW's establishment, millions of members have served their country in forward operating bases, combat theaters, war zones, and other locations, including Afghanistan and, specifically, Bagram Airfield, where the tragic events underlying this petition occurred.

Iraq and Afghanistan Veterans of America (IAVA) is a nonprofit and nonpartisan organization dedicated to advocating on behalf of post-9/11 generation veterans and their families. It is the first and largest veterans service organization dedicated exclusively to current and former voluntary servicemembers. Its members comprise more than 425,000 active servicemembers, veterans and civilian supporters across all 50 states. IAVA's members have served their country in, among other places, Afghanistan, including Bagram Airfield.

The VFW and IAVA (collectively "*amici*") share a significant interest in the issues presented by this petition. Due to the surge in the use of private contractors over the past two decades, *see* Heidi M. Peters, Cong. Rsch. Serv., R44116, *Department of Defense: Contractor and Troop Levels in Afghanistan and Iraq: 2007-2020* 1 (2021), *amici's* members

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[1] Pursuant to Supreme Court Rule 37.2, ten days before this brief was due, *amici* notified counsel of record for the parties of its intention to file this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief.

increasingly work with the personnel of private companies like Respondents. During their service in theaters like Afghanistan, Iraq and elsewhere, *amici*'s members understand – and have lived – the difference between true "combatant activities" (like firing weapons and dodging roadside bombs) and everyday base-support services (like fixing cars).

For this reason, the dimensions of the federal common-law preemption doctrine, first announced in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), profoundly affect the interests of *amici*'s members. Broadly, the very existence of this non-statutory, judicially crafted doctrine naturally influences any government contractor's incentives to exercise care in the discharge of its duties. More specifically, the lower federal courts' unguided extension of *Boyle* from its modest "indirect preemption" origins (relying on the FTCA's "discretionary function" exception to bar certain "design defect" claims) to something more akin to "field preemption for combatant activities," carries vast implications for the safety and security of America's servicemembers. This is especially true for injuries caused "inside the wire," the place where service-members ought to be (and feel) most secure. Finally, in light of the widely acknowledged 3-1-1 circuit split over the contours (and limits) of "combatant activities" preemption, the ability of servicemembers (and their families) to recover for life-altering injuries (or death) attributable to a government contractor's default can turn entirely on an unacceptable serendipity: namely the circuit in which the contractor happens to be amenable to suit.

That serendipity is especially unacceptable in a case like this one. ***Before the decision below, no federal appellate court had ever relied on this judicially***

crafted "combatant activities" extension of* Boyle *to preempt in their entirety the state-law tort claims of an injured or deceased American servicemember. Whatever *Boyle*'s proper contours, surely it cannot extend to an American servicemember's injuries sustained "inside the wire" and traceable to companies that, according to the Army's own investigators, were derelict in their duty. That dereliction of duty includes inexplicably allowing an employee to construct a suicide vest "inside the wire" with tools and equipment that Respondents never should have allowed him to access.

Confusion among the lower federal appellate courts about *Boyle* preemption and its relationship to "combatant activities" has persisted far too long and, thereby, endangered the very lives of the valorous servicemembers who serve this country. *Amici* implore this Court to resolve that confusion and, thereby, ensure that the lower court's unprecedented extension of *Boyle* does not jeopardize the life or health of another American servicemember or upend the lives of another servicemember's family. If "combatant activities" preemption truly extends so far, Congress, not the courts, should make that value-laden decision.

Otherwise, courts like the one below will continue to give "improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress pursuant to the Constitution . . . ." *Wyeth v. Levine*, 555 U.S. 555, 604 (2009) (Thomas, J., concurring); *accord Va. Uranium v. Warren*, 587 U.S. 761, 778 (2019) (plurality opinion) (Gorsuch, J., joined by Thomas & Kavanaugh, JJ.) ("No more than in field preemption can the Supremacy Clause be deployed here to elevate abstract and unenacted legislative desires above state law; only federal laws 'made in pursuance of' the Constitution, through its prescribed

process of bicameralism and presentment, are entitled to preemptive effect.").

