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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Fluor's brief in opposition confirms this Court should grant certiorari. The decision below preempted Hencely's state tort claims against a government contractor—not the government itself—because they purportedly conflict with nothing more than a penumbral "federal interest underlying the combatant activities exception"—not the statutory text itself. App.21. But this Court's cases allow preemption only when a state law conflicts with federal positive law in the form of "a constitutional text, federal statute, or treaty." *Kansas v. Garcia*, 589 U.S. 191, 202 (2020). The most Fluor offers to show that the decision below clears that hurdle are the claims that it "rests on the structure of the Constitution," BIO.16, or is consonant with obstacle-preemption decisions, BIO.18-19. Neither claim is correct. Even if they were, this Court's cases require more.

Nor does Fluor justify an extension of *Boyle* in these circumstances—allowing uncodified interests emanating from the FTCA's combatant-activities exception to bar state claims for conduct the military itself has condemned. Fluor doesn't even try to address the Fourth Circuit's manifest departures from *Boyle*'s limits. Fluor expressly concedes that the Second Circuit adopted a different test. And Fluor adverts to supposed vehicle problems that do not in fact exist.

This Court should grant plenary review. At a minimum, it should resolve the conceded differences among the circuits for analyzing when the federal interests that emanate from the combatant-activities

exception displaces state claims against government contractors.

I. Under this Court's precedent, state law can be preempted only if it conflicts with federal positive law.

A.1. Fluor begins by mischaracterizing the question presented. It asks the Court to deny the petition because "there is no circuit split" and says that "every other circuit to address" the question has held that *Boyle* governs "whether the combatant-activities exception can preempt claims against government contractors." BIO.13-14; *see id.* at 14-16. But the question presented is not whether the courts of appeals *have* extended *Boyle* to the combatant-activities exception; it's whether *Boyle* properly *should be* extended to that exception. Pet.i. This Court has never answered that question. S. Ct. R. 10(c). And Fluor's argument that *Boyle* should be extended because lower courts have extended it is question-begging. Nor has this Court extended *Boyle* when a contractor *violates* its contractual obligations and military orders. Pet. i; s*ee Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001)); *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 128 (2d Cir. 2021) (state-law claims not preempted "unless … the military specifically authorized or directed the action giving rise to the claim").

2. Extending *Boyle* to bar Hencely's state-law claims contradicts this Court's cases. *See* Pet.14-22; S. Ct. R. 10(c). Fluor's contrary arguments are not responsive because they proceed from different premises.

Hencely starts where this Court repeatedly has: "'There is no federal pre-emption *in vacuo*,' without a constitutional text, federal statute, or treaty." *Garcia*, 589 U.S. at 202. "'Invoking some brooding federal interest' … does not show preemption." *Id.* The Fourth Circuit, however, deemed Hencely's state-law claims preempted "even absent a statutory directive or direct conflict" after divining a "'federal interest[]'" in shielding contractors from state-law liability in a statute that expressly does not shield contractors from liability. App.20; *see* Pet.14-15.

Fluor answers by rewriting the Fourth Circuit's opinion. Fluor suggests "[m]ost fundamentally" that "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.'" BIO.16. That would be news to the Fourth Circuit. The "heart of this appeal," it said, is whether "uniquely federal interests represented by the Federal Tort Claims Act's combatant activities exception displaced Hencely's state-law claims." App.19. Its analysis then focused on whether Hencely's claims "would *clash with the federal interest underlying the combatant activities exception*." App.21 (emphasis added). So much for Fluor's suggestion that the Fourth Circuit "rest[ed]" its holding on the Constitution. BIO.16.

Nor do the foreign-affairs cases Fluor cites (BIO.18) support extending *Boyle* to preempt state claims against contractors because of a statute that does not purport to limit claims against contractors. Fluor's cited cases involved state laws that conflicted with federal positive law governing foreign affairs.

See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420-21 (2003) (a "clear conflict" between California's statute relating to Holocaust-era insurance policies sold and "the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria"); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (Massachusetts law "conflict[ed]" with a federal statute "by penalizing individuals and conduct that Congress … explicitly exempted or excluded from sanctions"). Fluor's generalized reliance on "the structure of the Constitution" (BIO.16)—without identifying a conflict between any constitutional provision and state tort law—cannot support preemption. *Cf. Penn Dairies v. Milk Control Comm'n of Pa.*, 318 U.S. 261, 271 (1943) ("no immunity of the national government … is to be implied from the Constitution" for those doing business with the government absent conflict with "Congressional policy").

