No. 24-924

IN THE

Supreme Court of the United States

WINSTON TYLER HENCELY,

Petitioner,

v.

FLUOR CORP., *ET AL.*,

Respondents.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has a longstanding interest in preserving state-law remedies for personal injury against unwarranted claims of preemption by federal law under the Constitution's Supremacy Clause. In that regard, Public Citizen opposes overbroad application of principles of implied conflict preemption that impair the operation of state law, including state damages remedies, based on courts' subjective perceptions of the unstated purposes and objectives of federal law. Similarly, Public Citizen has long been concerned about restrictive constructions of the Federal Tort Claims Act (FTCA) that may limit the availability of damages remedies to individuals injured by or in the course of federal activities. Accordingly, Public Citizen has frequently filed briefs in this Court and others addressing issues relating to preemption, as well as the FTCA. *See*, *e.g.*, *Martin v. United States*, 145 S. Ct. 1689 (2025).

Public Citizen submits this brief to address the Fourth Circuit's holding that the purposes and objectives of the FTCA's "combatant activities" exception, 28 U.S.C. § 2680(j), and the reasoning of this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), broadly preempt imposition of state tort liability on a private contractor whose actions result in injuries to members of the armed forces in a

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief.

war zone—even when the contractor has acted in violation of binding directives of military officers and its contractual obligations to the United States. Petitioner Hencely's brief understandably takes a skeptical view of "purposes and objectives" preemption, Pet. Br. 29–30, and argues that *Boyle* is "difficult to reconcile with the Supremacy Clause," Pet. Br. 31. Without engaging on those points, Public Citizen files this brief to emphasize, as Hencely also argues, that the Court need not reconsider or call into question the continuing viability of "purposes and objectives" preemption, or *Boyle*'s creation of a federal-contractor defense to state tort liability, to reverse the judgment below. Rather, conventional preemption analysis and the holding and reasoning of *Boyle* foreclose the result reached by the court of appeals.

SUMMARY OF ARGUMENT

The FTCA exempts the United States, its agencies, and its employees from tort liability arising from the military's combatant activities in time of war. The Act says nothing to suggest that contractors are similarly exempt: It neither expressly preempts state-law tort claims against military contractors nor occupies any field to the exclusion of such claims. Moreover, imposing liability on military contractors does not directly conflict with anything in the FTCA: Such liability does not rest on state-law requirements or rules of decision that are incompatible with the immunity for the United States, its agencies, and employees that the combatant activities exception creates.

Further, state tort liability for contractors does not frustrate the "purposes and objectives" of the combatant activities exception. The purpose of the exception is, as the statute's language and structure reveal, to

immunize the government and its employees. Imposing liability on contractors does not frustrate or impair that purpose. The Fourth Circuit's attribution of a broader purpose to the exception—precluding state-law "regulation" of the military—is unsupported by the FTCA's text, structure. and context, and does not, in any event, support the broad rule of preemption created by the Fourth Circuit. State tort claims like the ones in this case, which allege that the same conduct violated both state tort duties and the military's own directives to its contractors, do not call into question the correctness of the military's actions and decisions. Such claims thus do not threaten to "regulate" the military.

This Court's decision in *Boyle*, far from supporting the broad immunity that the court of appeals granted military contractors, contradicts it. *Boyle* emphasizes that state and federal law potentially conflict only when a tort claim against a federal contractor seeks to hold it liable for its *compliance* with its duties to the federal government, not when a tort plaintiff alleges that the contractor acted in violation of both its contractual obligations to the federal government and its state-law duties of care. *Boyle* suggests only that there may be a narrower preemption defense for military contractors who can demonstrate that the actions for which a plaintiff seeks to hold them liable were attributable to the military's directives, rather than to the contractor's independently wrongful conduct. Whether such a defense exists, and if so what it encompasses, is not before this Court in the current posture of this case, which presents only the question whether the blanket immunity that the Fourth Circuit granted military contractors for combatant-related activities can be sustained. This Court should therefore

reverse the judgment below and leave for another day the question whether a contractor defense analogous to that in *Boyle* applies to claims against contractors involved in combat activities.

