No. 24-924

IN THE

Supreme Court of the United States

WINSTON TYLER HENCELY,
Petitioner,

v.

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

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

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has an interest in protecting government contractors from unwarranted liability under state law. Many of the Chamber's members are government contractors that regularly assist the federal government in a variety of important ways. As the decision below recognizes, these contractors should not have to fear liability under state law when aiding the United States on foreign battlefields. Accordingly, the Chamber has an interest in securing affirmance of the decision below.

In addition, the Chamber has an interest in this Court's adherence to *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). Petitioner argues that "the Court can

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

'leave' *Boyle* as it 'found it,'" and asks only that *Boyle* not be "extended" by the decision below. Pet. Br. 31. But Petitioner also attacks *Boyle*'s validity, claiming that the decision is "difficult to reconcile with the Supremacy Clause and this Court's superseding preemption decisions." *Ibid.*

The Court should not overrule or undermine *Boyle*. For almost 40 years, *Boyle* has protected government contractors, including those in the Chamber's membership, from burdensome private lawsuits second-guessing the government's discretionary judgments. Amply supported by law, *Boyle* was correctly decided and protects important policy and reliance interests.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below should be affirmed. As Respondent persuasively explains, state law cannot regulate how the United States conducts its wars overseas, including by threatening liability against contractors who aid American combatants. The United States increasingly relies on these contractors, and reversing the decision below would undermine vital American interests.

Beyond attacking the decision below, Petitioner also challenges *Boyle* and the entire preemption doctrine on which *Boyle* is based. This Court should not overrule or undermine *Boyle*. *Boyle* is amply supported by law, protects important policy interests, and has been heavily relied upon for nearly 40 years.

ARGUMENT

I. Federal contractors are vital to advancing American interests.

Private contractors are critical to the federal government. In 2024 alone, the U.S. Government Accountability Office (GAO) reported that "the federal government committed about $755 billion" in new contracts. *A Snapshot of Government-Wide Contracting for FY 2024, U.S. GAO* (June 24, 2025), https://tinyurl.com/4u8zcy3w (*FY 2024 Snapshot*). That was a significant increase from the $637 billion in new federal contracts awarded just three years earlier. *A Snapshot of Government-Wide Contracting for FY 2021, U.S. GAO* (Aug. 25, 2022), https://tinyurl.com/3m38t9sp.

These contractors support the United States in many contexts. They not only are central to military operations and defense, but also help keep our country safe in myriad other ways and stabilize countries around the globe.

A. Combat and defense

Reliance on federal contractors has increased sharply in recent years, particularly by the U.S. military. In the wake of the Cold War, the federal government began outsourcing military-related tasks, "freeing up uniformed personnel to focus on military-specific activities; providing supplemental expertise in specialized fields, such as linguistics or weapon systems maintenance; and providing surge capabilit[ies] to quickly deliver critical support functions." Alexandra G. Neenan, Cong. Rsch. Serv.,

IF10600, *Defense Primer: Department of Defense Contractors* at 1 (2024) (*Defense Primer*); *see also* Moshe Schwartz & Jennifer Church, Cong. Rsch. Serv., R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* 1 (2013) (*DoD's Use of Contractors).* Accordingly, military contractors now perform many combat duties previously assigned to service members, including constructing and maintaining facilities, transporting supplies and personnel, providing life support to service members on the battlefield, and executing numerous other tasks in active war zones. *See Al Shimari v. CACI Intern., Inc.*, 679 F.3d 205, 240 (4th Cir. 2021) (Wilkinson, J., dissenting) ("It is a truism that government, including the military, must contract"); *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008) (noting "ample evidence that the military finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission").

In fact, the Department of Defense (DoD) regularly obligates more money on federal contracts than the contract spending of all other government agencies combined. *See, e.g.*, *Defense Primer* at 1. In FY 2024, DoD allocated $445.1 billion for private contractors, while the remainder of the federal government allocated $310 billion. *FY 2024 Snapshot*.

