No. 24-924

IN THE

Supreme Court of the United States

WINSTON TYLER HENCELY,
Petitioner,

v.

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

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

BRIEF FOR *AMICI CURIAE* THE CENTER FOR MILITARY LAW AND POLICY, VETERANS LEGAL SERVICES, THE MILITARY-VETERANS ADVOCACY, INC., AND THE JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Center for Military Law and Policy is a not-for-profit think tank that strengthens legal protections for servicemembers and veterans. Dr. Dwight Stirling, a law professor and reserve JAG officer, founded and leads the Center. The Center engages in research, educational initiatives, and policy advocacy, including on the *Feres* Doctrine, sexual assault, and reducing the civilian-military gap by

[1] No counsel for a party authored any part of this brief. No entity or person other than *amici* or their counsel made any monetary contribution intended to fund its preparation or submission.

educating the civilian population about military life and culture.

Veterans Legal Services (VLS) is a non-profit located in Boston, Massachusetts, devoted to helping veterans overcome adversity by providing free civil legal aid that honors their service and responds to their distinctive needs. More than half of VLS's clients have a disability, often caused by their service, and many have experienced homelessness. VLS draws on its experience representing individual veterans in a variety of civil legal matters to inform its legislative, regulatory, and appellate advocacy, promoting policy change to benefit veterans.

The Military-Veterans Advocacy Inc. (MVA) is a nonprofit organization that litigates and advocates for servicemembers and veterans. Established in 2012 in Slidell, Louisiana, MVA educates servicemembers and veterans concerning rights and benefits, represents veterans contesting the improper denial of benefits, and advocates for legislation to protect and expand servicemembers' and veterans' rights and benefits.

The Jewish War Veterans of the United States of America (JWV), organized in 1896 by Jewish veterans of the Civil War, is the oldest active national veterans' service organization in America. Incorporated in 1924, and chartered by an act of Congress in 1984, *see* 36 U.S.C. §110103, JWV's objectives include to "encourage the doctrine of universal liberty, equal rights, and full justice to all men," *id.* §110103(5) and to "preserve the spirit of comradeship by mutual helpfulness to comrades and their families," *id.* §110103(7). The JWV has long

advocated that all servicemembers and veterans receive the benefits to which they are entitled.

SUMMARY OF THE ARGUMENT

Attempting to follow *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), lower courts have invented many different flavors of government contractor defenses. Among the worst is the combatant activities defense, which is unfaithful to the conflict preemption principles from *Boyle*. The Petitioner's brief explains powerfully why the combatant activities defense has no basis in any statute and does not follow from *Boyle*.

There is a reason lower courts have misapplied *Boyle* in mutually contradictory ways—that reason is *Boyle*'s failure to ground its rule of decision in any positive source of federal law. The Court should overturn it. *Stare decisis* factors favor overturning *Boyle* because its reasoning is poor, its logic unworkable, and its method out-of-step.

First, *Boyle* is poorly reasoned. It begins by positing federal interests in the interpretation of federal contracts and in the civil liability of federal officers, neither of which applied. It then merges these two interests by claiming that state law will induce contractors to change the price or terms of procuring equipment and deems this a direct conflict between state law and federal interests. After choosing a balance between the state law and federal interests that seemed reasonable to the Court, it plucks a facially inapplicable Federal Tort Claims Act exception, insisting that this unrelated provision properly implements federal common law. This policy-driven, results-first analysis is the epitome of poor legal reasoning.

Second, *Boyle*'s rule of decision is unworkable. Circuit splits have multiplied on issue after issue as an unavoidable consequence of requiring lower courts to employ a rule that is unclear and fundamentally not amenable to judicial application. The federal contractor defense also provides defendants opportunities for jurisdictional gamesmanship. Under current doctrine, most contractors can make a non-frivolous showing of federal officer removal jurisdiction, relying on *Boyle* as a federal defense. This delays cases, multiplies appeals, clogs the federal courts, and robs plaintiffs of their forum of choice.

Third, and most important, *Boyle* is irreconcilable with the Court's recent precedent. When interpreting statutes, this Court now always starts with the text and eschews policy arguments. *Boyle* starts with policy and never addresses the FTCA provision excluding government contractors. The clear trend of this Court's case law is to cut back on federal common law because it lacks secure grounding in a positive source of law, or, where there must be federal common law, to adopt state law to fill gaps. *Boyle* ignored this insight, falling prey to the impulse to make up muscular and uniform federal law based on judicially posited federal interests.

