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 RESPONDENTS

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QUESTION PRESENTED

Whether, consistent with the federal government's exclusive authority to make war, a state may impose its tort law on private contractors for claims arising out of combatant activities on a foreign battlefield.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

The Constitution vests all war powers in the federal government. In an exercise of those powers, Congress has chosen to provide for the common defense by using an all-volunteer military supported by private contractors. Those contractors are critical to the United States' ability to wage war successfully. The contractors' employees—like the servicemembers they support—put their lives at risk while performing essential support services, including functions historically carried out by uniformed soldiers.

Petitioner brought this suit to recover for injuries he suffered in a suicide-bombing by a Taliban operative on a U.S. military base in Afghanistan. Petitioner did not (and could not) sue the United States, despite the Army's acknowledgement that it was at least partially responsible for the attack. The Army, after all, authorized the bomber's on-base employment and failed to exclude him from the base after counterintelligence screenings raised security concerns—information the Army withheld from Fluor. Petitioner instead sued Fluor, whose subcontractor employed the Taliban operative.

The court of appeals held that federal law preempted Petitioner's claims. According to Petitioner, "preemption *in vacuo* is all that explains" that decision. Pet. Br. 2 (cleaned up). Petitioner ignores the Constitution. He never acknowledges that the Constitution vests exclusive warmaking authority in the federal government, much less grapples with the implications of applying state law to regulate combat operations on a foreign battlefield. Instead, he simply proclaims that it is "undisputed" that the Constitution does not preempt his claims. Pet. Br. 1.

That is very much disputed. Fluor has consistently maintained that Petitioner's claims interfere with the federal government's exercise of its constitutional powers.

And in holding that the claims are preempted, the court of appeals applied a test that specifically accounts for the constitutional powers at stake. That test recognizes that suits like Petitioner's "are really indirect challenges to the actions of the U.S. military." *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009).

The court of appeals correctly held that Petitioner's claims are preempted. That result is compelled by this Court's decisions addressing the federal government's war powers and foreign-affairs preemption. It is also compelled by the Court's decision in *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). Petitioner criticizes *Boyle*, but he does not ask the Court to overrule it. Yet ruling for Petitioner would require the Court to do just that. *Boyle* held that tort claims against a military contractor were preempted because they conflicted with "uniquely federal interests." *Id.* at 504. Petitioner's claims create an even greater conflict because they strike at the heart of the federal government's exclusive warmaking authority.

The courts of appeals have uniformly recognized the ill-fit between military operations and state tort law. Tort law is entirely out of place on the battlefield, where risk-taking is the rule, not the exception. Applying tort law on the battlefield would stifle military decisionmaking, impede combat operations, imperil national security and the security of our troops, and frustrate the federal government's provision for the common defense—an exclusively federal function at the core of the Constitution's design. The judgment below should be affirmed.

STATEMENT

A. Constitutional Background

1. The Constitution vests all war powers in the federal government. Article I dictates that Congress shall have the

power "to declare War," "raise and support Armies," "provide and maintain a Navy," "make Rules for the Government and Regulation of the land and naval Forces," call forth "the Militia," "provide for [their] organizing, arming, and disciplining" and to make all laws "necessary and proper" to effectuate these duties. Art. I, § 8, cls. 1, 10-18. And Article II makes the President the "Commander in Chief of the Army and Navy of the United States" and "of the Militia of the several States, when called into the actual Service of the United States." Art. II, § 2, cl. 1.

Additional war powers—including the powers to "wage war" and "conclude peace"—are also "vested in the federal government as necessary concomitants of nationality." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936). These fundamental attributes of sovereignty, together with the Constitution's text, effect a "complete delegation of authority" to the Congress and President "to provide for the common defense." *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 590 (2022).

The Constitution also excludes states from exercising warmaking powers. For example, states may not "engage in War, unless actually invaded." Art. I, § 10, cl. 3. Although states retain a limited role in overseeing the Militia, ultimate control rests with Congress and the President. Art. I, § 8, cls. 15-16. "These substantial limitations on state authority, together with the assignment of sweeping power to the Federal Government, provide strong evidence that the structure of the Constitution prevents States from frustrating national objectives in this field." *Torres*, 597 U.S. at 590.

2. The federal government's exclusive war powers are "broad and sweeping." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 58-59 (2006) ("*FAIR*"). Exercising these powers, Congress, for example, has enacted

various conscription measures during wartimes, *see* Enrollment Act of 1863, 12 Stat. 731; created the Selective Service military registration system, 5 U.S.C. § 3328; and appropriates hundreds of billions of dollars each year to fund service member pay and benefits, weapons and other equipment, research, and military readiness.

Since the Founding, Congress has exercised its plenary war powers to authorize the military to contract with private parties to supplement and support its enlisted force.[1] For example, after the bombing of Pearl Harbor, Congress authorized the President to enter contracts to "facilitate the prosecution of the war." First War Powers Act, Pub. L. No. 77-354, 55 Stat. 838, 839 (1941). Since then, Congress has continued to authorize the military to leverage federal contractors' many capabilities. *See, e.g.*, National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547, 1628, 1640-41 (1993).

In 1973, Congress eliminated the draft and chose to rely on an all-voluntary military. To facilitate this transition, Congress directed the Secretary of Defense to identify "logistics activities" that could be performed by private contractors, rather than enlisted soldiers. Department of Defense Authorization Act, Pub. L. No. 98-525, 98 Stat. 2492, 2514-15 (1984). In response, the Army established the Logistics Civil Augmentation Program ("LOGCAP"), under which civilian contractors "perform selected services in wartime to augment Army forces." Army Reg. 700-137, at 1-1 (Dec. 16, 1985). By performing these services,

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[1] *See, e.g.*, 20 *Journals of the Continental Congress* 597-98 (1781) (creating position overseeing acquisition contracts for troop supplies); Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 50 (establishing the Department of War); Janet A. McDonnell, *A History of Defense Contract Administration*, Def. Cont. Mgmt. Agency (Mar. 5, 2020), https://www.dcma.mil/News/Article-View/Article/2100501/a-history-of-defense-contract-administration.

contractors "release military units for other missions or fill shortfalls." *Id.*

Congress' policy choice to shift to an all-volunteer military made private contractors an even more critical part of military operations. During the military operations in Iraq and Afghanistan, for example, contractors like Fluor accounted for 50 percent or more of the Defense Department's in-country presence.[2] The military now considers contractor personnel "part of the total force."[3] And, by the military's own admission, it would be "unable to effectively execute many operations, particularly those that are large-scale and long-term in nature, without extensive operational contract support."[4]

B. Factual and Procedural Background

1. During the war in Afghanistan, the U.S. military adopted the "Afghan First" program as part of its counter-insurgency strategy. Pet.App.3. This program sought to divert Afghans away from the Taliban by creating opportunities for them to gain skills and steady employment through work on military bases. Pet.App.3. As with any wartime policy, there was a trade-off: The Army knew that reliance on Afghans could create security risks and sacrifice short-term efficiency, but the Army accepted these risks to advance its long-term goal of fostering a "moderate,

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[2] Heidi M. Peters, Congressional Research Service, R44116, *Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007-2020* 1 (Feb. 22, 2021).

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

[4] Moshe Schwartz & Jennifer Church, Congressional Research Service, R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* 2 (May 17, 2013).

stable, and representative Afghanistan capable" of self-governance. Pet.App.3.

The military implemented the "Afghan First" program at Bagram Airfield, the U.S. command center and the then-largest U.S. military base in Afghanistan. There, the military controlled force protection, base security, and the Afghan work force. Pet.App.5. At all times, the military command retained direct authority over contractors regarding safety and security matters. Pet.App.5. The military was solely responsible for identifying and vetting Afghans for hiring. Pet.App.5, 46. The military also conducted counterintelligence assessments of all Afghans throughout their employment. Pet.App.5-6, 47.

The military controlled base entry and exit, as well as security inside the perimeter at Bagram Airfield. The military required daily physical searches of all Afghan employees entering the base. Pet.App.5. While on base, Afghan employees' movements to and from worksites were restricted pursuant to the military's badge access policy. Pet.App.6.[5] When they finished their shifts, the military escorted them off the base. Pet.App.43-44.

2. Fluor is an American engineering and construction firm headquartered in Irving, Texas. For more than 80 years, Fluor has provided—and continues to provide—mission-critical services to the federal government, including services to support the military in warzones. Those services include base construction, facilities administration, laundry, food, vehicle maintenance, and hazardous materials management. Pet.App.3.