Fluor next accuses Hencely of arguing "that express statutory preemption language is an essential prerequisite for preemption" and holds up obstacle preemption cases as its answer. BIO.18. Fluor's argument is a straw man. The petition never argues that preemption specifically requires express *preemption* provisions; it argues that preemption requires some federal positive law—"a constitutional text, federal statute, or treaty," *Garcia*, 589 U.S. at 202—that conflicts with state law. Obstacle preemption should not be treated as an exception to that basic rule of construction, as Fluor's cited case confirms. *See* BIO.19 (quoting *Barnett Bank of Marion Cnty., N.A. v. Nel-*

son, 517 U.S. 25, 31 (1996) (when "explicit pre-emption language does not appear" in a federal statute, courts still "must consider *whether the federal statute's* structure and purpose, or *nonspecific statutory language*, nonetheless reveal a clear, but implicit, preemptive intent") (emphasis added)); *see also Va. Uranium, Inc v. Warren*, 587 U.S. 761, 777-78 (2019) (Op. of Gorsuch, J.) (rejecting obstacle preemption based on "unenacted purposes and objectives"). Since the Fourth Circuit based preemption not on federal positive law but on "the federal interest underlying the combatant activities exception," App.21, even obstacle preemption cannot save the decision below.

3.a. Fluor fails to show that *Boyle* itself justifies preempting state claims against contractors based on interests emanating from the combatant-activities exception. Recall that *Boyle* created a "'federal common law'" contractor defense in a case involving the FTCA's discretionary-function exception. *See* 28 U.S.C. §2680(a). This Court thought there was a "potential for … 'conflict'" with "federal interests" in procuring military equipment for those particular circumstances. *Boyle v. United Techs. Corp.*, 487 U.S. 511, 504, 511 (1988).

Fluor deems it sufficient that *Boyle* "interpreted exceptions found in the same section of the same statute." BIO.20 Fluor cites no authority for this assertion. Questions about a statute's "preemptive effect," like "any other" question "about statutory meaning, look[] to the text and context of the law in question"—here, the combatant-activities exception distinct from the discretionary-function exception in *Boyle*—and

are "guided by the traditional tools of statutory interpretation" in view of the particular words used in the particular subsection at issue. *Va. Uranium*, 587 U.S. at 767 (Op. of Gorsuch, J.). This is a text- and subsection-specific inquiry; assuming words used in one subsection have the same effect as different words in a different subsection will not do. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning."). *Boyle* interpreted only the FTCA's discretionary-function exception. *See* 28 U.S.C. §2680(a). Whether the combatant-activities exception carries the same preemptive effect (and if so, when) is a separate inquiry to be answered based on the different text in §2680(j).

Nor would granting the petition "require overruling *Boyle*." BIO.21. Hencely already explained that "this Court need not revisit *Boyle*" to rule in his favor. Pet.31 n.1. This Court can "leave" *Boyle* as it "found it"—by "not extend[ing]" *Boyle* beyond the discretionary-function exception but also "not overrul[ing] it." *Hein v. FFRF*, 551 U.S. 587, 615 (2007).

b. The decision below also cannot be reconciled with *Boyle* itself. Pet.19-22. Fluor has no real answer.

First, the existence of a "'significant conflict'" with a federal interest is a precondition in *Boyle*. 487 U.S. at 507-08; *accord O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). The existence of a "uniquely federal interest" is merely a "necessary, not a sufficient, condition for the displacement of state law."

Boyle, 487 U.S. at 507. "[C]onflict there must be" before displacing state law. *Id.* at 508. That's why *Boyle* concluded that state law should not be displaced if "the contractor could comply with both its contractual obligations and the state-prescribed duty of care." *Id.* at 509.

But the Fourth Circuit refused to entertain Hencely's argument that his state-law claims should not be preempted because "Fluor could comply with state tort duties *and* the military's directives." App.27. That court said it views combatant-activities preemption as a "'more general' … 'battle-field preemption'"—one that mimics field preemption. App.27; *but see Badilla*, 8 F.4th at 127 ("declin[ing] to expand *Boyle* beyond its direct conflict rationale"). Fluor adopts this reasoning, stating that the "potential for state-law interference with these uniquely federal prerogatives" is "'obvious.'" BIO.23.

