No. 24-924

In the Supreme Court of the United States

WINSTON TYLER HENCELY,
Petitioner,

v.

FLUOR CORPORATION, ET AL.,
Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Should *Boyle* be extended to allow federal interests emanating from the FTCA's combatant-activities exception to preempt state tort claims against a government contractor for conduct that breached its contract and violated military orders?

PARTIES TO THE PROCEEDING

The parties to the proceeding below are as follows:

Petitioner is former U.S. Army Specialist Winston T. Hencely. He was the plaintiff in the U.S. District Court for the District of South Carolina and the appellant in the U.S. Court of Appeals for the Fourth Circuit.

Respondents are Fluor Corporation, Fluor Enterprises, Inc., Fluor Intercontinental, Inc., and Fluor Government Group International, Inc. Respondents were defendants in the district court and appellees in the Fourth Circuit.

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INTRODUCTION

During Veterans Day weekend in 2016, an Afghan employee under a government contractor's supervision unleashed terror at Bagram Airfield. He roamed free on the base as he left his night shift—in violation of the contractor's obligations to keep Afghan employees in close view when escorting them off base. He walked toward hundreds of U.S. troops gathered for a Veterans Day 5K. When Specialist Winston Hencely confronted him, the suicide bomber detonated an explosive vest he made on base and on company time with the contractor's tools and materials—more stark violations of the contractor's promises to the military. He killed five U.S. soldiers and civilians and wounded over a dozen more. Hencely was among the casualties. He sustained severe, lifelong injuries.

Seeking some justice for his injuries and the attendant lifelong costs, Hencely sued the government contractor—Fluor and its subsidiaries—under South Carolina law. An Army investigation had already found that Fluor's supervision failures were "the primary contributing factor" to the bombing. Pet.App.158. Hencely's lawsuit pursued that same theory of liability—that Fluor, having violated military orders, breached state-law duties of care too.

The question here: Can Hencely's lawsuit proceed, or does something, somewhere in federal law preempt it? No constitutional provision or statute preempts Hencely's claims. That's undisputed. So can courts stop Hencely's suit when the Constitution and Congress have not? Yes, according to the courts below:

Even though Congress has *not* preempted claims against government contractors, courts may nevertheless divine a conflict between such claims and "an area of uniquely federal interest." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988). And voilà: preemption.

That approach to preemption cannot be squared with the Supremacy Clause or this Court's cases. To preempt state law, the Supremacy Clause requires a conflict between state law and "th[e] Constitution," "Laws of the United States" passed by Congress, or "Treaties." U.S. Const. art. VI, cl.2. Such a conflict is a prerequisite to preemption because this Court has eschewed "'federal preemption *in vacuo*,' without a constitutional text, federal statute, or treaty made under the authority of the United States." *Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (quoting *P.R. Dep't of Consumer Affs. v. Isla Petrol. Corp.*, 485 U.S. 495, 503 (1988)).

But "'preemption *in vacuo*'" is all that explains the decision below. The Fourth Circuit invoked the Federal Tort Claims Act despite agreeing that the FTCA concerns only the tort liability of the United States and expressly *not* contractors. 28 U.S.C. §§1346(b)(1), 2671. And while the FTCA restores the federal government's immunity for the military's "combatant activities," *id.* §2680(j), it does not regulate claims against contractors.

Yet the Fourth Circuit derived from the combatant-activities exception a broad preemption rule that bars a state claim against a contractor if that claim

even "'touches'" the military's combatant activities. Pet.App.21. To the Fourth Circuit, such a state claim "'always'" conflicts with the uniquely federal interest of "'eliminating [state] regulation of the military during wartime.'" *Id.*

That dramatically extends *Boyle*, a precedent arguably at odds with more recent preemption decisions rejecting "'freewheeling judicial inquir[ies] into whether a state [law] is in tension with federal objectives.'" *Garcia*, 589 U.S. at 202 (quoting *Chamber of Com. of U.S.A. v. Whiting*, 563 U.S. 582, 599 (2011) (plurality)). *Boyle* looks nothing like the so-called "'field'" preemption applied below. *Compare* Pet.App.30, *with Boyle*, 487 U.S. at 512-13. *Boyle* itself rejects the notion that a contractor who violates government orders can still invoke some federal interest to preempt state claims against it. *Id.*

If Hencely's state claims against Fluor for its systemic and catastrophic failures are to be displaced, Congress must make that policy choice with all the "legitimacy of having been prescribed by the people's elected representatives." *United States v. Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting). Because Congress has not made that choice, Hencely's state claims may proceed.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 120 F.4th 412 and is reproduced at Pet.App.1-36. The District of South Carolina's opinion is reported at 554 F. Supp. 3d 770 and is reproduced at Pet.App.38-66.

JURISDICTION

The Fourth Circuit entered judgment on October 30, 2024, and denied a petition for rehearing en banc on November 26, 2024. Pet.App.37. Hencely timely filed a petition for a writ of certiorari on February 24, 2025, which this Court granted on June 2, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are included in the statutory appendix.

STATEMENT OF THE CASE

A. An Afghan employee of Fluor's subcontractor perpetrated the 2016 Bagram Airfield bombing.

In 2016, hundreds of U.S. service members gathered inside Bagram Airfield in Afghanistan for a Veterans Day 5K race. Pet.App.156. An Afghan national later identified as Ahmad Nayeb approached them suspiciously. Pet.App.2-3, 72.

Nayeb worked for Fluor's subcontractor at Fluor's non-tactical vehicle maintenance yard. Pet.App.3, 76. Under its contract, Fluor promised to supervise Afghan employees including Nayeb and personally escort them in constant view when they left their worksites. Pet.App.4-6. In Nayeb's case, Fluor broke those promises.

Fluor's systemic supervision failures allowed Nayeb to build a bomb inside the U.S. base while on the job. Pet.App.9, 158, 180. Nayeb used Fluor's tools

and components to do so. Pet.App.9, 172-74. Then, on the day of the attack, Fluor violated the military's instructions to personally escort him off base. Pet.App.10, 174-76, 186. That allowed Nayeb to leave his jobsite wearing the suicide vest and walk undetected for about an hour toward the Veterans Day celebration. Pet.App.10, 156, 176, 186.

U.S. Army Specialist Winston Hencely, then just 20 years old, was stationed at Bagram. Pet.App.68. Hencely and others confronted Nayeb as he approached. Pet.App.72, 156. When Nayeb ignored his questions, Hencely grabbed Nayeb's shoulder and felt the explosive vest under Nayeb's robe. Pet.App.72. Nayeb detonated the bomb. Pet.App.72, 156.

Hencely's heroic actions prevented Nayeb from reaching the troops gathered at the 5K area. But the explosion still killed three U.S. soldiers and two civilian contractors and injured seventeen other soldiers, including Hencely. Pet.App.156. The Army found that Hencely's intervention "likely prevent[ed] a far greater tragedy" that day. *Id.*

Hencely sustained life-threatening injuries, including a fractured skull and brain injuries. Pet.App.72-74. Now, Hencely cannot fully use his left arm, left hand, or left side of his face or mouth. *Id.* Traumatic brain injury has caused neuropathic pain, cognitive disorder, chronic PTSD, permanent short-term memory loss, and anxiety. *Id.* He's increasingly vulnerable to Alzheimer's, Parkinson's, and Lou Gehrig's disease. *Id.* His permanent injuries likely will require lifelong care. Pet.App.74-75.

B. The Army investigated the bombing, found Fluor at fault, and exhaustively detailed Fluor's negligence.

The Army investigated the bombing, including Fluor's violations of its military contract. Fluor had agreed to provide services under the Logistics Civil Augmentation Program IV. Pet.App.4. The military subsequently awarded Task Order 005 to Fluor, which included Fluor's work at Bagram Airfield. *Id.* Task Order 005 included a performance work statement, *id.*, which generally "[d]escribe[s] the work" by Fluor "in terms of required results" rather than specifying "'how' the work is to be accomplished," 48 C.F.R. §37.602(b)(1). Under performance-based statements of work, the government "does not … exercise specific control over the actions and decisions of the contractor." *Contractor Personnel Authorized to Accompany U.S. Armed Forces*, 73 Fed. Reg. 16,764, 16,768 (Mar. 31, 2008).

The Army's investigation found Fluor at fault: The "primary contributing factor to [the] attack" was "Fluor's complacency and its lack of reasonable supervision of its personnel." Pet.App.158; *see* Pet.App.10. Those personnel included Nayeb, an Afghan national hired as part of the military's "Afghan First" program. Pet.App.168. Fluor's contract imposed on Fluor a strict "supervisory responsibility" over all employees, subcontractors, and subcontractor employees including Nayeb. *Id.* Fluor was "responsible" for "all of" their "actions" and all "necessary supervision." *Id.* Fluor was "responsible for oversight of" any Afghan nationals hired by Fluor and its subcontractors "to ensure

compliance with all [contractual] terms." Pet.App.168; *see* Pet.App.4-5. But Fluor failed to comply. Pet.App.158. "These conditions enabled the suicide bomber to construct and employ a suicide vest inside the Bagram Airfield perimeter." *Id.*

The Army's fault findings turned on the specific requirements of Fluor's military contract. The Army's investigation report explained, point by point, Fluor's "systemic" contractual and supervisory failures that enabled the bombing. Pet.App.176.