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[5] Under this policy, the Army assigned each employee a color-coded badge, which determined whether they could travel unescorted on the base. Pet.App.5-6.

In 2007, the Army awarded Fluor the LOGCAP IV contract to provide essential support services for military operations in Afghanistan. Pet.App.4. Two years later, the military awarded Fluor Task Order 0005, which retained Fluor to serve Bagram Airfield. Pet.App.4.[6] The Army retained Fluor to provide, among other things, construction services, facilities administration, and hazardous materials management. Pet.App.3. Pursuant to the Army's "Afghan First" program, Fluor's contract required it to hire Afghans "to the maximum extent possible." Pet.App.3, 45-46.

Fluor's services were limited to those set forth in its contract. In accordance with the Army's security policies, Fluor's contract did not provide for round-the-clock monitoring of Afghan employees, nor did it require monitoring any Afghan employees while at their worksites, and some Afghan employees were given even more permissive access to the base through the Army's badge access policy. Pet.App.6-7, 44-45. Fluor repeatedly offered to provide additional escorts to monitor Afghan employees, but the Army rejected Fluor's proposal to expand Fluor's scope of work, citing fiscal constraints. Pet.App.8, 44-45.

3. In 2011, the Army interviewed, vetted, and approved for employment Ahmad Nayeb, a former Taliban member. Pet.App.46. After the Army sponsored Nayeb's employment, Fluor's subcontractor hired him to work in the hazardous materials section of a non-tactical vehicle yard at Bagram Airfield. Pet.App.3. The Army never told

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[6] In 2021, Fluor's obligations to the U.S. military transitioned to the LOGCAP V contract. Fluor Corp., *Fluor Awarded U.S. Army's LOGCAP V Contract for U.S. Africa Command* (Apr. 15, 2019), https://newsroom.fluor.com/news-releases/news-details/2019/Fluor-Awarded-US-Armys-LOGCAP-V-Contract-for-US-Africa-Command/default.aspx.

Fluor about Nayeb's history with the Taliban. Pet.App.9, 46-47.

During his employment, the Army interviewed Nayeb at least seven times to determine whether he should retain base access privileges. Pet.App.9, 47. Each time, the Army decided, for reasons not disclosed to Fluor, that Nayeb should retain access. Pet.App.47. Just months before Nayeb's attack, the Army affirmed Nayeb's base access privileges, despite considering his answers to be "trained and coached" during his last security screening. Pet.App.9, 47.

4. On November 12, 2016, the military's base security and force protection policies failed. Nayeb detonated a suicide bomb, killing himself, along with two civilian Fluor employees and three service members. Pet.App.8, 156. The bomb injured seventeen others, including Petitioner, an enlisted soldier. Pet.App.8, 156. Shortly after the attack, the Army "required *all*" Afghan employees "to be escorted *at all times* while on the base," rather than just to and from their worksites. Pet.App.25. The Army also terminated the employment of over 1,000 Afghans working at Bagram Airfield. Pet.App.25.

A month after the bombing, the Army conducted a three-week investigation, eventually producing a heavily redacted, largely classified report. Pet.App.8; *see also* Pet.App.155-78. The publicly available portions of the report faulted both the Army and Fluor for the attack. *See* Pet.App.155-78. The report cites "eight major findings" of failures by the military, Pet.App.158-59, but the Army redacted all details regarding its own failures. The report's conclusions regarding Fluor's responsibility are disputed: Others in the military have criticized the report, claiming the investigating officer "just got it wrong." Pet.App.64.

The Army Contracting Command subsequently issued a show-cause notice to Fluor about potential termination of its LOGCAP IV contract. Pet.App.179-82. After reviewing Fluor's response, the Army decided not to terminate Fluor's contract. Pet.App.187. Several months later, the Army announced that it had awarded Fluor a new contract. *See supra* n.6.

5. Petitioner filed suit in 2019 in the U.S. District Court for the District of South Carolina, asserting tort claims against Fluor under South Carolina law. Pet.App.39 n.2. After denying Fluor's motion to dismiss based on the political question doctrine, Pet.App.11, the district court entered summary judgment for Fluor, holding that Petitioner's state-law tort claims were preempted by the "uniquely federal interests" contained in the combatant activities exception of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680. Pet.App.12, 38 (discussing 28 U.S.C. § 2680(j)). The district court also granted Fluor partial judgment on the pleadings on Petitioner's breach-of-contract claim. Pet.App.11-12.

The Fourth Circuit affirmed. Pet.App.35. The court of appeals recognized, consistent with every other court of appeals to consider the question, the inherent "conflict between federal and state interests in the realm of warfare." Pet.App.21. It acknowledged that the FTCA's "combatant activities exception reflects an important federal policy of foreclosing state regulation of the military's battlefield conduct and decisions." Pet.App.20 (quotation marks omitted). Accordingly, the court of appeals held that Petitioner's claims were preempted because Fluor was indisputably "integrated into combatant activities," Pet.App.22-23, and "'the military retained command authority' over Fluor's supervision of [Afghan] employees on base," Pet.App.23. In such circumstances, the court reasoned, "state tort laws would clash with the federal interest

underlying the combatant activities exception," Pet.App.21, and preemption was required to "preserve the field of wartime decisionmaking exclusively for the federal government," Pet.App.30.

SUMMARY OF ARGUMENT

I. Federal law preempts Petitioner's state-law tort claims. Petitioner's attempt to apply state tort law to regulate combat operations on a U.S. military base in Afghanistan would interfere with the federal government's exclusive warmaking powers. That result follows from this Court's decision in *Boyle* and from the Constitution itself.

A. Federal law preempts state tort claims when applying state law would interfere with "uniquely federal interests." In *Boyle*, the Court held that state tort claims against a military contractor were preempted because they conflicted with uniquely federal interests. The case for preemption is significantly stronger here. In addition to touching upon the uniquely federal interests implicated in *Boyle*, this suit would directly impinge upon the federal government's exclusive warmaking authority.

The proper rule of decision has two elements. *First*, it requires some connection between the plaintiff's claims and combatant activities during war. This element reflects Congress' judgment, expressed in the FTCA's combatant activities exception, that state tort law should not govern battlefield conduct. *Second*, the rule of decision must ensure that a connection exists between the military's authority and the contractor's actions. This element accounts for the constitutional backdrop against which Congress enacted the FTCA.

These elements tailor the rule of decision to the uniquely federal interests at play. To permit fifty-one state tort regimes to regulate military contractors acting under

the authority granted by their contracts and at the direction of the military would trample the federal government's ability to provide for the common defense. Such a regime would require contractors to make decisions based on their best guesses about what a jury or judge will deem "reasonable" years and miles removed from the battlefield. Unbridled tort liability would also interfere with the military's ability to engage military contractors at its discretion and to police those contractors in the way that maximizes military objectives.

As the Fourth Circuit correctly concluded, federal law preempts Petitioner's state-law tort suit. *First*, Petitioner challenges conduct that occurred in a foreign country, within the perimeter of a secure U.S. military base in an active war zone. The Army was responsible for base security and set an entrance, exit, access, and escort policy with which Fluor was contractually obliged to comply. The Army also directed Fluor to engage the suicide bomber and cleared him for his initial employment and subsequently screened him seven times during his continued employment. *Second*, Fluor's actions were within the scope of its contract and the military's command. The Army's contract required Fluor to hire as many Afghan employees as possible to perform work on base and to supervise those employees in ways the Army devised. Liability imposed upon Fluor for supposed negligence while engaging in these activities is liability imposed for contractual duties. The court of appeals therefore correctly concluded that under *Boyle* and proper consideration of the uniquely federal interests pervading this case, Petitioner's suit is preempted.

B. Even if Congress had never enacted the FTCA, the Constitution would preempt this suit. For more than 200 years, this Court has recognized that state laws that conflict with the federal government's constitutional authority

must give way. And just as states cannot directly hamper the federal government's constitutional authority, they also cannot regulate private parties to reach the same end. These principles require preemption. State-law tort suits have no place on the battlefield where risk-taking is the norm. Subjecting military operations to the varying standards of state tort law diminishes military effectiveness, sabotages national defense and foreign policy, burdens the American taxpayer, and elevates states to a position in warmaking that the Constitution expressly withholds.