Many of these military contracts supply weapons and equipment that are key to the national defense and military operations overseas. For example, DoD recently awarded a $3.5 billion contract for new air-

to-air missiles, the largest contract in program history. U.S. Dep't of Def., *Contracts for July 31, 2025,* https://tinyurl.com/4cmbhbaa (last visited Sept. 19, 2025); David Cenciotti, *Raytheon Secures Record-Breaking $3.5 Billion AMRAAM Missile Contract from U.S. DoD*, The Aviationist (Aug. 1, 2025), https://tinyurl.com/3c67wvea. Similarly, the Air Force recently entered into a contract for the development and manufacture of "the world's first sixth-generation fighter aircraft." Secretary of the Air Force Public Affairs, *Air Force Awards Contract for Next Generation Air Dominance (NGAD) Platform, F-47*, Air Combat Command (Mar. 23, 2025), https://tinyurl.com/2m93pxau. The government lacks the capacity to design and build those warplanes itself—which is why it described the contract as "reflect[ing] the Air Force's commitment to delivering cutting-edge technology to the warfighter while optimizing taxpayer investment." *Ibid.* Other recent examples include state-of-the-art missile-defense systems, new communications systems for the Air Force's central command, architectural and engineering services for the Army, repair contracts for military bases abroad, and research into "advanced manufacturing techniques" for the Air Force, to name just a few. U.S. Dep't of Def.*, Contracts for July 28, 2025,* https://tinyurl.com/ycyrd897 (last visited Sept. 19, 2025).

The above examples reflect the depth and breadth of the military's reliance on private contractors to help it accomplish tasks that it either cannot achieve alone or can better or more efficiently achieve through a

partnership with the private sector. Private contractors often provide technical skills and advanced capabilities not always found in the military and allow the military to focus on its core mission: combat operations and strategic objectives.

Contractors have proven particularly valuable in combat zones, where they provide key logistical and operational support. In Iraq and Afghanistan, for example, contractors managed waste, ammunition, fuel, facilities, water treatment, food services, detainee interrogation, and communication services. *Hencely v. Fluor Corp.*, 120 F.4th 412, 427 (4th Cir. 2024); *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 351 (4th Cir. 2014); *Al Shimari*, 679 F.3d 205. Indeed, throughout the United States's combat operations in these two countries, private contractors comprised 50 percent or more of the total U.S. military force. *DoD's Use of Contractors* at 1; Heidi M. Peters, Cong. Rsch. Serv., R4416, *Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007–2018,* at 1 (2019). Such outsourcing allowed military personnel to focus their attention where it was needed most—actual combat.

The use of contractors in armed conflict shows no signs of abating. According to defense officials and analysts, the U.S. military cannot function effectively on the battlefield without support from private contractors. *DoD's Use of Contractors* at 15; *see also* Office of the Under Sec'y of Def. for Acquisition and Sustainment, DoD Instruction 3020.41, *Operational Contract Support Outside the United States*, (Nov. 27, 2024) https://tinyurl.com/y2ua6me9 (designating

contractors as a crucial part of the "total force" and acknowledging that contractors are essential for providing operational and logistical support, technical expertise, and other specialized services). Both the number and value of contracts awarded, as noted above, and the sheer number of private contractor personnel working for DoD confirm that conclusion. In FY 2024, US Central Command reported that approximately 21,000 contractor personnel worked for DoD within its area of responsibility. *Defense Primer* at 1. "[T]he future battlefield will require ever increasing numbers of often critically important contractor employees." *Al Shimari*, 679 F.3d at 240 (Wilkinson, J., dissenting) (quoting U.S. Dep't of the Army, Field Manual 3-100.21, Contractors on the Battlefield Preface (2003)).

B. International stability operations

Federal contractors are critical to international stability operations, too. To promote freedom and democracy around the globe, the federal government works to "strengthen fragile states where state weakness or failure would magnify threats to the American homeland and empower reform-minded governments, people, and civil society." U.S. Dep't of State, *United States Strategy to Prevent Conflict and Promote Stability* 1, 4, 7, 14 (2020), https://tinyurl.com/3bnahfts (internal quotation marks omitted). Over the past several decades, the United States has helped partner countries—including those recovering from or at risk of conflict—to become more self-reliant and democratic. U.S. Department of State ("State Department") personnel

step in to help such countries "build durable mechanisms to resolve conflicts, undertake difficult reforms where needed, enhance social cohesion, build critical institutions, . . . and mobilize domestic resources that can enable lasting peace, stability, and ultimately prosperity." *Id.* at 7. To achieve those objectives, the State Department relies heavily on civilian contractors and other forms of public-private partnerships. *Id.* at 3.