ARGUMENT

I. The FTCA's combatant activities exception does not preempt claims against a military contractor that do not challenge the military's own actions or decisions.

All arguments that federal law preempts state law—including the claim in this case that state-law claims against military contractors for injuries to members of the armed forces in combat zones are preempted—find their ultimate source in the Constitution's Supremacy Clause. *See Murphy v. NCAA*, 584 U.S. 453, 477 (2018). That Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2.

The Supremacy Clause's text forecloses application of state law only when state law provides something "to the Contrary" of federal law. That is, the Clause "supplies a rule of decision when federal and state laws conflict," under which "state law must yield" to a conflicting command of federal law. *Martin v. United States*, 145 U.S. 1689, 1700 (2025). This Court has long used the term "preemption" to describe the circumstance where the Supremacy Clause's rule of decision forecloses application of a conflicting state law. *See Murphy*, 584 U.S. at 477. And it has explained that *all* forms of preemption involve "a clash between

a constitutional exercise of Congress's legislative power and conflicting state law." *Id.* at 479. Here, imposing state-law tort liability on a private contractor for injuries to a servicemember involved in wartime combatant activities does not involve any such clash with an exercise of Congress's legislative power. Application of state law therefore is not preempted.

A. Tort claims against a military contractor do not conflict with the FTCA.

1. The Supremacy Clause's rule of decision most clearly comes into play when a valid federal statute expressly preempts application of state law to particular subjects or circumstances. Resort to state law in those circumstances is directly contrary to the explicit command of federal law. *See Murphy*, 584 U.S. at 478. Nothing in the FTCA or any other federal statute, however, expressly preempts state-law tort claims against contractors who injure servicemembers engaged in combat activities in time of war.

2. Preemption may also arise when state law is invoked in an area that the Constitution or a statute has expressly or implicitly carved out as the exclusive domain of federal law. In such cases, a state law that purports to operate in the occupied field is contrary to a federal-law directive that excludes application of state law and thus presents "a clash between a constitutional exercise of Congress's legislative power and conflicting state law." *Id.* at 479.

No such clash is present here. To the extent the FTCA occupies any field, that field is limited to the liability or immunity of the United States, its agencies, and its employees for torts committed by government employees in the course of their duties. *See* 28 U.S.C. §§ 1346(b), 2671–2680. The statute does not

address the liability of contractors who do not fall within its definition of employees, and it expressly excludes contractors from its definition of the federal agencies subject to its provisions. *See* 28 U.S.C. § 2671. The liability of private entities that are neither federal government agencies nor employees is not regulated by the FTCA. And when a federal statute does not address a subject, "it is hard to see how or why state law on the subject would be [field] preempted." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 787 (2019) (opinion of Ginsburg, J.). Simply put, a statute's field preemption cannot extend beyond the field of exclusive federal authority that the statute defines. *See id.* at 768 (lead opinion of Gorsuch, J.).

3. Preemption of state tort liability will also arise where state law is contrary to commands of federal law, even when applicable federal law does not explicitly displace state law and even in fields where the state and federal governments both possess authority. *See Murphy*, 584 U.S. at 478. Importantly, this Court has held that this type of implied conflict preemption occurs only when state and federal law "directly conflict." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011). Not all differences in the outcomes generated by application of state and federal law are direct conflicts. In our system, state and federal law often "overlap," addressing the same subjects in different ways. *Kansas v. Garcia*, 589 U.S. 191, 211–12 (2020). State laws may impose requirements or prohibitions that federal laws on similar subjects do not. *See*, *e.g.*, *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011). Similarly, federal law may limit liability under a federal cause of action by making proof of some fact an element of the claim, while state law may not require such proof to recover damages for the same type

of conduct under a state-law cause of action. Such variations are not conflicts, but permissible differences between the rights afforded and requirements imposed under state and federal law. Unless federal law is properly understood to *protect* a defendant against the liability that state law would impose, the imposition of liability under state law is not "contrary" to federal law within the meaning of the Supremacy Clause. *See Garcia*, 589 U.S. at 211.

