No. 24-924

In the Supreme Court of the United States

WINSTON TYLER HENCELY, PETITIONER

v.

FLUOR CORPORATION, ET AL.

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

BRIEF FOR UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Supremacy Clause preempts state-law tort claims against a government contractor for actions taken within the scope of its duties supporting the United States military's overseas combat activities.

TABLE OF CONTENTS

Page

Interest of the United States 1
Introduction 2
Statement 3
Summary of argument 7
Argument:
A. The Supremacy Clause preempts state laws that conflict with uniquely federal interests 9
B. The Supremacy Clause preempts petitioner's state-law claims challenging a military contractor's combat-support actions on a foreign battlefield 14
1. Regulation of the battlefield involves uniquely federal interests 14
2. Petitioner's state-law claims clearly conflict with those interests 17
3. The FTCA's combatant-activities exception confirms the conflict in this case 22
4. The facts of this case demonstrate the inherent conflict 23
C. A conflict exists here regardless of whether state-law tort claims challenge the contractor's contractual violations or discretionary actions 25
D. Petitioner's arguments regarding the FTCA and *Boyle* do not support reversal 29
E. Petitioner's remaining arguments lack merit 31
Conclusion 34

TABLE OF AUTHORITIES

Cases:

American Ins. Ass'n v. *Garamendi*, 539 U.S. 396 (2003) 11, 12, 27
Arizona v. *United States*, 567 U.S. 387 (2012) 8, 10, 27

Cases—Continued: Page

Badilla v. *Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105 (2d Cir. 2021), cert. denied, 143 S. Ct. 2512 (2023) 23, 25
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964) 7, 11, 12
Boyle v. *United Techs. Corp.*, 487 U.S. 500 (1988) 6-8, 12-14, 18, 20, 23, 25, 30, 31, 33
Buckman Co. v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) 12, 17-19, 26-28
Cassirer v. *Thyssen-Bornemisza Collection Found.*, 596 U.S. 107 (2022) 11, 30
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943) 12
CoreCivic, Inc. v. *Governor of New Jersey*, 145 F.4th 315 (3d Cir. 2025) 22
Corrie v. *Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) 24
Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000) 17, 27, 33, 34
Filarsky v. *Delia*, 566 U.S. 377 (2012) 19
Harris v. *Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3d Cir. 2013), cert. denied, 574 U.S. 1120 (2015) 23, 25, 27
Hernández v. *Mesa*, 589 U.S. 93 (2020) 33
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 10, 11
Howard v. *Lyons*, 360 U.S. 593 (1959) 12
Japan Line, Ltd. v. *Los Angeles County*, 441 U.S. 434 (1979) 11, 32
Johnson v. *Maryland*, 254 U.S. 51 (1920) 10
KBR, Inc., Burn Pit Litig., In re, 744 F.3d 326 (4th Cir. 2014), cert. denied, 574 U.S. 1120 (2015) 20, 23
KBR, Inc., In re, 893 F.3d 241 (4th Cir. 2018), cert. denied, 586 U.S. 1114 (2019) 16

Cases—Continued: Page

KBR Inc. v. *Metzgar*, 573 U.S. 915 (2014) 1
Kansas v. *Garcia*, 589 U.S. 191 (2020) 9, 3, 32
Kellogg Brown & Root Servs., Inc. v. *Harris*, 573 U.S. 915 (2014) 1
Midwest Air Traffic Control Serv., Inc. v. *Badilla*, 142 S. Ct. 2674 (2022) 1
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 10
Neagle, *In re*, 135 U.S. 1 (1890) 10
New York ex rel. Bank of Commerce v. *Commissioners of Taxes for City & County of New York*, 67 U.S. (2 Black) 620 (1862) 10
Osborn v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) 9, 33, 34
PennEast Pipeline Co. v. *New Jersey*, 594 U.S. 482 (2021) 15
Perpich v. *Department of Defense*, 496 U.S. 334 (1990) 18
Saleh v. *Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), cert. denied, 564 U.S. 1037 (2011) 8, 18-23, 28, 32
Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 32
Southern Pac. Co. v. *Jensen*, 224 U.S. 205 (1917) 11, 32
Sprietsma v. *Mercury Marine*, 537 U.S. 51 (2002) 9
Tarble's Case, 80 U.S. (13 Wall.) 397 (1871) 10
Tennessee v. *Davis*, 100 U.S. 257 (1879) 10
Texas Indus., Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) 11
Tiffany v. *United States*, 931 F.2d 271 (4th Cir. 1991), cert. denied, 502 U.S. 1030 (1992) 24
Torres v. *Texas Dep't of Pub. Safety*, 597 U.S. 580 (2022) 7, 15, 19, 22