First, Fluor failed to comply with its supervision obligations. "Fluor did not reasonably supervise Nayeb at the work facility." Pet.App.167. "As the only HAZMAT employee on night shift, Nayeb worked at the HAZMAT work center alone and with sporadic supervision." Pet.App.170; *see* Pet.App.9. Fluor personnel had "a poor understanding … as to who was responsible for Nayeb's supervision." Pet.App.171. This failure "demonstrate[d] an unreasonable complacency by Fluor to ensure Local National employees were properly supervised at all times, as required by their contract and non-contractual, generally recognized supervisor responsibility." *Id.* "This lack of reasonable supervision facilitated Nayeb's ability to freely acquire most of the components necessary for the construction of the suicide vest and the freedom of movement to complete its construction." *Id.*; *see* Pet.App.9-10.

Second, Fluor "fail[ed] to supervise use of tools by employees," including Nayeb. Pet.App.169. Between

August and November 2016, Nayeb "checked out multiple tools not associated with his duty as the HAZMAT employee." Pet.App.172; *see* Pet.App.9.

Third, Fluor failed to fire Nayeb after repeated job violations. Pet.App.172. Nayeb repeatedly was absent without permission or slept on the job. Pet.App.10, 171-72. These infractions were terminable offenses under the LOGCAP contract. Pet.App.171. But Fluor did nothing for those violations; instead, Fluor even promoted Nayeb. Pet.App.172, 177. The Army found that Fluor's "failure to enforce a work-related standard of performance and the unjustified retention of Nayeb amount[ed] to a lack of reasonable supervision." Pet.App.172; *see* Pet.App.10.

Fourth, Fluor failed to comply with its escort responsibilities. The military required strict supervision and control of Afghans on base. It had instituted a color-coded badging system for Afghans. Pet.App.6. Red-badge holders including Nayeb required a Fluor escort "in all areas" outside their work areas. *Id*. Under military policies, Fluor escorts were to remain in "'close proximity'" and in "'constant view'" of Nayeb outside of his work area. *Id*. At shift change, Fluor was required to escort Nayeb on a bus that would take him to an entry control point to leave the base. Pet.App.10, 175. Instead, Fluor used a simple "sign in/sign out sheet." Pet.App.175. Fluor's escorts didn't even know who they were escorting. *Id*. On the day of the bombing, Nayeb never made it to the bus. Pet.App.10, 175. Instead, he left his work area and walked for about an hour, unsupervised, to carry out his attack. Pet.App.10, 176. The Army faulted Fluor for "a lack of

reasonable supervision" "while escorting Local Nationals" and for "systemic" failure that "enabled Nayeb" to carry out his attack "undetected." Pet.App.176.

Beyond the Army investigation report, the Army Contracting Command separately issued a show-cause notice to Fluor about potential termination of its government contract. Pet.App.179-82. After reviewing Fluor's response, the Army concluded that Fluor "indisputabl[y]" "did not comply with the key contractual requirements," "namely in the areas of supervision of local national[s] … and adherence to escort requirements." Pet.App.186. Fluor had no "measures in place to keep [local nationals] from leaving the work area without escorts." *Id.* Though the Army decided not to terminate Fluor's contract, the Army stated unequivocally that Fluor—not the government—was responsible for the attack. Pet.App.187.

C. Specialist Hencely's lawsuit.

1. Hencely sued Fluor in federal district court in South Carolina. Among other claims, Hencely brought negligent-supervision, negligent-entrustment, negligent-control, and negligent-retention claims under South Carolina law. Pet.App.136-52.

Fluor moved to dismiss, arguing that Hencely's claims implicated political questions. 2020 WL 2838687, at *1 (D.S.C. June 1). The district court denied the motion, explaining that his claims did not require any "evaluation of the reasonableness of military decisions." *Id.* at *11, 14-16. They were simply

about the reasonableness of Fluor's particular actions. *See id.* at *15. The Fourth Circuit later affirmed that Hencely's claims were justiciable, including because the claims were about Fluor, not "'military decisions.'" Pet.App.19. But the district court ultimately granted summary judgment for Fluor, holding that Hencely's state claims were preempted by "uniquely federal interests" that stem from the FTCA's combatant-activities exception. Pet.App.49.

2. The Fourth Circuit affirmed, agreeing that "'uniquely federal interests'" underlying the FTCA's combatant-activities exception preempted Hencely's claims. Pet.App.20.

The court acknowledged that, "[b]y their terms," the FTCA's provisions "do not apply to government contractors." *Id.* Even so, it invoked *Boyle* and reasoned that preemption could apply "even absent a statutory directive or direct conflict" in "areas involving 'uniquely federal interests.'" *Id.* The court purported to "extend[] *Boyle*'s logic to the FTCA's combatant activities exception," given "the conflict between federal and state interests in the realm of warfare." Pet.App.21. The court described that conflict as "'much broader'" than the "inconsistency" at issue in *Boyle*. *Id.* State tort law, the court reasoned, "'inevitably conflicts with the combatant activity exception's goal of eliminating such regulation of the military during wartime.'" Pet.App.21. In warfare, "'the federal government occupies the field.'" *Id.* According to the court, the federal government's "'interest in combat is always precisely contrary to the imposition of a non-federal tort duty,'" even for suits against government

contractors—including those who breach their contracts. *Id.*

To decide whether Hencely's claims were preempted, the Fourth Circuit applied the following 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.'" Pet.App.21-22.

In the court's view, Hencely's claims met that test. First, "Fluor was 'integrated into combatant activities' at Bagram Airfield." Pet.App.22. Viewing "'combatant activities'" with "'a broad lens,'" the court held that Fluor's "supervising Local National employees on a military base in a theater of war" qualified. Pet.App.22-23.

Second, the federal government retained sufficient "'authority'" over Fluor. Pet.App.23. It sufficed that "the Army instructed Fluor to hire Local Nationals" as part of a counterinsurgency strategy; that "the Army decided which Local Nationals could access the base for employment"; that the Army "dictated when, where, and how Fluor must escort and supervise each of those Local National employees"; that the Army "screened and approved Local Nationals"; and that the Army "controlled base security, including entry and exit," performed searches on base, and "required Fluor to follow its escort protocols" and "trained Fluor personnel" to do so. Pet.App.23-25.

The Fourth Circuit acknowledged Fluor still "possessed some discretion when operating within this framework," including the ability to refuse tools to its employees (even if the Army did not forbid it) and the ability to fire employees (even if the Army had screened them). Pet.App.25-26. Still, that discretion did "not eliminate the conflict" between state tort law and the federal interest because the Army "retained ultimate command authority over supervision of Local Nationals and the protocols necessary to mitigate the risk posed by their presence on base." *Id.*

The Fourth Circuit rejected Hencely's argument that Fluor could comply with state tort duties and the military's directives. Pet.App.27. It didn't matter, for example, that Fluor could have denied Nayeb's access to dangerous tools without violating any military policy. *Id.* The question for "'battle-field preemption'" was *not* "'whether the substance of the federal duty is inconsistent'" with state tort duties. *Id.* Rather, *any* imposition of state tort law—no matter how harmonious—"'conflicts with the federal policy of eliminating such regulation of the military during wartime.'" *Id.*

The Fourth Circuit also rejected Hencely's argument that preemption should not apply because Fluor disregarded the military's instructions and broke its contractual obligations. Pet.App.30. It thought the interests underlying the combatant-activities exception extended beyond "'protecting contractors who adhere to the terms of the contracts.'" *Id.* Its broad "preemption rule preserves the field of wartime decisionmaking exclusively for the federal government," even in cases of "'contractor misconduct.'" *Id.*

Judge Heytens concurred in part and dissented in part. He would have vacated the district court's grant of summary judgment on Hencely's negligent-entrustment and negligent-retention claims. Pet.App.36. He observed "genuine disputes of fact relevant to the second preemption requirement—whether the military 'retained command authority' over" Fluor's decisions "to allow employees to access tools they did not need or fire employees for poor job performance." *Id.*

SUMMARY OF THE ARGUMENT

I. The FTCA's combatant-activities exception provides no basis for preempting all state tort law in all suits against all government contractors just because state tort claims "'touch[]'" events in military theaters. Pet.App.21.

A. For the FTCA to preempt Hencely's state tort claims, the FTCA's text and state tort law must conflict. But no conflict exists between the FTCA—a statute addressing suits against the United States but *not* "any contractor"—and state-law duties of care that Hencely alleges Fluor violated.

B. The FTCA's text dictates what the FTCA does and does not preempt. No unspoken penumbras or emanations from the FTCA's text provide grounds for broadening the scope of FTCA preemption beyond Congress's chosen words. Field preemption does not lurk in the FTCA, as the Fourth Circuit thought, displacing any "'state tort law'" that remotely "'touches the military's battlefield conduct and decisions.'" Pet.App.21. And given the FTCA's express text, no other basis exists for finding any other implied

preemption unspoken in the FTCA that would foreclose state tort claims against all government contractors.

II. *Boyle*'s "uniquely federal interests" preemption should not be extended to all government contractors operating in warzones.

A. *Boyle*'s "uniquely federal interests" preemption is difficult to reconcile with the Supremacy Clause and this Court's preemption cases. Brooding federal interests and judicial policy inquiries cannot support preemption; yet *Boyle* invites precisely those types of inquiries.

B. *Boyle*'s own terms do not justify preemption here. Courts cannot define what constitutes a "uniquely federal interest" by looking to the FTCA—a statute that doesn't purport to address that question. Nor can courts define it at such a high level of generality that it encompasses all government contractors' activities occurring in theater. No "uniquely federal interest" exists where, as here, the military itself has deemed a government contractor to have violated its contractual obligations.