State and federal law conflict most obviously when they impose substantive requirements or prohibitions on primary conduct that are irreconcilable—for example, when state law directs someone to do something that federal law prohibits. Where it is not possible for a regulated party to "comply with both federal and state directives, the Supremacy Clause tells us the state law must yield." *Martin*, 145 S. Ct. at 1700; *see PLIVA*, 564 U.S. at 618 (explaining that state law is preempted where it is "impossible for a private party to comply with both state and federal requirements" (citation omitted)).[2] State and federal law may also conflict if they supply contradictory rules of decision applicable to matters involving non-contradictory substantive standards of conduct. In such circumstances, it is impossible for a judge to apply both state and federal law. For instance, federal law may protect someone from a form of liability that state law imposes for

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[2] Justice Thomas has suggested that state and federal laws also conflict when they "are in logical contradiction[,] … even if it is possible for a person to comply with both," as when "federal law gives an individual the right to engage in certain behavior that state law prohibits" and "an individual could comply with both by electing to refrain from the covered behavior." *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 319 (2019) (Thomas, J., concurring).

wrongful conduct, even where the state and federal standards of conduct are consistent.[3]

Imposing liability on military contractors for injuries arising out of wartime combatant activities presents no such conflict with the FTCA's provisions immunizing the United States, its agencies, and its employees from claims for such injuries. *See* 28 U.S.C. §§ 2680(j), 2679(a) & (b)(1). In preserving the immunity of the United States against such claims, and precluding suit against agencies and employees, the FTCA sets forth no substantive standard of conduct governing military contractors or, indeed, anyone else. Accordingly, applying state tort law to military contractors whose activities in a theater of combat cause injuries to servicemembers or others does not, in itself, subject contractors to state and federal standards of conduct with which it is impossible to comply or that are otherwise logically contradictory.[4] Nor does imposing liability on a military contractor that is outside the

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[3] Illustrating the point, the Due Process Clause's limits on punitive damages awards conflict with and preempt state laws that permit higher awards. *See*, *e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). In such cases, the state and federal rules at issue do not set forth different standards governing primary conduct, and hence present no issue of impossibility of compliance or logical contradiction between substantive standards; rather, what such divergent rules render impossible is a judicial decision that complies fully with both state and federal law.

[4] Such a conflict might be posed if liability were premised on conduct required by the contractual obligations to the United States undertaken by the contractor or by lawful military orders that the contractor was bound to obey. The claims in this case, however, are premised on allegations that the contractor violated its contractual obligations and applicable military orders. The Fourth Circuit ruled that the contractor was protected even assuming those allegations were correct.

immunities conferred by the FTCA present courts with any clash among contradictory rules of decision. Imposing liability on a party who is *not* immunized by a federal statute does not contradict the statute's directive that *other* entities and persons—that is, the United States, its agencies, and employees—*are* immune.

B. Imposing state-law tort liability on a military contractor does not thwart the "purposes and objectives" of the FTCA's combatant activities exception.

Absent express, field, or impossibility preemption, the argument that the FTCA preempts the claims in this case turns on this Court's holdings that implied preemption may occur where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidovitz*, 312 U.S. 52, 67 (1941). Even this broadest variant of implied conflict preemption, however, does not support preemption here because private-contractor liability for injuries arising from combatant activities does not conflict with the purposes served by the relevant provisions of the FTCA.