Reconstruction in Afghanistan and Iraq is a prime example. Before the United States withdrew from Afghanistan in 2021, over 21,000 contractor personnel remained in Afghanistan, Iraq, and Syria, performing a range of functions such as security, IT and communications support, construction, social services, and medical care. U.S. Dep't of Def., *Contractor Support of U.S. Operations in the USCENTCOM Area of Resp.* 1 (Apr. 2021), https://tinyurl.com/373dpwf6. Indeed, as many as 80 percent of State Department personnel performing these on-the-ground functions in Afghanistan and Iraq were private contractors. Mary Beth Sheridan & Dan Zak, *In Iraq, It's Crunch Time for the State Department*, Wash. Post, (Feb. 8, 2012), at A12.

Today, nearly 20,000 contractors continue aiding the Department of Defense in Iraq, Syria, and other countries around the globe. U.S. Dep't of Def., *Contractor Support of U.S. Operations in the USCENTCOM Area of Resp.* 1 (Jan. 2025). These contractors perform billions of dollars of work—including constructing and restoring infrastructure,

developing new justice systems, and protecting U.S. diplomatic officials.[2]

C. Intelligence gathering, counter-terrorism training, and narcotics eradication

Federal contractors also keep America safe in a variety of other ways. In Africa, for example, the U.S. military has outsourced air reconnaissance operations to contractors. In past missions, these contractors have supplied aircraft and surveillance gear, as well as pilots and personnel, to obtain electronic intelligence concerning terrorist organizations. Contractors have also trained Ugandan recruits to fight terrorists in Somalia and have engaged in counternarcotics operations in South America.[3]

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[2] *See generally* Michael R. Gordon, *Civilians to Take U.S. Lead After Military Leaves Iraq*, N.Y. Times, Aug. 19, 2010, at A1; Jamie Crawford, *For Contractors Who Stay, It "Is Not Going To Be Easy"; Thousands Left in Iraq Will Navigate Complex Scenario*, Chi. Trib., Oct. 23, 2011, at 27; Andrew Quinn, *Security Contractors Filling Big Void; State Department Doubling the Ranks to Protect Civilians*, Chi. Trib., Aug. 22, 2010, at 23; Rajiv Chandrasekaran & Scott Higham, *Access to Afghan Projects to Be Lost*, Wash. Post, Oct. 27, 2013, at A01.

[3] *See* Craig Whitlock, *Contractors Run U.S. Spying Missions in Africa*, Wash. Post, June 14, 2012, https://tinyurl.com/jsbda9wv; Craig Whitlock, *U.S. Trains African Soldiers for Somali Mission*, Wash. Post, May 13, 2012, https://tinyurl.com/mrxfsktx; Counternarcotics Contracts in Latin America: Hearing Before the Ad Hoc Subcomm. On Contracting Oversight of the S. Comm. on Homeland Security and Governmental Affairs, 111th Cong. 9, 64, 95–96, 99 (2010).

* * * * *

In short, American contractors and businesses further U.S. national security interests, including military, reconstruction, and other foreign-policy efforts, in broad and significant ways. Private contractors have given the federal government extraordinary flexibility and have been instrumental in bridging the gap between our Nation's expanding global efforts and the capacities of the Armed Forces and federal civilian workforce.

II. The Court should adhere to *Boyle*.

The public-private partnerships discussed above depend on the longstanding liability protections underlying the decision below. The Court should affirm that decision and leave these important legal protections in place. As Respondent persuasively explains, Petitioner's claims are preempted by "uniquely federal interests" and the Constitution itself. Resp. Br. 13–33.

But Petitioner doesn't just attack the decision below; he also attacks *Boyle*. On the one hand, Petitioner presents a narrow question of whether *Boyle* should be "extended," Pet. Br. i, which Petitioner claims can be resolved while leaving *Boyle* in place, *id*. at 31. But in the same breath, Petitioner also challenges *Boyle* as "difficult to reconcile with the Supremacy Clause and this Court's superseding decisions." *Ibid.*

The Court should reject these suggestions. *Boyle* is amply supported by law, protects important policy

interests, and has been heavily relied upon for nearly 40 years.