Cases—Continued: Page

United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) 12
United States v. *Standard Oil Co.*, 332 U.S. 301 (1947) 11, 12
United States v. *Stanley*, 483 U.S. 669 (1987) 18, 21
United States v. *Texas*, 599 U.S. 670 (2023) 32
United States v. *Washington*, 596 U.S. 832 (2022) 10, 22
United States v. *Zubaydah*, 595 U.S. 195 (2022) 21
Yearsley v. *W.A. Ross Const. Co.*, 309 U.S. 18 (1940) 10
Zivotofsky ex rel. Zivotofsky v. *Clinton*, 566 U.S. 189 (2012) 24
Zschernig v. *Miller*, 389 U.S. 429 (1968) 11, 32

Constitution, statutes, and regulations:

U.S. Const.:
Art. I:
§ 8, Cls. 12-14 15
§ 10:
Cl. 1 15
Cl. 3 15
Art. II, § 2, Cl. 1 15
Art. VI, Cl. 2 (Supremacy Clause) 9
Contract Disputes Act of 1978, 41 U.S.C. 7101 *et seq.* 19
Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 832(2), 122 Stat. 4535 16
Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* 6, 13
28 U.S.C. 1346(b)(1) 23
28 U.S.C. 2680(j) 2, 6, 7, 23, 29
10 U.S.C. 802(a)(10) .....

Statutes—Continued: Page

10 U.S.C. 1413a 20
10 U.S.C. 1475 20
10 U.S.C. 1478 20
10 U.S.C. 4501-4508 16
18 U.S.C. 3261(a)(1) 20
26 U.S.C. 112 20
37 U.S.C. 310 20
37 U.S.C. 352 20
38 U.S.C. 1110 20
38 U.S.C. 1131 20
42 U.S.C. 233(a) 29
42 U.S.C. 1651(c) 30
50 U.S.C. 2783(b)(1) 30
50 U.S.C. 2783(b)(2) 30
32 C.F.R.:
Pt. 158 16
Section 158.4 16
Pt. 159 16
48 C.F.R.
Section 50.104-3 2
Section 52.211-11 17
Section 52.225-19(h) 19
Section 52.228-7(c) 21
Section 52.233-4 16
Section 52.242-14 19
Section 52.242-15 19
Section 52.249-6 19
Section 225.371 16
Section 252.225-7040 17

Miscellaneous: Page

Bradford R. Clark, Boyle *as Constitutional Preemption*, 92 Notre Dame L. Rev. 2129 (2017) 17

Contractor Personnel Authorized to Accompany the U.S. Armed Forces, DoD Instruction 3020.41 (Nov. 27, 2024) 28

73 Fed. Reg. 16,764 (Mar. 31, 2008) 28, 30

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Heidi M. Peters, Congressional Research Service, R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* (May 17, 2013), https://www.congress.gov/crs-product/R43074 16

Policy & Procedures for Determining Workforce Mix, DoD Instruction 1100.22 (Apr. 12, 2010) 28

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INTEREST OF THE UNITED STATES

The United States has a strong interest, rooted in its constitutional war powers and federal statutes, in engaging contractors to support overseas combat operations. State-law tort regulation of those contractors' performance in overseas war zones implicates the federal government's control and effective use of contractors to accomplish combat missions. At this Court's invitation, the United States has participated as amicus curiae at the certiorari stage in other cases presenting similar questions. See, *e.g.*, *Midwest Air Traffic Control Serv., Inc.* v. *Badilla*, 142 S. Ct. 2674 (2022) (No. 21-867); *KBR, Inc.* v. *Metzgar*, 573 U.S. 915 (2014) (No. 13-1241); *Kellogg Brown & Root Servs., Inc.* v. *Harris*, 573 U.S. 915 (2014) (No. 13-817).