Legitimate reliance is minor here. The defense is unpredictable anyway, and the federal government is increasingly purchasing commercial products to which *Boyle* does not apply.

Only overturning *Boyle* will fully cure the ever-growing, internally inconsistent cancer of *Boyle*-inspired lower court rulings. But if the Court is not ready to overturn *Boyle* outright in this case, it should borrow its approach to confining cases like *Bivens* to

specified contexts. *See Egbert v. Boule*, 596 U.S. 482, 492 (2022). Under that model, it would decline (for now) to overturn *Boyle*, but would consider the combatant activities exception a new context, and decline to extend *Boyle* in that new context in light of special factors counseling hesitation. The Court should make clear that the lower courts should apply that framework, too, and confine *Boyle* strictly to design defects involving military equipment with a tradeoff between safety and combat effectiveness.

ARGUMENT

Reversing the judgment below would be the correct ruling for this case and would chasten courts away from the combatant activities exception. But it would leave scores of cases applying *Boyle* in a panoply of different contexts. Those cases too should be reversed, because the Court should overturn *Boyle*.

I. *Stare Decisis* Is Insufficient to Retain *Boyle*.

Though this Court overturns precedent only infrequently, this is the rare case that warrants it. This Court has "identified several factors to consider in deciding whether to overrule a past decision, including 'the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 180, 203 (2019) (quoting *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 917 (2018)). All favor overturning *Boyle*.

A. *Boyle*'s Reasoning Is Remarkably Poor.

To start, *Boyle* is so unpersuasive that even readers who agree with the outcome feel there must be another way to get there. The trouble starts at the threshold

of the federal common law analysis, when the Court identifies *two* "uniquely federal interests" that the case "borders upon." 487 U.S. at 504. The first is the "obligations to and rights of the United States under its contracts," which are governed by a federal common law of contract; the second is "the civil liability of federal officials for actions taken in the course of their duty." *Id.* at 504–05. The problem, of course, is that neither interest applies: The state *tort* suits could be resolved without any reference to the meaning of any federal contract, and there were no federal officials in the case at all. Here, zero plus zero still sums to zero; "the rule cannot be that asserting two invalid [interests], no matter how weak, is always enough." *Fulton v. City of Philadelphia*, 593 U.S. 522, 599 (2021) (Alito, J., concurring).

Boyle's key move is transmuting two *inapplicable* interests into one applicable one, but it does not work. "The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." 487 U.S. at 507. This is gibberish because it baldly asserts that a self-evidently *indirect* effect is actually *direct*—simply by using the word "directly" twice. The "terms" of the contracts are entirely unaffected by state law. Rather, the Court predicts that the *contractor* will have an incentive to demand different terms, and the government may agree, a manifestly indirect (and hypothetical) effect.

The Court has rejected this exact logic time after time. In *O'Melveny & Myers v. F.D.I.C.*, the Court found no federal interest in the FDIC's recovery against a law firm for malpractice. 512 U.S. 79, 89

(1994). The FDIC argued for a federal interest in minimizing outlays from the deposit insurance fund, which the Court ridiculed as a "more money" argument, pointing out that "there is no federal policy that the fund should always win" and no *law* that makes replenishing the fund a federal interest. *Id.* at 88. Similarly, in *United States v. California*, the federal government had a cost-plus contract with a contractor, who paid California substantial taxes, and passed the cost directly through to the United States. 507 U.S. 746, 753 (1993). The United States sued California, arguing the taxes were invalid under a purported federal common law rule. *Id.* at 749. The Court had little trouble holding that no such federal common law existed, and that any fiscal strain must be addressed by Congress or by changing the contract, *id.* at 759, exactly the reactions *Boyle* deemed an illicit "direct" effect on the terms of a government contract.

After identifying the federal interest, *Boyle*'s next step is to explain how state law conflicts with it. The meat of the analysis is a freewheeling "search for the limiting principle." 487 U.S. at 509. "[I]t would be unreasonable" *always* to find preemption where the contract specifications conflict with state law. *Id.* With a conception of the right limit in mind, the Court searches for a more nuanced rule. It identifies "a statutory provision that demonstrates the potential for, and suggests the outlines of" the limiting principle that seems reasonable to the Court. *Id.* at 511. In a veritable *FTCA ex machina*, the next paragraph identifies the discretionary function exception as striking the right balance. The discretionary function exception was made to apply not because its text covered the case's facts, but simply because it contained the rule of decision the Court found promising.

