No. 24-924

IN THE
Supreme Court of the United States

WINSTON TYLER HENCELY,
Petitioner,

v.

FLUOR CORPORATION, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether state tort law may impose a duty to exercise reasonable care on private contractors acting at the direction of the U.S. military and engaged in combatant activities on a foreign battlefield.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents state as follows: Respondent Fluor Corporation is a publicly held corporation that has no parent corporation; 10% or more of its stock is owned by BlackRock Inc., a publicly held corporation. Respondent Fluor Enterprises, Inc. is a wholly owned subsidiary of Fluor Corporation. Respondent Fluor Government Group International, Inc. is a wholly owned subsidiary of Fluor Corporation. Respondent Fluor Intercontinental, Inc. is a wholly owned subsidiary of Fluor Enterprises, Inc., which is a wholly owned subsidiary of Fluor Corporation.

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INTRODUCTION

This suit arises out of an enemy attack by a Taliban operative on U.S. forces inside the secure perimeter of an overseas U.S. military base during the war in Afghanistan. Before his suicide-bombing attack in 2016, the Taliban operative, Ahmad Nayeb, had been employed on the base for five years as part of the U.S. military's "Afghan First Program." This program was part of the military's counterinsurgency strategy, which sought to discourage Afghanis from joining the Taliban by creating employment opportunities for them. During the five years that the U.S. military directed and authorized Nayeb's placement on the base as a contractor employee, the military retained complete command and control over all aspects of base security. The military also repeatedly conducted counterintelligence screening interviews of Nayeb, both before and during his employment. Yet it never warned Respondents of Nayeb's prior Taliban ties.

Petitioner was serving in the U.S. Army at the time of Nayeb's attack. He brought this suit in 2019, asserting tort claims under South Carolina law and seeking to hold Respondents liable for the injuries he allegedly suffered after he physically confronted Nayeb. The district court granted summary judgment for Respondents on the ground that Petitioner's state-law tort claims were preempted based on the combatant-activity exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j). App.38-66. The Fourth Circuit affirmed the judgment. App.1-36.

In so ruling, the Fourth Circuit agreed with all four other circuits that have addressed whether state-law tort claims arising out the military's "combatant activities" may be preempted by the FTCA's combatant-activity exception.

The Second, Third, Fourth, Ninth, and D.C. Circuits unanimously concur that state law should be displaced insofar as it conflicts with the federal objectives underlying the FTCA's combatant-activity exception. All five circuits have held that the preemption analysis is controlled by this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which interpreted a neighboring subsection of the FTCA—the discretionary-function exception. Indeed, not a single court has adopted Petitioner's position: that federal law *never* preempts state tort claims seeking to regulate combatants' activities on foreign battlefields.

Petitioner contends that the decision below "contradicts this Court's bedrock preemption cases" and "flouted" settled preemption rules by "displacing state law without any statutory basis." Pet. 14, 15, 22. It does no such thing. The decision is firmly rooted in the U.S. Constitution and this Court's longstanding preemption precedent. The Constitution commits to the Federal Government exclusive authority over warmaking powers, and it divests the States of any such authority. The decision thus correctly recognizes that the Federal Government, and not the States, retains exclusive authority over the conduct of war on foreign battlefields. And state-law tort claims would interfere with that important federal interest if each State were allowed to regulate conduct on the battlefield, including attacks by foreign enemies on U.S. forces during an active war.

Petitioner notes that the circuits have not adopted identical tests for deciding when the combatant-activity exception preempts state-law claims, but he overstates the practical differences between those tests. The Third, Fourth, and D.C. Circuits use an identical test, and the

Ninth Circuit applied a standard that predates but is consistent with that test. The Second Circuit's test purports to be different, but has not yet proven to be meaningfully so. Regardless, Petitioner's state-law tort claims would be preempted under any court's test. The U.S. military specifically authorized and directed the conduct at issue, and it dictated the means and methods of providing security and oversight to personnel on the base, including Nayeb. Under these facts, any attempt to impose state-law tort standards would undermine federal interests and directly interfere with the Federal Government's exclusive authority over the conduct of war. The petition should be denied.

STATEMENT OF THE CASE

A. Background

1. The Constitution vests all war powers in the federal government. Article I, Section 8 authorizes Congress "[t]o declare War," to "raise and support Armies," to "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8. And Article II designates the President "Commander in Chief of the Army and Navy of the United States." U.S. Const. art. II, § 2.

These war powers are not shared concurrently with the States. Rather, as the Court recently observed, "the Constitution's text, across several Articles, strongly suggests a *complete delegation* of authority to the Federal Government to provide for the common defense." *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 590 (2022) (emphasis added). Put another way, in delegating war-making authority to the Federal Government, "the

Constitution also divests the States of like power." *Id.* The Constitution thus "prevents States from frustrating national objectives in this field." *Id.*

2. Since the Founding, Congress has authorized the military to procure supplies and services for defense purposes.[1] In recent decades, the military has increasingly exercised that authority by hiring contractors to provide essential support services and to perform functions historically carried out by uniformed soldiers. *See*, *e.g.*, App.4.[2] This increased reliance on contractors in the past half century has been the direct result of the Federal Government's policy decision to eliminate the draft in favor of an all-volunteer military. The U.S. military now considers contractor personnel "part of the total force."[3] And it would be "unable to effectively execute many operations, particularly those that are large-scale and long-

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[1] *See* Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 50 (establishing the Department of War); Janet A. McDonnell, *A History of Defense Contract Administration*, Def. Cont. Mgmt. Agency (Mar. 5, 2020), https://www.dcma.mil/News/Article-View/Article/2100501/a-history-of-defense-contract-administration.