ARGUMENT

Nearly 40 years ago, this Court held in *Boyle v. United Technologies Corp.* that a fallen Marine's father could not press state tort claims against a government contractor for its allegedly defective design of a military helicopter. 487 U.S. 500 (1988). Those claims failed not because Congress said so—but because the Court divined "an area of uniquely federal

interest" in "the procurement of equipment by the United States" from government contractors. *Id.* at 507. Against such "uniquely federal interests," state law is sometimes—but not always—"pre-empted and replaced." *Id.* at 504. By what? According to whom? "[B]y federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" *Id.* But such preemption becomes "necessary," *id.*, only when a "significant conflict" arises between state tort law and the court-divined "federal policy or interest," *id.* at 507, 509. Only then can courts prescribe a federal-common-law rule to "replace[]" state tort law. *Id.* at 508.

Boyle thus concluded that federal contractors facing design-defect claims could sometimes raise a federal-common-law "Government contractor defense" to displace state tort law—but only if their equipment "conformed" to the government's design specifications. *Id.* at 512. *Boyle* deemed that "policy" necessary to conform federal contractors' liability to the Federal Tort Claims Act, which immunizes the United States from claims based on the government's "'discretionary function[s]'" such as selecting "the appropriate design for military equipment." *Id.* at 511 (quoting 28 U.S.C. §2680(a)). *Boyle* thought it made "little sense" to confer immunity "when the Government produces the equipment itself, but not when it contracts for the production" from a government contractor. *Id.* at 512.

Decades later, lower courts have reduced *Boyle* to the following: A separate FTCA provision reveals "an important federal policy of foreclosing state regulation of the military's battlefield conduct and decisions."

Pet.App.20 (cleaned up). And that policy "'inevitably'" conflicts with state tort claims against government contractors whenever state law even "'touches the military conduct and decisions.'" Pet.App.21. Contractors thus can always raise a so-called "combatant activities preemption defense"—even a contractor who "did not follow Army instructions and failed to comply with contractual obligations." Pet.App.28, 30. That type of broadly defined "preemption rule" is necessary to "preserve[] the field of wartime decisionmaking exclusively for the federal government." Pet.App.30.

Neither the FTCA nor *Boyle*'s "uniquely federal interests" preemption justifies the purported field-preemption rule below. A statute governing the *federal government's* sovereign immunity does not foreclose Hencely's state claims against a *government contractor*—let alone a government contractor like Fluor, whom the Army itself declared "failed to perform in accordance with the terms and conditions of the [military] contract," facilitating a terrorist attack at Bagram Airfield. Pet.App.179-80.

I. The FTCA Does Not Preempt Hencely's Claims.

The FTCA waives sovereign immunity and subjects the United States to damages claims for wrongdoing by federal employees. 28 U.S.C. §1346(b)(1). But that immunity waiver has limits. For one, the FTCA restores immunity for governmental wrongdoing "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. §2680(j). For another, the FTCA does

not speak to the potential liability of "any contractor with the United States." *Id.* §2671.

Though the FTCA does not preclude suits against contractors, the court below held that a government contractor could avail itself of "combatant activities preemption"—a form of "field" preemption it found lurking in the FTCA. Pet.App.30. No basis exists for that sweeping "preemption rule." *Id.*

A. The FTCA's text and Hencely's state claims do not conflict.

1. Preemption turns on the FTCA's text, not penumbras and emanations.

For the FTCA to preempt Hencely's state tort claims, those claims must conflict with the FTCA. Like any other question of statutory interpretation, discerning whether such a conflict exists turns on the FTCA's text.

Preemption is a function of the Supremacy Clause. U.S. Const. art. VI, cl.2. That Clause is not itself an "independent grant of legislative power to Congress." *Murphy v. NCAA*, 584 U.S. 453, 477 (2018). Instead, it provides a "'rule of decision.'" *Id.* When federal law conflicts with state law, "'federal law takes precedence.'" *Kansas v. Garcia*, 589 U.S. 191, 202 (2020). So when one "cannot comply with both federal and state directives, the Supremacy Clause tells us the state law must yield." *Martin v. United States*, 145 S.Ct. 1689, 1700 (2025). But without a conflict between state law and "th[e] Constitution," "Laws of the

United States" passed by Congress, or "Treaties," U.S. Const. art. VI, cl.2, no grounds exist for displacing state law.

The Supremacy Clause goes no further. By design, the Constitution "reserves most … regulatory authority to the States." *Rodriguez v. FDIC*, 589 U.S. 132, 136 (2020). Unlike "[t]he powers delegated … to the federal government," which are "few and defined," the powers of the States remain "numerous and indefinite." The Federalist No. 45, at 292 (Rossiter 1961). *accord* U.S. Const. amend. X. Relevant here, the States, with "'no question,'" possess the "'traditional authority to provide tort remedies to their citizens' as they see fit." *CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014) (Op. of Kennedy, J.). State law remains the default "law to be applied in any case"—including in federal court—except "in matters governed by the Federal Constitution or by acts of Congress." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Accordingly, and to preserve the States' role in our federalist system, in "all cases," an asserted conflict between state and federal law "must stem from either the Constitution itself or a valid statute enacted by Congress." *Garcia*, 589 U.S. at 202. Federal preemption does not exist "'*in vacuo*,' without a constitutional text, federal statute, or treaty made under the authority of the United States." *Id.* (quoting *P.R. Dep't of Consumer Affs. v. Isla Petrol. Corp.*, 485 U.S. 495, 503 (1988)). Merely "[i]nvoking some brooding federal interest or appealing to a judicial policy preference" will not do. *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (Op. of Gorsuch, J).

Preemption thus requires "point[ing] specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Id.* Even then, discerning a conflict requires parsing the statutory text itself, not "a 'freewheeling judicial inquiry into whether a state [law] is in tension with federal objectives.'" *Chamber of Com. of U.S.A. v. Whiting*, 563 U.S. 582, 599 (2011) (plurality). Any "[e]vidence of pre-emptive purpose" must be "sought in the text and structure of the statute at issue." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

The "preemption rule" adopted below cannot be reconciled with those rules. Pet.App.30. The FTCA's actual text provides no basis for preempting state claims against contractors. But the court below presumed it could forge ahead—"even absent a statutory directive or direct conflict" in the FTCA—to declare that the FTCA preempts Hencely's claims against Fluor. Pet.App.20. That exemplifies "'federal preemption *in vacuo*' without a constitutional text" or "federal statute." *Garcia*, 589 U.S. at 202.

2. The FTCA does not speak to government contractor liability.

The FTCA's text and Hencely's state claims against Fluor do not conflict. No FTCA provision precludes suits against contractors.

a. The FTCA resulted from "a long effort to mitigate unjust consequences of sovereign immunity." *Feres v. United States*, 340 U.S. 135, 139 (1950). Sovereign immunity precluded suits against the federal

government, so persons injured by government employees sued the employees instead. *Brownback v. King*, 592 U.S. 209, 211 (2021); *see also Little v. Barreme*, 6 U.S. 170, 179 (1804) (trespass suit against a naval officer who unlawfully seized a foreign vessel); *Mitchell v. Harmony*, 54 U.S. 115, 137 (1851) (trespass suit against an army officer who wrongfully seized private property); *Westfall v. Erwin*, 484 U.S. 292, 300 (1988) (negligence suit against federal employees for workplace injury), *superseded by* 28 U.S.C. §2679 (Westfall Act). That regime both subjected government employees to "ruinous liability" and left injured persons uncertain if they would ever see a damages award. Pfander & Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1876 (2010). As the federal government's activities expanded, so too did the "number of remediless wrongs." *Feres*, 340 U.S. at 139.

Before the FTCA, Congress would pass "private bills that awarded compensation to persons injured by Government employees," *Brownback*, 592 U.S. at 211, in response either to the federal employees' indemnification requests or to citizens' direct appeals to Congress, Pfander & Aggarwal, Bivens*, the Judgment Bar, and the Perils of Dynamic Textualism*, 8 U. St. Thomas L.J. 417, 424-25 & n.39 (2011). Soon, "Congress was considering hundreds of such private bills each year." *Brownback*, 592 U.S. at 211. "Critics worried about the speed and fairness with which Congress disposed of these claims." Pfander & Aggarwal, *supra*, at 426.

The FTCA changed all that in 1946. With certain limitations, the FTCA waives sovereign immunity and permits tort suits against the United States. *Martin*, 145 S.Ct. at 1695. The FTCA allows for claims against the United States for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of federal employees "acting within the scope of [their] office or employment." 28 U.S.C. §1346(b)(1). Congress then made the United States liable "to the same extent as a private individual under like circumstances." *Id.* §2674.

The FTCA often looks to state law to determine the government's tort liability. Far from eschewing state law, or relying exclusively on federal common law for liability, the FTCA states that the government's liability turns on "the law of the place where the act or omission occurred." *Id.* §1346(b)(1). For example, FBI agents raiding the wrong house in Georgia are subject to suit and liability to the extent permitted under Georgia law. *Martin*, 145 S.Ct. at 1703. The FTCA was "not patterned to operate with complete independence from" the laws "in various States." *Richards v. United States*, 369 U.S. 1, 6 (1962). Rather, the FTCA was "designed to build upon the legal relationships formulated and characterized by the States." *Id.* at 7.

b. By its express terms, the FTCA does not preclude state claims against government contractors.