The problem with this reasoning is not chiefly the result, but the method. "Justice Scalia based his conclusions about the content of those defenses largely on policy concerns." Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 Va. L. Rev. 1, 44 (2015). Picking which *federal statute* applies to a case based on matching it to pre-selected desirable "limiting principle" is no way to do law. Rather, statutes should apply to cases because their provisions cover the conduct at issue in the case.

The poor reasoning degrades any support *Boyle* can draw from *stare decisis*. *Boyle* "failed to ground its decision in text, history, or precedent." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 270 (2022). "[I]t devoted great attention to and presumably relied on matters that have no bearing on the meaning of the" applicable statutes, such as what level of preemption was reasonable in the abstract. *Id.* "[I]t concocted an elaborate set of rules, with" three prongs to assess conflict, "but it did not explain how this veritable code could be teased out of anything in the" FTCA or any laws that actually applied to contractors. *Id.* And its "reasoning quickly drew scathing scholarly criticism," *id.*, from both progressive and conservative scholars.[2]

Boyle's unpersuasiveness has made it sterile. It is rarely cited in this Court's opinions, always distinguished (often in a footnote), and is one of the

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[2] *E.g.*, Nelson, *supra*; Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 Colum. L. Rev. 452, 463 (2010) (calling *Boyle* "an aberration"); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward A Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295, 1367 (1990) ("[T]he result in *Boyle* seems flatly inconsistent with the textualist approach.").

rare cases cited more often in dissenting opinions than majorities. State courts often incorporate federal principles into state law but have declined to follow *Boyle*.[3] In short, *Boyle* is Justice Scalia's worst majority opinion and looks worse every year, as he himself recognized.[4] It is grievously wrong.

B. *Boyle* Has Proven Unworkable.

Just as a contradiction in a system of logic can prove any conclusion, so the incoherence at the root of *Boyle* calls forth a maelstrom in the lower courts. This Court already knows that lower courts applied the combatant activities exception in irreconcilable ways (thus the grant of certiorari); but that is only a glimpse. Unmoored, as it is, from any positive and clear source of law, *Boyle* has been applied in widely varying ways by courts and employed for jurisdictional gamesmanship by defendants.

1. Lower courts cannot agree how to apply *Boyle*.

Boyle is rooted in two vague federal interests and one statute that does not apply by its text. Starting from there, lower courts move in different directions.

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[3] *Conner v. Quality Coach, Inc.*, 750 A.2d 823 (Pa. 2000) (Pennsylvania Supreme Court expressly rejecting *Boyle* for state contractors); *Jackson v. Alert Fire & Safety Equip., Inc.*, 567 N.E.2d 1027, 1034 (Ohio 1991) (Ohio Supreme Court declining to adopt *Boyle*).

[4] In later years, Justice Scalia himself came to doubt *Boyle*: "[S]tudent[s] inquired whether there was a case the Justice had decided that he now believed he had gotten wrong . . . . He described a somewhat esoteric case involving the propriety of federal courts crafting a common law immunity to shield defense contractors from tort liability." Gil Seinfeld, *The Good, the Bad, and the Ugly: Reflections of A Counterclerk*, 114 Mich. L. Rev. First Impressions 111, 115 (2016).

- Military contractors or all contractors?

Some courts confidently held that the federal interest identified in *Boyle* is "rooted in considerations peculiar to the military," *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1455 (9th Cir. 1990), and so inapplicable to civilian contractors. *See also Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 731 (9th Cir. 2015) (reaffirming this rule). Others divined that the true "basis of the holding in *Boyle*" is "preventing judicial second-guessing of the government's public policy decisions, and limiting the government's financial burdens." *Carley v. Wheeled Coach*, 991 F.2d 1117, 1124 (3d Cir. 1993). That rationale extends to "manufacturers of nonmilitary products." *Id.* at 1125; *but see id.* at 1131 (Becker, J., concurring and dissenting) (identifying the federal interest as "the balance between equipment safety and combat effectiveness" which is limited to the military).

- Military equipment or all equipment?