1. "Purposes and objectives preemption" is unusual among the Court's doctrines in that it seems to give legal effect to a court's assessment, not of what a federal statute provides, but of the purposes that Congress intended the statute to serve. Treating a statute's purpose, as opposed to its enacted text, as part of "the Laws of the United States" that displace state law under the Supremacy Clause is in tension with the Court's usual recognition that "the ordinary meaning of [statutory] language accurately expresses the legislative purpose," *Engine Mfrs. Ass'n v. S. Coast Air*

Quality Mgmt. Dist., 541 U.S. 246, 252 (2004), and its rejection of the view "that *whatever* furthers [a] statute's primary objective must be the law," *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). For this reason, some members of the Court have disavowed "purposes and objectives" preemption and urged that the Court "explicitly abandon" it. *Garcia*, 589 U.S. at 213 (Thomas J., joined by Gorsuch, J., concurring).

Nonetheless, the Court has continued to recognize frustration of federal law's "purposes and objectives" as a basis for implied preemption of state law. *See*, *e.g.*, *Howell v. Howell*, 581 U.S. 214, 222 (2017). At the same time, however, the Court has made clear that preemption is never a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," and that, "[i]n all cases, the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress." *Garcia*, 589 U.S. at 202. It follows that, in the first instance, " '[e]vidence of pre-emptive purpose,' whether express or implied, must … be 'sought in the text and structure of the statute at issue.' " *Va. Uranium*, 587 U.S. at 778 (Gorsuch, J.) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Thus, a litigant claiming preemption based on conflict between state law and the requirements, purposes, or objectives of federal law "must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Id.* at 767 (citation omitted). The inquiry turns on "what can be found in the law itself," *id*. at 779, not on "abstract and unenacted legislative desires," *id*. at 778. As in other matters of statutory construction, an understanding of a federal statute's purpose must generally be sought in its text,

structure, and context. *See* A. Scalia & B. Garner, Reading Law 56 (2012).

Courts considering claims that state law frustrates a federal statute's purposes and objectives, moreover, must remain mindful of the general principles that "no legislation pursues its purposes at all costs," *Rodriguez*, 480 U.S. at 525–26, and that a statute's purpose is "not only to achieve certain ends, but also to achieve them by particular means," *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012). Thus, preemption determinations must respect both "what Congress wrote" and "what it didn't write," and should decline to infer a purpose to preempt state laws addressing matters that a federal statute conspicuously does not touch. *Va. Uranium*, 587 U.S. at 765 (Gorsuch, J.). That is, with respect to "purposes and objectives" preemption, as in other matters of statutory construction, when Congress has enacted "a statute going so far and no further," courts have no "roving license" to conclude that "Congress 'must have intended' something broader." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). Similarly, courts should not articulate the purposes of a federal statute at such a high "level of generality" that the statute's preemptive reach extends further than the text enacted by Congress warrants. *CTS Corp. v. Waldburger*, 573 U.S. 1, 18 (2014). Extending a statute to preempt state laws that affect matters the statute's text does not address is rarely if ever necessary to avoid "an unacceptable obstacle to the attainment of [the statute's] purposes." *Id*.

For these reasons, where the Court has found state laws preempted based on a "purposes and objectives" analysis, it has generally done so in circumstances where state law would effectively nullify or

circumvent explicit requirements or commands of a federal statute—not simply because the Court concluded that the legislative purpose would be better or more fully served by extending the law's preemptive reach more broadly. *See*, *e.g.*, *Howell v. Howell*, 581 U.S. at 222 (holding preempted state court orders that effectively "displace the federal rule" against treating waived military retirement pay as divisible community property); *Hillman v. Maretta*, 569 U.S. 483, 494 (2013) (holding preempted a state law that "displace[d]" a federal statute's designation of the beneficiary of a federal employee's life insurance benefits).[5]

2. The limits that this Court has placed on "purposes and objectives" preemption leave no room for the Fourth Circuit's holding that state tort laws that would impose liability for injuries caused by private contractors in war zones conflict with the "purposes and objectives" of the FTCA. The relevant provisions of the FTCA establish that the statute is the exclusive means of imposing tort liability on the United States for actions of its employees, 28 U.S.C. §§ 1346(b), 2679(a); that the statute precludes other actions seeking such relief against federal agencies and (with exceptions not relevant here) employees, *id.* §§ 2679(a) & (b); and that the statute does not permit claims against the United States based on combatant activities of its military forces during wartime, *id.* § 2680(j). The evident purpose of these provisions is to protect