The FTCA governs only *the United States*, while carving out contractors. It generally subjects "the United States" to tort liability and "money damages,"

28 U.S.C. §1346(b)(1), subject to limited exceptions precluding damages actions for certain topics, §2680(a)-(n). Those thirteen exceptions maintain the government's sovereign immunity for claims arising from misdelivered mail, tax collection, quarantines, and acts of the Tennessee Valley Authority or federal banks, among others. *See id.* While those FTCA exceptions "claw back *the government's* immunity in certain circumstances," *Martin*, 145 S.Ct. at 1695 (emphasis added), they do not limit suits against contractors.

The FTCA refers to government contractors once—to clarify it does *not* govern suits against contractors. It provides that employees of a "Federal agency" can trigger liability or invoke the FTCA's exceptions. 28 U.S.C. §2671. It then defines "Federal agenc[ies]" to include "executive departments," "judicial and legislative branches," "military departments," "independent establishments of the United States," and "corporations primarily acting as instrumentalities or agencies of the United States." *Id.* But "Federal agency," as defined by the FTCA, expressly "does not include any contractor with the United States." *Id.*

The FTCA thus cannot be read to preclude state tort claims against contractors. On this score, this case resembles the interpretive dispute in *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022). *Castro-Huerta* held that the General Crimes Act, which addressed only the extension of federal criminal jurisdiction to Indian country, did not "[b]y its terms" preempt "the State's authority to prosecute non-Indians who commit crimes against Indians in Indian country." *Id.* at 639. Similarly, the FTCA, which addresses only the

government's tort liability, does not preempt state law applicable to contractors. If anything, the FTCA's express carve-out of contractors, 28 U.S.C. §2671, negates any contention that the FTCA was "intended to insulate the contractor from liability for its own tortious acts." Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 Geo. L.J. 1, 10 (1946); *see also, e.g.*, *Krembel v. United States*, 837 F. App'x 943, 950 n.7 (4th Cir. 2020) ("[D]ismissing an FTCA claim [against the government] does not necessarily disturb any potential state law claim against an independent contractor."); *cf. Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72-73 (2001) ("[F]ederal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners housed in Government facilities."). Indeed, federal contractors routinely face state claims for their own negligence. *See, e.g.*, *Ghane v. Mid-South Inst. of Self Def. Shooting, Inc.*, 137 So.3d 212, 214 (Miss. 2014) (military contractor's negligent installation of ballistic wall on a Navy SEALs training site); *Federico v. Lincoln Mil. Hous., LLC*, 127 F. Supp. 3d 623, 627, 640-41 (E.D. Va. 2015) (mold in military housing managed by a contractor); *Stevens v. ARCO Mgmt. of Wash., D.C.*, 751 A.2d. 995, 996 (D.C. 2000) (slip-and-fall involving a federally controlled building managed by a contractor).

3. The FTCA's combatant-activities exception does not preclude suits against government contractors.

Nor does the FTCA's exception for "combatant activities" purport to preclude state claims against contractors. That exception's text does not cover Fluor, as

even the Fourth Circuit correctly acknowledged. Pet.App.20 ("By their terms, these provisions do not apply to government contractors.").

The "combatant activities" exception restores the government's sovereign immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. §2680(j). This exception has been part of the FTCA since its adoption in 1946. As initially proposed, the exception restored immunity for all claims "arising out of the activities of the military ... during time of war." 92 Cong. Rec. 10093 (1946). But the narrowing modifier "combatant" was added on the House floor without elaboration. *Id.* The enacted text—"*combatant* activities"—is necessarily more limited. *See BedRoc Ltd. v. United States*, 541 U.S. 176, 183-84 (2004) (plurality) (Congress can "textually narrow[] the scope of [a] term by using [a] modifier"). It does not purport to restore immunity for all "activities of the military," but instead only for a specific subset—"combatant activities" themselves.

Contemporaneous dictionaries defined the adjective "combatant" to mean "*Mil[itary].* Taking part in, or prepared to take part in, active fighting, as, a *combatant* officer, as distinguished from one of the medical, commissariat, or a similar branch." Webster's New Int'l Dictionary 533 (2d ed.) (1950). Or "[o]ne who takes part in combat or fighting, or in any conflict," New Century Dictionary, Vol. 1, 287 (1936 ed.); *see also Skeels v. United States*, 72 F. Supp. 372, 374 (W.D. La. 1947) ("combat activities" mean "the actual

engaging in the exercise of physical force" (citing both dictionaries)).

"Combatant activities" cannot fairly be read to encompass contractors' activities. To start, the combatant-activities exception, like the other FTCA exceptions, limits its application to governmental entities—"the military," "naval forces," and "the Coast Guard." 28 U.S.C. §2680(j); *cf. id.* §2680(f) ("establishment of a quarantine by the United States"); *id.* §2680(i) ("Treasury"). In other words, an activity would "qualify as a combatant activity" under the FTCA only if "performed by the United States," not by "a private party." *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1329 (M.D. Fla. 2006), *aff'd*, 502 F.3d 1331 (11th Cir. 2007). Fluor and other government contractors are private entities—*not* "the military or naval forces, or the Coast Guard."

Even then, §2680(j)'s immunity extends only to "combatant activities" of those government entities. "Combatant" connotes "taking part" in "active combat," Webster's (2d ed.), *supra*, and a degree of connection to combat, *see Badilla*-U.S.-Br., 2023 WL 3022440, at *14 (that a contractor's support for military personnel is "essential" does not mean that it is "closely combat-related."). By modifying "combatant activities" with the prepositional phrase "of military or naval force, or the Coast Guard," Congress created immunity from suit for claims against actions by the "[m]ilitary" that "take part" in or are "prepared to take part in active fighting." That reading comports with the United States' own long understanding. Under "domestic and international law," civilian contractors

"are not 'combatants'; they are 'civilians accompanying the force' and, as such, cannot lawfully engage in 'combat functions' or 'combat operations.'" U.S.-*Saleh*-Br., 2011 WL 2134985, at *15 (citing Dep't of Def., *Instruction 3020.4.1: Contractor Personnel Authorized to Accompany the U.S. Forces* (Oct. 3, 2005); Dep't of Def., *Instruction 1100.22: Policy & Procedures for Determining Workforce Mix* (Apr. 12, 2010); *Contractor Personnel Authorized to Accompany U.S. Armed Forces*, 73 Fed. Reg. 16,764, 16,764-65 (Mar. 31, 2008); Army Reg. 715-9, 11 3-3(d) (1999)).

Nor does the phrase "arising out of" expand the exception to bar claims against contractors. 28 U.S.C. §2680(j). The phrase "arising out of" modifies "claim." And the FTCA addresses "claims" *against the government* and expressly not its contractors. *Id.* §§1346(b)(1), 2671; *supra* at 21-23. So while the combatant-activities exception restores *the government's* immunity for some wartime claims, 28 U.S.C. §2680(j), it does not purport to limit claims against contractors.

Congress does not hide elephants in mouseholes. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). Section 2680(j) applies specifically to active fighting by "the military," "naval forces" and the "Coast Guard," 28 U.S.C. §2680(j), within a statute that speaks to wrongdoing of federal agencies, *id.* §1346(b)(1). Had Congress still meant that exception to preclude claims against contractors—especially after excluding "any contractor" from the FTCA's scope, *id.* §2671—it would have said so. After all, Congress knows how to speak to contractor liability when it

wants to. For instance, Congress provided relief for contractors who "carr[ied] out an atomic weapons testing program" by designating those contractors' employees as "employees of the Federal Government" and making suits against the government under the FTCA the exclusive remedy for "acts or omissions by the contractor." 50 U.S.C. §2783(b)(1)-(2). Congress also created similar protections for employees of contractors of certain federally funded health centers. 42 U.S.C. §233(a), (g). Viewed against those statutes, Congress's failure to immunize contractors in the FTCA or the combatant-activities exception dooms Fluor's arguments and the Fourth Circuit's judgment.

B. Field and implied preemption do not displace Hencely's claims.

1. The FTCA lacks the required indications for field preemption.

Contrary to the Fourth Circuit's view, field preemption does not lurk in the FTCA, ready to displace any "'state tort law'" that "'touches the military's battlefield conduct and decisions'"—a category so broad it would encompass almost any government-contractor activity at Bagram Airfield. Pet.App.21-22; *see also* Pet.App.27 ("'battle-field preemption'").

Courts "rare[ly]" find field preemption. *Garcia*, 589 U.S. at 208. Field preemption can be justified only when "'Congress ... [leaves] no room for state regulation of these matters.'" *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002). For claims in traditional State fields, the Court "'start[s] with the assumption that the historic police powers of the States were not to be

superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). And this Court has "'frequently rejected field pre-emption in the absence of statutory language expressly requiring it.'" *Arizona v. United States*, 567 U.S. 387, 438-39 (2012) (Thomas, J., concurring in part and dissenting in part). Members of this Court have grown "skeptical" of field preemption applied without such language. *Garcia*, 589 U.S. at 214 n.* (Thomas, J., concurring). Field preemption must be tied to "a clash" between "a constitutional exercise of Congress's legislative power" and "state law." *Murphy*, 584 U.S. at 479.

By its terms, the FTCA leaves room for state claims against government contractors and for state law more broadly. The statute expressly does not purport to govern claims against contractors. *Supra* at 22-23. And for the claims it does govern, involving government employees' wrongdoing, the FTCA directs courts to look to state law when applicable. *Supra* at 21; *accord Westfall*, 484 U.S. at 300. Thus the FTCA cannot be read to "foreclose" the application of state law, *Garcia*, 589 U.S. at 209, especially not for claims against contractors beyond the FTCA's scope, *see* 28 U.S.C. §2671. Its text evinces no "'clear and manifest purpose of Congress'" to foreclose state claims against government contractors. *Wyeth*, 555 U.S. at 565.