SUMMARY OF ARGUMENT

Two reasons, in addition to the ones advanced by Petitioner, support granting this petition.

First, the petition raises issues of critical importance to servicemembers and their families. Since *Boyle*, the military's use of private contractors has exploded. While media reports train on their activities in Afghanistan and Iraq, these private companies operate in virtually every continent. Their activities run the gamut from support services "inside the wire" of a base (like latrine maintenance and mess tent operations) to integrated services "outside the wire" of a base (like supplying trucking convoys or ferrying servicemembers over hostile airspace). Given the scale and diversity of these operations, civil suits for injuries or death to servicemembers regularly arise and prompt questions about whether *Boyle* preemption, if it encompasses "combatant activities," precludes such suits. Yet the jurisprudence is a mess – construing "combatant activities" to preclude some suits for injuries (or death) occurring "inside the wire" of a base yet permitting others for injuries (or death) occurring "outside the wire." The resulting confusion leaves injured servicemembers and the families of dead servicemembers at a total loss about whether (and under what circumstances) they can recover for harm traceable to a contractor's negligence. This petition offers this Court a clean vehicle by which to bring some desperately needed order to this jurisprudential jumble.

Second, alongside the 3-1-1 split described by the Petitioner, the decision below implicates additional disagreement over how *Boyle*'s framework applies in

the context of "combatant activities." Specifically, the second step of that framework requires courts to identify the relevant federal interest.[2] On this analytic step, federal appellate courts have articulated at least three different conceptions, in some cases expressly rejecting each other's views.[3] At the same time, some of those same federal courts, despite articulating different interests, ultimately derive the same test.[4] This sort of legal guesswork runs afoul of this Court's admonition against judicial policy making masquerading as Supremacy Clause jurisprudence when the preemption analysis is completely untethered from the actual language of a federal statute. Worse yet, the resulting uncertainty leaves injured service-members and their families to play guessing games about whether they can recover for injuries or death caused by the errors and omissions of private companies.

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[2] *Boyle*, 487 U.S. at 506-07.

[3] *Compare Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992) (describing the federal interest solely by reference to potential plaintiffs), *with Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009) (framing the federal interest to eliminate tort from the battlefield), *and Badilla v. Midwest Air Traffic Control Serv. Inc.*, 8 F.4th 105, 128 (2d Cir. 2021); *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 480 (3d Cir. 2013); *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 348 (4th Cir. 2014) (describing the federal interest as foreclosing state regulation of military battlefield conduct and conditions).

[4] *Compare In re KBR*, 744 F.3d at 348, *and Harris*, 724 F.3d at 480, *with Badilla*, 8 F.4th at 128.

ARGUMENT

I. The petition raises issues of critical importance to America's servicemembers and veterans.

Over the course of its history, the Department of Defense (DOD) has utilized contractors to assist with a broad array of operations. *See* Dan B. Dobbs et al., *The Law of Torts* § 352 (2d ed. April 2024 update). Between 2001 and 2020, contractors frequently accounted for 50% or more of the total DOD presence in Iraq and Afghanistan.[5] In Fiscal Year (FY) 2022, DOD allocated over $415 billion to federal contracts.[6] The following year, DOD utilized approximately 972,000 total prime and subprime contractor full-time equivalents within four service groups: logistics management services, equipment related services, knowledge-based services, and electronics and communications services.[7]

Those private contractors operate in a variety of theaters. The U.S. Central Command (USCENTCOM) publishes quarterly census reports on contractors employed through DOD-funded contracts in its area of responsibility (AOR), which includes Afghanistan, Syria, and Iraq.[8] As of the most recent report in January 2025, USCENTCOM approximates there are 19,671 contractor personnel supporting the DOD in the AOR.[9]

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[5]Alexandra G. Neenan, Cong. Rsch. Serv., IF10600, *Defense Primer: DOD Contractors* 2 (2024).

[6] *Id.* at 1.

[7] *Id.*

[8] *Id.* at 2.

[9] USCENTCOM, *Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility* (2025).