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[5] Although the Court articulated its holding in those two cases in terms of "purposes and objectives" preemption, Justice Thomas concurred based on his view that the contradiction between the requirements of federal and state law created a direct conflict. *See Howell*, 581 U.S. at 223 (Thomas, J., concurring in part and in the judgment); *Hillman*, 569 U.S. at 499–501 (Thomas, J., concurring in the judgment).

the United States, its agencies, and its employees against tort liability, and the burdens of defending against such liability, for injuries arising out of wartime combatant activities of the nation's military forces. Nothing in the statute's text, structure, or context reflects any purpose to provide similar protection to anyone else.

Accordingly, imposing tort liability on private entities who are not protected by the immunity the statute leaves in place for the United States with respect to combatant activities, or by the immunity the statute creates for government employees, does not in any way frustrate the purposes of the FTCA. Such liability does not nullify, circumvent, effectively displace, or impair the immunity that the relevant statutory provisions work together to provide for the United States and its employees: Regardless of the outcome of a suit against a private contractor, neither the United States nor its employees are in danger of being subjected to the claims or liabilities that it is the purpose of the FTCA to protect them against.

To be sure, an action seeking to impose liability on a contractor may have some other effects on the United States or its employees, such as requiring them to testify or supply evidence. But the text and structure of the FTCA evince no purpose to protect the government and its employees against inconveniences, expenses, or burdens that might incidentally be imposed by tort claims against parties that are not subject to the FTCA. The purpose of the FTCA is to protect the government and its employees to the extent and through the means that Congress chose—namely, the creation of immunity against liability and suit for the United States, its agencies, and its employees. When Congress enacts "a statute going so far and

no further," *Bay Mills*, 572 U.S. at 794, extending it further is not necessary to fulfill its "purposes and objectives."

The Fourth Circuit's contrary conclusion rests on its view that the purpose of the FTCA's combatant activities exception is not just to immunize the government and its employees from tort claims arising from combatant activities, but to "foreclose state regulation of the military's battlefield conduct and decisions." Pet. App. 30 (quoting *In re KBR, Inc.*, 744 F.3d 326, 348 (4th Cir. 2014); *see id.* at 20. This Court, however, has cautioned against basing "purposes and objectives" preemption on purposes attributed to Congress at such a broad and abstract "level of generality," untethered by the details of a statute's actual structure and language. *CTS Corp.*, 573 U.S. at 18. The FTCA, in particular, is ill-suited to be construed as embodying such a sweeping "purpose." The statute is not principally concerned with matters of military governance or policy, but is narrowly focused on the circumstances under which the United States is liable for torts committed by its employees, the procedures for imposing such liability, and, since the adoption of the Westfall Act in 1988,[6] the immunity of federal employees and the circumstances in which tort claims against them are deemed to be FTCA claims against the United States. The FTCA touches on the military only in defining the armed forces as agencies of the United States and service personnel as federal employees for purposes of FTCA claims, *see* 28 U.S.C. § 2671, and, in the brief provision at issue here, excluding claims based on combatant activities in wartime from those

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[6] Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563.

that can be brought against the United States under the Act. 28 U.S.C. § 2680(j). This Court's "purposes and objectives" preemption doctrine does not require reading a single narrow immunity provision within a statute governing only the liabilities of the United States, its agencies, and its employees as *sub silentio* enacting a far more expansive "purpose" into federal law binding under the Supremacy Clause.