2. Other implied preemption theories are inapplicable given the FTCA's text.

Nor do other implied preemption theories foreclose Hencely's state claims against Fluor.

Implied preemption asks whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). For implied preemption, a "'high threshold must be met'" to declare a state law in conflict with a federal statute's "'purposes.'" *Whiting*, 563 U.S. at 607 (plurality). Implied preemption, "like all preemption arguments," "must be grounded 'in the text and structure of the statute at issue.'" *Garcia*, 589 U.S. at 208. It cannot be as "simplistic" as asserting that Congress's unenacted objectives would be "undermined." *Va. Uranium*, 587 U.S. at 777-78 (Op. of Gorsuch, J.).

Neither the FTCA nor the combatant-activities exception supports impliedly preempting Hencely's state claims against a contractor. To say otherwise risks "displacing perfectly legitimate state laws on the strength of 'purposes' that only [courts] can see" that "lack the democratic provenance the Constitution demands before a federal law may be declared supreme." *Id.* at 778.

In the FTCA, Congress "did not decide" how tort liability against contractors should be handled, much less preclude it. *Garcia*, 589 U.S. at 211. Rather, Congress expressly chose not to regulate contractors' tort liability, *supra* at 21-23, against the existing legal

backdrop making state remedies available to persons injured by contractors, *see, e.g.*, *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 104 (1940) (negligence suit against a government contractor building a post office); *Balt. & A.R. Co. v. Lichtenberg*, 4 A.2d 734, 738-39 (Md. 1939) (state safety regulations applied to a contractor transporting federal employees), *appeal dismissed* 308 U.S. 525 (1939) (dismissing "for want of a substantial Federal question"). Congress did limit government contractors' liability to their *own* employees for injuries occurring on military bases overseas under the Defense Base Act in 1941. 42 U.S.C. §1651(a), (c). But it did not otherwise limit contractors' liability in that Act—or in the FTCA.

The FTCA's express terms "tolerate whatever tension" that results from excluding claims against government contractors from their reach. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (finding no "frustration" of federal nuclear regulations by state remedies); *see also Va. Uranium*, 587 U.S. at 777-78 (Op. of Gorsuch, J.) (similar). Second-guessing that choice entails the precise "'freewheeling judicial inquiry,'" *Whiting*, 563 U.S. at 607 (plurality), that neither Congress's chosen words nor this Court's preemption rules allow.

*

No text-based approach to preemption could justify reading the FTCA to displace Hencely's state claims against Fluor. The FTCA and its exceptions govern the United States' tort liability, with a special solicitude for state law. It does not purport to govern

contractors' liabilities. Thus it leaves state claims against contractors undisturbed.

II. *Boyle*'s "Uniquely Federal Interests" Preemption Does Not Foreclose Hencely's Claims.

Though neither the FTCA nor the combatant-activities exception preempts Hencely's state claims, the Fourth Circuit deemed Hencely's claims preempted by "extend[ing] *Boyle*'s logic." Pet.App.21. This Court should not extend *Boyle*'s "uniquely federal interests" preemption here for two reasons. *First*, *Boyle* is out of sync with this Court's later Supremacy Clause and preemption decisions. *Second*, not even *Boyle* would find a significant conflict between any "uniquely federal interests" and state claims against contractors who fail to "conform[]" their conduct to their contracts and the government's instructions. 487 U.S. at 512.

A. *Boyle* is difficult to reconcile with the Supremacy Clause and this Court's superseding preemption decisions.

Boyle's "uniquely federal interests" preemption should not be extended here. *Boyle* addressed different tort claims (design-defect claims) against a differently situated contractor (who conformed to the government's directions) by drawing from a different FTCA exception (for "discretionary functions," 28 U.S.C. §2680(a)). *Boyle* thus did not decide the question here, and the Court can "leave" *Boyle* as it "found it." *Hein v. FFRF*, 551 U.S. 587, 615 (2007) (Op. of Alito, J.).

1. In *Boyle*, a Marine pilot drowned when he could not escape his downed helicopter. 487 U.S. at 502. His father brought design-defect claims against the contractor who designed the helicopter's allegedly defective escape system. *Id.*

Boyle acknowledged that state law normally wouldn't be preempted without conflicting federal law. *Id.* at 504. Even so, *Boyle* reasoned that in "a few areas, involving 'uniquely federal interests,'" state law is nevertheless "pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" *Id.*

From there, *Boyle* proceeded in three steps. First, *Boyle* identified one such "uniquely federal interest" when the United States procures equipment. *Id.* at 507. Procuring a helicopter, *Boyle* reasoned, "border[ed] upon" two lines of cases in which this Court had described the uniquely federal interests of (a) the United States' own rights and obligations and (b) the liability of federal officials. *Id.* at 504-05, 507 & nn.1-2.

Second, *Boyle* assessed whether a "'significant conflict'" existed between that federal interest and Boyle's state design-defect claims. *Id.* at 507. *Boyle* concluded that the alleged state-law duty requiring the manufacturer to design hatches one way (Boyle said inward-opening) was "precisely contrary" to the government's way (specifying outward-opening hatches). *Id.* at 509. *Boyle* turned to the FTCA's discretionary-function exception to bolster that finding of

a conflict. *Id.* at 511 (concluding that the FTCA exception "demonstrate[d] the potential for, and suggest[ed] the outlines of, 'significant conflict' between federal interests and state law in the context of Government procurement"). According to *Boyle*, it made "little sense" to insulate the government for discretionary design choices when the government itself produced the helicopters but not when it contracts for their production according to its specifications. *Id.* at 512.

Third and finally, *Boyle* created a rule of federal common law for contractors that, when satisfied, displaced state claims: "Liability for design defects in military equipment cannot be imposed, pursuant to state law when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* The first two conditions were necessary to "assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself." *Id.*

Four justices dissented. *See id.* at 515-31 (Brennan, J., dissenting); *id.* at 531-32 (Stevens, J., dissenting). Justice Brennan—joined by Justices Marshall and Blackmun—observed that "federal common law cannot supersede state law *in vacuo* out of no more than an idiosyncratic determination by five Justices that a particular area is 'uniquely federal.'" *Id.* at 517-18 (Brennan, J., dissenting). Justice Brennan added that, before *Boyle*, this Court had "steadfastly declined to impose federal contract law on relationships

that are collateral to a federal contract, or to extend federal employees' immunity beyond federal employees." *Id.* at 519. And he observed that the majority created a contractor defense despite Congress's rejection of "a sustained campaign by Government contractors to legislate for them some defense." *Id.* at 515 & n.1 (citing H.R.4765, 99th Cong., 2d Sess. (1986); S.2441, 99th Cong., 2d Sess. (1986); H.R.2378, 100th Cong., 1st Sess. (1987); H.R.5883, 98th Cong., 2d Sess. (1984); H.R.1504, 97th Cong., 1st Sess. (1981); H.R.5351, 96th Cong., 1st Sess. (1979)). Justice Stevens separately explained that Congress, not courts, was "better equipped" to "embark on a lawmaking venture." *Id.* at 531 (Stevens, J., dissenting).

2. *Boyle* is hard to square with this Court's more recent Supremacy Clause and preemption jurisprudence. The Supremacy Clause requires a conflict between state law and the "Constitution" or "Laws of the United States," U.S. Const. art. VI, cl.2, not "'some brooding federal interest,'" *Garcia*, 589 U.S. at 202; *see also supra* at 17-19. But by *Boyle*'s own telling, the "uniquely federal interests" underlying step one of its preemption analysis are those divined by "courts," not codified by Congress. 487 U.S. at 504. And no federal "Laws," U.S. Const. art. VI, cl.2, preempted the state claims, *Boyle*, 487 U.S. at 504. Echoing Justice Brennan's dissent, this Court has since rejected such freewheeling preemption analyses: "In all cases," "'[t]here is no federal preemption *in vacuo*,' without a constitutional text, federal statute, or treaty." *Garcia*, 589 U.S. at 202.

At every step, *Boyle* unavoidably requires a "'freewheeling judicial inquiry into whether a state [law] is in tension with federal objectives'"—an inquiry unmoored from statutory text, and that "cannot" support preemption. *Id.* (quoting *Whiting*, 563 U.S. at 599 (plurality)). *Boyle* embraced a "freewheeling, policy-based analysis," Merrill, *The Disposing Power of the Legislature*, 110 Colum. L. Rev. 452, 463 n.64 (2010), and "a public policy rationale rather than reliance upon any statutory regulation established by Congress," Smith, *Defective Military Aircraft & the Government Contractor Defense*, 54 J. Air L. & Com. 439, 496 (1988). At steps one and two, *Boyle*'s search for a "'significant conflict'" did not compare state law and a law passed by Congress, but state law and court-divined "uniquely federal interest." 487 U.S. at 507-08. In so doing, *Boyle* relied on unspoken emanations from the FTCA, extrapolating what Congress might have thought about contractors while acknowledging Congress had not gone so far. *Id.* at 505-07, 511-12. And, at step three, without a congressional directive, *Boyle* contrived new federal law based on what "seem[s]" like "sound policy." *Id.* at 513. Step after step, *Boyle* "'undercut[s] the principle that it is Congress rather than the courts that pre-empts state law.'" *Whiting*, 563 U.S. at 607 (plurality). Because *Boyle*'s "uniquely federal interests" preemption analysis is difficult to reconcile with the Supremacy Clause and this Court's recent preemption decisions, this Court should not extend it here.