II. None of Petitioner's arguments attacking the court of appeals' decision are persuasive.

A. Petitioner does not ask this Court to overrule *Boyle*, but Petitioner's arguments ask this Court to jettison *Boyle*'s reasoning. Petitioner contends, for example, that federal law can preempt his claims only if they conflict with the text of the Constitution or a statute. His claims do, of course, conflict with the Constitution, but in any event, this Court has consistently, and recently, recognized that federal common law may displace state law when necessary to protect uniquely federal interests. *Boyle* similarly forecloses Petitioner's argument that his claims cannot be preempted based on an exception to the FTCA because the FTCA does not apply to contractors. In *Boyle*, the Court relied on the FTCA's discretionary function exception to inform its preemption analysis, notwithstanding the FTCA's exclusion of contractors.

B. Petitioner repeats his contention, urged below, that Fluor breached its contract and violated military requirements. This is incorrect. It is also beside the point.

The court of appeals correctly rejected Petitioner's breach claim, and Petitioner cannot use that claim to circumvent preemption. Petitioner's argument on this front reveals his unduly narrow understanding of the uniquely

federal interests in this case. Those interests are rooted directly in the Constitution, and they are clear. And nothing about those federal interests is diminished by a plaintiff's allegations that a military contractor did not act in line with its contract.

Petitioner's argument proceeds not from a breach alleged by the United States or adjudicated under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109, but rather from a heavily redacted, largely classified report drafted by the Army which assigned blame to both the Army and Fluor. Petitioner never grapples with the Army's determination not to terminate Fluor's contract, nor does he contend with the Army's extension of a new contract to Fluor. The Court should not permit courts and juries to second-guess military judgments under the guise of state tort law.

ARGUMENT

I. FEDERAL LAW PREEMPTS PETITIONER'S STATE-LAW TORT CLAIMS.

The Constitution expressly entrusts the common defense to the federal government's exclusive authority. Recognizing the need for the federal government to engage in military operations unencumbered by the threat of tort litigation, Congress has preserved the government's sovereign immunity with respect to claims "arising out of" "combatant activities." 28 U.S.C. § 2680(j). This FTCA exception captures the uniquely federal interest in waging war that the Constitution commits to the federal government and expressly withholds from state regulation. Even if there were no FTCA—and therefore no express exception preserving immunity for combatant activities—the Constitution's text and design would lead to the same conclusion. Regardless of the preemption test applied, a state tort suit challenging the conduct of a military contractor in an

active theater of war is preempted because it directly impedes the federal government's ability to fulfill its constitutional prerogative to provide for the common defense.

A. Petitioner's Claims Are Preempted Because They Conflict with Uniquely Federal Interests.

Federal law preempts state law when preemption is "necessary to protect uniquely federal interests." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 116 (2022) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)). Preemption based on uniquely federal interests is warranted only in "limited areas," because the Constitution "reserves most … regulatory authority to the States." *Rodriguez v. FDIC*, 589 U.S. 132, 136 (2020). But in areas where the Constitution vests exclusive authority in the federal government—such as control over foreign relations—state law must give way. *See Cassirer*, 596 U.S. at 116.

Petitioner's claims interfere with uniquely federal interests. His claims clearly implicate the federal government's war powers. This exclusive authority flows directly from the Constitution and is embodied in the FTCA's combatant activities exception. Because Petitioner's suit would impose liability for a terrorist attack against U.S. forces on a military base during a time of war, it is preempted.

1. Petitioner's Claims Implicate Uniquely Federal Interests, Including the Federal Government's Warmaking Powers.

An interest is "uniquely federal" if it is "committed by the Constitution and laws of the United States to federal control." *Boyle*, 487 U.S. at 504. Put another way, uniquely federal interests exist where "the authority and duties of

the United States as sovereign are intimately involved" or where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Indus.*, 451 U.S. at 641.

Petitioner's claims implicate at least three such interests. Most centrally, they implicate the federal government's power to wage war. And as in *Boyle*, Petitioner's claims implicate the federal government's rights and obligations under its contracts and, were liability to attach, such liability would dramatically discourage private actors from "getting the Government's work done." 487 U.S. at 505.

a. The power to wage war necessarily implicates uniquely federal interests. "Foreign relations is of course" an area in which uniquely federal interests are present. *Cassirer*, 596 U.S. at 116. That is because "[g]overnmental power over external affairs is not distributed, but is vested exclusively in the national government." *United States v. Belmont*, 301 U.S. 324, 330 (1937). The power to wage war is an indispensable part of foreign relations, and is perhaps the power that the Constitution most clearly and emphatically vests in the federal government and shields from state interference.

The Constitution's text, "across several Articles," creates a "complete delegation of authority to the Federal Government to provide for the common defense." *Torres*, 597 U.S. at 590. "Unlike most of the powers given to the National Government, the Constitution spells out the war powers not in a single, simple phrase, but in many broad, interrelated provisions." *Id.*; *see also Johnson v. Eisentrager,* 339 U.S. 763, 788 (1950) (noting eight of "seventeen specific paragraphs" delineating Congress' Article I powers "are devoted in whole or in part to specification of powers connected with warfare."). The Constitution

simultaneously deprives the states of any parallel powers, expressly prohibiting states from "engag[ing] in War, unless actually invaded," or from "keep[ing] Troops." Art. I, § 10, cls. 1, 3.

In *Torres*, the Court held that the Uniformed Services Employment and Reemployment Act, 38 U.S.C. § 4301, displaced state sovereign immunity because "[t]ext, history, and precedent show the States agreed that their sovereignty would yield ... so far as is necessary to national policy to raise and maintain the military." 597 U.S. at 594. More than a century and a half earlier, the Court held that a state court's habeas power did not extend to its citizens serving in the military. *See Tarble's Case*, 80 U.S. 397, 408 (1871). The Court explained that the "power of the National government in the formation, organization, and government of its armies" is "plenary and exclusive," and that "[n]o interference" with this power "by any State officials could be permitted without greatly impairing the efficiency" of the federal government's war powers. *Id.* And after World War II, the Court observed that the federal government's power to raise and support a military "is given fully, completely, unconditionally. It is not a power to raise armies if State authorities consent." *Lichter v. United States*, 334 U.S. 742, 757 n.4 (1948) (quoting 9 J. Nicolay & J. Hay, Complete Works of Abraham Lincoln 75-77 (1894)).

Because "military affairs" are within "the exclusive control of the National Government," *Perpich v. Dep't of Def.*, 496 U.S. 334, 353 (1990), state-law tort claims that involve the federal government's war powers implicate "uniquely federal interests," *United States v. Standard Oil Co. of Cal.,* 332 U.S. 301, 305 (1947). In *Standard Oil*, the Court held that the claims were governed by federal common law because they implicated issues "distinctively federal in character." 332 U.S. at 305. In so holding, the

Court relied on the fact that "the Federal Government has the exclusive power to establish and define the relationship" between the military and service members "by virtue of its military and other powers." *Id.* at 306 (citing U.S. Const. art. I, § 8).

Congress has recognized that the power to wage war is a uniquely federal interest that requires protection from the reach of state tort law. In enacting the FTCA, Congress waived the United States' sovereign immunity for some tort claims, while continuing to bar liability for other "categories of claims." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 485 (2006). As relevant here, the FTCA preserves the government's sovereign immunity for "any claim arising out of the combatant activities of the military or naval forces ... during time of war." 28 U.S.C. § 2680(j). That exception reflects the fact that "all of the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, where risk-taking is the rule." *Saleh*, 580 F.3d at 7.

b. Petitioner's claims also implicate the "uniquely federal interests" at issue in *Boyle*. The dispute there concerned whether a federal contractor could be held liable under Virginia tort law for an alleged design defect in a helicopter that had been included in the helicopter's design per the military's design specifications. 487 U.S. at 502-03. Those state-law claims "border[ed] upon two areas" that the Court had already recognized as raising "uniquely federal interests." *Id.* at 504.

First, the claims in *Boyle* implicated the federal government's rights and obligations under its contracts. *Id.* Those rights and obligations are uniquely federal—and thus are governed by federal common law—because the federal government "is exercising a constitutional function or power"

that has "its origin in the Constitution and the statutes of the United States" and is "in no way dependent on" state law. *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366 (1943); *see also Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 707 (2006) (Alito, J., dissenting) (Because "petitioner's claim is based on the interpretation of a federal contract" it "should be governed by federal common law.").