Accepting the Fourth Circuit's view of the statute's purpose would not, in any event, support that court's conclusion that the claims in this case are preempted. Imposing liability for the conduct at issue would not frustrate or even slightly impair the hypothesized purpose of "foreclos[ing] state regulation of *the military's* battlefield conduct or decisions." Pet. App. 20 (emphasis added). Here, petitioner Hencely alleges that respondent Fluor Corporation's conduct was both wrongful under applicable state tort law principles, and in violation of the obligations imposed on Fluor by its contracts with the military and the Army directives under which Fluor operated in the field. Hencely's claims do not rest on any allegedly wrongful action or failure to act by the military, and thus do not pose any threat of state regulation of the military's conduct or decisions.

The Fourth Circuit insisted that "when state tort law touches the military's battlefield conduct and decisions it inevitably conflicts with the combatant activity exception's goal of eliminating such regulation of the military during wartime." Pet App. 21 (quoting *KBR, Inc.*, 744 F.3d at 349). But the court never explained why any application of tort law that "touches" battlefield conduct—even if only to enforce state tort duties against a third party that align with the military's own directives to that party—"inevitably

conflicts" with the supposed statutory goal of eliminating state *regulation of the military*.

Indeed, elsewhere in its own opinion, the Fourth Circuit explained why claims such as the ones at issue do *not* interfere with the military's decisionmaking and conduct. Before considering the "purposes and objectives" preemption issue that is now before this Court, the court of appeals' opinion addressed what it considered an antecedent question: whether Hencely's claims were barred by the Fourth Circuit's own judge-made doctrine that "[m]ost military decisions are matters solely within the purview of the executive branch and therefore present nonjusticiable political questions." Pet. App. 13 (citations and internal quotation marks omitted). Applying that doctrine, the Fourth Circuit has in the past held that a claim against a military contractor is barred if "a decision on the merits of the claim would require the judiciary to question actual, sensitive judgments made by the military." Pet. App. 16 (quoting *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d. 147, 155 (4th Cir. 2016)). Conversely, a claim is not barred under the Fourth Circuit's "political question" rulings "if the underlying state law (which forms the basis for the negligence claims and defenses) does not actually require the court to assign fault to the military's actions," because in such circumstances "a district court is not inevitably required to evaluate the reasonableness of military judgments." Pet. App. 16. Moreover, the court of appeals has explained that claims that do not question military decisionmaking are not barred even when the defendant alleges as a defense that military decisions were the actual cause of the plaintiff's injuries, in whole or in part, as long as the applicable law does not

allow allocation of fault to the military in adjudicating such a defense. Pet. App. 16–17.

Applying these principles, the court of appeals held that the claims here do not raise nonjusticiable "political questions," because neither the claims nor Fluor's causation defense would " 'invariably require' the fact-finder to judge whether the military's decisions were *reasonable*, as opposed to evaluating only whether those decisions caused Hencely's injuries." Pet. App. 19 (citation omitted).[7] Thus, the court was "not convinced that deciding Hencely's case would cause the court to 'inevitably be drawn into a reconsideration of military decisions.' " Pet. App. 19 (quoting *Lane v. Halliburton*, 529 F.3d 548, 563 (5th Cir. 2008)).

In other words, when applying a judge-made doctrine designed to prevent *judicial* regulation of the military, the Fourth Circuit carefully explained why, in light of the applicable state tort law, the fact allegations underlying Hencely's claims, and the defenses asserted by Fluor, adjudication of the case *would not* "inevitably" involve the court in evaluating the propriety of the military's actions and decisions. But in determining the preemptive effect of the purpose it ascribed to the FTCA—preventing *state-law* regulation of the military—the court concluded that adjudicating exactly the same claims and defenses *would* "inevitably" involve regulation of military actions and decisions. Those conclusions cannot both be correct. And

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[7] *See also* Pet. App. 18 ("[A]lthough Fluor's defense may require the district court 'to decide if the military made decisions' that caused Hencely's injuries, it 'does not necessarily require the district court to evaluate the propriety of [those] judgments' because the court cannot assign fault to the military. *KBR, Inc.*, 744 F.3d at 340.").

the Fourth Circuit's careful explanation in its "political question" analysis of why the claims and defenses in this case do *not* intrude on military decisionmaking and prerogatives is far more persuasive than the *ipse dixit* in its preemption analysis that any state tort claims that "touch" battlefield matters "inevitably" conflict with the FTCA's supposed "purpose" of preventing state regulation of the military.