[2] The Army's Logistics Civil Augmentation Program ("LOGCAP") was established in 1985 as part of this policy shift. *See* App.4; *see also In re KBR, Inc. Burn Pit Litig.*, 744 F.3d 326, 332 (4th Cir. 2014) ("*Burn Pit I*") (citing Army Reg. 700-137 (Dec. 16, 1985)).

[3] DoD Instruction 3020.41, para. 1.2.a (Nov. 27, 2024), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302041p.pdf.

term in nature, without extensive operational contract support."[4]

During the war in Afghanistan, the U.S. military adopted the "Afghan First Program" as part of its counterinsurgency strategy. As a matter of policy, the military sought to divert Local Nationals away from the Taliban by creating opportunities for them to gain skills and steady employment. *See* App.3, 46 n.7. As with any wartime policy, there was a trade-off: The military knew that reliance on Local Nationals created security risks and sacrificed short-term efficiency, but the military accepted these downsides to advance the long-term goal of "developing the Afghan economy" and fostering a "moderate, stable, and representative Afghanistan capable of controlling and governing its territory." App.3.

The U.S. military implemented the "Afghan First Program" at Bagram Airfield, located north of Kabul in the Parwan Province. Bagram Airfield was the U.S. command center and the largest base in Afghanistan. At times, the base housed more than 25,000 military and civilian personnel. There, the military controlled force protection, base security, and the Local National work force. *See* App.5. At all times, the military command retained direct authority over contractors regarding safety and security matters. *See* App.5. The military was solely responsible for identifying and vetting Local Nationals for hiring. *See*

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[4] Moshe Schwartz & Jennifer Church, Congressional Research Service, R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* 2 (2013), https://sgp.fas.org/crs/natsec/R43074.pdf.

App.5; *see also* App.46. After Local Nationals were hired, the military conducted counterintelligence assessments of all Local Nationals throughout their employment. *See* App.5-6; *see also* App.43, 47.

The military controlled base entry and exit, as well as security inside the perimeter at Bagram. The military required daily physical searches of all Local Nationals entering the base at Entry Control Points ("ECPs"). *See* App.5. While inside the perimeter, Local Nationals were subject to physical searches by bomb-sniffing dogs and armed guards at any time. App.5. When Local Nationals arrived back at ECPs after their shifts, the military physically escorted them off the base. *See* App.43-44.

The military dictated the protocols for supervising Local Nationals authorized by the military to work on base. *See* App.6. For example, the military issued a color-coded base-access badge to each Local National that passed screening requirements. *See* App.6; *see also* App.43. Red badge holders—the default for Local Nationals—required an escort in all areas of Bagram Airfield except at the badge-holder's work facility. *See* App.6; *see also* App.45. The military also trained and authorized qualifying Local Nationals to hold yellow badges, which increased base access and permitted the badge-holder to escort up to ten other Local Nationals. App.6-7. The military alone decided the level of base access and requisite level of supervision for each Local National on an individualized basis. App.42-43.

The military operated a surveillance system to monitor compliance with on-base escort protocols, including by assigning a quality assurance representative to make sure that escorting requirements were followed any time there

was movement of Local National personnel on base. App.7, 41, 43-44 n.6 ("the Army monitored all movements of [Local Nationals] from worksites to ECPs where they were handed off to the Military").

B. Facts and Procedural History

1. From 2009 until 2021, Fluor provided essential support services for the military at Bagram Airfield under the LOGCAP IV Contract. *See* App.4-5. Under the terms of Fluor's contract with the Army, Fluor was required to utilize Local Nationals "to the maximum extent possible." App.3, 45-46. Fluor could not vet those candidates; instead, Fluor had to rely on the military's vetting process. *See* App.5, 46.

In 2011, the military authorized Ahmed Nayeb, a former Taliban member, for training and employment at Bagram Airfield. *See* App.46. Despite Nayeb's Taliban ties, the military believed that providing him with employment would encourage his reintegration into civil society and away from the insurgency, consistent with the Afghan First Program. *See* App.9. After the military sponsored Nayeb for employment, he was hired to work as a low-skilled laborer in the hazmat area of the Non-Tactical Vehicle Yard. App.3. Before Nayeb began work in support of the LOGCAP IV Contract, the military vetted and interviewed him. App.46. The military never told Fluor about Nayeb's Taliban ties. App.9, 46-47.

After his initial screening, the military interviewed Nayeb at least six times during his five years of employment to decide whether Nayeb should retain base access privileges. App.9, 47. Each time, the military decided, for reasons not disclosed to Fluor, that Nayeb

should continue working on the base. App.47. The military did not share the information it learned with Fluor. App.47.

In March 2016, the military conducted a counterintelligence screening of Nayeb. App.9, 47. During that interview, the military found that Nayeb's answers were "trained and coached." App.9, 47. Despite noting this red flag, the military chose not to expel Nayeb. The military again failed to warn Fluor of Nayeb's terrorist ties and suspicious behavior. *See* App.9, 47.

Throughout his time at Bagram Airfield, the military authorized Nayeb to hold the "red badge" access level. App.9. Thus, under the military's policy, he generally required an escort in all areas of the base, except at his work facility. *See* App.6, 44-45.