A. *Boyle* is amply supported by law.

Boyle was correctly decided for at least two reasons. *First*, relying on a longstanding preemption theory that the Court has applied in other important contexts, *Boyle* properly recognized that state law cannot govern the inherently federal topic of private contractor liability for executing federal officials' discretionary judgments. *Second*, even setting aside that theory, the result in *Boyle* is independently supported by even older fundamental principles of constitutional preemption: preemption of state law by the Constitution itself.

1. *Boyle* is justified on its own terms. Petitioner suggests that *Boyle* invented its preemption rationale from whole cloth. *See, e.g.,* Pet. Br. 35 (criticizing "*Boyle's* 'uniquely federal interests' preemption analysis"); *id.* at 34 (arguing that *Boyle* improperly relied on "some brooding federal interest" and applied "federal preemption *in vacuo*, without a constitutional text, federal statute, or treaty") (quotation marks omitted) (citations omitted). But that simply isn't true. Preemption in fields of "uniquely federal interests" has deep roots, and this Court has applied it in other limited—but important—areas.

Drawing from a longstanding and broader tradition of constitutional preemption starting in the Early Republic, *see infra* pp. 13–17, the Court's recognition of preemption based on uniquely federal interests dates back at least 80 years to *Clearfield*

Trust Co. v. United States, 318 U.S. 363 (1943). *See* Charles A. Wright & Arthur R. Miller, *Areas of Competence for the Formulation of Federal Common Law—Conflicts Between State Law and Federal Interests*, 19 Fed. Prac. & Proc. Juris. § 4515 (3d ed.) (section last updated May 21, 2025). There, the United States sued a bank for improperly cashing a federal check. *Clearfield*, 318 U.S. at 364–66. A state law would have barred the claim, and no federal statute or regulation explicitly preempted it. *Id.* at 366. In a unanimous decision, however, the Court held that the state law nevertheless could not apply because of the inherently federal nature of the topic and power at issue: "When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power," and the exercise of that power is "in no way dependent" on the law of any state. *Ibid.*

Since *Clearfield*, the Court similarly has recognized that state law cannot govern other inherently federal fields or topics. *See, e.g.,* Wright & Miller, 19 Fed. Prac. & Proc. Juris. § 4515 (collecting cases). Often this doctrine protects the rights of the United States itself, such as the government's ability to contract, *e.g., United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592–594 (1973), to sue in tort, *e.g., United States v. Standard Oil Co. of Cal.,* 332 U.S. 301, 307 (1947), to act through its officials, *e.g., Westfall v. Erwin*, 484 U.S. 292, 295 (1988), and to implement federal programs, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718 (1979). But the doctrine also protects broader federalism interests by

recognizing that exclusively federal law governs "certain controversies between states." *Rodriguez v. Fed. Deposit Ins. Corp.*, 589 U.S. 132, 136 (2020) (citations omitted). Such topics include "interstate disputes over borders, water rights, or the interpretation of interstate compacts," *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. 230, 246 (2019) (citations omitted), and disputes over interstate pollution, *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91 (1972).

Petitioner's criticism of "*Boyle*'s 'uniquely federal interests' preemption analysis" ignores this broader historical and doctrinal context. *See* Pet. Br. 34–35. And by doing so, Petitioner implicitly invites the Court to revisit the entire doctrine upon which *Boyle* rested its holding. *See ibid.* The Court should decline the invitation. Disturbing or casting doubt on this doctrine would threaten important and long-recognized federal interests extending far beyond *Boyle*, as discussed above.

2. Even setting aside *Boyle*'s particular preemption theory, *Boyle*'s holding independently rests on constitutional preemption—preemption of state law by the Constitution itself. *See* Bradford R. Clark*, Boyle As Constitutional Preemption,* 92 Notre Dame L. Rev. 2129 (2017) ("*Constitutional Preemption"*). Indeed, many of the Court's decisions recognizing preemption in areas of uniquely federal interest are best understood through the lens of constitutional preemption. This alternative basis for *Boyle* is another reason to decide the narrower

question presented without disturbing or revisiting *Boyle*.