II. The Fourth Circuit's decision cannot be squared with this Court's decision in *Boyle*.

The Fourth Circuit's misapplication of conflict preemption principles to hold that the FTCA's combatant activities exception preempts *all* state-law tort claims against contractors arising out of wartime combatant activities rested in significant part on its view that this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500, afforded similar preemptive effect to the FTCA's discretionary function exception, 28 U.S.C. § 2680(a), when it created a *limited* defense for government contractors against tort liability for acts required by their contracts. Regardless of what one may think about whether *Boyle* itself was correctly decided, *see* Pet. Br. 31–34, its holding and reasoning strongly undermine the argument for preemption here and call for reversal of the decision below.

To begin, *Boyle* is an especially unlikely source of support for the proposition that a contractor must be afforded immunity coextensive with that of the federal government under an FTCA exception because it held just the opposite. The discretionary function exception at issue in *Boyle* categorically bars courts from imposing tort liability on the United States for an agency's or employee's performance or nonperformance of a discretionary function, "whether or not the discretion

involved be abused." 28 U.S.C. § 2680(a). Similarly, the combatant activities exception prevents the United States from being held liable in tort for actions of its employees that "aris[e] out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," regardless of whether those actions were proper. *Id.* § 2680(j). *Boyle*, however, did not extend a defense of similar scope to contractors: It did not hold that any claims against them relating to matters involving an agency's (or their own) exercise of discretionary functions were preempted, but only claims that sought to impose liability on a contractor for actions required to comply with contractual obligations—specifically, for providing the government with equipment that conformed to precise design specifications approved by the government.[8] *Boyle*, 487 U.S. at 512. An analogous relationship between the defense afforded a contractor and the related FTCA exception would exist, in a case like this one, if the defense were available only where a military contractor involved in wartime combatant-related activities demonstrated that the actions for which a plaintiff sought to hold it liable were required by reasonably precise government directives to the contractor in its contract or applicable military orders.

Boyle's reasoning, as well as its result, is incompatible with the court of appeals' preemption ruling. Unlike the Fourth Circuit, this Court in *Boyle* did not hold claims against contractors to be preempted just because an FTCA exception would bar analogous

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[8] Even under those circumstances, the contractor defense is unavailable if the contractor failed to warn the government about dangers posed by the specifications of which the government was unaware.

claims against the United States. Rather, *Boyle* stressed that preemption of state law can occur only when there is a "significant conflict" between state law and the policies and interests protected by federal law. 487 U.S. at 508. The Court found that conflict in the first instance not in the FTCA, but in the clash between state and federal law that may arise when state tort law would impose liability on a federal contractor for actions required to fulfill its legal duties to the federal government under a contract enforceable under federal law. *See id.* at 509. As this Court explained it, "the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications)." *Id.* The Court was concerned, however, that "it would be unreasonable to say that there is always a '*significant* conflict' " when state law imposes a duty that conflicts with federal contractual obligations. *Id.* (emphasis added). For example, the Court observed that there is no significant conflict between requirements of state and federal law when a government procurement contract does not reflect specific governmental approval of a design feature alleged to give rise to state-law tort liability (as when the government merely orders a certain quantity of "off-the-shelf" items). *See id.*