Second, the claims in *Boyle* implicated "the civil liability of federal officials for actions taken in the course of their duty." 487 U.S. at 505. In support of this uniquely federal interest, this Court relied on cases such as *Westfall v. Erwin*, 484 U.S. 292, 295 (1988), and *Howard v. Lyons*, 360 U.S. 593, 597 (1959), which held that "the scope of absolute official immunity afforded federal employees is a matter of federal law" to be formulated by the courts. *Westfall*, 484 U.S. at 295 (discussing *Howard*). Those decisions recognized that the purpose of such immunity "is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation." *Westfall*, 484 U.S. at 295. The Court in *Boyle* reasoned that, although decisions like *Westfall* and *Howard* involved federal actors, it "obviously implicate[s] the same interest in getting the Government's work done" when that work is performed by federal contractors. 487 U.S. at 505.

For these reasons, the Court should follow its decision in *Boyle* and recognize the uniquely federal interests at play in a state tort suit seeking to impose liability for actions taken by military contractors in an active combat zone abroad. Those interests require application of federal common law, rather than application of potentially dozens of competing tort regimes.

2. The FTCA's Combatant Activities Exception Supplies the Rule of Decision.

Given the uniquely federal interests at issue, the Court "may appropriately craft the rule of decision" to resolve this case. *Rodriguez*, 589 U.S. at 136. That rule of decision must preempt any state law that poses a "significant conflict" with the federal interests at stake. *Boyle*, 487 U.S. at 507 (citation omitted). In determining the scope of preemption, the Court's analysis is guided by the "identifiable federal policies and interests." *Id.* (cleaned up). Reflecting the interests at stake, every court of appeals to have considered the question, as well as the federal government, has concluded that federal interests in warmaking displace state law and has looked to the FTCA's combatant activities exception to determine the common-law rule to apply.[7]

a. The FTCA preserves the government's sovereign immunity for "any claim arising out of the combatant activities of the military or naval forces ... during time of war." 28 U.S.C. § 2680(j). The combatant activities exception "eliminat[es]" "tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Saleh*, 580 F.3d at 7. That exception reflects Congress' judgment regarding the circumstances in which tort liability would most significantly interfere with the federal government's exclusive authority to wage war.

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[7] *See Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 127 (2d Cir. 2021); *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 349 n.11 (4th Cir. 2014); *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 479 (3d Cir. 2013); *Saleh*, 580 F.3d at 5-7; *Koohi v. United States*, 976 F.2d 1328, 1336 (9th Cir. 1992); *see also, e.g.,* Br. United States as Amicus Curiae in *In re KBR* (No. 13-1241) at 15, 20-21.

Congress did not enact an FTCA exception as "broad and sweeping" as the federal government's war powers (though it certainly could have). *FAIR*, 547 U.S. at 58-59. It instead shielded from liability "combatant activities" during "time of war." 28 U.S.C. § 2680(j). In so doing, Congress "determined which military activities are too sensitive to permit the intrusion of tort liability." *Carter v. United States*, 145 S. Ct. 519, 519 (2025) (Thomas, J., dissenting from denial).

But within the specific context of wartime combatant activities, Congress enacted an exception that "paint[s] with a far broader brush" than other FTCA exceptions. *Dolan*, 546 U.S. at 489. The exception precludes liability for "any claim arising out of the combatant activities." 28 U.S.C. § 2680(j). Congress' reference to "any" claim immediately emphasizes its breadth. *See United States v. Yellow Cab Co.*, 340 U.S. 543, 548 (1951) ("The words '*any claim* against the United States' … are broad words in common usage. They are not words of art."). And its use of "arising out of" further emphasizes its broad application. This "expansive" language "sweep[s] within the exception all injuries associated in any way with" the specified activity, "rather than claims targeted to" the activity alone. *Kosak v. United States*, 465 U.S. 848, 854 (1984) (interpreting "claim arising" formulation in FTCA exception).

Congress sensibly chose to bar all tort claims arising out of combatant activities because "[t]he very purposes of tort law are in conflict with the pursuit of warfare." *Saleh*, 580 F.3d at 7. The brooding presence of tort law on the battlefield would also "introduce[] a wholly novel element into military decisionmaking," one that would degrade military effectiveness and would render the military less responsive and nimble in the face of the ever-changing realities of war. *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 226 (4th Cir.

2012) (Wilkinson, J., dissenting on ground that appeal should have proceeded on collateral order review).

b. All the courts of appeals grappling with the rule of decision to apply to state tort suits in this context, as well as the United States in amicus briefs, have distilled the rule of decision into two components: *first*, whether there is a connection between the challenged conduct and combatant activities, and *second*, whether there is a connection between the military's authority and the challenged actions of the contractor. Although there has been disagreement at the edges, all the relevant formulations capture these two points. The first ensures the requisite connection to the constitutionally enshrined uniquely federal interest in warmaking, and the second ensures that the federal government's interests in governing its military contractors are also considered.

First, the rule of decision must effectuate Congress' decision to preclude liability for claims "arising out of" "combatant activities." 28 U.S.C. § 2680(j). A connection to combatant activities is necessary to tailor the rule of decision to the uniquely federal interest in warmaking. Permitting state-law tort suits to proceed against military contractors supporting combatant activities would degrade military effectiveness, undermine federal interests related to national defense and foreign policy, and lead to increased contract, insurance, and indemnity costs that would ultimately be passed on to the federal government and taxpayer. *See, e.g.*, Br. United States as Amicus Curiae in *In re KBR* (No. 13-1241) at 14, 20-21. And, if ruinous tort judgments were ultimately awarded, the federal government's ability to work with the contractors of its choosing would be impeded. *See Boyle*, 487 U.S. at 512; *see also Saleh*, 580 F.3d at 8.

Petitioner not only proposes to permit tort suits against military contractors acting at the behest of the federal government, but he also proposes that the tort law of multiple states (or even foreign countries) might apply in such suits. Pet. Br. 29-31. Tort law is notoriously variable from state to state, not to mention from country to country. *Cf. Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300-02 (7th Cir. 1995) (Posner, J.) (directing decertification of class because the Constitution forbade adjudication of claims "under a law that is merely an amalgam, an averaging, of the nonidentical negligence laws of 51 jurisdictions"). "The federal government's interest in preventing military policy from being subjected to fifty-one separate sovereigns (and that is only counting the *American* sovereigns) is not only broad—it is also obvious." *Saleh*, 580 F.3d at 11. If dozens of different state tort regimes were to regulate battlefield conduct, military contractors may hesitate to follow the military's orders when they require high-risk conduct that may violate the state tort law of numerous states. "[T]he direct effect" of such a regime would be to "hinder the exercise" of the federal government's plenary power to raise and support armies. *Union Pac. R. v. Peniston*, 85 U.S. (18 Wall.) 5, 30 (1873).

Second, the rule of decision must also consider the connection between the challenged actions of the contractor and the military's control and direction. Military contractors support the military through contracts that govern their operations; a claim "arising out of" combatant activities for contractors will be necessarily tied to those contractual obligations. For federal law to supply the rule of decision, therefore, the contractor must be acting within the scope of a contract for services related to combatant activities such that the military retains "command authority." *Saleh*, 580 F.3d at 9.

This part of the rule of decision accounts for the backdrop against which Congress enacted the FTCA. *See, e.g.*, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014) (Congress knows the prevailing law when it enacts a statute). This Court's decision in *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18 (1940), issued just six years before the FTCA's enactment, demonstrates that broad immunity should apply so long as a military contractor is providing services pursuant to a contract. In *Yearsley*, this Court rejected an attempt by a landowner to hold a contractor liable under state law for land erosion. This Court reasoned that "if [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing [the Government's] will." 309 U.S. at 20-21; *see also Filarsky v. Delia*, 566 U.S. 337, 391 (2012) (rejecting approach that would leave contractors "holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity"). The same is true here: If a military contractor takes action on behalf of the federal government within the scope of a valid contract, it is not subject to liability under state law for claims arising out of that action.

Preventing state law tort suits against contractors acting within the military's command and contractual authority is necessary to protect the military's ability to operate effectively. This case demonstrates as much. The district court, highlighting this case's voluminous record containing "recent depositions of Army personnel," explained that "[a]llowing this litigation to proceed would [] undermine military discipline, as soldiers would inevitably be haled into court proceedings to testify and to implicate and critique the conduct of other soldiers and senior officers." Pet.App.64. Such proceedings would necessarily

"offend separation-of-powers principles" by forcing "Military commanders, officers, and their subordinates" to "point[] the finger at one another" to avoid liability themselves. Pet.App.64. And the concern is especially heightened here, as much of the relevant evidence is classified. Pet.App.63-64.