Lower courts disagree over whether *Boyle* applies to commercial products, with some courts holding that "[w]here the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." *In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806, 811 (9th Cir. 1992). Other courts disagree, reasoning that it does not matter "whether the product was military or nonmilitary in nature," but only whether the government approved the product design. *Carley*, 991 F.2d 1117, 1124 (3d Cir. 1993); *but see id.* at 1131 (Becker, J., concurring and dissenting).

- Must the specifications prohibit warnings or not?

Multiple lower courts have extended *Boyle* to "failure to warn claim[s], but the applications vary widely." *Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710, 717 (D. Md. 1997). Some courts have held that a failure to warn claim is barred only if the government specifications include a "prohibition against health warnings on the product," reasoning that anything short of that would allow the contractor to warn without conflict. *Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487, 1489 (11th Cir. 1990).[5] Others have held that it is enough if "a contractor proposes warnings that the government substantively approves," *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995), even if nothing in the specifications prohibited the contractor from using a better warning.[6]

The dispute seems to boil down to the nature of the elusive federal interest. If the core interest is enforcing a specification to balance safety and combat effectiveness (as Judge Becker thought), *Dorse* seems correct. But if the federal interest is "in insulating its contractors from state failure to warn tort liability" when it had no objection to the warnings, *Tate*, 55 F.3d

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[5] *See also Glassco v. Miller Equip. Co.*, 966 F.2d 641, 644 (11th Cir. 1992) (applying *Dorse*); *Miller v. United Techs. Corp.*, 660 A.2d 810, 836 (Conn. 1995) (allowing the defense "only if the government dictated with reasonable precision the content of the initial warnings"); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 884 P.2d 920, 930 (Wash. 1994) (similar).

[6] Some courts also have extended *Boyle* to cover "manufacturing defects" as well. *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 749 (9th Cir. 1997). One wonders what government interests would support that rule.

at 1157, then *Tate* seems correct. *Boyle* says both in different places.

- Does *Boyle* invite courts to identify new federal interests?

Lower courts have not confined themselves to the federal interests *Boyle* invoked. The Second Circuit, for example, applied *Boyle* outside the FTCA context, holding that "the rationale for the government contractor defense would extend to the disaster relief context due to the unique federal interest in coordinating federal disaster assistance and streamlining the management of large-scale disaster recovery projects, as evidenced by the Stafford Act." *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 197 (2d Cir. 2008). The Eleventh Circuit held that *Boyle* preempted a Florida law presumption that "where a product is destroyed in an accident, and the plaintiff presents evidence to negate possible causes other than a product defect, an inference of *manufacturing* defect arises." *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989). Apparently, the inference of defect itself was preempted because "[m]ilitary equipment is highly likely to be destroyed in accidents." *Id.*

Sound rules of decision rooted in positive law have natural limiting principles and predictable application. *Boyle*'s rootless balancing of federal interests and conflict principles produces chaos.

2. Defendants use *Boyle* for jurisdictional gamesmanship, flooding federal courts.

Boyle has proven especially troublesome in the removal context. Federal defenses cannot ground

federal *question* jurisdiction, but can bootstrap a path to federal court via federal *officer* jurisdiction. *Boyle* is so contested and amorphous that defendants with tenuous connections to any governmental decision remove on the song and prayer that their government contractor defense may be found colorable. This clogs the federal courts and snarls cases in a jurisdictional quagmire.

Courts are supposed to apply *Boyle* at a granular level, evaluating a particular defect and a particular contract specification. The "government's rubber stamp on the design drawings" is not enough without substantive engagement. *Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989). Pre-discovery jurisdictional rulings are ill-suited to this analysis and so courts mostly take the contractor's word for it, upholding federal jurisdiction unless the defense is outlandish. As a typical example, the Second Circuit held that a contractor put forward a colorable defense to a failure to warn claim via evidence of "specifications that for all their particularity made no mention of asbestos warnings." *Cuomo v. Crane Co.*, 771 F.3d 113, 117 (2d Cir. 2014). That created a "possibility of satisfying" *Boyle*, which was enough. *Id.* Since virtually all product liability cases include a failure to warn claim, they all can be removed under this rule, so long as the contractor can proffer (on a one-sided record) that the specification did not affirmatively require an adequate warning.