INTRODUCTION

While serving in the U.S. Army, petitioner was severely wounded by a suicide bomber's attack on a U.S. military base in Afghanistan. Petitioner cannot bring a tort claim against the federal government itself, see, *e.g.*, 28 U.S.C. 2680(j), but he brings state-law tort claims against the government contractor who employed the suicide bomber on the base. Those state-law claims are preempted because of the uniquely federal interests at stake when evaluating how a military contractor executed its duties to support U.S. troops on a foreign battlefield. The Constitution commits the power to wage war and support armies wholly to Congress and to the President as Commander in Chief. States have no historical or traditional interest in regulating conduct on foreign battlefields. And opening the door to state-law tort suits in this context would inflict grave harms on the separation of powers and the federal government's ability to effectively prosecute wars abroad.

Petitioner, who was honorably serving our country in a dangerous combat zone, suffered grievous injuries at the hands of enemies of the United States. But under our constitutional system, affording petitioner a state-law remedy for his injuries is not a proper method of compensating him or the myriad other servicemen and women who have courageously exposed themselves to injury and death on foreign fields of battle.

Petitioner contends that state tort law can regulate the way in which contractors operate in the most intense fields of battle—from the beaches of Normandy to the airfields of Afghanistan—so long as a plaintiff proves as a threshold matter that a contractual provision was violated or that military commanders did not dictate everything a contractor did. But satisfying that

threshold inquiry would not lessen the impermissible and dangerous intrusion into the federal government's exclusive authority over foreign theaters of combat. Petitioner's contention that Congress must expressly address such state-law intrusions to preempt them contravenes this Court's longstanding precedents. The Court should reject petitioner's attempt to open a new fount of tort law arising from the federal government's use of military contractors to support troops in combat.

STATEMENT

1. a. This case arises from a military contractor's actions to support United States military operations in Afghanistan. The military contracted with respondent —Fluor Corporation and associated entities—to provide "base life support services and theater administration mission functions to U.S. and coalition forces" at Bagram Airfield. Pet. App. 3. At the time, the military's counterinsurgency strategy included a policy of employing Afghans to help develop the Afghan economy. *Ibid.* Accordingly, respondent's contract required it to hire Afghans (referred to as "Local Nationals") "to the maximum extent possible." *Ibid.* (citation omitted).

The military required its contractors to follow security protocols regarding supervision of Local Nationals working on the base. Pet. App. 5-7. Under those protocols, most Local Nationals received red badges, which required them to be escorted everywhere outside their work facilities. *Id.* at 6-7.

One of the Local Nationals that respondent hired was Ahmad Nayeb. Pet. App. 3. The military vetted Nayeb and knew he had formerly been involved with the Taliban, but the military determined that he could receive a red badge and sponsored him for employment. *Id.* at 9. For most of the five years beginning in Decem-

ber 2011, Nayeb worked night shifts at the hazardous-materials section of the non-tactical vehicle yard, which respondent supervised. *Id.* at 9, 165-167.

b. Petitioner is a former soldier in the U.S. Army who was stationed at Bagram in 2016. Pet. App. 2. Early in the morning of November 12, 2016, petitioner observed Nayeb approaching the crowded starting line for a Veterans Day race at the Airfield. *Id.* at 8. Petitioner confronted Nayeb, who detonated an explosive vest, killing himself and five others and severely wounding petitioner and sixteen others. *Ibid.*