Before the November 2016 attack, Fluor repeatedly offered to provide additional escorting of Local National employees, including surveillance of Local Nationals at their work facilities. App.8, 44-45. The military rejected Fluor's proposals, citing fiscal constraints. *See* App.8, 44-45. Fluor was thus prohibited from performing this additional work, and Fluor had no discretion to provide enhanced oversight of Local Nationals beyond the oversight dictated by the military. App.44-45.

2. On November 12, 2016, the military's base security and force protection policies failed, with devastating results. Nayeb detonated a suicide bomb, killing himself and five others.

After Nayeb's attack, the Army convened an investigation pursuant to Army Regulation 15-6. App.8, *see*

also App.155-78. The Army designated most of the resulting report (roughly 50 out of 70 pages) and thousands of pages of investigative materials as classified and refused to make them available for use in litigation. *See* App.155-78.[5]

The heavily redacted version of the report contains a conclusory allegation that "Fluor's complacency" was "the primary contributing factor" to the attack. App.10, 158. The redacted report does not mention that the Army rejected Fluor's repeated proposals to perform additional escorting, including at worksites. *See* App.8, 44-45. The Army investigative team was apparently unaware of this fact, as the report failed to note that the Army prohibited Fluor from performing enhanced escorting, including supervision, at work sites.

The redacted report also does not acknowledge that the Army never warned Fluor that Nayeb had Taliban ties. *See* App.9, 47. Thus, the redacted report does not attempt to reconcile its conclusory findings related to Fluor with the Army's extensive and far superior knowledge regarding the extraordinary threat posed by Nayeb.

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[5] In addition to convening an investigation, the military also took swift action to change its base security policies. Further demonstrating "[t]he military's command authority over Local National employment and supervision at Bagram Airfield," immediately after the attack the military "required *all* Local Nationals to be escorted *at all times* while on the base," and the military terminated the employment of over 1,000 Local Nationals, expelling them from the base. App.25 (emphasis in original).

The redacted report cites "eight major findings" of failures by the military, App.158-59, but the Army redacted all details regarding its own failures. For example, the redacted report references "force protection gaps and seams that enabled the assailant to conduct the attack," App.157, yet the Army redacted all details regarding "gaps and seams" in the military's force protection. The report also faults the military's failure to "properly enforce[]" "Local National access and supervision" requirements; it cites the military's lack of "[u]nity of effort" and "unity of command"; and, it states that "[c]ounterintelligence shortages impaired Coalition Forces' capability to screen Local National employees and to identify Nayeb's threat indicators." App.158-59. Yet, the Army redacted all details regarding these and all other military deficiencies in carrying out the military's core responsibility to protect the base against the unique threat posed by Nayeb.

The redacted report does not explain how Nayeb evaded military screening and security to smuggle or otherwise gain access to deadly explosives on a secure military base in a war zone. *See* App.9. The redacted report does not disclose the status of military intelligence in the days and months preceding the attack. *See* App.9. Evidence suggests the military had specific knowledge of a potential attack the day before the bombing, but never warned Fluor of this threat. *See* App.9.

The redacted report also includes findings that are contradicted by evidence. During discovery, a retired Lieutenant General testified that another Lieutenant General, who led the Army's investigation, "just got it wrong." App.64.

3. Petitioner filed suit in February 2019 in the U.S. District Court for the District of South Carolina, asserting tort claims that he acknowledged were "uniquely federal claims." App.39, n.2. Fluor moved to dismiss based on the political question doctrine. The district court denied the motion and the parties proceeded with discovery. App.11; *Hencely v. Fluor Corp. Inc.*, No. 6:19-cv-00489, 2020 WL 2838687, at *1 (D.S.C. June 1, 2020).[6]

In 2021, Fluor moved for summary judgment based on "combatant activities" preemption, which the district court granted. App.12, 38.[7] Although the court did not revisit its political question ruling, it emphasized that further litigation would "offend separation-of-powers principles," and explained that harmful "military versus military" testimony had already occurred. App.64-65. The district court also noted that "core facts that would be central to litigating this suit" remain classified, and the government's

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[6] Dozens of plaintiffs also filed suit against Fluor in Texas based on the same attack. *See Loquasto v. Fluor Corp.*, No. 3:19-CV-1455-B, 2021 WL 75550 (N.D. Tex. Jan. 8, 2021). The district court there dismissed the case based on the political question doctrine. *Id*. Thereafter, rather than pursue an appeal, many of the *Loquasto* plaintiffs re-filed identical claims in the District of South Carolina, where they have been consolidated and remain pending. *See Tangen v. Fluor Intercontinental, Inc.*, No. 6:21-cv-00335-JD (D.S.C.).

[7] Fluor separately moved for partial judgment on the pleadings on Petitioner's breach-of-contract claim, which the district court granted two days after granting summary judgment. *See* App.11-12; *Hencely v. Fluor Corp.*, No. 6:19-00489, 2020 WL 3604781, at *1 (D.S.C. Aug. 13, 2021).

withholding of classified information "would present a major hurdle, if not a prohibitive event, to the resolution of this matter on the merits." App.46-47 n.8.

4. Petitioner appealed to the Fourth Circuit. The court of appeals first addressed the political question doctrine, concluding that, "while the question may be closer than the district court's pre-discovery ruling suggested, we are not convinced that deciding Hencely's case would cause the court to 'inevitably be drawn into a reconsideration of military decisions.'" App.19 (quoting *Lane v. Halliburton*, 529 F.3d 548, 563 (5th Cir. 2008)).