B. *Boyle* doesn't shield contractors such as Fluor who violate their contracts and the government's instructions.

Even if "uniquely federal interests" preemption were justified in *Boyle*, the logic of *Boyle* does not apply to the circumstances of Hencely's state claims.

1. *Boyle*'s preemption analysis applied in a uniquely narrow circumstance.

By *Boyle*'s own terms, courts should deploy "uniquely federal interests" preemption only in limited circumstances not present here. The Fourth Circuit could find Hencely's claims preempted only by extrapolating *Boyle* beyond its bounds.

Boyle observed that in "most fields of activity," this Court has "refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, or a direct conflict between federal and state law." 487 U.S. at 504. *Boyle* itself contemplated only "a few areas" of "'uniquely federal interests'" and even fewer instances triggering preemption. *Id.*; *see id.* at 508 ("But conflict there must be."). This Court's "recourse" to that type of atextual preemption was then and is now "noticeably diminishing." Merrill, *supra*, at 463; *see, e.g.*, *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-42 (1981) (declining to create a federal rule of decision).

a. At step one, *Boyle* added a new "uniquely federal interest[]" to those "few areas" previously recognized by relying on two lines of this Court's precedent.

487 U.S. at 504. *Boyle*'s foundation for that new "federal interest[]" shows just how limited this Court intended *Boyle*'s reach to be. *Id.* at 504-05.

Boyle's first line of decisions displaced state law with federal law because the government was a party and the government's rights and obligations were at stake. In those cases, the government issued commercial paper, *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366 (1943); *Nat'l Metro. Bank v. United States*, 323 U.S. 454, 455-56 (1945), was the assignee of a note, *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 457-58 (1942), had rights under a contract, *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947), or obtained land, *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 592-94 (1973). In contrast, the government is not a party here; this suit pits an injured soldier against a government contractor already found to have violated its government contract. Pet.App.158, 167-69, 179-80, 186.

Boyle's second line of decisions identified civil liability of federal officials as another area of "peculiarly federal concern." 487 U.S. at 505. Those decisions were also limited. Broad federal-common-law immunity remains for only a narrow subset of federal officials: judges, *Bradley v. Fisher*, 80 U.S. 335, 354 (1871), heads of executive departments, *Spalding v. Vilas*, 161 U.S. 483, 498 (1896), and prosecutors, *Yaselli v. Goff*, 12 F.2d 396, 404 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927). Other federal officials have more limited immunity—only for discretionary acts performed within the scope of official duties. *See Barr v. Matteo*, 360 U.S. 564, 573 (1959) (plurality); *Howard*

v. Lyons, 360 U.S. 593, 596-97 (1959). Again, government contractors appeared nowhere in those cases' holdings.

Neither of *Boyle*'s twin pillars for its newfound "federal interest" for some government contractors supports the sweeping rule below: that a "uniquely federal interest" exists in blocking state claims against government contractors merely "'touch[ing]'" the military. Pet.App.21.

Indeed, alongside those lines of cases, this Court had long recognized that "the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation"—even when the rights and obligations of the government are at issue. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979) (priority of federal liens over private liens); *see also United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 316-17 (1947) (declining to create a right of the government to recover from the defendant for injuring a soldier); *United States v. Gilman*, 347 U.S. 507, 508-09, 511-13 (1954) (declining to create a right of the government to seek indemnity from its employee whose negligence resulted in judgment against the United States). For instance, in *Westfall*, 484 U.S. at 300, this Court "recognized the continuing viability of state tort suits against federal officials," *Hernandez v. Mesa*, 589 U.S. 93, 110 (2020). Responding to *Westfall*, Congress passed the Westfall Act (28 U.S.C. §2679) to "'protect Federal employees from personal liability for common law torts committed within the scope of their employment.'" *De Martinez v. Lamagno*, 515 U.S. 417, 426

(1995). Decided against this backdrop, *Boyle* did not categorically rescind this Court's instruction that courts should "withhold creative touch" until Congress acts. *Standard Oil*, 332 U.S. at 317.

Boyle further acknowledged that any such "federal interests," with all their limitations, rarely apply when the government is not a party. 487 U.S. at 506. In cases "purely between private parties" that do not "touch the rights and duties of the United States," this Court leaves state law in place except in the most unique and limited circumstances. *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Parnell*, 352 U.S. 29, 33 (1956). The dispute in *Parnell* involved a bank that owned purportedly stolen government-guaranteed bonds and a claim that the defendants took the bonds in bad faith. *Id.* at 31-32. The question was whether federal law (imposing the burden of showing bad faith on the bank) ought to control, given that "[s]ecurities issued by the Government generate immediate interests of the Government." *Id.* at 33. This Court held that federal law need not control because the notion that applying state law to that dispute "might somehow" adversely affect the government was "far too speculative" and "remote" to justify displacing state law. *Id.* at 33-34. In *Wallis v. Pan American Petroleum Corp.*, the Court similarly held that state law could govern the "dealings of private parties in an oil and gas lease," even though the lease was issued by the Secretary of the Interior. 384 U.S. 63, 67 (1966). And in *Miree v. DeKalb County*, state law governed whether plaintiffs could sue a municipality as third-party beneficiaries of the municipality's contract with the FAA after the municipality's violations of various safety

provisions in the contract allegedly caused a plane crash. 433 U.S. 25, 26-27 (1977). Allowing state law to govern claims in that suit between private parties had "no direct effect upon the United States or its Treasury," even though the municipality was involved only by virtue of a government contract. *Id.* at 29.

Because it labored against that backdrop, *Boyle* "strained to establish a narrow extension of federal common law" with preemptive force in a case where the government was not a party. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 Ohio State L.J. 559, 610-11 (2013). In doing so, *Boyle* purported to stick to its modest foundations and "resisted general language that would imply broad-ranging federal common law arising from nonspecific federal interests." *Id.* For instance, while acknowledging that Boyle's claims did "not involve an obligation to the United States under its contract" but rather Sikorsky's liability, the Court emphasized that Sikorsky's performance implicated the "interest in getting the Government's work done" exactly as the government specified. 487 U.S. at 505, 508-10, 512. In this way, *Boyle* conceived of Sikorsky as the government's *alter ego* to justify extending this Court's government-as-a-party lines of precedents to a case involving a contractor. For that extension, *Boyle* did not purport to break new ground. *Boyle* pins its rationale to *Yearsley v. W.A. Ross Construction Co.*, which held that "there is no liability on the part of the contractor" who "execute[s]" the government's "will." 309 U.S. 18, 20-21 (1940). Neither that rationale nor *Yearsley* itself

could justify a further extension to a government contractor found to have *violated* the government's will. *Contra* Pet.App.30.

b. *Boyle*'s step-two and step-three analyses further limit any extension of *Boyle*. At step two, *Boyle* analyzed whether a "'significant conflict'" exists between the relevant federal interest and state law. *Boyle* found "procurement of equipment by the United States is an area of uniquely federal interest," but that did not "end the inquiry." 487 U.S. at 507. That interest could displace state law "only where … a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law.'" *Id.* (quoting *Wallis*, 384 U.S. at 68). If the conflict is "more narrow," then "only particular elements of state law are superseded." *Id.* at 508 (citing *Little Lake*, 412 U.S. at 595; *Lyons*, 360 U.S. at 597).

Boyle's examples of qualifying conflicts illustrate its limits. In those examples, the dispositive question was whether a plaintiff sought to impose "a duty *contrary* to the duty imposed by the Government contract." *Id.* (emphasis added) (discussing *Miree*). If not, no conflict. *Id. Boyle* hypothesized a government order for air-conditioning units "specifying the cooling capacity but not the precise manner of construction." *Id.* at 509. Some additional state-law duty regarding a "certain safety feature" for air-conditioning units generally would not be "contrary" to anything promised to the government. *Id.* Because the contractor "could comply both with its contractual obligations and the state-prescribed duty of care," "[n]o one suggests that

state law would generally be pre-empted in this context." *Id.* *Boyle* similarly imagined a government order for "stock" helicopters that "happen to be equipped with" outward-opening escape hatches, though not specified by the government; in that case, it would be "impossible" to say the government "has a significant interest in that particular feature." *Id.* It necessarily follows that there is no "significant interest"—and no conceivable conflict—with state claims against a government contractor *who breached* its government contract.

The conflict found in *Boyle* abides by those limitations and bears no resemblance to the government contractor acting in violation of its contract here. *Boyle* found a "'significant conflict'" between the alleged state-law duty requiring an inward-opening escape hatch and the "precisely contrary" duty imposed by the government specifying outward-opening escape hatches. *Id.* The outward-opening hatches, *Boyle* later explained, were a product of the government's specific "judgment" that balanced "the trade-off between greater safety and greater combat effectiveness." *Id.* at 511. State claims against the contractor who acted as the government's *alter ego* "'second-guess[ed]'" that governmental "judgment." *Id.* at 511-12. By contrast, state claims against a contractor who violated its contract and didn't do what the government required do not second-guess the government's judgment.