The Army subsequently conducted an investigation and issued a report with its findings. Pet. App. 8. The redacted version of the report that has been publicly released found that Nayeb likely built his explosive vest during his night shift at the hazardous-materials work center, where he was alone during his work hours. *Id.* at 9. The report further found that Nayeb was not escorted after his shift on the morning of the attack and instead proceeded undetected for 53 minutes until he detonated the vest. *Id.* at 10. The report concluded that respondent's "complacency and its lack of reasonable supervision" was the "primary contributing factor" to the attack. *Ibid.* (citation omitted). It further "faulted [respondent] for deficient performance of its escort duties between the non-tactical vehicle yard" and the base entrance, for "lending Nayeb tools his job didn't require," and for "not adequately supervising Nayeb while he worked in the hazardous materials work center." *Ibid.*

Following the investigation, the Army issued a notice directing respondent to show cause why its contract should not be terminated for contractual violations. Pet. App. 179-181. After evaluating respondent's re-

sponse, the Army reaffirmed its conclusion that respondent had violated "key contractual requirements," but the Army "determined that terminating [the contract] for default [was] not currently in the Government's best interest." *Id.* at 186-187.

2. In 2019, petitioner filed this diversity suit against respondent in federal district court. Pet. App. 11. Petitioner seeks damages, including punitive damages, under South Carolina law, based on alleged negligence in supervising, retaining, and controlling Nayeb, as well as vicarious liability and breach of contract. *Ibid.*

The district court denied respondent's motion to dismiss on political-question grounds. Pet. App. 11. Later, the court dismissed petitioner's breach-of-contract claims on the pleadings, finding that petitioner is not a third-party beneficiary of respondent's contract. *Id.* at 11-12.

As to petitioner's tort claims, the district court granted summary judgment to respondent. Pet. App. 12. The court observed that the case is "an extraordinary lawsuit that arises out of an attack by a foreign enemy—a Taliban operative—on a U.S. Military [base]" in Afghanistan. *Id.* at 39. "In light of the war zone context," the court concluded that "uniquely federal interests" preempt state tort law. *Id.* at 39, 41.

3. a. The court of appeals affirmed. Pet. App. 1-36. The court agreed that the political-question doctrine does not bar the suit because "it does not yet appear that litigating [petitioner's] negligence claims and [respondent's] defenses would 'invariably require' the factfinder to judge whether the military's decisions were reasonable." *Id.* at 19 (citation and emphasis omitted).

The court of appeals also agreed that "uniquely federal interests" preempt the application of state tort law

in this case. Pet. App. 20, 31 (quoting *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 511 (1988)). Under circuit precedent, the majority held that such preemption applies because respondent was "integrated into combatant activities" and "the military retained command authority" over the relevant aspects of respondent's work. *Id.* at 22-23 (citation omitted); see *id.* at 22-28.

In so holding, the court of appeals looked to Congress's decision to except from the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, "[a]ny claim arising out of the combatant activities" of the military. Pet. App. 20 (quoting 28 U.S.C. 2680(j)). Although the FTCA "do[es] not apply to government contractors," the court concluded that Congress's decision to exclude claims arising out of combatant activities "reflects an important federal policy of 'foreclosing state regulation of the military's battlefield conduct and decisions.'" *Ibid.* (citation and brackets omitted).

The court of appeals rejected petitioner's arguments that preemption does not apply because respondent "failed to comply" with its contract or because respondent "could comply with state tort duties *and* the military's directives." Pet. App. 27, 30. The court reasoned that such arguments "misunderstand[] the nature" of the relevant preemption, which is necessary to "preserve[] the field of wartime decisionmaking exclusively for the federal government" and "to avoid potential interference 'with the federal government's authority to punish and deter misconduct by its own contractors.'" *Id.* at 30 (citation omitted).

b. Judge Heytens concurred in part and dissented in part, agreeing with most of the majority's analysis, but concluding that material disputes of fact exist as to the

application of preemption to petitioner's claims of negligent entrustment and retention. See Pet. App. 36.