While USCENTCOM's AOR perhaps represents the most familiar theater due to media accounts and reported case law (discussed below), contractors operate in other theaters too. Published reports identify contractors in virtually every continent and on bases ranging from Camp Casey on the Korean Peninsula to Ramstein Air Base in Germany.[10]

In these and other theaters, employees of these private companies perform a host of functions. For example, that work falls into some of the following categories: logistics and transportation, intelligence analysis, linguistics, providing security escorts, protecting fixed locations, guarding traveling convoys, and training police and military personnel.[11] A further review of caselaw involving government contractors reveals an even broader array of activities. *See generally* James Lockhart, *Construction and Application of the Combatant Activities Exception to Federal Tort Claims Act, 28 U.S.C.A. § 2680(j)*, 23 A.L.R. Fed. 2d 489. These include "on base" services like waste management, water treatment, oversight of the mess tents, and maintenance of vehicles.[12] They also include "off base"

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[10] *See e.g.* DOD, *Military Installations USAG Yongsan-Casey: Installation Details* (last visited March 25, 2025), https://installations.militaryonesource.mil/in-depth-overview/usag-yongsan-casey (analyzing contractors at Camp Casey); DOD, *Contracts for Jan. 15, 2020: Air Force* (last visited March 26, 2025), https://www.defense.gov/News/Contracts/Contract/Article/2058353/ (analyzing contractors at Ramstein Air Base).

[11] Neenan, CRS, *Defense Primer* 1-2.

[12] *See, e.g., Cloyd v. KBR, Inc.*, 536 F. Supp. 3d 113, 126 (S.D. Tex. 2021) (noting the company typically performed operations and maintenance, laundry, water and ice production and delivery, firefighting, fuel delivery and waste management); *In re KBR*, 744 F.3d at 339 (contractor involved in water treatment); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 1342823, at *1 (S.D.

services like the provision of transportation services and the design of missiles and other weapons systems.[13]

Unsurprisingly, then, the last two decades have spawned an array of lawsuits arising from the injury (or death) of American servicemembers. Yet the expansion of *Boyle* from its modest origins (borrowing the FTCA's discretionary function exception to preclude a design defect claims) to a more sweeping preemption doctrine grounded in "combatant activities" has given rise to an unprincipled jurisprudential jungle. The resulting legal chaos leaves injured servicemembers and the families of dead servicemembers clueless about whether (and under what circumstances) they can recover for losses traceable to contractor negligence. Servicemembers and their families are desperate for clarity, so, circuit splits aside, the sheer importance of this recurring legal issue justifies this Court's review.

A. Servicemembers understand the difference between true "combatant activities" and everyday support services provided by private contractors.

Extending the definition of "combatant activities," as the lower court did, to include federal contractors

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Tex. May 16, 2006) (unreported opinion) (contractor involved in mess tent operations); *Lessin v. Kellogg Brown & Root*, No. CIVA H-05-01853, 2006 WL 3940556, at *1 (S.D. Tex. June 12, 2006) (contractor engaged in inspection and maintenance of vehicles).

[13] *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1318 (M.D. Fla. 2006) (contractors engaged in air transportation and operational support services); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1490 (C.D. Cal. 1993) (contractor engaged in missile manufacturing); *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948) (contractor engaged in supplying ammunition to fighting vessels).

providing on-base support services underscores a fundamental misunderstanding of military force composition and the modern battlefield, thereby diluting the meaning of combat service and diminishing the unique sacrifices made by servicemembers. While contractors play an important role in supporting the military,[14] they are not servicemembers.[15]

The distinction between servicemembers and private contractors is meaningful, particularly where combat is involved. Private contractors like Fluor, for instance, are considered "force multipliers" for the military—not because they perform combat functions but because they perform off-battlefield functions, thereby "freeing up uniformed personnel to conduct combat operations."[16] Under domestic and international law, contractor personnel engaged in authorized activity are not "combatants"[17] – at best, they are conferred status as

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[14] *See* Heidi M. Peters, Cong. Rsch. Serv., R43074, *DOD's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* 1 (2013) (explaining contractors provide expertise in specialized fields, provide a surge capability, and deliver critical support to specific military needs.)