Boyle's step three confirms that *Boyle*'s logic doesn't apply to the contractor who violates its contract. After finding a significant conflict, *Boyle* determined the scope of displacement of state law at step

three. *Boyle* held that state law would be displaced only if the government "approved reasonably precise specification" to which the contractor "conformed," and only after the contractor "warned" about "dangers in the use of the equipment." *Id.* at 512. In other words, *Boyle* on its own terms doesn't displace state claims against contractors who fail to "conform[]" to the government's specifications. *Id.* So invoking *Boyle* to displace state claims against a contractor who violates its contract stretches *Boyle* beyond its stated limits.

2. The asserted federal interest in the decision below is more abstract and overbroad than *Boyle* permits.

The decision below gets *Boyle* backwards at every step. Neither Fluor nor the Fourth Circuit has identified what possible "unique federal interest" warrants shielding all government contractors merely touching the military. Nor do they identify a possible conflict between such a federal interest and state claims against a government contractor who *violates* its contract and military orders.

a. The Fourth Circuit's step-one search for "uniquely federal interests" looks nothing like *Boyle*. *Boyle* did not identify its new "federal interest" by jumping straight to the FTCA. Instead, *Boyle* looked first to the history of federal law in cases involving the rights and obligations of the federal government and federal officials. 487 U.S. at 504-05; *see* Ramsey, *supra*, at 610-11. Finding the specific procurement contract at issue "border[ed] upon" those existing "areas,"

Boyle next asked whether applying state law could thwart that newfound federal interest, or whether state and federal law could coexist to govern it. 487 U.S. at 504, 507. The Court found a "significant conflict" in those particular circumstances given the directly contradictory design requirements. Only then did *Boyle* consult the FTCA's discretionary-function exception as a further "*limiting principle*." *Id.* at 509, 511 (emphasis added); *see also id.* at 526 (Brennan, J., dissenting) (observing that the discretionary-function exception had no "direct bearing" on the majority's analysis and both the contractor and the government "disavowed" relying on it).

By contrast, the Fourth Circuit jumped straight to the end. It converted the FTCA from a limiting principle to the starting blocks for "'field'" preemption. Pet.App.21; *but see supra* at 36-41. The court never identified what existing "areas" of uniquely federal interests "border[ed]" on Hencely's claims against a contractor who breached its contract. *Boyle*, 487 U.S. at 504; *see* Pet.App.20-21. Instead, the court started with the FTCA's combatant-activities exception as a fount of preemption for government contractors—even though the FTCA says nothing about them.

Not even *Boyle* considered the FTCA to be grounds for declaring a new "uniquely federal interest[]" for government contractors. That would contravene this Court's caution that "strict conditions" must be satisfied before claiming "a new area for common lawmaking." *Rodriguez*, 589 U.S. at 136. And this Court has closely scrutinized whether "common lawmaking" is

truly "'necessary to protect uniquely federal interests.'" *Id.*

At bottom, *Boyle* calls on courts to "focus[]" and "train[] on," *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 693 (2006), a "specific" and "concrete" federal interest, *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994). Only that kind of specific inquiry can prevent the "runaway tendencies" of judicial lawmaking. *Id.* at 89. *Rodriguez*, for example, held that a host of IRS regulations for tax returns did not evince any "unique interest" justifying a federal-common-law rule with preemptive force for a question about tax distribution. 589 U.S. at 134, 136-37. Likewise, *O'Melveny* held that the FDIC's statutory authority to serve as a receiver of failed banks did not provide a uniquely federal interest justifying federal-common-law rules of malpractice and fiduciary duty applicable against a law firm that advised the failed bank. 512 U.S. at 81, 85-86, 88-89.

Even if the FTCA's exceptions were relevant at *Boyle*'s first step of identifying any federal interest, *contra Boyle*, 487 U.S. at 509, 512, the combatant-activities exception still cannot support the Fourth Circuit's broad extrapolation of a unique federal interest "'in combat'" that is "'*always precisely contrary*'" to state tort law. Pet.App.21 (emphasis added). That exception restores *the government's* immunity for *the military's* combatant activities. *Supra* at 24-26. At most, and contrary to the FTCA's silence on contractor liability, courts could extrapolate from it an interest in limiting liability for contractors acting in step with

the government as its *alter ego*, conforming to its orders. But nothing in that exception makes "unmistakably clear," *Tex. Indus.*, 451 U.S. at 643, a federal policy that a government contractor violating the government's own orders still "should always win" a preemption defense, *O'Melveny*, 512 U.S. at 88.

b. Had the Fourth Circuit looked further than the FTCA, labeling a case as one about "warfare" strikes at far too high a level of generality. Pet.App.21. *Boyle* did not stop after identifying procurement of military equipment generally as an "area" of "uniquely federal interests." 487 U.S. at 507. It then required "an identifiable 'federal policy or interest'"—there, the interest in obtaining a specific helicopter design suited for military functions. *Id.* at 507, 509-12.

The same must be true here. This dispute does not involve a State's attempt to interfere with Congress's power to raise and support the Army or Navy, *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 593-94 (2022), or the President's deployment of troops, *Perpich v. Dep't of Def.*, 496 U.S. 334, 349 (1990). Rather, this tort suit pits an injured soldier against a private contractor whose only connection to the military is the government contract that it violated. *Cf. Penn Dairies v. Milk Control Comm'n of Pa.*, 318 U.S. 261, 270 (1943) (milk supplier for the military not immune from state regulations of milk prices where the State "impose[d] no prohibition on the national government or its officers"). If this contractor-facing suit implicates the federal government's interest in war, that interest focuses on safeguarding "the military's *own* conduct or decision" from state interference. *Badilla v.*

Midwest Air Traffic Control Serv., Inc., 8 F.4th 105, 128 (2d Cir. 2021). *Boyle* requires more legwork—and limitations—before a court derives any "wartime" interest beyond the military and imputes it to contractors.

A rule shielding government contractors from liability based on a "federal interest" in military-theater operations flouts *Boyle* unless the contractors' actions can be regarded as the military's own. *See id.* at 128-29. Conversely, defining a "federal interest" broadly enough to *preclude* state claims against contractors for actions *violating* military orders, *cf.* Pet.App.21, 30, defies English. It *undermines* the military's "interest" (as defined in *Boyle*) to shield such contractors from liability. *Boyle*, 487 U.S. at 512 (applying preemption only when "the design feature in question was considered by a Government officer, and not merely by the contractor itself").

Defining the interest properly—such that it does not extend to all contractors in all cases touching on the military's activities—comports with the Department of Defense's own understanding. Warfare by itself doesn't preclude contractor liability. According to DOD, contractors such as Fluor who accompany U.S. forces in theater should not expect to "avoid accountability to third parties *for their own actions* by raising defenses based on the sovereignty of the United States" if "the Government does not, in fact, exercise specific control over" the contractor's "actions and decisions." 73 Fed. Reg. at 16,768 (emphasis added). By contrast, DOD understood that contractors can avoid liability

only "when injuries to third parties are caused by the actions or decisions of the Government." *Id.*

Fluor thus cannot claim *Boyle* preemption unless it begins by identifying a specific and concrete federal interest that justifies shielding a contractor who violates its contract and the government's instructions (as the Army found so with Fluor). Pet.App.158, 167-69, 179-80, 186. That is, Fluor must show its own failures to supervise and escort Nayeb were somehow "the military's *own* conduct or decision." *Badilla*, 8 F.4th at 128. Fluor cannot make that showing here. The military required Fluor to supervise its own Afghan national subcontractor employees and to escort them at all times outside worksites. Pet.App.168, 179-80, 184-86. Fluor failed to "'execut[e]'" the government's "'will,'" *Boyle*, 487 U.S. at 512 (quoting *Yearsley*, 309 U.S. at 20-21), meaning its negligence was not "the military's *own* conduct or decision," *Badilla*, 8 F.4th at 128. Fluor fails at *Boyle*'s step one.

3. State claims against contractors who have breached their contracts do not significantly conflict with any uniquely federal wartime interests.

Even if a "uniquely federal interest" can be extended to government contractors here, that's only *Boyle*'s first step. 487 U.S. at 507. A uniquely federal interest alone isn't "'sufficient'" to displace state claims against all contractors. *McVeigh*, 547 U.S. at 692; *accord Boyle*, 487 U.S. at 507 (federal interest is

"necessary" but not "sufficient"). A "'significant conflict between some federal policy or interest and the use of state law'" is a "precondition" before heretofore undiscovered federal common law can preempt state law. *O'Melveny*, 512 U.S. at 87; *Boyle*, 487 U.S. at 508 ("conflict there must be"). Without that significant conflict, *Boyle* preemption fails at step two "regardless of the strength or importance of the federal interests at stake." *Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 141 (2d Cir. 2005) (Sotomayor, J.).

Nothing in *Boyle* suggests that state law poses a significant conflict with federal law when a contractor "indisputabl[y]" violated its contract and the military's instructions. Pet.App.186. And *Boyle* itself acknowledges that when a contractor can comply with both state law and the military's instructions, courts should not displace state law. 487 U.S. at 509.

a. Recall that *Boyle* found a significant conflict between "precisely contrary" government design instructions and an asserted state-law duty. *Id. Boyle* thus recognizes "a special circumstance" "[w]here 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. *Boyle* "hinges" on the "contractor's having followed" the government's instructions. *In re Jt. E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 631 (2d Cir. 1990); *see, e.g.*, *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 800-01 (5th Cir. 1993) ("federal law provides no defense to the military contractor that mismanufactures military equipment" and "fail[s] to

conform to the government specifications" (cleaned up)).