The Fourth Circuit then addressed federal preemption. *See* App.19-31. Citing "the conflict between federal and state interests in the realm of warfare," the court analyzed the case using the Fourth Circuit's test for preemption—the same test previously adopted by the D.C. Circuit and the Third Circuit. App.21-22. Under that test, "[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.40 (quoting *Burn Pit I*, 744 F.3d at 349).

The Fourth Circuit concluded the first element was met, which Petitioner does not contest: Fluor was "integrated into combatant activities," including the specific activities at issue in this case. App.22-23 (quoting *Burn Pit I*, 744 F.3d at 351). The Fourth Circuit also determined that the second element was met: "'the military retained command authority' over Fluor's supervision of Local National employees on base." App.23 (quoting *Burn Pit I*, 744 F.3d at 351). The Fourth Circuit reasoned that the military "controlled base security"; "reserved for itself decisions

about containing the security threat posed by hiring Local Nationals to work on the military base"; "dictated when and how the Local National must be supervised"; and "exercised comprehensive command over Fluor's supervision of Local Nationals' on-base movements and activities." App.23-24, 26.[8]

The Fourth Circuit denied a petition for rehearing on November 26, 2024. App.37.

REASONS FOR DENYING THE PETITION

I. There Is No Circuit Split on the Question Presented.

Petitioner seeks certiorari on the question whether "*Boyle* should be extended" to the "FTCA's combatant-activities exception to preempt state tort claims against a government contractor." Pet. i. But since the early 1990s, five appellate courts have addressed this question, and all have held—consistent with *Boyle*—that the FTCA's combatant-activities exception can preempt state-law tort claims against contractors. The United States has also consistently taken the same view.

Petitioner criticizes *Boyle* and the uniform precedent applying *Boyle* to the combatant-activities exception as relying on "unspoken penumbras," Pet. 2, and "judicially divined federal interest[s]," Pet. 15. But those decisions do no such thing. They are firmly grounded in well-

[8] The Fourth Circuit also addressed Petitioner's breach-of-contract claim and affirmed the district court's judgment on the pleadings in favor of Fluor. App.35.

established preemption principles and properly respect the Federal Government's exclusive warmaking powers.

A. The Circuits Have Uniformly Rejected Petitioner's Position.

Petitioner contends that the decision below "warrants plenary review" because the Fourth Circuit's judgment "contradicts this Court's bedrock preemption cases" and "flouted" settled preemption rules by "displacing state law without any statutory basis." Pet. 14, 15, 22. Petitioner argues that the decision below—and every other appellate decision to date—"contravenes the foundational principle articulated in this Court's preemption cases." Pet. 14.

Petitioner badly mischaracterizes the Fourth Circuit's ruling. Far from flouting this Court's preemption decisions, the Fourth Circuit faithfully applied them. In so doing, the court of appeals reached the same result as every other circuit to address whether the combatant-activities exception can preempt claims against government contractors:

- **D.C. Circuit.** *See Saleh v. Titan Corp.*, 580 F.3d 1, 5 (D.C. Cir. 2009) ("We agree with the defendants (and the district judge) that plaintiffs' common law tort claims are controlled by *Boyle*."), *cert. denied*, 564 U.S. 1037 (2011);

- **Second Circuit.** *See Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 127 (2d Cir. 2021) ("[W]e have no problem retaining *Boyle*'s useful 'analytic process' for determining whether federal law preempts state-law claims against government contractors."), *cert. denied*, 143 S. Ct. 2512 (2023);

- **Third Circuit.** *See Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 479 (3d Cir. 2013) ("To decide how *Boyle* applies to § 2680(j), we must undertake the same analytic process."), *cert. denied*, 574 U.S. 1120 (2015);

- **Fourth Circuit.** *See Burn Pit I*, 744 F.3d at 346 ("The Supreme Court's *Boyle* decision governs" the interpretation of § 2680(j)), *cert. denied*, 574 U.S. 1120 (2015); and

- **Ninth Circuit.** *See Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992) ("[T]he Supreme Court has recognized that the exceptions to the FTCA may preempt common law tort actions against defense contractors under certain circumstances." (citing *Boyle*, 487 U.S. at 511)), *cert. denied*, 508 U.S. 960 (1993).

As the United States recently explained, "[a]ll five courts of appeals to consider the issue … have concluded that this Court's reasoning in *Boyle* also applies to the FTCA's combatant activities exception in certain circumstances." Br. for the United States as Amicus Curiae, *Midwest Air Traffic Control Serv., Inc. v. Badilla*, No. 21-867, 2023 WL 3022440, at *11 (U.S. Apr. 17, 2023) ("U.S. *Badilla* Amicus Br."). Moreover, the United States agrees with the circuit courts and disagrees with Petitioner. *See*, *e.g.*, Br. for the United States as Amicus Curiae, *KBR, Inc. v. Metzgar*, No. 13-1241, 2014 WL 7185601, at *14 (U.S. Dec. 16, 2014) ("the FTCA's combatant-activities exception codifies a federal interest that would be frustrated if state-law tort liability applied without limitation to battlefield contractors under the military's auspices").

In short, five circuits have addressed whether—consistent with *Boyle*—the FTCA's combatant-activities exception can preempt state-law claims against contractors. All have held that it can. And this Court denied petitions for certiorari seeking review of every one of those decisions. The Court should do the same here.

B. The Circuits' Uniform View In Favor of Combatant-Activity Preemption Is Correct.

By holding that preemption may be warranted in suits arising out of combatant activities, the decision below and other circuits are in accord with this Court's longstanding preemption principles, including *Boyle*. The rationale for preemption in suits involving quintessential federal prerogatives related to warfare and foreign policy is far more compelling than the context presented in *Boyle*.