Allowing tort law to regulate battlefield conduct also would require civilian judges and juries to sit in judgment of sensitive military decisions. Tort law's reasonability standard is an ill fit to regulate battlefield conduct. *See Aktepe v. USA*, 105 F.3d 1400, 1404 (11th Cir. 1997) ("[C]ourts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life."); *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 410 (4th Cir. 2011) ("[T]he court ha[s] no way of assessing reasonableness in the context of military orders and regulations."); *Lane v. Halliburton*, 529 F.3d 548, 563 (5th Cir. 2008) (Courts cannot "develop a 'prudent force protection' standard."). Tort law cannot be the yardstick by which courts measure battlefield conduct. Rather, when a contractor acts through a military contract and subject to the command authority of the military, state law must step aside to protect federal interests.

c. The Fourth Circuit applied a rule of decision that accounts for both of these factors. Under that test, courts consider whether "a private service contractor is integrated into combatant activities over which the military retains command authority," and whether the claim "aris[es] out of the contractor's engagement in such activities." Pet.App.40 (citation omitted); *Saleh*, 580 F.3d at 9 (adopting same test). That test protects the federal interests at stake and accounts for both the text of the combatant activities exception and the constitutional backdrop against which the exception was enacted. It is also supported by

the similar rule the United States has previously proposed. *See, e.g.,* Br. United States as Amicus Curiae in *In re KBR* (No. 13-1241) at 15, 20-21 (arguing for preemption where claims arise out of combatant activities and are within the scope of the contract).[8]

Petitioner's criticism of the Fourth Circuit's approach as a form of field preemption lacks merits. Pet. Br. 27-28. Field preemption is at its core "a species of conflict preemption." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990). Petitioner misunderstands why the rule of decision here is broader than that adopted in *Boyle*. It is not because of "field preemption," but because of the scope of the federal interests at issue. As *Boyle* recognized, *contra* Pet. Br. 55, the discretionary function exception in that case "suggest[ed] the outlines of" the conflict between federal interests and state law. 487 U.S. at 511. Here, where the combatant activities exception and the Constitution itself embody the federal interests in conflict with state law, it was not error to adopt an approach to avoid that conflict. Fluor does not ask this Court to blindly apply preemption within the "field" of military affairs, but rather to recognize the obstacle state law tort suits pose to the federal government's ability to provide for the common defense.

Likewise, Petitioner's reliance on the Second Circuit's decision in *Badilla* is misplaced. Pet. Br. 46-48, 54-55. Although the Second Circuit began its approach to preemption appropriately, it faltered at the last step, announcing a test that is too narrow and could permit suits that plainly interfere with the warmaking prerogatives of the United States. The court held that for preemption to apply the

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[8] The slight differences between the test applied by the Fourth Circuit and the test proposed by the United States are immaterial to this case. Accordingly, the Court need not adopt either particular formulation of the test to affirm the judgment below.

military must have "specifically authorized or directed the action giving rise to the claim." *Badilla*, 8 F.4th at 128. If *Badilla*'s test permits tort suits against contractors whenever the military gives discretion to contractors to determine how to implement the military's broader commands, this test badly undersells the warmaking powers of the federal government. It would also unduly cabin the federal government's ability to use contracts structured like the LOGCAP contracts, which often set broad objectives, and require instead that the government direct every minute detail of contractor work. And it is also counterintuitive: There is no reason to believe that, where the federal government has chosen to permit discretion in implementation of military objectives, the need to protect federal interests from state tort law interference disappears.

3. The Fourth Circuit Correctly Held That Petitioner's Claims Are Preempted.

Petitioner's claims arose in a foreign country, inside a secure U.S. military base, within an active war zone. Petitioner alleges injuries caused by an enemy attack carried out against U.S. forces. That attack was perpetrated by a Taliban operative who U.S. commanders deliberately placed on the base in furtherance of a counterinsurgency strategy and whose entrance and movement on the base were controlled by the military. Petitioner asserts claims based on the allegedly negligent supervision, retention, and control of the Taliban operative. Petitioner's suit also challenges the adequacy of security at entry control points and within the perimeter of Bagram Airfield. Applying the key elements of a federal rule of decision regarding claims arising out of combatant activities, Petitioner's claims are preempted, and this Court should affirm the Fourth Circuit's decision.

a. Petitioner conceded below that "Fluor was integrated into combatant activities at Bagram Airfield," that "Fluor was engaged in combatant activities," and that "supervising [Afghan] employees on a military base in a theater of war" is a "combatant activity." Pet.App.22-23 (cleaned up). Petitioner attempts to withdraw these concessions now, Pet. Br. 24-26, but it is too late to do so, *see United States v. Bean*, 537 U.S. 71, 74 n.2 (2002) (argument waived when raised for the first time in merits brief). His arguments are unpersuasive in any event.

The Fourth Circuit correctly concluded that Fluor was integrated into the federal government's combatant activities, including the specific activities at issue in this case. Pet.App.22-23. The Army instructed Fluor to hire Afghan employees. *See supra* pp. 6-7. The Army was responsible for all aspects of base security, including screening such employees when they entered and exited the base, as well as determining whether and to what extent such employees would be supervised and escorted while on base. *Id.* The Army was responsible for base security and, as part of its control over base access, adopted a policy that allowed Afghan employees to be unescorted at their worksites. *See id.* The Army instructed Fluor to hire Afghan employees, directed where and how Fluor was to escort and supervise those employees, and decided whether Afghan employees could continue to access the base. *Id.* Fluor was also contractually obligated to comply with the military's vetting and base access policies. Pet.App.42-44.

By challenging the retention of Nayeb and his access privileges on the base, at minimum, Petitioner challenges activities that the military specifically authorized as part of military operations at Bagram Airfield. But Petitioner's challenge also takes aim at the Army's broader counterinsurgency strategy and security plan for base access. Base security is plainly part of combatant activities, and Fluor's

contract directed it to supervise, under the military's comprehensive command and only to the extent the Army directed, Afghan employees' on-base movements and activities. There can be no question that had the military itself provided the same services as Fluor, it would not be subject to liability because of the combatant activities exception. And, moreover, Petitioner's claims arise out of a tragic incident for which the military was, by its own admission, at least partly to blame. *See* Pet.App.158-59.

Petitioner now attempts to dispute these conclusions based on a new, narrow interpretation of the combatant activities exception. Having previously conceded that Fluor was engaged in combatant activities, Petitioner now contends that "combatant activities" are limited to "active fighting" and only uniformed soldiers can engage in "combatant activities." Pet. Br. 25-26.

Petitioner is incorrect that "combatant activities" are limited to active fighting. Shortly after the FTCA was enacted, the Ninth Circuit concluded that "combatant activities" is most naturally read to include "not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948). Other courts of appeals have uniformly adopted this reading and have correctly reasoned that the exception encompasses a wide variety of conduct necessary to sustain military forces. *In re KBR*, 744 F.3d at 351 ("waste management and water treatment functions"); *Harris*, 724 F.3d at 481 (electrical systems); *Koohi*, 976 F.2d at 1333 n.5 ("tracking and attempted identification of an unidentified and apparently threatening aircraft"). But even if "active fighting" were required, Petitioner's claims would fit the bill. That is because Petitioner was injured by a Taliban operative's suicide-bombing on a military base in an active war theater.

Petitioner's argument that only uniformed soldiers may engage in "combatant activities" also misses the mark. Petitioner contends that, because "civilian contractors are not combatants," they "cannot lawfully engage in combat functions or combat operations." Pet. Br. 25-26 (cleaned up). But the combatant activities exception applies to "any claim" "arising out of" combatant activities. 28 U.S.C. § 2680(j). The phrase "any claim" does not differentiate between claims against the government and claims against private parties. *Contra* Pet. Br. 26. That "expansive" phrase, coupled with "arising out of," "sweep[s] within the exception all injuries associated in any way with" the military's "combatant activities." *Kosak*, 465 U.S. at 854. Petitioner's claims satisfy that requirement because the military was responsible for security on the base, and Petitioner was injured by an enemy attack that the military's security efforts did not prevent. Petitioner's claims are thus preempted under his own flawed definition.

b. The Fourth Circuit also determined that Fluor's actions were sufficiently within the scope of its contract and the military's command over that contract. Pet.App.23 (quoting *In re KBR*, 744 F.3d at 351). The court reasoned that the military "controlled base security"; "reserved for itself decisions about containing the security threat posed by hiring [Afghan employees] to work on the military base"; "dictated when and how the [Afghan employee] must be supervised"; and "exercised comprehensive command over Fluor's supervision of [Afghan employees]' on-base movements and activities." Pet.App.23-24, 26.