But Fluor never disputes that it could have complied "with both its contractual obligations and the state prescribed duty of care." *Boyle*, 487 U.S. at 509. *Boyle*—whose core is conflict analysis—does not endorse this type of "'more general'" preemption inquiry, App.27, devoid of any analysis on "'significant conflict,'" *Boyle* 487 U.S. at 508, 512; *see also O'Melveny*, 512 U.S. at 88.

Second, *Boyle* protects contractors only when "the government has directed a contractor to do the very thing that is the subject of the claim." *Malesko*, 534 U.S. at 74 n.6. Applying that prerequisite here would doom Fluor's defense. Fluor fails to show that

the military directed it to retain Nayeb, leave him unsupervised, give him unfettered access to its tools, and dispense with its existing escorting responsibilities. Pet.21; *see also infra* at 11. *Boyle* comes nowhere near approving the Fourth Circuit's decision to deem Hencely's state-law claims preempted against a contractor that failed to follow the military's instructions—that is, when Fluor's actions were not actually "considered by a Government officer." 487 U.S. at 512; *compare* App.30 (preempting claims even "in cases of 'alleged contractor misconduct'"), *with Badilla*, 8 F.4th at 130 (not preempting unless "the Government made the contractor do it" (cleaned up)).

*

A more fundamental problem lurks behind each of Fluor's arguments: Fluor is not the Federal Government or the Executive Branch or the military. Hencely's claims aren't against the Federal Government. They're against a contractor. And the combatant-activities exception is a defense only for the government—not contractors.

Hencely's state-law claims conflict with no express federal law or policy. Nor would adjudicating them undermine or second-guess military decisions. Pet.4; App.19; *see Penn*, 318 U.S. at 270 ("Here the state regulation imposes no prohibition on the national government or its officers."). Hencely's claims do not challenge actions that Fluor took to comply fully with all the military told it to do. *Cf. Malesko*, 534 U.S. at 74 n.6. Hencely's claims challenge only those actions the military has already decided did *not*

comply with its contract and military orders. Hencely asks for his day in court to redress only Fluor's negligent supervision, entrustment, retention, and control of its own personnel in direct violation of its military contract. Pet.4, 21-22, 33. Hencely's claims are not ones that undermine the military. *Contra* BIO.22-24. They are claims reinforcing that the military, not contractors, set the rules and boundaries in wartime.

By repeatedly invoking the Constitution and military power and judgments (BIO.3-4, 6, 16-19, 22-24, 29-34), Fluor loses track of that critical distinction between our military and contractors. This Court should not.

II. The circuits are split on the proper test for displacing state law based on interests emanating from the combatant-activities exception.

Whatever one makes of *Boyle* and its application here, this Court's review is still warranted because the circuits are squarely split on when the interests emanating from §2680(j) preempt state tort claims.

A. Fluor concedes that the Second Circuit "formulated a different test in *Badilla*." BIO.26. Fluor also concedes that there are, in fact, "differences in the circuit courts' articulation of the combatant activities preemption test." BIO.27. That comports with Fluor's concession below that "*Badilla* adopted a narrow preemption rule." Fluor-CA4-Br. n.12; *see also id.* (the "*Badilla* test" is "narrower").

B. Trapped by its concessions, Fluor resorts to arguing that there's no "demonstrable difference in practice" between the divergent tests. BIO.26. This is wrong for two reasons.

First, Fluor omits that the Second Circuit expressly rejected how most circuits frame their preemption test. Pet.32-33. The D.C. Circuit views the combatant-activities exception as embodying the federal interest of "'eliminati[ng] … tort from the battlefield.'" *Badilla*, 8 F.4th at 127. That expansive framing spawned a majority rule used here that broadly preempts state-law claims if the contractor is "'integrated into combatant activities over which the military retains command authority.'" App.21.

The Second Circuit viewed the federal interest more narrowly—as "foreclosing state regulation of the military's battlefield conduct and decisions." *Badilla*, 8 F.4th at 128. This narrower articulation should "result in a correspondingly more modest displacement of state law": "[T]he combatant activities exception does not displace state-law claims against contractors unless … the military specifically authorized or directed the action giving rise to the claim." *Id.* In the Second Circuit, "the fact that 'the military retain[ed] command authority' … would not be dispositive." *Id.* at 128 n.11. Contra Fluor, that's a judicially intentional "demonstrable difference." BIO.26.