[15] *See* Neenan, CRS, *Defense Primer* 1 ("The term 'contractor' does not refer to military servicemembers, civilian DOD career employees, or civilian political appointees.").

[16] Peters, CRS, *DOD's Use of Contractors to Support Military Operations* 3.

[17] *See* DOD, *Instruction 1100.22: Policy & Procedures for Determining Workforce Mix,* Encl. 4, ¶ 2.a.(1)(b) (December 1, 2017) (explaining that DOD civilians and contractors are not combatants); DOD, *Dictionary of Military and Associated Terms* (March 2017) (defining "combatant command (command authority)" to mean "[n]ontransferable command authority . . . over assigned forces involving . . . giving authoritative direction over all aspects of military operations"; defining "combat power" to mean "[t]he total means of destructive and/or disruptive force that a military unit/formation can apply against the opponent at a given time").

"contractors authorized to accompany the force" – and, as such, cannot lawfully engage in "combat functions" or "combat operations."[18]

Service in the armed forces entails distinct responsibilities. Veterans who have engaged in combat while serving in the military have done so under the oath of enlistment or commission, placing themselves in harm's way as part of their sworn duty to the nation.[19] Their service involves inherent risks,

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[18] *See* DOD, *Instruction 3020.41: Operational Contract Support Outside the United States* ¶ 3.9.a(b)(1) (November 27, 2024) (explaining defense contractor personnel with CAAF status may be characterized as "persons authorized to accompany the armed forces"); *id.* ¶ 3.15.d(4)(b) (noting "[c]ontractor personnel cannot be forced to be armed"); *id.* ¶ 3.5.a(1) (listing federal laws and regulations that "bar contracting for the performance of inherently governmental functions and duties"); DOD, *Instruction 1100.22,* Encl. 4, ¶ 1.c.(1)(b) (explaining "combat operations" are inherently governmental because they "entail the exercise of sovereign Government authority and involve substantial discretion" that "can significantly affect the life, liberty, or property of private persons or international relations"); *Contractor Personnel Authorized To Accompany U.S. Armed Forces (DFARS Case 2005-D013)*, 73 Fed. Reg. at 16,764-16,765 (2008) ("[T]he Government is not contracting out combat functions."); NATO Status of Forces Agreement (2009) art I (defining "force" to mean "the personnel belonging to the land, sea or air armed services" whereas "civilian component" means "civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service").

[19] *See* DOD, *Instruction 1100.22,* Encl. 4, ¶ 1.b.(1) ("Military officers and enlisted personnel are subject to a strict form of discipline – i.e., they must obey all lawful orders at all times and are trained and prepared to immediately perform all duties as directed by military commanders. In addition, military personnel may not quit or abandon their duties."); *id.* ("[T]he differences between the military and civilian communities result from the fact that it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.").

extensive training, strict rules of engagement, and lifelong responsibilities to the military chain of command.[20] Military commanders bear ultimate responsibility for their subordinates' actions.[21]

Private contractors are not subject to these same commitments and obligations. It makes little sense to grant private contractor personnel performing non-war functions the same broad immunity from tort law afforded to servicemembers and military commanders in combat theater. Extending *Boyle* creates a dangerous gap in accountability that dishonors servicemembers by potentially blocking any path to recourse for injury caused by private negligence.

The lower court's near-reflexive conclusion that the military exercised complete control over on-base contractors is also difficult to reconcile with the DOD's admitted struggles in this area.[22] In January 2009, Secretary of Defense Robert Gates acknowledged DOD's failure to adequately prepare for the use of contractors, which occurred without any supervision

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[20] *See id.,* Encl. 5 (articulating military risk assessments to perform in order to avoid "ceding government control and authority of [inherently governmental] functions").

[21] *See* DOD, *Instruction 1100.22,* Encl. 4, ¶ 1.a. (discussing military force chain of command); *United States v. Johnson*, 481 U.S. 681, 691 (1987) ("[M]ilitary discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country.").