Petitioner does not meaningfully challenge any part of this analysis. Nor could he. Fluor acted at all times within the scope of its contractual relationship. Take, for example, Petitioner's negligent retention claim. *See* Pet.App.2, 40. The Army's contract required Fluor to hire as many Afghan employees as possible to perform work on base. Pet.App.3,

45-47, 57-58. If, as Petitioner contends, Fluor could be liable for retaining Nayeb—which "stemmed from military decisions," Pet.App.45, 57-58—it would necessarily impose liability on Fluor for actions taken within the scope of its contractual relationship with the government and over which the military had command authority.

The same is true for the supervision claim. Fluor's contract required it to follow the badge access policy set by the military, Pet.App.42-44, and, indeed, Fluor offered to increase its escorting duties beyond those required by the policy, but the Army declined, *see* Pet.App.8, 44-45. If liability were to flow from Nayeb's unescorted access to his worksite, that too would impose liability on Fluor for actions over which the military retained both contractual and command authority. Allowing a claim to proceed against a contractor for actions within the scope of the contractual relationship necessarily conflicts with the government's need to exercise discretion to engage the contractor and delegate such work at the level of detail the military deems appropriate.

B. The Constitution Preempts Petitioner's Claims Because They Interfere with the Federal Government's Exclusive Warmaking Authority.

Petitioner's claims are preempted because they conflict with the federal government's exercise of its constitutional war powers. *Boyle* compels this conclusion, *see supra* Part I.A, but the Court need not engage in common lawmaking to reach that result because Petitioner's claims would be preempted even if Congress had never enacted the FTCA.

1. This Court has long held that state laws that interfere with the federal government's constitutional powers are preempted because "the States have no power … to retard, impede, burden, or … control" such powers. *See, e.g.*,

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). "[T]he very essence of supremacy" empowers the federal government to "remove all obstacles to its action within its own sphere ... [and] exempt its own operations from [state] influence." *Id.* at 427.

Just as states cannot directly encumber the federal government's constitutional authority, they cannot regulate private parties in a way that would indirectly burden the federal government's sovereignty. *See, e.g.*, *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). In *Osborn,* this Court refused the state of Ohio's attempt to collect taxes from the Second Bank of the United States by suing the bank's officers, rather than the Bank. In so holding, the Court analogized the bank officials to military contractors:

> Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? [O]r could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.

22 U.S. at 867. Were it otherwise, states could indirectly "hinder the exercise" of the federal government's powers. *Union Pac. R.*, 85 U.S. at 30.[9]

This Court has consistently set aside state laws that would impede and interfere with the legitimate exercise of

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[9] *Osborn* thus demonstrates that "[t]he acts of contractors taken in performance of federal contracts—like the acts of the Bank of the United States taken in accordance with its charter—are acts authorized by federal statutes made in pursuance of the Constitution," and the Constitution therefore preempts actions taken against those contractors. Bradley Clark, Boyle *as Constitutional Preemption*, 92 Notre Dame L. Rev. 2129, 2138 (2017).

the federal government's sovereign powers. The Constitution preempts state law where there is a "clear conflict" between state and federal law, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003), and "where under the circumstances of [a] particular case," the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" the federal government's sovereign policy, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (cleaned up). Where, as here, the federal government is vested with plenary authority, state law will be displaced so long as there is "something more than [an] incidental effect" on the effectuation of federal law and policy. *Garamendi*, 539 U.S. at 421; *see also, e.g.*, *Belmont,* 301 U.S. at 331 ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states" (citing *Curtiss-Wright,* 299 U.S. at 316)).

2. In both *Crosby* and *Garamendi*, preemption arose not because the state law conflicted with express provisions of federal law, but because imposition of *any* state law created an "obstacle to the accomplishment of Congress's full objectives." *Crosby*, 530 U.S. at 373. Petitioner's suit is littered with such obstacles.

Petitioner's suit interferes with the federal government's exercise of its war powers for the same reasons that it conflicts with the uniquely federal interests embodied in the FTCA's combatant activities exception. *See supra* Part I.A.3. By allowing second-guessing of military decisions, it would improperly empower states to occupy a new and unprecedented role in warmaking. Traditionally, a state's interest in enforcing its own tort regime is largely confined to tortious activity within its own borders or against its own citizens. *See* Br. of West Virginia et al. as Amici Curiae at 2, 17-18. If Petitioner is right, states could pass laws that

effectively constrain the federal government's military operations. But "state laws aimed at influencing foreign relations cannot stand when they conflict with federal objectives." *Al Shimari*, 679 F.3d at 234 (Wilkinson, J., dissenting).

Petitioner has no response to these points. He attempts to sidestep the Constitution by baldly asserting that it is "undisputed" that the Constitution does not preempt his claims. Pet. Br. 1. That is simply false. Fluor has consistently argued that Petitioner's claims would be preempted even without *Boyle* based on the Constitution itself. Fluor CA4 Br. 33; Br. in Opp. 16-18. As the D.C. Circuit held in *Saleh*, federal law would preempt tort suits against private contractors integrated into the military's combat operations "even in the absence of *Boyle*." 580 F.3d at 11. That is because "[t]he states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making." *Id.*

II. PETITIONER OFFERS NO PERSUASIVE REASON WHY HIS SUIT MAY PROCEED.

Despite criticizing *Boyle*, Petitioner does not ask the Court to overrule it. Yet without overruling *Boyle*, the Court cannot rule for Petitioner on most of his arguments. Petitioner attempts to reconcile his arguments with *Boyle* by arguing that his assertions that Fluor breached its contract with the military are sufficient to save his claims from preemption. Those assertions do not change the result here.

A. Most of Petitioner's Arguments Are Foreclosed by *Boyle*.

Petitioner urges the Court not to "extend" *Boyle*. Pet. Br. 56. But the bulk of his arguments do not merely seek to limit *Boyle* to its holding. They take aim at the entirety of

the preemption framework applied there. Pet. Br. 14-53. The Court would thus need to overrule *Boyle* to accept those arguments.

1. Petitioner contends that federal law can preempt his claims only if they conflict with the text of the Constitution or a statute. Pet. Br. 17-18. Even putting aside that his claims conflict with the Constitution, *see supra* Part I.B, to adopt that view, the Court must overrule *Boyle* and the many cases on which it relied. 487 U.S. at 504 (collecting cases). *Boyle* acknowledged that preemption usually results from a conflict between a statute's text and state law, but it held that, in "a few areas," preemption can arise from a conflict between state law and "uniquely federal interests." *Id.* (cleaned up).

Petitioner suggests that this Court has already adopted his preemption test, which leaves no room for preemption based on uniquely federal interests. Pet. Br. 18-19 (citing *Kansas v. Garcia*, 589 U.S. 191, 202 (2020); *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019)). That is incorrect. The Court has recently reiterated that it is appropriate to "creat[e] … federal common law to displace state-created rules" when "necessary to protect uniquely federal interests." *Cassirer*, 596 U.S. at 116. Rather than departing from this longstanding approach here, the Court should reaffirm that, in "limited areas," state law may be preempted by uniquely federal interests. *Rodriguez*, 589 U.S. at 136.

2. As discussed above, *Boyle* forecloses Petitioner's argument that his claims do not even implicate uniquely federal interests. *See supra* Part I.A.1. Petitioner attempts to distinguish *Boyle* based on his allegation that Fluor breached its contract. Pet. Br. 48-54. That argument is flawed in numerous respects. *See infra* Part II.B. But, most fundamentally, it does not change the nature of the federal

interests at stake. Because Petitioner's claims implicate the same interests present in *Boyle* and the federal government's exclusive warmaking powers, *Boyle* establishes that his claims involve uniquely federal interests.

3. The Court would also need to depart from *Boyle* to accept Petitioner's argument that the Court should "'adopt the readymade body of state law as the federal rule of decision.'" Pet. Br. 38 (quoting *United States v. Kimbell*, 440 U.S. 715, 740 (1979)). But as in *Boyle*, here there is no "readymade body of state law" that regulates battlefield conduct, because "when the States entered the federal system, they renounced their right to interfere with national policy in this area." *Torres*, 597 U.S. at 590. Instead, as *Kimbell* itself makes clear, certain federal interests "by their nature are and must be uniform in character throughout the Nation." 440 U.S. at 728.