SUMMARY OF ARGUMENT

A. The Constitution's structure preempts state laws that intrude on core federal powers. The Court has thus long held that state laws cannot apply when they conflict with "uniquely federal interests" in contexts committed to federal control. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964). And the Court has held that those principles can preempt state tort law's application to military contractors in the domestic context. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504 (1988).

B. The court of appeals correctly held that those principles require preemption here. Petitioner's claims would apply state tort regulation to a military contractor's performance of contractual obligations to support U.S. troops fighting in a foreign country. Under the Constitution, Congress and the President wield exclusive war powers in that context. Accordingly, "the structure of the Constitution prevents States from frustrating national objectives in this field." *Torres* v. *Texas Dep't of Pub. Safety*, 597 U.S. 580, 590 (2022). And state tort regulation would pose grave obstacles to the federal government's control over the battlefield, its effective use of military contractors to support combat operations, and its ability to wage war in foreign theaters.

Congress previously recognized those serious conflicts in a related area, when it expressly retained the United States' sovereign immunity against claims arising out of combatant activities under the Federal Tort Claims Act (FTCA). See 28 U.S.C. 2680(j). That choice confirms the "obvious" conflicts between state tort regulation and exclusive federal control over military oper-

ations abroad. *Saleh* v. *Titan Corp.*, 580 F.3d 1, 11 (D.C. Cir. 2009), cert. denied, 564 U.S. 1037 (2011).

C. Conflicts between state law and federal war powers will inhere in every claim that challenges a military contractor's execution of its contract and arises out of combat activities abroad. Petitioner is incorrect in contending that the conflict posed by such claims dissipates so long as a court (or jury) thousands of miles from the battlefield first determines that a contractor violated its contract or that a contractor's challenged acts were not dictated by the military. This Court has repeatedly acknowledged that state laws may conflict with the federal government's exercise of power "even when they "attempt[] to achieve * * * the same goals as federal law." *Arizona* v. *United States*, 567 U.S. 387, 406 (2012).

That is the case here. Such judicial inquiries would inevitably conflict with and place pressure on the military's own assessments regarding contract compliance or negligence on the battlefield. And even when courts' judgments coincide with the military's assessment of fault, such suits would intrude on the military's relations with contractors and on its responses to any infractions based on its assessment of wartime exigencies —potentially placing the military and its contractors in a publicly adversarial posture during active hostilities.

D. Petitioner's arguments that the FTCA's combatant-activities exception does not apply here do not support reversal. The court of appeals correctly explained that the combatant-activities exception merely reflects the uniquely federal interests that are at stake. Similarly, petitioner's criticisms of this Court's decision in *Boyle*, *supra*, are misguided, but in all events do not affect the bottom line that the Constitution requires preemption of state tort regulation of the battlefield.

E. Petitioner's remaining arguments lack merit. Preemption in this case is not *in vacuo*; nor does it require freewheeling speculation. Rather, preemption turns on undisputable federal interests in a field committed to federal control. Moreover, given the lack of any historical tradition of such claims under state law, no sound reason exists to read Congress's silence as acquiescence to state intrusions onto the battlefield through the medium of tort law. This Court's precedents make clear that "the judicial power alone" can (and must) protect the federal government from structural intrusions on its powers. *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824). That principle applies with special force to the federal government's ability to wage war abroad.

ARGUMENT

A. The Supremacy Clause Preempts State Laws That Conflict With Uniquely Federal Interests

The Supremacy Clause provides that the Constitution, federal statutes, and treaties constitute "the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Thus, when federal and state law conflict, "federal law takes precedence and the state law is preempted." *Kansas* v. *Garcia*, 589 U.S. 191, 202 (2020). While the Constitution or a federal statute "may expressly preempt state law," it has also "long been established that" state laws may "be impliedly preempted." *Id.* at 202-203. That may occur when federal law leaves "no room for state regulation" in a field, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 69 (2002) (citation omitted), or when "state law confers rights or imposes restrictions that conflict with the federal law," *Garcia*, 589 U.S. at 202 (citation omitted). And it is a "well-settled proposition" that state law is preempted if it poses an "obstacle to

the accomplishment and execution" of a federal activity. *Arizona* v. *United States*, 567 U.S. 387, 406 (2012) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