Constitutional preemption "dat[es] back to the early days of the republic" with *McCulloch v. Maryland*, 17 U.S. 316, 408 (1819). *Constitutional Preemption* at 2134. In *McCulloch*, the Court held that Maryland could not tax the newly formed bank of the United States "without violating the constitution." 17 U.S. 316, 425 (1819). In chartering this bank, Congress had exercised its constitutional authority "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies." *Id.* at 407. And states cannot "burden, or in any manner control," the exercise of that authority. *Id.* at 436. Preemption was therefore an "unavoidable consequence" of the Supremacy clause. *Ibid.*

The same principle supports *Boyle*. *Constitutional Preemption* at 2136–40. In procuring weapons and military equipment, the federal government exercises its constitutional authority to "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval forces." U.S. Const. art. I, § 8, cl. 12–14. The United States government's military-procurement power is inherently federal. Private contractor liability for executing federal officials' discretionary procurement instructions accordingly must remain within the "exclusive" power of Congress because "a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." Alexander Hamilton, *The Federalist No.*

32 [Jan. 2, 1788], Founders Online, National Archives, https://tinyurl.com/yettwc75 (last visited Sept. 19, 2025) (explaining when the Constitution's delegation of a power to Congress is inherently exclusive). The state law in *Boyle* would have thwarted federal-procurement authority by "impos[ing] potentially enormous tort liability" on the suppliers of military equipment for simply doing what the government asked. *Constitutional Preemption* at 2137. Accordingly, although *Boyle* relied on "uniquely federal interests" for preemption, it could have instead relied on the Constitution itself. *Id.*[4]

Indeed, the Court suggested as much in *Osborn v. Bank of U.S.,* 22 U.S. 738 (1824). There, the Court recognized that, just like the Maryland tax on the Bank of the United States struck down in *McCulloch*, a state law holding federal officials liable for official acts would be "repugnant to a law of the United States, made in pursuance of the constitution, and therefore, void." *Id.* at 868. *Osborn* then suggested that the Constitution would similarly preempt certain state laws holding federal *contractors* liable too:

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[4] Constitutional preemption may also support the application of *Boyle* beyond military procurement contracts. *See infra* pp. 19–20. These cases could be understood as protecting the exercise of other constitutional powers, such as the power "to regulate commerce," *McCulloch*, 17 U.S. at 407, or broader constitutional principles such as the "separation of powers," *In re World Trade Ctr. Disaster Site Litig.,* 521 F.3d 169, 192 (2d Cir. 2008). But at a minimum, *Boyle* is supported by the military powers discussed above.

> 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? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.

Id. at 867.

Constitutional preemption is also woven into the Court's more modern decisions recognizing that state law cannot apply in certain areas of uniquely federal interest. In *Clearfield*, for example, the Court reasoned that the United States's "authority to issue the check" that was fraudulently endorsed "had its origin in the Constitution." 318 U.S. at 366. Accordingly, the Court explained, the state law at issue would burden not just a federal interest but the "exercising [of] a constitutional function or power." *Ibid.* In *Standard Oil*, the Court similarly derived the federal interests at stake from the Constitution—i.e., the same military powers that justify *Boyle*. *Standard Oil*, 332 U.S. at 306 & n. 7 (quoting U.S. Const., Art. I, s 8, cl. 12–14). The Court held the state law at issue was preempted because it interfered with the "execution" of those "exclusive power[s]." *Id* at 307. As these cases illustrate, many federal-interest decisions can be understood as applying constitutional preemption.

Constitutional preemption provides another reason for the Court to decline Petitioner's invitation

to revisit *Boyle*. Pet. Br. 31. Doing so would require broader reconsideration of fundamental constitutional-preemption principles. And the Court need not confront such significant questions when answering the narrow question presented here. *See* Pet. Br. at i.

B. *Boyle* protects important policy and reliance interests.

1. Private contractors have relied on the courts' almost 40 years' application of *Boyle*.

Over the past 37 years, both contractors and the federal government have relied heavily on *Boyle*. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407 (2024) (identifying "reliance" interests as one of the "most relevant" considerations for stare decisis). Indeed, "considerations favoring stare decisis are at their acme" in "cases involving property and contract rights" because "parties are especially likely to rely on such precedents when ordering their affairs." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 457 (2015) (internal quotation marks and citation omitted); *see also The Genesee Chief,* 53 U.S. 443, 458 (1851) ("In such a case, *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to.").