This is undoubtedly such a scenario. As this Court has explained, "[n]ot only is the government-soldier relation distinctively and exclusively a creation of federal law," but there is "no good reason why" the federal government's rights "should vary in accordance with the different rulings of the several states." *Standard Oil*, 332 U.S. at 305. To hold otherwise would offend the Constitution's explicit delegation of warmaking authority to the federal government, jeopardizing national security in the process.

4. *Boyle* similarly forecloses Petitioner's argument based on the FTCA's definition of "federal agency," which excludes "any contractor with the United States." Pet. Br. 22 (quoting 28 U.S.C. § 2671). In *Boyle*, the Court relied on the FTCA's discretionary function exception to inform its preemption analysis. That exception expressly references "federal agency," and yet the Court held that the plaintiff's claims against a federal contractor were preempted. 487 U.S. at 504. That ruling necessarily forecloses Petitioner's

argument here, where the relevant FTCA exception does not even use the term "federal agency."

Contrary to Petitioner's assertion, Congress need not enact legislation expressly immunizing contractors for federal law to preempt his claims. Pet. Br. 26-27. When enacting the FTCA in 1946, Congress would have been keenly aware of *Yearsley*, issued just a few years before, which provided derivative sovereign immunity for contractors. *See supra* pp. 22-23. There is no reason to think that, in partially waiving sovereign immunity for the United States, Congress would have perceived a need to legislate separately with respect to contractors following *Yearsley*.

Nor does it matter that Congress has, on occasion, "deem[ed]" certain entities to be federal employees. Pet. Br. 27 (citing 42 U.S.C. § 233(g); 50 U.S.C. § 2783). These statutes simply show that Congress opened the federal fisc to pay for the tortious acts of federal contractors in certain circumstances; they have no bearing on whether tort suits may proceed against contractors integrated with the U.S. military and assisting war efforts. Instead, taking *Yearsley* and the FTCA together, Congress set up a system in which the United States would not generally shoulder the burden of liability for its contractors, but those contractors might share in some of the immunity the federal government possesses, either because state law would be preempted, *see Boyle*, 487 U.S. at 512, or more directly through derivative sovereign immunity, *see Yearsley*, 309 U.S. at 20-21.[10]

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[10] Petitioner's reliance on *Oklahoma v. Castro-Huerta,* 597 U.S. 629 (2022), is misplaced. Pet. Br. 22-23. There, the Court held that a federal law did not displace the law in Indian country because the grant of federal jurisdiction was not exclusive. 597 U.S. at 639-47. That is irrelevant here, where the federal government enjoys exclusive authority over warmaking, and states have no role to play in governing military operations. *See supra* Part I.A.1.

B. Petitioner's Reliance on a Purported Breach of Contract Does Not Change the Preemption Analysis.

Petitioner contends that his claims are not preempted because Fluor violated its contract with the federal government. Pet. Br. 41-43, 47-54. Fluor denies that it breached its contract or that it is responsible for the tragic bombing at Bagram Airfield. But even accepting Petitioner's contention, the outcome here would be the same: Petitioner's claims would be preempted.

1. Petitioner's Claims Interfere with the Federal Government's Warmaking Powers Regardless of Whether a Breach Occurred.

Petitioner contends that his claims do not implicate a "uniquely federal interest"—and thus cannot be preempted—because Fluor breached its contract. Pet. Br. 46-48. Petitioner further contends that, even assuming a uniquely federal interest, Fluor's purported breach means that his claims cannot conflict with that interest. Pet. Br. 48-54. Neither argument has merit.

a. Petitioner's claims implicate uniquely federal interests regardless of whether he can prove that Fluor breached its contract. The preemption inquiry requires consideration of the nature of the federal interest at stake—not the merits of Petitioner's claim. And preemption is required when the claim falls in an area that is "so committed by the Constitution and laws of the United States to federal control that state law is pre-empted." *Boyle*, 487 U.S. at 504.

Although Petitioner would prefer to ignore the fact, it cannot reasonably be disputed that the federal government has an exclusive and abiding interest in the conduct of war,

see supra Part I.A.1, including the base security operations directly implicated by Petitioner's claims. It follows that the federal government alone may regulate that conduct, and state law cannot impose additional requirements on the exercise of such powers. *Id.* Nothing about those federal interests hinges on an evaluation of whether or to what extent those assisting the federal government in its warmaking efforts comply with contractual terms.

Petitioner also proposes no basis on which to limit his argument to military contractors. If federal interests disappear when discretion is abused, the FTCA and the Westfall Act's broader immunity provisions are difficult to understand. Under this scheme, individual employees are granted immunity if acting in the scope of their employment, even if they act improperly. *See* 28 U.S.C. § 2679(b)(1); *see also, e.g., id.* § 2680(a) (exception applies even when discretion is abused). As Petitioner highlights, the Court in *Boyle* observed that "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," Pet. Br. 33, even though those designs later proved unsafe. So too here. It makes equally "little sense" to shield from liability activities related to warmaking carried out by military personnel even if those actions are injurious and an abuse of discretion, but not do so when the military—pursuant to its warmaking prerogatives—chooses to use contractors for the same activities.

To be sure, the Westfall Act does not extend immunity for *all* actions of federal employees, and Fluor does not argue for unlimited immunity for military contractors either. *Cf.* Pet. Br. 47 (urging the Court to "defin[e] the interest properly [] such that it does not extend to all contractors in all cases touching on the military's activities"). Although the events that injured Petitioner were undeniably tragic,

Petitioner does not allege that Fluor engaged in unlawful or intentional conduct. Instead, Petitioner asserts negligent control, retention, and supervision claims. *See* Pet. Br. 51. Any such alleged breach did not violate federal law, nor did Fluor's conduct frustrate the conditions necessary for Fluor to have the government's authorization to act. The government did not terminate Fluor's contract, Pet.App.187, and instead entered into a new contract with Fluor. *See supra* n.6.

b. Petitioner next contends that his claims are consonant with any uniquely federal interest. Pet. Br. 48-54. That is so, he claims, because Fluor's breach of contract means a state law tort suit seeking to punish the breach would assist the federal government. This is incorrect. His claims conflict with the federal government's warmaking powers even if Fluor breached its contract, and federal law would still therefore supply the rule of decision.

Petitioner's argument cannot be squared with this Court's longstanding precedent holding that a state law can sufficiently interfere with the federal government's exercise of its constitutional powers even if a state seeks to impose liability only for conduct that also violates federal law. *See, e.g.*, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (holding state-law "fraud-on-the-FDA" claims preempted even though plaintiffs challenged actions alleged to conflict with federal law). State law is especially likely to obstruct the federal government's powers when, as here, the law interferes with the exercise of constitutional powers vested solely in the federal government. In this circumstance, state law is preempted because a "conflict in the method of enforcement" or "conflict in technique" can be as "disruptive" to our constitutional order as a "conflict in overt policy." *Arizona v. United States*, 567 U.S. 387, 406 (2012) (citation omitted); *see also Garamendi*, 539 U.S. at 423-25 (state law preempted because

it "employ[ed] a different[] state system of economic pressure and in so doing undercut[] the President's diplomatic discretion"); *Crosby*, 530 U.S. at 376, 381 (state law preempted because it "impos[ed] a different, state system of economic pressure" and "compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments").[11]

Petitioner misconstrues *Boyle* in service of this argument, contending that *Boyle* turned only on a perceived conflict between federal and state tort law requirements. *See* Pet. Br. 35-43. That is not true on its own terms, as explained, but in any event, *Boyle* concerned the unique interests embodied by the discretionary function exception. 487 U.S. at 505-06. In *Boyle*, the focus on the ability to comply with conflicting standards reflected the nature of the interests protected by the discretionary function exception: The manufacturer could not be bound by standards outside those the government set forth without interfering with the government's ability to set those standards. But here, the interest at stake—the federal government's ability to control the conduct of war—has a much broader sweep. Those exclusive warmaking powers are enshrined in the Constitution and the FTCA and shield the entire expanse of military operations from interference.