The 3M Combat Arms multidistrict litigation is a prime example. The claims were based on 3M's sale of earplugs to the military that claimed to protect hearing better than they actually did. 3M removed thousands of cases from state court, arguing that, as a government contractor, it was "acting under" a federal

officer, that providing the earplugs was "under color of federal authority," and that the government contractor defense was a "colorable federal defense." *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-2885, 2020 WL 365617, at *3–*6 (N.D. Fla. Jan. 22, 2020). Judge Rodgers denied all motions to remand across the board, finding the first two prongs met any time a government contractor is "produc[ing] an item" that the government would otherwise make itself, *id.*, at *3, and the third whenever the contractor defense is non-frivolous, *id.*, at *6.

With removal jurisdiction automatic, all roads led to federal court. The Earplugs MDL ballooned to hundreds of thousands of cases, nearly equaling in one year the volume of all other federal civil cases combined.[7] Though not frivolous in the context of jurisdictional skirmishes, the defense was quite weak: Judge Rodgers granted summary judgment *for the plaintiffs* on the government contractor defense for multiple independent reasons, finding no triable issues. *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 474 F. Supp. 3d 1231, 1260 (N.D. Fla. 2020).[8]

Worse still, even if a district court grants a motion to remand, the government contractor has an unusual right to appeal the federal officer order under 28 U.S.C. § 1447(d). The plaintiff, of course, cannot appeal a denial of the motion to remand until final

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[7] *See* 2023 Year-End Report on the Federal Judiciary, at 10, https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf.

[8] Another district court disagreed with Judge Rodgers, and 3M appealed to the Eighth Circuit. *See Graves v. 3M Co.*, 17 F.4th 764 (8th Cir. 2021). Unlike Judge Rodgers, the Eighth Circuit at least allowed remand for plaintiffs who purchased *only* 3M's commercial earplugs, though it denied remand for anyone who received earplugs through the military. *Id.* at 770, 773.

judgment, and even then has little chance. *E.g.*, *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 120 (2d Cir. 2021) (affirming denial of motion to remand based on the federal defense, even though it found the defense did not succeed on the merits). These jurisdictional government contractor appeals are ubiquitous, [9] clogging federal courts, delaying lawsuits by current and previous servicemembers, and adding substantial expense. The end result is powerful one-sided tool for jurisdictional gamesmanship.

C. *Boyle* Is Fatally Inconsistent With Recent Precedent.

Recent precedents of this Court have rejected the mode of reasoning that animates *Boyle*. It represents a path the Court walked down before quickly backtracking to strike off in a more promising direction. Too many lower courts have walked blindly down this wrong path. The Court should block it off.

1. Modern statutory interpretation is irreconcilable with *Boyle*.

The Court has grown increasingly textualist for powerful separation of powers reasons. Recent cases are adamant that "[o]nly the written word is the law."

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[9] *E.g.*, *Moore v. Elec. Boat Corp.*, 25 F.4th 30, 37 (1st Cir. 2022) (removal upheld because the defense was not "wholly insubstantial and frivolous"); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 140 (2d Cir. 2008); *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 815 (3d Cir. 2016); *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 259 (4th Cir. 2017); *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 298 (5th Cir. 2020); *Bennett v. MIS Corp.*, 607 F.3d 1076, 1090–91 (6th Cir. 2010); *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1186 (7th Cir. 2012); *Graves v. 3M Co.*, 17 F.4th 764, 773 (8th Cir. 2021); *DeFiore v. SOC LLC*, 85 F.4th 546, 560 (9th Cir. 2023).

Bostock v. Clayton Cnty., Georgia, 590 U.S. 644, 653 (2020). Whether a result is good policy or bad, "[t]his Court is not free to substitute its preferred economic policies for those chosen by the people's representatives." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 525 (2018).

Because the "judicial function [is] to apply statutes on the basis of what Congress has written, not what Congress might have written," this Court is careful not only to follow what the text *does* say, but also not to go *beyond* what it says. *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952). Multiple cases explain in detail how to interpret textual silence to respect legislative compromise:

> [A] lawmaking body that enacts a provision that creates a right or prohibits specified conduct may not wish to pursue the provision's purpose to the extent of authorizing private suits for damages. For this reason, finding that a damages remedy is implied by a provision that makes no reference to that remedy may upset the careful balance of interests struck by the lawmakers.

Hernandez v. Mesa, 589 U.S. 93, 100 (2020).