[22] *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 841, 122 Stat. 230 (establishing independent "Commission on Wartime Contracting" to study contracting in Iraq and Afghanistan); Moshe Schwartz & Joyprada Swain, Cong. Rsch. Serv., R40764, *DOD Contractors in Afghanistan & Iraq: Background & Analysis* 18-19 (Mar. 29, 2011) (noting steps DOD has taken to improve management of contractors in Iraq and Afghanistan).

or coherent strategy.[23] Contractors were used on an *ad-hoc* basis, without putting in place the necessary oversight, often resulting in poor performance, billions of dollars of waste, and failure to achieve mission goals.[24] Many analysts believe this is exactly what occurred in Iraq and Afghanistan.[25] The Commission on Wartime Contracting in Iraq and Afghanistan, for instance, concluded in its final report to Congress in 2011 that operations in Iraq and Afghanistan between FY2002 and FY2011 had led to an "unhealthy over-reliance" on contractors by DOD, Department of State, and USAID, including "using contractors for static security at bases and camps[.]"[26] The Commission's "conservative estimate of waste and fraud" resulting from "[p]oor planning and oversight by the U.S. government, as well as poor performance on the part of contractors" ranged from $31 billion to $60 billion.[27]

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[23] *See* Peters, CRS, *DOD's Use of Contractors to Support Military Operations* 4.

[24] *Id.* at 3-4.

[25] *Id.* at 4 n.12; DOD, *Quadrennial Def. Rev. Rep.*, Feb. 2010, at 92; U.S. Gov't Accountability Off., GAO-12-290, *Operational Contract Support: Management and Oversight Improvements Needed in Afghanistan* 1-2 (2012) ("DOD does not have a sufficient number of CORs [contracting officer's representatives] to oversee the numerous contracts in Afghanistan. . . GAO recommends that DOD enhance the current strategy for managing and overseeing contracts in contingency areas such as Afghanistan by, for example, developing training standards for providing operational contract support.").

[26] Commission on Wartime Contracting in Iraq and Afghanistan, *Transforming Wartime Contracting: Controlling Costs, Reducing Risk*, Final Report to Congress, Aug. 2011, at 4-5, 19.

[27] *Id.* at 5; *see also* Peters, CRS, *DOD Contractor and Troop Levels in Afghanistan and Iraq: 2007-2020* 1.

Apart from this general distinction between military personnel and private contractors, including internal base policies and protocols within the definition of "combatant activity" threatens an unlimited expansion of government contractor preemption. According to the lower court, "the purpose of the combatant activities exception is . . . to 'foreclose state regulation of the military's battlefield conduct and decisions.'"[28] But a military base is not a battlefield.[29] Rather, it is the one place American servicemembers should feel safe and is critical for unit cohesion and morale. Notably, the military's "Direct War Requirements" (including "combat support") are considered "war costs" for purposes of federal funding whereas "Base Requirements" are considered "non-war costs."[30] The Court should therefore reject any attempt to shift the risk of harm back onto the American citizenry through "defenses based on the sovereignty of the United States" for the contractor's "own actions."[31] In fact,

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[28] *In re KBR*, 744 F.3d at 350.

[29] *Compare* DOD, *Dictionary of Military and Associated Terms* ("base — 1. A locality from which operations are projected or supported. 2. An area or locality containing installations which provide logistic or other support. 3. Home airfield or home carrier."), *with id.* ("objective area — A geographical area, defined by competent authority, within which is located an objective to be captured or reached by the military forces.").

[30] Christopher T. Mann, Cong. Rsch. Serv., IF11182, *U.S. War Costs, and Personnel Levels Since 9/11* 1 (2019) (criticizing blanket designation of OCO funds as "base budget activities" for "obscur[ing] the true cost of both war and non-war spending" and recommending that Congress "consider durable alternatives for discriminating between the temporary costs of contingency operations [i.e., war funding] and long-term funding for base budget activities").