Tort litigation directed at any conduct related to combatant activities *itself* interferes with those interests regardless of any allegations of breach of contract. Both the

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[11] Contrary to Petitioner's assertions, Pet. Br. 46, *Penn Dairies v. Milk Control Comm'n of Pa.*, 318 U.S. 261 (1943), said nothing about state tort suits that, as here, impede the federal government's authority to exercise its plenary war powers. The Court held that federal law did not preempt state-imposed price controls on the price of milk, because the law did not obstruct the federal government's exercise of its constitutional powers. *Id.* at 270. That is not the case here.

leading D.C. Circuit case and the United States have espoused the view that breach of contract has no place in the preemption analysis. In *Saleh*, plaintiffs put forth allegations of breach of contract and misconduct on the part of the military contractors. But the Court explained that preemption was still appropriate, in part because to hold otherwise could "interfere with the federal government's authority to punish and deter misconduct by its own contractors." 580 F.3d at 8. Likewise, the United States has explained that preemption will apply "even if any employee of a contractor allegedly violated the terms of the contract" because "[d]etermination of the appropriate recourse for the contractor's failure to adhere to contract terms and related directives under its exclusively federal relations with the United States would be the responsibility of the United States." *See* Br. United States as Amicus Curiae in *In re KBR* (No. 13-1241) at 16.[12]

These decisions recognize that the federal government exercises exclusive control over the design and implementation of military operations, including the circumstances under which it determines to take action against contractors who fall short of the military's expectations. Liability imposed based on mere breach allegations permits impermissible second-guessing of the U.S. Government's evaluation of contractor performance, management of its use of contractors, and design of benefits systems for service members.

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[12] Petitioner cites dicta from *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001), in an attempt to limit *Boyle* to situations in which the "government has directed a contractor to do the very thing that is the subject of the claim," Pet. Br. 49-50. But the federal interests protected by the combatant activities exception are broader than those at issue in *Boyle*. *See supra* Part I.A.1.

Congress has enacted a comprehensive framework for litigating disputes over government contracts, which saves the parties time and resources. Under the Contract Disputes Act, Congress provided an exclusive mechanism for the federal government to pursue contract actions against contractors, and for contractors to pursue claims against the federal government. The Army, as a party to the contract, could have sought remedies against Fluor for any alleged breach of contract, but declined to do so. Pet.App.187. And the Army's control was especially pervasive here: Fluor's contract was a cost-plus award-fee contract, Pet.App.92, that allowed the government to "unilaterally" determine additional payments based on "its evaluation of the Contractor's performance," CA4 J.A.2115.

Preempting tort claims does not leave Petitioner without a remedy. It instead effectuates Congress' judgment on how to assist those injured on battlefields abroad through various mechanisms of redress. Congress has provided veterans, including Petitioner, with a "wide range" of administrative remedies through the Veteran Benefits Administration. *Bufkin v. Collins*, 145 S. Ct. 728, 733 (2025) (citing 38 U.S.C. §§ 1110, 1131). The benefits system "provides a swift, efficient remedy for the injured serviceman," *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977), and is "the sole remedy for service-connected injuries," *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464 (1980).

2. Petitioner's Assertions of a Breach of Contract Do Not Make It So.

Petitioner's claims would be preempted even if Fluor had breached its contract, but, in any event, there has never been a determination of breach. The Army did not terminate Fluor's contract or challenge any claims paid under that contract. Pet.App.187. The Army has since entered

into *a new contract* with Fluor following the Bagram Airfield bombing. *See supra* n.6. Those actions are not consistent with the flouting of military orders Petitioner insists happened.

a. Petitioner cannot directly seek damages from Fluor for a purported breach of its contract with the government. That much is now settled. The Fourth Circuit affirmed the dismissal of his breach-of-contract claim because he is neither a party nor a third-party beneficiary to that contract. Pet.App.33-34. Petitioner did not seek certiorari on this correct determination, *see* Pet. Cert. i-ii, nor does he argue the Fourth Circuit was wrong in his opening brief, *see* Pet. Br. 10-13.[13]

But Petitioner's position would provide an end-run around that ruling. He now contends that he can pursue tort claims against Fluor so long as he can establish a breach of contract. Pet. Br. 48-54. That theory swaps the orderly process Congress designed to resolve contract disputes with a novel and unworkable theory of Petitioner's own design. When confronted with a preemption defense, according to Petitioner, a state court or federal court sitting in diversity would first have to determine whether the federal contractor breached their government contract. *See, e.g.*, Pet. Br. 42. But interpretation of federal contracts is governed by *federal* common law, *see supra* pp. 17-18, and Petitioner never answers the questions that immediately spring to mind: What role would the United States' view of

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[13] Because Petitioner is not a third-party beneficiary to Fluor's contract with the United States, his reliance on *Miree v. DeKalb County*, 433 U.S. 25 (1977), is misplaced. This Court did not apply federal common law there because the suit implicated "only the rights of private litigants" and would "have no direct effect upon the United States or its Treasury." *Id.* at 29-30. By contrast, here, "a uniform national rule is necessary to further the interests of the Federal Government," *id.* at 29, in the conduct of war.

the contract play? What law would govern the resolution of such questions? Could such determinations have preclusive effect, including between the two parties to the contract? Who would bear the burden of proof? The list goes on.

Such inquiries would also run headlong into political question problems, *see, e.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), as courts would be tasked with stepping into the shoes of the United States to construe the contract, weigh competing military objectives, and judge compliance. And, as this case vividly demonstrates, questions of breach in military contracts often implicate the propriety of the Army's actions as well, and often turn on classified information. *See supra* p. 23. Judges are, however "not given the task of running the Army." *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence" than "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force." *Gilligan*, 413 U.S. at 10. Such mischief is a sure sign that this Court should reject Petitioner's proposed focus on whether a breach of contract has occurred.

b. Petitioner attempts to sidestep these issues by asserting that Fluor "indisputably" breached the contract. Pet. Br. 9 (cleaned up). But, as the district court acknowledged, that issue is very much in dispute and the court or a jury would have to determine whether a breach occurred if this case proceeds. Pet.App.56, 62-65. But further litigation and any trial in this matter would result in inappropriate judicial intrusion into sensitive military judgments.

Petitioner invokes the views of the contracting officer who concluded that the Army should not terminate Fluor's

contract. Pet. Br. 9 (quoting Pet.App.186). But by correctly declining to take that step, the officer deprived Fluor of an opportunity to obtain a neutral adjudication of whether a breach occurred. Had the contracting officer issued an adverse decision about Fluor's performance, Fluor could have sought review of the decision in the U.S. Court of Federal Claims or before an administrative board. *See* 41 U.S.C. § 7104. And if necessary, Fluor then could have appealed to the Federal Circuit. *See* 28 U.S.C. § 1295; 41 U.S.C. § 7107.

If the case were to proceed, a key issue would be whether the military's security failures caused Nayeb's attack and Petitioner's resulting injuries. The heavily redacted Army report listed "eight major findings" of failures by the military, including failing "to identify Nayeb's threat indicators." Pet.App.157-59. To resolve the causal role of the military's deficient base security, the parties would necessarily seek to compel testimony from base commanders, military officers, and other military personnel responsible for safety and security of personnel on the base. In the process, the military's wartime decisions would be scrutinized and evaluated by the court or jury.

These issues had already materialized during discovery in this case. A retired Lieutenant General testified in his deposition that the Army investigators "just got it wrong" in their post-attack report, which the district court noted was a "preview" of what is to come if further discovery were allowed. Pet.App.64; *see also Saleh*, 580 F.3d at 8 (noting "the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings" that "will as often as not devolve into an exercise in finger-pointing").

Litigating whether Fluor breached its contract would be further hampered by the lack of access to critical

evidence. As the district court observed, "core facts that would be central to litigating this suit" remain classified, and the government's withholding of classified information "would present a major hurdle, if not a prohibitive event, to the resolution of this matter on the merits." Pet.App.46 n.8. The unavailable evidence goes to the heart of Petitioner's claims, including "details regarding Nayeb's Taliban ties." Pet.App.46 n.8. For example, the Army refused to release all evidence, including documents and witness statements, related to the military's security failures. The Army also refused to release evidence regarding the military's intelligence in the days and weeks leading up to the attack, though there is some indication that the Army had "[c]ounterintelligence shortages" and failed "to identify Nayeb's threat indicators." Pet.App.159. The Army has even refused to release the identities of apparent co-conspirators who facilitated Nayeb's attack. Without this pivotal evidence, and other evidence withheld due to national security concerns, Fluor would be deprived of key evidence to defend against Petitioner's claims.

Petitioner's request of this Court is nothing short of extraordinary. He proposes to open the operations of the national defense, which the Framers entrusted solely to the federal government, to second-guessing by courts and juries applying state tort law. This Court should reject Petitioner's invitation and affirm its longstanding precedent recognizing that states have no role to play in warmaking.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted,

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