Under these clear principles, a Court confronting the issues of *Boyle* today would certainly begin with the text of the FTCA. As Petitioner persuasively explains, the FTCA's text contains no government contractor defense. *See* Pet. Br. at 16–31. This absence is all the more significant because federal law is replete with express statutory defenses for

contractors.[10] The logic from *Hernandez v. Mesa* follows inexorably: a lawmaking body that enacts a defense to a claim against government *employees* may not wish to pursue the provision's purpose to the extent of authorizing a defense for government *contractors*. For that reason, finding that a defense for contractors is implied by a provision that makes no reference to that defense may upset the careful balance struck by the lawmakers.

Boyle never even performed the basic textualist moves. Instead, it jumped straight to identifying federal interests as though the FTCA *must* pursue those interests "at all costs." *Hernandez*, 589 U.S. at 100. That mode of legal reasoning has been discredited.

2. Modern federal common law cases have left *Boyle* an outlier.

The Court has described "'federal common law'" as "a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." *Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997). Even after *Erie*'s admonition that "[t]here is no federal

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[10] *See*, *e.g.*, 10 U.S.C. § 1089(a) (making the FTCA's remedy in 28 U.S.C. § 1346(b) "exclusive" of any other remedy for government healthcare workers *expressly including* those under a "services contract . . . or subcontract"); 6 U.S.C. § 442 (providing for a reticulated "government contractor defense" for sellers of "qualified anti-terrorism technology"); 50 U.S.C. § 2783 (providing procedures and defenses for "contractor[s]" involved in "atomic weapons testing program[s]"); 42 U.S.C. § 2210 (providing a federal cause of action and indemnity, but not a liability defense, for Department of Energy contractors who cause nuclear accidents).

general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), there were multiple decades when courts fashioned federal common law rules based on vague federal policy interests. *See, e.g.*, *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456–57 (1957). No longer. The cases since *Boyle* show an ineluctable trend of reining in federal common law in favor of identifying clear, authoritative sources of law outside the judiciary.

Since *Boyle*, the only notable new federal common law rule arose under the Alien Tort Statute (ATS), though that exception proves the rule. The ATS provides for federal jurisdiction over a tort "committed in violation of the law of nations." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, the Court sketched a framework for recognizing violations against the law of nations, suggesting that a court *might*—with much fear and trembling—recognize a private right of action in an appropriate case. 542 U.S. 692, 724–25 (2004). But it was not *that* case; Mr. Alvarez-Machain's claim for "illegal detention . . . violates no norm of customary international law." *Id.* at 738. Justice Scalia warned that the majority's "Never Say Never Jurisprudence" would invite "lower federal courts" to venture where the majority would not. *Id.* at 750 (Scalia, J., concurring in part and concurring in the judgment). Unsurprisingly, the Court then took ATS case[11] after ATS case[12] smacking down one fact pattern after

[11] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013) (holding that ATS claims did not apply extraterritorially).
[12] *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 272 (2018) (holding that ATS claims cannot be brought against foreign companies).

another.[13] No ATS claim has succeeded before this Court.

That is hardly surprising, since ATS claims swim against the riptide of the Court's conclusion that "creating a cause of action is a legislative endeavor." *Egbert v. Boule*, 596 U.S. 482, 491 (2022). Implied causes of action have been the Court's whipping boy for decades, the object of in-depth takedowns, *id.*, as well as summary reversals, *see Goldey v. Fields*, 606 U.S. 942, 945 (2025). Given *Atherton*'s definition of "federal common law" as a judicial creation *not* derived from statute, it is equally unsurprising that the same few decades have seen the tide go out on federal common law.

Indeed, one could accurately summarize federal common law jurisprudence since *Boyle* as a list of contexts in which federal common law *does not* apply. Cases since *Boyle* teach that federal common law does not apply to choice of law rules,[14] tax refunds,[15] punitive damages awards,[16] labor relations tort

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[13] *Nestle USA, Inc. v. Doe*, 593 U.S. 628, 634 (2021) (again holding that ATS claims do not apply extraterritorially).

[14] *Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 116 (2022) (rejecting a federal choice-of-law rule for claims under the Foreign Sovereign Immunities Act); *see also Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (rejecting a federal choice-of-law rule for claims in diversity).

[15] *Rodriguez v. F.D.I.C.*, 589 U.S. 132, 137 (2020).