Second, Fluor incorrectly asserts that Hencely's claims would be preempted even under the Second Circuit's test. BIO.27-29. But Hencely already explained why his claims would not be preempted.

Pet.25-27. Fluor's contrary assertions do not persuade.

Fluor has no response to its failure to safeguard its tools. *See* Pet.26; App.36 (Heytens, J., dissenting). Nor does Fluor argue that the military specifically authorized or directed it to give employees like Nayeb unfettered access to tools they do not need.

Fluor also has no response to its negligent retention of Nayeb. That the military "'instructed Fluor to hire Local Nationals'" is irrelevant. BIO.27. Hencely doesn't allege negligent *hiring*. And Fluor doesn't dispute that the military never specifically directed Fluor to *retain* Nayeb *despite* Nayeb's numerous workplace infractions that were grounds for termination (*e.g.*, absences without permission). Pet.8; *see also* App.36 (Heytens, J., dissenting).

Fluor contends that the military declined Fluor's offer to provide additional escorts for Afghan nationals, including at the worksites. BIO.28-29. But escorting and supervision aren't the same thing. Even if the military didn't ask Fluor to place additional escorts in worksites, Fluor still had the preexisting "contract[ual] and non-contractual, generally recognized supervisory responsibility" to "ensure [that] Local National employees were properly supervised at all times." App.171; *see* Pet.7-8. More to the point, even at its approved staffing, Fluor failed to escort Nayeb on the day of the bombing as *existing* escorting protocols required. Pet.9-10. The military never specifically authorized or directed Fluor to flout its existing supervisory and escorting responsibilities. Pet.26-27.

III. No vehicle problems preclude plenary review.

The purported vehicle problems Fluor raises do not bar plenary review. ***First***, Fluor says that it would reassert the political-question doctrine. BIO.29-30. But both the district court and the Fourth Circuit rejected Fluor's political-question arguments despite agreeing with Fluor on the combatant-activities exception. App.12-19; 2020 WL 2838687 (D.S.C.). Again, Fluor is not the military. Based on the summary-judgment record, the Fourth Circuit concluded that the military did not exercise "plenary control" over Fluor's challenged acts. App.15. Nor would "deciding Hencely's" claims "cause the court to 'inevitably be drawn into a reconsideration of military decisions.'" App.19. Fluor points to nothing in its two sparse paragraphs on this issue that undermines those conclusions. *See* BIO.29-30. In any event, the mere fact that a respondent says it will raise a justiciability argument that "[e]very court to have considered [it] has rejected" doesn't prevent this Court from granting certiorari and deciding the merits. *See SFFA v. Harvard*, 600 U.S. 181, 198-99 (2023).

Second, Fluor suggests that review is inappropriate because if Hencely prevails, military personnel might be called to testify at depositions or trial on remand. BIO.30-31. Speculation about which witnesses might be asked to testify later poses no barrier to deciding the preemption question now. And on remand, ordinary mechanisms for civil procedure provide ample safeguards against any improper interference. *See* Fed. R. Civ. P. 45(d)(3)(A).

Third, Fluor invokes the state-secrets privilege as a barrier to plenary review, suggesting that privilege might be relevant on remand. BIO.32. But that issue is premature. The United States has not formally—or informally—asserted the state-secret privilege in this case. *Cf. United States v. Zubaydah*, 595 U.S. 195, 205 (2022) (requiring a "'formal claim of privilege'" by the government). The district court has never ruled on any state-secrets issues.

The district court already proposed one way to resolve any evidentiary concerns: requesting, through a local U.S. Attorney, a chance for the court to review classified documents in camera to determine the redacted versions' admissibility. D.Ct.Doc.170, at 51:21-52:8; 28 C.F.R. §17.46(c). And at Fluor's request, the Army began a declassification review of various documents. D.Ct.Doc.153, at 4. Those avenues have not yet been exhausted, but even so, plenty of unclassified and otherwise admissible evidence (such as the Army Contracting Command's separate findings, App.179-87) already exists for further litigation. Ultimately, the fact that other legal issues might need to be resolved later poses no bar to review now. The question presented is whether Hencely can have his day in court for the conduct that the military already concluded violated Fluor's contract. This Court can and should bring uniformity to the divergent tests used by lower courts to preempt claims against negligent contractors.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

May 6, 2025

Respectfully submitted.

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