Boyle's logic doesn't apply if the contractor *violates* the government's instructions. A contractor who doesn't do what the government says cannot claim "the Government made me do it." *In re Katrina Canal Breaches Litig.*, 620 F.3d 455, 465 (5th Cir. 2010) (cleaned up). And the "subject of the claim" couldn't be the "very thing" that the government "directed" the contractor to do. *Malesko*, 534 U.S. at 74 n.6.

Here, the Army found Fluor "indisputabl[y]" violated its contractual obligations and the military's instructions to supervise its Afghan personnel and to escort Nayeb on the day of the bombing. Pet.App.186. Fluor has not shown—and cannot show—that the military "made" it do what the Army found it did:

- ignore existing escorting responsibilities on the day of the attack, Pet.App.174-76, 180, 186;

- give Nayeb unfettered access to tools he did not need for his job (such as a multimeter used to measure voltage, current, and resistance) that could be used to construct a bomb, Pet.App.169, 172-74;

- supervise Nayeb in a "sporadic" manner and let him roam unattended, which "facilitated" his "freely acquir[ing]" the bomb components and gave him the "freedom of movement to complete [the bomb's] construction," Pet.App.169-71, 179-80, 186;

- retain Nayeb for continued employment despite his repeated workplace infractions that warranted termination, Pet.App.171-72, 177.

Given the Army's findings, Hencely's claims do not challenge *the military's* conduct and decisions. *Contra* Pet.App.21. Yet the Fourth Circuit conceived of Hencely's claims as second-guessing the military's conduct and decisions because the military (a) adopted the strategy to hire Afghan nationals to work on the base and (b) vetted Nayeb before his employment with Fluor. Pet.App.23-24. But Hencely doesn't allege negligent *hiring* by Fluor. His claims go to Fluor's negligent supervision, entrustment, retention, and control. Fluor—not the military—bore the responsibility to supervise and escort Nayeb. Pet.App.168-69. And Fluor controlled the use of and access to its tools, and could terminate Afghan employees on its own initiative. Pet.App.26; *see also* Pet.App.36 (Heytens, J., dissenting).

The Fourth Circuit also observed that the military controlled base access, searched Afghan nationals, and provided base security. Pet.App.24. But once inside the base, Fluor—not the military—bore the responsibility to supervise Nayeb at his worksite and to escort him whenever he left it. Pet.App.168-69. Adjudicating Hencely's claims against Fluor for its own failures within its areas of responsibility doesn't require second-guessing the military's separate protection measures. Indeed, the Fourth Circuit didn't discuss those military responsibilities to tie Fluor's failures to specific military conduct and decisions. Instead, the court asked—applying its flavor of field-

preemption—whether the military had the "ultimate command authority" over the base at a high level of generality. Pet.App.26. Such an analysis flouts *Boyle*, which asks whether and how the government's specific "judgments" would be "frustrated." 487 U.S. at 511-12.

The Fourth Circuit also adverted to the fact that, before the bombing, Fluor offered to provide additional escorts, but the military rejected that proposal. Pet.App.24-25. But Fluor failed to escort Nayeb on the day of the bombing as *existing* escorting protocols required. Pet.App.174-76, 180, 186. Hencely's claims don't allege that Fluor should have increased the number of escorts. And the military's choice not to fund additional escorts does not bear on whether Fluor properly discharged its then-existing supervision and escorting requirements.

b. The Fourth Circuit also erred by displacing state law even though Fluor could have "compl[ied] with both its contractual obligations and the state-prescribed duty of care." *Boyle*, 487 U.S. at 509. Fluor has never argued that it couldn't. And the Fourth Circuit expressly sidestepped that question. Pet.App.27.

In *Boyle*, the helicopter manufacturer could not comply with "precisely contrary" escape-hatch design requirements. 487 U.S. at 509. By contrast, South Carolina's duties of reasonable supervision, entrustment, retention, and control of employees underpinning Hencely's claims are not "precisely contrary," *id.*, to what the military required of Fluor. Fluor's contract

imposed on Fluor a "supervisory responsibility" of Afghan national subcontractor employees. Pet.App.168. Fluor was "'responsible for'" ensuring that "'all personnel supporting [the contract] comply with the standards of conduct, and all terms/conditions set forth in [the performance work statement] and the Basic Contract,'" and for "'provid[ing] the necessary supervision for personnel.'" *Id.* Hencely's state claims of negligent supervision, entrustment, retention, and control concern Fluor's duty to "exercise reasonable care to control" its personnel. *Degenhart v. Knights of Columbus*, 420 S.E.2d 495, 496 (S.C. 1992); *see also James v. Kelly Trucking Co.*, 661 S.E.2d 329, 330-31 (S.C. 2008); *Doe v. ATC, Inc.*, 624 S.E.2d 447, 450 (S.C. Ct. App. 2005).

Hencely's claims look more like *Miree* than *Boyle*. In *Miree*, "the suit was not seeking to impose upon" the contractor "a duty contrary to the duty imposed by the Government contract. *Boyle*, 487 U.S. at 508. Rather, it was the contractual duty itself." *Id.* The suit in *Miree* "advance[d] federal aviation policy by inducing compliance with FAA safety provisions." 433 U.S. at 32. Though Hencely's negligence claims do not seek to enforce Fluor's contract, they enforce the same supervisory responsibility required of Fluor and do not impose duties that are "precisely contrary" to what the military required. *Boyle*, 487 U.S. at 509. The Fourth Circuit never analyzed whether they were. Pet.App.27. This failure cannot be reconciled with this Court's federal-common-law decisions holding that the "permissibility" of "displacing state law" turns on a significant conflict between state law and federal in-

terests. *O'Melveny*, 512 U.S. at 87-88. "Unless and until that showing is made, there is no cause to displace state law." *McVeigh*, 547 U.S. at 693.

For all these reasons, Fluor fails at *Boyle* step two. It cannot show a significant conflict between federal interests and Hencely's state claims. Without such a conflict, displacing state law is inappropriate.

4. Even if a significant conflict exists, the Fourth Circuit crafted an overbroad test.

Even if this case presents a significant conflict between uniquely federal interests and state law, the Fourth Circuit still devised an overbroad test to displace state law. At step three, *Boyle* tied the scope of displacement to the nature of the significant conflict to "assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated." 487 U.S. at 512. That's why this Court later held that "[n]ot only the permissibility" but also "the scope" of displacement of state rules "turns upon such a conflict." *O'Melveny*, 512 U.S. at 87-88.

Here, *Boyle* requires nothing less than a test that focuses on the uniquely federal interests safeguarding "the military's *own* conduct or decision" from state law. *Badilla*, 8 F.4th at 128. Those interests may, at most, require displacing state law when "the military specifically authorized or directed the action giving rise to the claim." *Id.* Only that kind of approach would be faithful to the federal interests at issue and *Boyle*'s careful tailoring of the displacement. *Id.*; *see also Boyle*, 487 U.S. at 512-13. Applied here, the properly

tailored test doesn't displace Hencely's claims. The military never specifically directed or authorized Fluor to dispense with its existing supervision and escorting responsibilities under its contract. *See supra* at 50-51.

By contrast, the Fourth Circuit's test asks only if the contractor is "'integrated into combatant activities over which the military retains command authority.'" Pet.App.21-22. This test initially originated from the D.C. Circuit which "designed [it] around" the "purported 'policy of eliminating tort concepts from the battlefield'"—a broad articulation of federal interests that every court of appeals to examine it, including the Fourth Circuit itself, has rejected. *Badilla*, 8 F.4th at 128 (quoting *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009)). According to the Fourth Circuit, this test mimics field preemption of a "'more general'" nature and preempts state law—no matter if the contractor violates the military's instructions, or if "the substance of the federal duty" isn't "inconsistent with" state-law duty—so long as the military retains "ultimate command authority" over the activity. Pet.App.26-27, 30. The Fourth Circuit's quasi-field-preemption test goes far beyond *Boyle*, which tailored the displacement of state law to the nature of the conflict in that case. *See* 487 U.S. at 512-13; *O'Melveny*, 512 U.S. at 87-88. The "more narrowly defined federal interest" of safeguarding "the military's *own* conduct or decision" should "result in a correspondingly more modest displacement of state law." *Badilla*, 8 F.4th at 128; *see also Boyle*, 487 U.S. at 508 (If "the conflict is more narrow," then "only particular elements of state law are superseded."). Fluor fails at *Boyle* step three.

* * * * *

Should Congress wish to immunize a military contractor like Fluor, it can say so. Congress always can preempt state tort law if it thinks that state law interferes too much with the federal government and its contractors. But extending *Boyle* here beyond its stated limits, rather than waiting for Congress to act, "'ignores the power of Congress to protect the performance and functions of the national government.'" *Sadrakula*, 309 U.S. at 104; *see also Penn Dairies*, 318 U.S. at 271.

CONCLUSION

This Court should reverse the judgment below and remand for further proceedings.

July 31, 2025

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STATUTORY APPENDIX

APPENDIX

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Statutory Provisions:

1. 28 U.S.C. §1346 provides:

§1346 – United States as a defendant.

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

> **(1)** Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;
>
> **(2)** Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

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

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided

in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

2. 28 U.S.C. §2671 provides:

§2671 – Definitions.

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the

service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

3. 28 U.S.C. §2674 provides:

§2674 – Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense

based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

4. 28 U.S.C. §2680 provides:

§2680 – Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to--

> **(a)** Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
>
> **(b)** Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if--

> **(1)** the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> **(2)** the interest of the claimant was not forfeited;
>
> **(3)** the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> **(4)** the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering

the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[**(g)** Repealed. Sept. 26, 1950, c. 1049, §13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.