For decades, parties have relied not only on *Boyle*, but also on circuit court decisions applying this settled precedent. Almost every circuit court has applied *Boyle* in various military contexts, including:

- *In re "Agent Orange" Prod. Liab. Lit.*, 513 F.3d 76 (2d Cir. 2008) (private contractor's use of Agent Orange in military conflict);
- *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3d Cir. 1990) (contractor's design of military aircraft);
- *In re KBR, Inc., Burn Pit Lit.*, 744 F.3d 326 (4th Cir. 2014) (emissions from open burn pits and contaminated water at military bases in Iraq and Afghanistan);
- *Miller v. Diamon Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001) (use of Agent Orange on military aircraft);
- *Tate v. Boeing Helicopters*, 140 F.3d 654 (6th Cir. 1998) (products-liability suit against private manufacturers of army helicopters and components);
- *Ruppel v. CBS Corp.*, 701 F.3d 1176 (7th Cir. 2012) (colorable argument that *Boyle* applied in case involving military aircraft turbines supplied by private military contractor);
- *Oliver v. Oshkosh Truck Corp*., 96 F.3d 992 (7th Cir. 1996) (claims brought against manufacturer of military vehicle);
- *Graves v. 3M Co.*, 17 F.4th 764 (8th Cir. 2021) (colorable argument that *Boyle* applied in case involving earplugs supplied by private military contractor);

- *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744 (9th 1997) (private military helicopter manufacturer);
- *Brinson v. Raytheon Co.*, 571 F.3d 1348 (11th Cir. 2009) (private military aircraft manufacturer); and
- *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1333–34 (11th Cir. 2003) (private military service contracts).

And circuit courts have applied *Boyle* in various non-military contexts, too, including:

- *In re World Trade Center Disaster Site Lit.*, 521 F.3d 169, 194–97 (2d Cir. 2008) (applying *Boyle* to discretionary functions carried out under the Stafford Act);
- *Carley v. Wheeled Coach*, 991 F.2d 1117, 1119–23 (3d Cir. 1993) (holding government contractor defense available to nonmilitary private contractors);
- *Sewell v. Sewerage & Water Bd. of New Orleans*, 697 F. App'x. 288, 291 (5th Cir. 2017) (applying *Boyle* to suit involving federally funded drainage project);
- *Boruski v. United States*, 803 F.2d 1421, 1430 (7th Cir. 1986) (pre-*Boyle*, applying government contractor defense in suit against vaccine manufacturer);
- *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846 (11th Cir. 1985) (same); and

- *Helfrich v. Blue Cross and Blue Shield Ass'n*, 804 F.3d 1090, 1099–1103 (10th Cir. 2015) (applying *Boyle* in suit regarding health insurance).[5]

A decision overruling, undermining, or casting doubt on *Boyle* would wreak havoc on billions of dollars in active government contracts (as well as future contracts, as further addressed below). Both the government and private businesses entered into existing contracts while relying on almost 40 years of *Boyle* preemption. Those contracts were designed and priced—both by the government and private business—against the backdrop of *Boyle*'s important liability protections. As a result, DoD and the private contractors with whom it does business priced those contracts without accounting for the contractors' potential liability under any particular state's laws—let alone all 50 states' laws. Upending *Boyle* now could jeopardize many of these contracts and the essential products and services they provide.

2. Overruling or undermining *Boyle* will harm U.S. contractors and the federal government.

A decision overruling or undermining *Boyle* would severely hamper both contractors and the government. It would threaten contractors with protracted, uncertain litigation and potentially ruinous liability. That, in turn, would cause private

[5] *But see In re Hawaii Fed. Asbestos Cases*, 960 F.2d 806, 810–12 (9th Cir. 1992) (limiting *Boyle* to cases involving military contractors).

U.S. businesses to turn away from government contracting, and those contractors that remained "predictably" would "raise their prices to cover, or to insure against, contingent liability." *Boyle*, 487 U.S. at 511–12. Ultimately, those attendant increased costs would be borne by "the American taxpayer." *Saleh v. Titan Corp.,* 580 F.3d 1, 8 (D.C. Cir. 2009).