[16] *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (rejecting a federal common law limitation on punitive damages).

claims,[17] forum selection clauses,[18] legal malpractice claims,[19] reimbursement under federal employee health insurance plans,[20] air pollution,[21] water pollution,[22] airline contracts,[23] and bank contracts.[24] Even where federal common law had been previously recognized, this Court cut it back, limiting adventurous applications of claim preclusion,[25] declining to fashion "a specialized body of federal common law of trust administration,"[26] rejecting a federal common law rule requiring "special deference to the opinions of treating physicians" in ERISA

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[17] *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 313–14 (2010).

[18] *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28–32 (1988) (applying a statutory standard and chastising lower courts for applying a federal common law standard to the enforceability of a forum selection clause).

[19] *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88–89 (1994) (rejecting federal common law rule for legal malpractice liability involving an insolvent federal bank).

[20] *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 693 (2006) (rejecting federal common law claim for reimbursement involving a federal employees health insurance contract).

[21] *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 415 (2011) (holding that the Clean Air Act displaces federal common law).

[22] *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) (holding that the Clean Water Act displaces federal common law and down-river state law); *Arkansas v. Oklahoma*, 503 U.S. 91, 99–100 (1992) (same).

[23] *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995) (rejecting a federal common law rule under the Airline Deregulation Act).

[24] *Atherton v. F.D.I.C.*, 519 U.S. 213, 226 (1997) (rejecting federal common law rule for federally chartered banks).

[25] *Taylor v. Sturgell*, 553 U.S. 880, 904 (2008) (rejecting the novel doctrine of virtual representation).

[26] *Loc. 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 589 (1993) (quoting Goetz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 Cornell L. Rev. 911, 930 (1970)).

cases,[27] rebuffing a proposed federal common law rule favoring striking employees,[28] restricting the *in pari delicto* defense in securities cases,[29] and eliminating remedies for long-past violations of federal Indian law.[30]

Even under federal statutes that left interstitial gaps, the Court has strongly favored borrowing state law over fashioning a "special federal rule of decision." *Atherton*, 519 U.S. at 218. It has borrowed state statutes of limitations,[31] state claim-preclusion law,[32] and state demand-futility law for derivatives suits.[33] That sort of rule could work for government contractors, since there are analogous defenses under state law. To be sure, the Court continued to fashion federal common law in some areas. The Court continued developing the common law in maritime

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[27] *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 825 (2003); *see also Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002) (rejecting the argument that federal common law under ERISA preempted state law).

[28] *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 443 (1989).

[29] *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985).

[30] *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005).

[31] *E.g.*, *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 411 (2005).

[32] *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

[33] *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 109 (1991) (rejecting a uniform federal common law of demand futility in shareholder derivative securities litigation).

cases[34] (though even there state law often applies)[35] and interstate water disputes.[36] Federal common law in these areas arose more than a century ago and could not easily be jettisoned. The Court also created federal common law in applying statutes such as ERISA and the Federal Employers Liability Act,[37] which simply respects congressional intent for those unusual statutes.

Cases after *Boyle* have treated government contractors differently from government employees, consistent with the FTCA itself. This is clear in *United States v. California*, which, as discussed above, held that the fact that costs are passed through to the government is categorically insufficient to ground federal common law. 507 U.S. 746, 759–60 (1993). In another context, the Court held that government contractors operating a prison—unlike government employees—should not receive qualified immunity. *Richardson v. McKnight*, 521 U.S. 399, 412 (1997). Neither case cited *Boyle*.

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[34] *See Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 601 U.S. 65, 69 (2024) (fashioning maritime common law rules), *Air & Liquid Sys. Corp. v. DeVries*, 586 U.S. 446, 452 (2019) (same); *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 27 (2004) (same).

[35] *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 216 (1996) (rejecting a federal common law rule in favor of state law for a death on the water); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 457 (1994) (rejecting a federal common law rule of *forum non conveniens* for maritime disputes that would apply in state court).

[36] *Florida v. Georgia*, 585 U.S. 803, 815 (2018); *Virginia v. Maryland*, 540 U.S. 56, 79 (2003).

[37] *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 166 (2003) (crafting FELA negligence rule); *Metro-N. Commuter R. Co. v. Buckley*, 521 U.S. 424, 444 (1997) (same); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 558 (1994) (same).

In short, *Boyle* stands alone. Federal common law doctrine is markedly different now and has no place for *Boyle*.