The Court in *Boyle* turned to the FTCA's discretionary function exception, not as the source of potential conflict between state and federal law in matters involving government contracts, but rather in its search for "the limiting principle" to distinguish when

such conflicts are significant enough to give rise to preemption. *Id*. at 510. The Court observed that the discretionary function exception suggested a significant federal interest in providing protection for, and preventing second-guessing of, discretionary choices made by government officials, including choices about the features of products the government contracts to purchase. The Court reasoned that the same consideration suggested that a conflict between a government contractor's legal obligations under its federal contracts and state tort law would be *significant* when a tort claim sought to impose liability on the contractor for complying with a contract term reflecting a discretionary judgment by an agency or its employees. *See id*. at 511. A tort claim seeking to impose liability on a government contractor for design defects in military equipment would present a significant conflict, the Court held, only when "the United States [had] approved reasonably precise specifications" for the product, "the equipment conformed to those specifications," and "the supplier warned the United States about the dangers in the use of the equipment that were know to the supplier but not the United States." *Id*. at 512. These limitations, the Court explained, would serve to ensure that liability would not be imposed when the alleged fault was not "merely" that of "the contractor itself," but reflected a discretionary decision by the government. *Id*.

Boyle's reasoning contradicts the Fourth Circuit's creation of blanket preemption of all claims against military contractors relating to combatant activities in wartime. When, as in this case, the allegedly tortious conduct of the contractor was not the result of its compliance with its contractual obligations or military directives binding on the contractor, the essential

predicate for preemption insisted on by *Boyle*—conflict between the duties imposed by federal and state law—is absent. *Boyle* made this point explicitly, recognizing that when a "contractor could comply with both its contractual obligations and the state-prescribed duty of care," a conflict is not present, and "[n]o one suggests that state law would generally be preempted in this context." *Id.* at 509.

At most, *Boyle*'s reasoning would suggest that a conflict might be present in cases (unlike this one) where a tort claim sought to impose liability for combat-related actions by a contractor that conformed to applicable contract requirements and military directives—that is, where the plaintiff effectively sought to premise liability on the *military's* actions and decisions rather than the fault of the contractor itself. In that circumstance, *Boyle* might further suggest that the combatant activities exception's protection of military actions lends support to the view that the conflict between state and federal law obligations is "significant" enough to allow preemption. The blanket immunity for contractors created by the Fourth Circuit, however, finds no support in *Boyle*.

Another aspect of *Boyle* not considered by the Fourth Circuit confirms the point. Among the possible bases for preempting claims against military contractors considered by the Court in *Boyle* was the "*Feres* doctrine." *Id.* at 510. Originating in this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950), that doctrine recognizes an unenumerated exception to the FTCA that serves interests similar to those of the combatant activities exception, but does so more broadly by providing that the FTCA "does not cover injuries to Armed Services personnel in the course of military service." *Boyle*, 487 U.S. at 510. *Boyle*

rejected the argument that imposing state-law liability on military contractors for injuries to servicemembers would conflict with the broad preclusion of claims against the United States for the same injuries under *Feres*. Rather, the Court stated that prohibiting all service-related tort claims against contractors because service-related tort claims against the United States are prohibited under *Feres* would be "too broad." *Id.* The same criticism applies to the Fourth Circuit's conclusion that the blanket preclusion of tort liability against the United States for injuries arising from combatant activities should extend to contractors.

To the extent that *Boyle* is read to suggest that tort claims against military contractors arising from combatant activities may be preempted, if they present a conflict between the contractor's duties to the military under federal law and the standard of care that state tort law would impose, those circumstances are not present here. This case provides no occasion for considering the existence and scope of any such conflict preemption. The only preemption issue presented to and decided by the Fourth Circuit in this appeal was whether the FTCA's combatant activities exception preempts claims against a contractor even when their premise is that the alleged wrongdoing of the contractor violated both state tort-law duties and the contractor's obligations to the military and to the United States. The Fourth Circuit decided that issue incorrectly. Whether Fluor has preserved or may now assert a narrower defense arguably more in line with *Boyle*'s contractor defense, what the elements of that defense may be, and how they align with the facts of this case are matters for the district court to take up in the first instance.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals and remand with directions that the summary judgment entered by the district court be reversed.

Respectfully submitted,

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