[31] 73 Fed. Reg. 16,768 (2008) (DOD response to public comments to proposed amendment to Defense Federal Acquisition Regulation

federal law obligates a contractor to "accept [ ] the risks associated with required contract performance in such operations." 48 C.F.R. § 252.225-7040(b)(2). The DOD has since confirmed that this requirement endorses "holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors."[32]

In short, the petition implicates important issues to ensure that sensitive military judgments are not subject to judicial second-guessing, that private contractors exercise proper care in minimizing risks to service-members and, finally, that those contractors do not avoid accountability for their blunders.[33] As one judge aptly summarized, tort law does not lose "its salutary capacity to encourage care, punish negligence and spread the cost of accidents, simply because the customer happens to be the government." *McMahon v. Gen. Dynamics Corp.*, 933 F. Supp. 2d 682, 692 (D.N.J. 2013).

Supplemental Rule providing that the "Contractor accepts the risks associated with required contract performance in such operations").

[32] *Id.* ("Contractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government.").

[33] *Boyle*, 487 U.S. at 511-512 (grounding the defense, in part, on the need to prevent courts from "second-guessing" military judgments); 73 Fed. Reg. 16,768 ("[T]o 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.").

B. Unreflective judicial expansion of *Boyle* to create a federal common law of "combatant activity" preemption subjects injured servicemembers and the families of dead servicemembers to a heartless guessing game about whether they can recover for death or injury fairly attributable to a private company's wrongdoing.

This is hardly the first case where a private contractor has invoked *Boyle* to claim that a combatant activities exception preempts state-law tort claims brought by a servicemember or their survivors. The above-described proliferation in the use of such contractors and the range of services performed by them have naturally given rise to an array of lawsuits. The decisions cannot be reconciled and demonstrate the urgent need for this Court's intervention to supply coherence to this unsanctioned extension of *Boyle* preemption.

A brief comparison of several decisions, mostly involving claims by injured American servicemembers against private contractors, illustrate the point. Some cases (like the instant petition) involve injuries sustained "inside the wire" of a base but reach radically different conclusions. For example, one court has applied "combatant activities" preemption to preclude state-law claims by a civilian who fell in the latrine maintained by a private contractor in Iraq. *Aiello v. Kellogg, Brown & Root, Servs., Inc.*, 751 F. Supp. 2d 698 (S.D.N.Y. 2011). Yet another court has held that the same doctrine does not preempt some state-law claims by family members of a deceased American servicemember electrocuted in a bathroom following negligent maintenance of the base electricity system

by a private contractor in Iraq. *Harris v. Kellogg, Brown & Root Servs., Inc.*, 724 F.3d 458 (3d Cir. 2013).

The absurdities do not end with bathrooms. Others include exposure to toxic chemicals. One court has held that "combatant activities" include a private contractors' water treatment and trash disposal activities in Iraq and, consequently, left open the possibility that this extension of *Boyle* might preempt servicemembers' claims stemming from those activities. *In re KBR, Inc.*, *Burn Pit Litigation*, 744 F.3d 326 (4th Cir. 2014).[34] Yet another court held that the same doctrine does not preempt state-law claims by an American servicemember who sustained injuries following exposure to a private contractor's toxic chemicals while stationed at a water plant in Iraq. *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224 (D. Or. 2010).

Confusion even encompasses the viability of suits arising from suicide bombers who maim (or kill) servicemembers "inside the wire." In this case, the court below held that "combatant activities" preemption entirely barred state law claims arising from Petitioner's injuries sustained on a base in Afghanistan from a suicide bomber who was employed by Respondents and who built the bomb from tools managed by Respondents. Yet another court has held that the

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[34] The Fourth Circuit ultimately vacated the district court's decision to dismiss the servicemembers' claims and remanded the case for further discovery. *Id.* Upon remand, the district court again dismissed the servicemembers' claims based on the political question doctrine and because the FTCA preempted the servicemembers' state law claims. On appeal, the Fourth Circuit affirmed the dismissal but vacated the portion of the opinion discussing the FTCA issue. *See In re KBR, Inc., Burn Pit Litig.*, 268 F. Supp. 3d 778, 820 (D. Md. 2017), *aff'd in part, vacated in part sub nom. In re: KBR, Inc.*, 893 F.3d 241, 264 (4th Cir. 2018).