Abandoning or undermining *Boyle* would inject considerable uncertainty into federal contracting. Military contractors provide products and services that affect soldiers from multiple states. *See, e.g., supra* Section II.B.1. Accordingly, uncertainty as to which state's law might apply in any particular case (with respect to standard of care, possible defenses, and punitive damages, for example) would make federal contracting increasingly unattractive. And for those companies who did decide to contract, calculating costs would be much more difficult, as they would have to account for potential liability arising from "the tort regimes of all fifty states" as well as federal and local law. *Al Shimari,* 679 F.3d at 234 (Wilkinson, J., dissenting). And "[c]ompeting claims" by different states "may lead to inconsistent standards being applied and uncertainty on the part of actors who wish to conform their conduct to the law." Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 Notre Dame L. Rev. 1057, 1064 (2009).

This is particularly true in situations involving conduct occurring abroad. Permitting "extra-territorial application of different state tort

regimes . . . allows for unlimited variation in the standard of care that is applied to" these vital "public-private partnership[s]" abroad. *Al Shimari,* 679 F.3d at 238, 240 (Wilkinson, J., dissenting). The possibility that "different jurisdictions [could] issue inconsistent judgments" in the transnational tort context is likely to lead to conflicting or multiple liability. Florey, *Reflections*, 84 Notre Dame L. Rev. at 1064. This is exacerbated by the fact that the countries in which private contractors often work can have "undeveloped legal system[s] that do[] not, or cannot, cooperate with discovery[.]" Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 Geo. L.J. 2161, 2190 (2012) (*Corporate Liability*). And "[r]equiring consideration of the costs and consequences of protracted tort litigation introduces a wholly novel element into military decisionmaking, one that has never before in our country's history been deployed so pervasively in a theatre of armed combat." *Al Shimari,* 679 F.3d at 227 (Wilkinson, J., dissenting).

The issues and uncertainty described above may well result in American businesses hesitating to enter into the vital partnerships that sustain U.S. military operations. *See Filarsky v. Delia,* 566 U.S. 377, 391 (2012) (recognizing that "private individuals [who] work in close coordination with public employees[] and face threatened legal action for the same conduct" will "think twice before accepting a government assignment"). With a newfound application of state laws, it could hardly be surprising if U.S. contractors

"prove reluctant to expose their employees to litigation-prone combat situations," post-conflict zones, disaster relief efforts, and the like. *Saleh v. Titan Corp.,* 580 F.3d 1, 8 (D.C. Cir. 2009); *see Al Shimari,* 679 F.3d at 238–239 (Wilkinson, J., dissenting) (faced with "application of different state tort regimes," "[c]ontractors can be forgiven for not wanting to entrust their employees to the vagaries and caprice of individual verdicts and trials[]").

As a result, the federal government will be left with a smaller pool of potential contractors to choose from and will be forced to pay substantially higher fees to these fewer contractors to cover their potential liability costs, as well as their corresponding increased insurance premiums. Without being able to rely on *Boyle*, federal contractors maybe forced to raise their rates to account for the increased risk of liability. *Boyle*, 487 U.S. at 511–12. In other words, the costs of "state tort suits against contractors" would "ultimately be passed through, substantially if not totally, to the United States itself," *id*, and, as a result, the American taxpayer. This would "chill both the government's ability and willingness to contract by raising the price of partnering with private industry[.]" *Al Shimari*, 679 F.3d at 243 (Wilkinson, J., dissenting). Limiting the pool of available contractors also would reduce the government's options and might eliminate those service providers best able to support or carry out critical DoD functions. *See ibid.* ("Few, if any, governmental tasks are undertaken today without some form of public-private partnership.").

Worse yet for American businesses is that foreign corporations might step into the void left by U.S.-based contractors who decide the risk and attendant costs are simply too high. Opening U.S.-based private military contractors to state tort liability will give foreign firms a competitive advantage and eliminate prospective jobs for Americans, as foreign corporations often "are beyond the reach of U.S. courts both as a legal and practical matter," and "may have little to fear from . . . litigation . . . under state tort law[.]" *Corporate Liability* at 2190. Foreign companies inevitably will take advantage of the "tax" imposed on U.S. companies by the specter of state-law tort litigation, leaving American companies and their employees with even fewer business opportunities.

CONCLUSION

The Chamber respectfully requests that the Court affirm the judgment of the Fourth Circuit. In addition, the Chamber respectfully requests that the Court not overrule or undermine *Boyle*.

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