1. The decision below rests not only on *Boyle*, but also on the U.S. Constitution and dozens of this Court's preemption decisions dating back more than a century. As Judge Silberman observed, "even in the absence of *Boyle*, the plaintiffs' claims would be preempted" because "[t]he states … constitutionally and traditionally have no involvement in federal wartime policy-making." *Saleh*, 580 F.3d at 11.

Most fundamentally, the decision below rests on the structure of the Constitution, which grants the Federal Government "supremacy of federal power in the area of military affairs." *Perpich v. Dep't of Def.*, 496 U.S. 334, 351 (1990); *see also Torres*, 597 U.S. at 590 ("[T]he Constitution's text, across several Articles, strongly suggests a complete delegation of authority to the Federal

Government to provide for the common defense."). While committing "sweeping power" to the Federal Government, "[t]he Constitution also divests the States of like power." *Torres*, 597 U.S. at 590-92 ("The States ultimately ratified the Constitution knowing that their sovereignty would give way to national military policy.").[9]

Since the earliest days of the republic, this Court has held that the Constitution preempts state law that interferes with the legitimate exercise of federal authority. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405-07, 436 (1819) (holding the Constitution preempted State's attempt to tax federal bank because doing so would constrain the constitutionally granted power of Congress to "lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies"). A long line of cases applying "constitutional preemption" utilized "a relatively straightforward application of the Supremacy Clause to resolve conflicts between state law and the Constitution." Bradford R. Clark, *Boyle as Constitutional Preemption*, 92 Notre Dame L. Rev. 2129, 2130, 2134-41 (2017).

The Fourth Circuit's decision follows this settled precedent by precluding state interference with military

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[9] Given the Federal Government's exclusive warmaking powers, Petitioner is wrong to characterize the decision below as finding preemption based on nothing more than a "'brooding federal interest,'" Pet. 3 (quoting *Kansas v. Garcia*, 589 U.S. 191, 202 (2020)), or by "'elevat[ing] abstract and unelected legislative desires … above state law,'" Pet. 18 (quoting *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022)).

and foreign policy matters that are exclusively committed to the federal government by the Constitution. *See*, *e.g.*, App.27 n.7 ("the rationales for tort law … are singularly out of place in combat situations, where risk-taking is the rule," and "where the military took the calculated risk to bring Local Nationals, including known former insurgents, on base for employment in order to further its counterinsurgency strategy in Afghanistan") (cleaned up). As the D.C. Circuit recognized, when it established the combatant-activities preemption rule applied by the court below, "[a]rguments for preemption of state prerogatives are particularly compelling in times of war" because the States "constitutionally and traditionally have no involvement in federal wartime policy-making." *Saleh*, 580 F. 3d at 11 (citing U.S. Const. art. I, § 10); *see also Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government … imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy ….") (cleaned up).

The decision below also comports with this Court's precedent regarding "obstacle" preemption. Contrary to Petitioner's argument, this Court has never held that express statutory preemption language is an essential prerequisite for preemption. *E.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000) ("A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply."). Rather, the Court has repeatedly emphasized that state laws that "interfere with" federal interests, or that present "obstacles" to

federal objectives, may trigger preemption. *See Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (explaining that where "explicit pre-emption language does not appear, or does not directly answer the question … courts must consider whether the federal statute's structure and purpose, or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent") (cleaned up). Rather than focusing on express language, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

The court below, and every other appellate court to address the issue, had no trouble identifying an important federal interest implicated by tort suits arising out of combatant activities. App.27-35. As the Fourth Circuit explained, "[t]he federal government's interest in preventing military policy and base security from being governed by the laws of fifty-one separate sovereigns is 'obvious.'" App.35 (quoting *Saleh*, 580 F.3d at 11); *see also Harris*, 724 F.3d at 480 ("We agree that the statute represents a federal policy to prevent state regulation of the military's battlefield conduct and decisions.").

Having identified a federal interest—the "touchstone" for preemption—the Fourth Circuit did what this Court has done repeatedly: It held that when state law stands as an obstacle to the federal objective, preemption is warranted. *E.g.*, *Farmers Educ. & Coop. Union of Am., N. Dakota Div. v. WDAY, Inc.*, 360 U.S. 525, 535 (1959) ("we have not hesitated to abrogate state law where satisfied that its enforcement would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (cleaned up); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) ("Our task is to determine

whether under the circumstances of this particular case, (the State's) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (cleaned up).[10]

2. Petitioner contends that the decision below "contradicts *Boyle*" and "erroneously extended *Boyle* to a different statutory provision." Pet. 21-22. According to Petitioner, *Boyle*'s holding regarding "the FTCA's discretionary-function exception does not control here" because "a decision 'address[ing] a different statute enacted for a different purpose … does not control.'" *Id.* at 17 (quoting *Negusie v. Holder*, 555 U.S. 511, 520 (2009)) (alterations in original).

But *Boyle* did not address a different statute enacted for a different purpose. Both *Boyle* and the decision below interpreted exceptions found in the same section of the same statute. In *Boyle*, the Court interpreted the FTCA's discretionary-function exception, codified at 28 U.S.C. § 2680(a), and the decision below interpreted the FTCA's combatant-activity exception, codified at 28 U.S.C. § 2680(j). For that reason, courts have uniformly rejected Petitioner's view that *Boyle* is not controlling here. To the

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[10] As this Court has explained, adopting a preemption rule is especially appropriate where, as here, the suit arises in a context in which the States have had no historical role, and the Federal Government has dominated. *See United States v. Locke*, 529 U.S. 89, 108 (2000) ("an assumption of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence") (cleaned up).

contrary, just as uniquely federal interests underlying the FTCA justified preemption in *Boyle*, so too here.