1. The Court has long held that the Constitution's structure impliedly preempts inconsistent state law. For example, state laws may not encumber the federal government's exercise of its powers by "directly regulat[ing] or discriminat[ing] against" the federal government. *United States* v. *Washington*, 596 U.S. 832, 835 (2022); see *id.* at 838 (attributing that principle to *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)); *New York ex rel. Bank of Commerce* v. *Commissioners of Taxes for City & County of New York*, 67 U.S. (2 Black) 620, 632 (1862) ("[T]he powers granted by the people of the States to the General Government" are to be exercised "free and unobstructed by any State legislation or authority."); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408-409 (1871) (holding that the Constitution preempted a state court from issuing a writ of habeas corpus regarding a U.S. service member).

Because the federal government "can act only through its officers and agents," *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1879), structural constitutional preemption necessarily shields those officers and agents "from state control in the performance of their duties." *Johnson* v. *Maryland*, 254 U.S. 51, 57 (1920). Thus, the Constitution's structure bars state laws discriminating against federal contractors, *Washington*, 596 U.S. at 839; state tort claims against contractors for following federal orders, *Yearsley* v. *W.A. Ross Const. Co.*, 309 U.S. 18 (1940); and state prosecutions against federal officials for executing their duties, *In re Neagle*, 135 U.S. 1, 58 (1890) (finding California's murder prosecution barred even

though "no statute" specifically authorized the deputy marshal's actions).

The Constitution also preempts state regulation of third parties that interferes with "matters [that are] exclusively federal, because" they have been "made so by constitutional * * * command." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307 (1947). Thus, for example, the Constitution preempts state laws that intrude on "the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig* v. *Miller*, 389 U.S. 429, 432 (1968); see, *e.g.*, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 419 n.11 (2003); *Hines*, 312 U.S. at 63. Similarly, state laws may not unduly burden "[f]oreign commerce" in ways that implicate foreign affairs because that is "pre-eminently a matter of national concern" under the Constitution. *Japan Line, Ltd.* v. *Los Angeles County*, 441 U.S. 434, 448-450 (1979); see, *e.g.*, *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 216 (1917) (same as to admiralty and maritime law).

2. Consistent with those structural principles, this Court has long held that a federal rule of decision must displace state law in discrete areas of "uniquely federal interests," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964), such as 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., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); see *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 116 (2022).

For example, federal rules of decision displace state law when it interferes with the federal government's

contractual relations, see, *e.g.*, *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943); foreign affairs, see *Sabbatino*, 376 U.S. at 427; rules implementing federal loan programs, *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); the civil immunity of federal officials for official acts, *Howard* v. *Lyons*, 360 U.S. 593, 597 (1959); or the relationship between the federal government and members of its armed forces, *Standard Oil*, 332 U.S. at 305-306. Those contexts are "so committed by the Constitution and laws of the United States to federal control" that state law must be "preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504 (1988).

When the relevant field is not one that "States have traditionally occupied," there is no "presumption against" preemption. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (citation omitted). Rather, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption." *Boyle*, 487 U.S. at 507; see *Garamendi*, 539 U.S. at 419 n.11.

Because preemption in contexts of exclusive federal interest stems from constitutional structure, it applies "even [when] Congress has not acted affirmatively about the specific question." *Standard Oil*, 332 U.S. at 307. Nonetheless, the Court has considered whether "constitutional and statutory provisions indirectly * * * reflect[] a concern" that justifies preemption in a particular context. *Sabbatino*, 376 U.S. at 427 n.25. Federal statutory provisions in a related context may "demonstrate[] the potential for, and suggest[] the out-

lines of, 'significant conflict' between federal interests and state law." *Boyle*, 487 U.S. at 511.