same doctrine does not preempt state-law claims by the family of an American non-military personnel killed after a suicide bomber detonated himself in a mess tent on a base in Iraq due to a private contractor's failure properly to secure the tent. *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 1342823, at *4-5 (S.D. Tex. May 16, 2006) (unreported opinion).[35]

Ironically, while this line of cases reveals a jumbled jurisprudence for soldiers injured "inside the wire," another line of cases, involving injuries sustained "outside the wire" (that is, outside the protective perimeter of a military base), has held that "combatant activity" preemption does not preclude state-law tort claims. For example, several decisions have held that the "combatant activity" doctrine does not preempt injuries sustained by servicemembers in connection with trucking convoys and other transportation services even while traveling in a combat zone. *See, e.g., Lessin*, 2006 WL 3940556; *Fisher v. Halliburton*, 390 F. Supp. 2d 610 (S.D. Tex. 2005); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 450 F. Supp. 2d 1373 (N.D. Ga. 2006). Apart from land transport, another case has held that the "combatant activity" doctrine did not preempt claims by survivors of American servicemembers killed in an air crash and attributable to the private contractor providing air transportation and operational support services in Afghanistan. *See McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315 (M.D. Fla. 2006). In reaching this conclusion, the *McMahon* court expressed

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[35] The Court subsequently held that the political questions doctrine barred the suit. *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2421326 (S.D. Tex. Aug. 30, 2006). As Petitioner has noted, *see* Pet. Cert. 11, the court below rejected application of that doctrine in this case.

skepticism over whether the preemption doctrine developed in *Boyle* even extended beyond product liability claims to encompass the negligent provision of services. *Id.* at 1330-31.

To be clear, *amici* do not suggest that preemption should simply turn on whether the injury was suffered inside or outside the wire. Nonetheless, the results in these cases defy common sense and illustrate the pitfalls of a preemption doctrine grounded in judge-made federal common law and free-flowing notions of policy: Inside the wire, "combatant activities" encompass some (but not all) injuries sustained in bathrooms, some (but not all) exposure to toxic chemicals and some (but not all) injuries sustained from suicide bombers. Meanwhile, "outside the wire," this very same judicially manufactured federal common law doctrine does not encompass claims for injuries sustained while trucking convoys escort servicemembers in war zones or planes carrying servicemembers crash while the United States is engaged in active hostilities. Until this Court (or, better yet, Congress) draws a line, American servicemembers and their families are the victims of this jurisprudential jumble.

II. The Decision Below Implicates Additional Disagreement Over the Contours of "Combatant Activity" Preemption.

While the issue's importance to servicemembers (and their families) supplies a sufficient ground upon which to grant the petition, disagreements among the federal appellate courts offer another, independent reason. Petitioner has already identified one such disagreement, namely the 3-1-1 split over the precise test governing *Boyle* preemption in the context of the combatant activities. Additionally, the federal circuits divide over the interest-analysis mandated by *Boyle*.

This additional conflict compounds confusion about *Boyle* preemption and necessitates this Court's review.

Boyle provides the proper entry point to understand this additional circuit split. Recall that *Boyle* developed a tripartite framework for implied preemption: (1) identify the unique federal interest associated with the FTCA exception; (2) determine the scope of the underlying policy; and (3) derive a test ensuring the preemption of state laws that create a significant conflict with that policy. *Boyle*, 487 U.S. at 511-12. As to this last step, Petitioner already has correctly identified a clear 3-1-1 split over the "test." Pet. Cert. 22-25.

Apart from this split, another inter-circuit disagreement concerns the second step in the *Boyle* analysis, specifically in the context of combatant activities. As the Second Circuit recognized most recently, federal courts "have reached varying conclusions about the 'uniquely federal interests'" at stake in these cases. *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 127 (2d Cir. 2021).