Despite framing his argument as whether *Boyle* should be extended, in reality, Petitioner's argument would require overruling *Boyle*. Petitioner argues that this Court's precedent prohibits combatant-activities preemption because the FTCA excludes contractors by its terms, and thus "no text enacted by Congress provides a basis to declare Hencely's state negligence claims against Fluor, a contractor, preempted." App.15 (emphasis omitted). But *Boyle* rejected that very argument. 487 U.S. at 503-04 ("Petitioner's broadest contention is that, in the absence of legislation specifically immunizing Government contractors from liability for design defects, there is no basis for judicial recognition of such a defense. We disagree."). As *Boyle* explained, this Court has long held that certain areas involving "uniquely federal interests" are "so committed by the Constitution and laws of the United States to federal control that state law is pre-empted." *Id.* at 504 (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-29 (1979); *Banco Nacional v. Sabbatino*, 376 U.S. 398, 426-27 (1964); *Howard v. Lyons*, 360 U.S. 593, 597 (1959); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 457-58 (1942)).[11]

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[11] Petitioner does not expressly argue for overruling *Boyle*. For good reason: "*stare decisis* carries enhanced force when a decision … interprets a statute." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). If Congress disagrees with the decision in *Boyle*, "[i]t can change that if it likes. But (continued…)

In accordance with *Boyle*, the decision below and other appellate courts held that federal preemption may be warranted—notwithstanding the absence of express statutory language—because the military's combatant activities are clearly an area committed to federal control. *See*, *e.g.*, *Burn Pit I*, 744 F.3d at 347 n.10 ("Congress need not act affirmatively to cause the preemption of state law."). The courts of appeals have thus focused the preemption analysis on whether state-law claims conflict with the congressional purposes underlying the statute, and all courts have held that such a conflict may be present in claims arising in wartime settings. *See, e.g.*, *Saleh*, 580 F.3d at 7 ("[I]t is plain enough that Congress sought to exempt combatant activities because such activities 'by their very nature should be free from the hinderance of a possible damage suit.'" (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948))); *Harris*, 724 F.3d at 480 ("The purpose underlying § 2680(j) … is to foreclose state regulation of the military's battlefield conduct and decisions."); *see also Boyle*, 487 U.S. at 511-12 ("[P]ermitting 'second-guessing' of these judgments … through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exception." (citing *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984))).

3. If anything, the argument for federal preemption is much stronger here than in *Boyle*. Petitioner's lawsuit is a case in point. Petitioner's claims arose in a foreign country, inside a secure U.S. military base, within an active war

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until and unless it does, statutory *stare decisis* counsels [this Court] staying the course." *Allen v. Milligan*, 599 U.S. 1, 39 (2023).

zone. Petitioner alleges injuries caused by an enemy attack carried out against U.S. forces by a Taliban operative who U.S. commanders deliberately placed on the base in furtherance of a counterinsurgency strategy. *See* App.23-38. No arena is more immersed in exclusively federal interests, nor more inappropriate for state-law regulation.

There can be no question, as the decision below held, that claims arising on a foreign battlefield implicate profound and uniquely federal interests. App.35; *see*, *e.g.*, *Ping v. United States*, 130 U.S. 581, 605 (1889) ("[T]he United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments."); *United States v. Belmont*, 301 U.S. 324, 330 (1937) ("Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government.").

And there can be no question, as the decision below held, that allowing state-tort law to invade this province raises the "obvious" potential for state-law interference with these uniquely federal prerogatives. App.35; *see*, *e.g.*, *Al Shimari v. CACI Intern., Inc.*, 679 F.3d 205, 231 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting) ("It defies belief that, notwithstanding the constitutional entrustment of foreign affairs to the national government, Virginia silently and impliedly wished to extend the application of its tort law to events overseas.").

Petitioner argues that the Court should grant review because Congress has not explicitly precluded States from applying their tort law to regulate combatant activities on battlefields in foreign countries. But the circuits have uniformly and correctly held the opposite. The Petition should be denied.

II. The Different Formulations of the Test for Combatant-Activity Preemption Are Immaterial Here.

Petitioner contends that the circuits are split "3-1-1" on the test for determining whether state-law claims are preempted by the combatant-activity exemption. Pet. i. But any difference in how courts have articulated the text is irrelevant here. Petitioner's claims would be barred under all preemption formulations. For good reason: State law has no role in governing an enemy attack on U.S. forces in a foreign war zone—especially where, as here, the U.S. military made a strategic decision to allow a former Taliban fighter to join a contractor workforce without any warning to the contractor. The federal interest in avoiding state-law interference with such wartime prerogatives is clear and obvious—not, as Petitioner proclaims, hanging by a thread of "unspoken penumbras." Pet. 2.

A. The Alleged Split Is Largely Illusory.

Petitioner points to a purported split in the appellate courts' articulation of the appropriate preemption test. Pet. 22-25. But as the United States has recently observed, "the degree to which there is divergence among the courts of appeals as to the proper formulation of state-law claims against military contractors that do arise out of combatant

activities is uncertain." U.S. *Badilla* Amicus Br., 2023 WL 3022440, at *17.