D. Reliance Interests Are Low.

The government contractor defense does not provide a clear enough rule to engender substantial reliance. Much like the "physical presence rule," the government contractor defense is not "a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced." *S. Dakota v. Wayfair*, 585 U.S. 162, 186 (2018).

To be sure, companies greatly relish having a federal defense that allows removal, an appeal of a remand order, and a potential defense on the merits, but mere benefit is not reliance. *Stare decisis* considers only "legitimate reliance interest[s]." *Wayfair*, 585 U.S. at 186 (quoting *United States v. Ross*, 456 U.S. 798, 824 (1982)). Just as tax break pre-*Wayfair* was largely "because consumers regularly fail to comply with lawful use taxes," 585 U.S. at 186, so too here the procedural advantages *Boyle* affords were never intended.

Upset reliance interests are especially implausible because government contractors do not appear to have well-aligned incentives. Government Commissions have found fraud and waste from contractors of "$31 billion to $60 billion."[38] It is difficult to imagine that the same contractors who are wasting billions of dollars per year will suffer a financial shock if their

[38] Comm'n on Wartime Contracting in Iraq and Afg., Transforming Wartime Contracting: Controlling Costs, Reducing Risks 5 (2011), https://apps.dtic.mil/sti/tr/pdf/ADA549381.pdf.

expectations about one liability defense (of many) are lowered.

The federal government's "policy" under the Trump Administration is to "procure commercially available products and services" as a way to "eliminate unnecessary and imprudent expenditures."[39] This is a continuation of a broader trend of moving away from customized government specifications. Because *Boyle* only applies to customized government specifications, the movement toward commercial equipment is already reducing reliance on *Boyle*.

On the other side of the ledger are plaintiffs—chiefly those who served our country—who were grievously injured, just like Army Specialist Hencely, by contractors' negligence, defective equipment, and other malfeasance. Every meritorious claim that *Boyle* defeats is an "injustice . . . of this Court's own making." *Boyle*, 487 U.S. at 516 (Brennan, J., dissenting). Those losses should count, too.

The doctrine of *stare decisis* is strongest when applied to statutory construction, but that principle does not apply here. Even though Congress *could* abrogate them, the Court does not apply statutory *stare decisis* to federal common law decisions. *See, e.g.*, *Wayfair*, 585 U.S. at 183 (2018); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007); *Allen v. Milligan*, 599 U.S. 1, 43 n.1 (2023) (Kavanaugh, J., concurring). After all, Congress would be hard-pressed to decide which *words* in the

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[39] Executive Order 14271, *Ensuring Commercial, Cost-Effective Solutions in Federal Contracts* (Apr. 16, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/ensuring-commercial-cost-effective-solutions-in-federal-contracts/.

United States Code to change, since *Boyle* is based on none of them.

Nor is there any other reason to apply heightened *stare decisis*. It would be one thing if *Boyle* "reaffirmed a long line of precedents," *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). It did not. It is a true "one-off," *id.*, with no case like it before, and none since. This "derelict in the stream of the law," should be "overruled." *N. Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 167 (1973).

II. If the Court Keeps *Boyle*, It Should Stop Lower Courts From Extending *Boyle* to New Contexts.

The simplest and best way to resolve this case is to overturn *Boyle*. Anything else leaves "lower federal courts [as] the principal actors," since this Court will "review but a tiny fraction of their decisions." *Sosa*, 542 U.S. at 750–51 (Scalia, J., concurring in part and concurring in the judgment).

But, if the Court does not wish to do so yet, it should strongly signal to lower courts that the case should not be freely extended. Specifically, the Court should adopt its two-part framework from *Bivens* cases, asking first whether a given case presents a "new context," and second if there are "special factors" suggesting the courts are "at least arguably less equipped than Congress" to decide whether the defense should apply. *Egbert*, 596 U.S. at 492. In light of the vast proliferation of the government contractor defense in lower courts, a strong, doctrinally clear signal is the only way to limit *Boyle*'s festering.

CONCLUSION

Boyle was wrong the day it was decided, and each year becomes more of an outlier. It is fatally out of step with this Court's approach to statutory interpretation and federal common law. As Petitioner explains persuasively, there are overpowering arguments against extending it to create a combatant activities defense. But whether in this case or another, the only full cure is overturning *Boyle*.

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