The circuits divide into three camps. The Ninth Circuit frames the federal interest solely by reference to the potential plaintiffs: "during wartime encounters no duty of reasonable care is owed to those against whom forced is directed as a result of authorized military action." *Koohi*, 976 F.2d at 1337. By contrast, the D.C. Circuit frames the federal interest in more sweeping terms: "the policy embodied by the combatant activity exception is simply the elimination of tort from the battlefield." *Saleh*, 580 F.3d at 7. Finally, the Second, Third and Fourth Circuits frame the federal interest in more modest terms: "foreclosing state regulation of the military's battlefield conduct and decisions." *Badilla*, 8 F.4th at 128; *Harris*, 724 F.3d at 480; *In re KBR*, 744 F.3d at 348. Circuits adopting this

last formulation of the federal interest expressly reject the D.C. Circuit's formulation because it fails to recognize that the FTCA "does not provide immunity to nongovernmental actors." *Harris*, 724 F.3d at 480; *see also In re KBR*, 744 F.3d at 348; *Badilla*, 8 F.4th at 127.

These inter-circuit disagreements over the conception of the federal policy compound the confusion created by the circuit split over the preemption test identified by Petitioner. This case illustrates how that compound confusion can be outcome determinative:

- The torts at issue in this case would not implicate the federal interests, as conceptualized by the Ninth Circuit, because Petitioner was not someone "against whom force is directed."
- By contrast, under the D.C. Circuit's conception, the torts might implicate the relevant federal interest even though the D.C. Circuit itself recognized that "a service contractor might be supplying services in such a discrete manner – perhaps even in the battlefield context – that those services could be judged separate and apart from combat activities of the U.S. military." *Saleh*, 580 F.3d at 122 n.6.
- Most confusing is the conception of the federal interest adopted by the Second, Third and Fourth Circuits. The torts do not trigger the federal interest under the Second Circuit's view, *see* Pet. Cert. 24-25, but they apparently do so under the Fourth Circuit's view even though both courts frame the federal interest in identical terms.

In other words, not only have the federal circuits adopted three different preemption tests, they have reached irreconcilable conclusions over how to frame

the animating federal interests. Three circuits frame the federal interest in identical terms yet derive different tests. *Compare In re KBR*, 744 F.3d at 348 *and Harris*, 724 F.3d at 480 *with Badilla*, 8 F.4th at 128. Conversely, at least two circuits (*Harris*, 724 F.3d at 480 and *In re KBR*, 744 F.3d at 348) expressly reject the D.C. Circuit's framing of the federal interest yet still adopt its test.

Several justices have warned against just such judicial guesswork. "Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law." *Va. Uranium, Inc.*, 587 U.S. at 767 (2019) (Gorsuch, J., joined by Thomas & Kavanaugh, JJ.) (plurality opinion) (citation and internal quotations omitted). The disarray over the undisciplined extension of *Boyle* preemption to combatant activities invites just such "brooding" and unprincipled efforts to apply "judicial policy preference(s)." *See id.* The resulting uncertainty leaves injured servicemembers and their families at a complete loss to understand whether they can recover for injury or, even, death caused the errors and omissions of private contractors providing simple support services on the bases where they (or their loved ones) serve. While *amici* agree that wholesale reexamination of *Boyle* is not strictly necessary to correct course,[36] only this

[36] Subsequent jurisprudence of this Court has cast doubt on the scope and, indeed, the very foundations of *Boyle*. This Court described *Boyle* as a "special circumstance" limited to case "[w]here the government has directed a contractor to do the very thing that is the subject of the claim." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001). Moreover, as noted above, several justices of this Court have expressed skepticism of

Court's review can halt this freewheeling development of "judicial policy preferences" untethered from constitutional text or a federal statute, especially where the FTCA, by its plain terms, does not encompass private parties. Otherwise, left unchecked, "[t]he combatant activities exception, cut loose from its rationale, threatens to metamorphose into a near-absolute immunity for contractors." *McMahon*, 933 F. Supp. 2d at 693-94.

CONCLUSION

For the foregoing reasons, in addition to those advanced by Petitioner, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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March 28, 2025

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implied preemption doctrines that, like *Boyle*, are not grounded in the text of a properly enacted statute but, rather, judicial speculation about Congressional purposes. *See Wyeth*, 555 U.S. at 604 (Thomas, J., concurring); *accord Va. Uranium,* 587 U.S. at 778 (plurality opinion).