1. Petitioner acknowledges that three courts—the Third, Fourth, and D.C. Circuits—have adopted the same preemption test. *See* Pet. 23-24; U.S. *Badilla* Amicus Br., 2023 WL 3022440, at *17 ("The D.C., Third and Fourth Circuits have, broadly speaking, all adopted substantially the same framework."). That test hinges on whether the military "retains command authority" over the contractor's combatant activities that gave rise to the state law claims at issue. *Saleh*, 580 F.3d at 9; *Harris*, 724 F.3d at 480; *Burn Pit I*, 744 F.3d at 349.

The Ninth Circuit analyzed combatant-activity preemption decades prior to the D.C. Circuit's *Saleh* decision, in a much different factual setting. *See Koohi*, 976 F.2d at 1337. According to the Ninth Circuit, preemption is warranted where state law claims arise out of "authorized military action." 976 F.2d at 1337. The Ninth Circuit's approach is consistent with the test later adopted by the Third, Fourth, and D.C. Circuits. *See Saleh*, 580 F.3d at 7 ("As the Ninth Circuit has explained, the combatant activities exception was designed 'to recognize that during wartime encounters[,] no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action.'") (quoting *Koohi*, 976 F.2d at 1337). There is no meaningful difference between "authorized military action," *Koohi*, 976 F.2d at 1337, and military action over which the military "retains command authority," *Saleh*, 580 F.3d at 9.

Thus, in four of the five circuits that have addressed combatant activities preemption, the tests used to determine the scope of displacement are virtually identical.

2. The Second Circuit formulated a different test in *Badilla*, but it is unclear whether that test will ever lead to different outcomes. *Badilla* is minimally instructive here for numerous reasons. *First*, it is not clear that the claims in *Badilla* even arose out of combatant activities, which is a threshold requirement in all circuits for the applicability of combatant activities preemption. U.S. *Badilla* Amicus Br., 2023 WL 3022440, at *7 ("Because respondents' claims do not arise out of the military's combatant activities, this case does not squarely present the question raised by petitioner.").

Second, as the United States noted, "it is not clear that this different articulation would make a substantial difference in practice." *Id.* at *18. The Second Circuit's preemption formulation requires that "the military specifically authorized or directed the action giving rise to the claim." *Id.* (cleaned up). Thus, consistent with the other appellate courts, the Second Circuit's test ultimately hinges on whether the military exercised some level of authority over the contractor's activities. While the Second Circuit purported to disagree with other circuits regarding the proper scope of preemption, at present there is no demonstrable difference in practice between the military "retain[ing] command authority," "authoriz[ing] military action," or "specifically authoriz[ing] or direct[ing] the action." *Id.* ("[I]t is not clear that the Third, Fourth, Ninth, or D.C. Circuits would have reached a different result in the circumstances of this case by applying the Second Circuit's formulation.").

B. Petitioner's Claims Are Preempted Under Every Circuit's Test.

The differences in the circuit courts' articulation of the combatant activities preemption test have no practical impact in this case. Because the claims are barred under Fourth Circuit precedent, which is consistent with the Third, Ninth, and D.C. Circuits, *see supra*, the claims here would be barred under all four courts' precedents. Petitioner does not contend otherwise.

Petitioner's claims are also barred under the Second Circuit's preemption test. In *Badilla*, after recognizing the potential for combatant activities preemption using the *Boyle* framework described *supra*, the court articulated its test as follows: "the combatant activities exception does not displace state-law claims against contractors unless (1) the claim arises out of the contractor's involvement in the military's combatant activities, and (2) the military specifically authorized or directed the action giving rise to the claim." *Badilla*, 8 F.4th at 128.

Petitioner's claims satisfy both elements. *First*, Petitioner concedes that his claims arose out of the military's combatant activities. App.23 ("We agree with Hencely that Fluor was engaged in combatant activities at Bagram Airfield and that the particular activity at issue in Hencely's lawsuit—supervising Local National employees on a military base in a theater of war—so qualifies.").

Second, the military specifically authorized and directed the actions giving rise to Petitioner's claims. Petitioner asserts claims based on the allegedly negligent hiring, supervision, and retention of Nayeb. But "the Army instructed Fluor to hire Local Nationals, directed where

and how Fluor must escort and supervise Local Nationals, and decided whether Local Nationals could continue to access the base for employment." App.26-27; *see also* App.23 ("The military, independent of Fluor, screened and approved Local Nationals for employment.").[12] By challenging the hiring and retention of Nayeb, and the decision to allow him to operate at his worksite without supervision, Petitioner is challenging activities that the military specifically authorized and directed.

Beyond that, Petitioner's suit challenges the adequacy of security at ECPs and within the perimeter of Bagram Airfield, but "the military controlled base security, including entry and exit," and "[a]s part of its mandate over base security, the military exercised comprehensive command over Fluor's supervision of Local Nationals' on-base movements and activities." App.24. By challenging the level of security at the base, and by alleging negligence in monitoring Nayeb's movements on the base, Petitioner again challenges activities that the military authorized and directed.

Moreover, Petitioner seeks to impose a state-law duty for Fluor to have provided an increased level of supervision

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[12] *See also* App.29 ("The military decided which Local Nationals to permit and which to exclude at Bagram Airfield; how to screen for explosives and other threats at the base; which Local Nationals needed what levels of access and eyes-on escorting; if escorting was needed, the where, when, and how of such supervision; what items Local Nationals were not permitted to handle while on base; and what procedures were necessary to ensure Local Nationals exited the base.").

over Local National workers at the base, including increased worksite supervision. But the military specifically directed Fluor *not* to increase supervision of Local Nationals inside the base and while at their work facilities, despite Fluor requesting permission and additional resources to do so. App.7-8 ("It is undisputed that, before the bombing, Fluor had proposed providing additional escort supervision of Local Nationals while at their work facilities, but the Army rejected that proposal."); App.8 (noting testimony that "the price tag was going to be excessive"). Imposition of any state-law duty to provide such supervision would run headlong into a contrary federal directive—one made by military commanders in the midst of an active war, while facing complex policy objectives and limited resources.

As a result, even under the Second Circuit's purportedly different formulation of the combatant activities preemption test, Petitioner's claims are still preempted by federal law. The asserted circuit court split is thus irrelevant to the outcome of this case.

III. The Petition Presents Additional Vehicle Problems.

This case is not a good vehicle for review because the Court cannot reach the question presented if it lacks subject matter jurisdiction. Respondents have argued that this suit must be dismissed because it raises non-justiciable political questions. App.12. And they would continue to press that argument if the Court were to grant certiorari.

1. Respondents have argued throughout the litigation that Petitioner's claims are barred by the political question

doctrine. Although the Fourth Circuit rejected the argument, it acknowledged that "the question may be closer than the district court's pre-discovery ruling suggested." App.19. Under the political question doctrine, "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it' … [,] a court lacks the authority to decide the dispute before it." *Zivotofsky v. Clinton*, 566 U.S. 189, 195, 198 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

As the Fourth Circuit recognized, "'the Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief,'" and thus "'[m]ost military decisions are matters solely within the purview of the executive branch' and therefore present nonjusticiable political questions." App.13 (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012); *In re: KBR, Inc., Burn Pit Litig.*, 893 F.3d 241, 259 (4th Cir. 2018) ("*Burn Pit II*"). The court noted that "[g]iven the modern military's reliance on contractors to support its mission, … 'a military contractor acting under military orders can also invoke the political question doctrine as a shield under certain circumstances.'" App.13 (quoting *Lebron*, 670 F.3d at 422-23; *Burn Pit II*, 893 F.3d at 259).

2. Further litigation and any trial in this matter would result in inappropriate judicial intrusion into matters committed to the Political Branches, including second-guessing sensitive military judgments and harming military discipline.

For example, if the case were to proceed, a core issue would be whether Nayeb's attack, and Petitioner's

resulting injuries, were caused by the multitude of military failures at Bagram Airfield. The heavily redacted Army report listed "eight major findings" of failures by the military, including "force protection gaps and seams that enabled the assailant to conduct the attack." App.157-59. To explore and resolve the causal role of the military's deficient base security, the parties would necessarily seek to compel testimony from base commanders, military officers, and other military personnel responsible for safety and security of personnel on the base. At depositions and, if permitted, at trial, the wartime decisions by servicemembers up and down the chain of command would be scrutinized and evaluated by a judicial factfinder. As a result, the Judiciary would inevitably interfere with sensitive military judgments constitutionally committed to the Executive Branch. *See Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986) (dismissing case against contractor where trial of the case would "'require members of the Armed Services to testify in court as to each other's decisions and actions'" (quoting *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977))).

This is not a hollow concern. During depositions in the proceedings below, one retired Lieutenant General already testified that another Lieutenant General "just got it wrong" in the post-attack investigation report, which the district court noted was a "preview" of what is to come if further discovery were allowed. App.64; *see also Saleh*, 580 F.3d at 8 (noting "the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings" that "will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government's wartime policies," which "will surely hamper military flexibility and cost effectiveness").

3. Beyond the political question doctrine, yet another defense rooted in uniquely federal interests may bar this proceeding altogether: the state secrets privilege. In the proceedings below, the prospect of dismissal on this basis was apparent, as the Executive Branch sought to curtail the Judiciary's intrusion into military affairs by refusing to release classified information that is essential to the resolution of this case. As the district court explained, "core facts that would be central to litigating this suit" remain classified, and the government's withholding of classified information "would present a major hurdle, if not a prohibitive event, to the resolution of this matter on the merits." App.46-47 n.8.

The evidence being withheld by the Executive Branch goes to the heart of Petitioner's claims. App.46 ("The details regarding Nayeb's Taliban ties are classified, as are other core facts that would be central to litigating this suit."). For example, the Army refused to release all evidence, including documents and witness statements, related to the military's security failures—the failures that allowed Nayeb to smuggle deadly explosives onto the base, or to otherwise acquire them in order to perpetuate his attack. The Army has refused to release all evidence regarding the military's intelligence in the days and weeks leading up to the attack, though there is some indication in the heavily redacted Army report that the Army had "[c]ounterintelligence shortages" and failed to act on warning signs and "to identify Nayeb's threat indicators." App.158-59. The Army has also refused to release the identities of apparent co-conspirators who facilitated Nayeb's attack. Without this pivotal evidence, and without other evidence being withheld by the Army due to national security concerns, this suit can never be litigated or tried, and will have to be dismissed. *See, e.g.*, *Farnsworth*

Cannon, Inc. v. Grimes, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) ("any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation").

This is the state-law tort suit that Petitioner seeks to revive: If the litigation is permitted, military commanders would be forced to testify about how other military commanders failed to stop an enemy attack inside an active war zone; and, Executive Branch concerns over national security threats would likely preclude access to core information essential to any semblance of a fair trial. Under any scenario, allowing state-law claims to proceed would cause significant damage to federal interests and run counter to the fundamental design of the Constitution.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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