3. This Court's decision in *Boyle*, *supra*, applied those principles in the context of state-law tort claims against a military contractor. 487 U.S. at 502. The plaintiff alleged that the contractor's design of an escape hatch on a helicopter was defective and led to a Marine's death after an accident in Virginia. *Ibid.* The contractor, however, had been required to follow the military's design specifications. *Id.* at 509. The Court held that the suit "border[ed] upon two areas" involving "'uniquely federal interests'": the "obligations to and rights of the United States under its contracts," and the "civil liability of federal officials for actions taken in the course of their duty." *Id.* at 504-505 (citing cases). Although "the dispute [was] one between private parties," the Court explained that the suit "obviously implicated" the same federal prerogatives in those fields. *Id.* at 505-506. And a conflict existed because the plaintiff's design-defect claims sought to impose liability for complying with the government's specifications. *Id.* at 509.

In finding a conflict, the Court also looked to Congress's decision to shield the government from liability for similar kinds of claims in a related area. In particular, Congress barred claims against the government's exercise of any discretionary functions under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, a bar that would apply to claims challenging the government's "selection of the appropriate design for military equipment." *Boyle*, 487 U.S. at 511. That decision in an analogous context "demonstrate[d]" a "significant conflict" because the suit at hand would lead to the same harms that Congress had sought to avoid. *Ibid.*

The Court nonetheless determined that not all claims challenging a contractor's defective design are preempted. The Court endorsed a three-part test to mark "the scope of displacement" of state law, which turns on whether the government "approved reasonably precise specifications," whether "the equipment conformed to those specifications," and whether "the supplier warned the United States about the dangers * * * that were known to the supplier but not to the United States." *Boyle*, 487 U.S. at 512.

B. The Supremacy Clause Preempts Petitioner's State-Law Tort Claims Challenging A Military Contractor's Combat-Support Actions On A Foreign Battlefield

Petitioner's state-law claims against a military contractor arise from an attack by a foreign enemy on a U.S. military base in Afghanistan. See Pet. App. 53 n.9 (noting petitioner's "concession that this was a war zone, and his allegation that the suit arises out of an enemy attack"). There is no dispute that the military contractor's challenged actions were taken within the scope of carrying out its federal contract to support federal troops in a war zone, or that the contract was governed exclusively by federal law. State tort law would therefore be regulating a contractor's execution of a federal contract and policy in an overseas combat zone. Uniquely federal interests—arising from the Constitution and federal statutes and policies carrying out federal war powers—preempt such state regulation.

1. Regulation of the battlefield involves uniquely federal interests

State tort regulation in this area intrudes on war powers that have been exclusively committed to the federal government. The Constitution provides a "com-

plete delegation of authority to the Federal Government to provide for the common defense." *Torres* v. *Texas Dep't of Pub. Safety*, 597 U.S. 580, 590 (2022). "The Preamble makes the 'common defence' one of the [Constitution's] central projects," and gives Congress authority to pursue that end "in six separate paragraphs: to 'declare War'; 'raise and support Armies'; 'provide and maintain a Navy'; 'make Rules' for the Armed Forces; 'provide for calling forth the Militia'; and 'provide for [their] organizing, arming, and disciplining.'" *Ibid.* (quoting U.S. Const. Art. I, § 8, Cls. 12-14). "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.'" *Ibid.* (quoting U.S. Const. Art. II, § 2, Cl. 1).

At the same time, the Constitution "divests the States of like power," providing that they "may not 'engage in War, unless actually invaded,' 'enter into any Treaty,' or 'keep Troops, or Ships of War in time of Peace.'" *Torres*, 597 U.S. at 590 (quoting U.S. Const. Art. I, § 10, Cls. 1, 3). Those provisions show that "the States agreed that their sovereignty would 'yield so far as necessary' to national policy to raise and maintain the military." *Id.* at 594. (quoting *PennEast Pipeline Co.* v. *New Jersey*, 594 U.S. 482, 502 (2021)) (alteration omitted). And they reflect that, "'when the States entered the federal system, they renounced their right' to interfere with national policy in this area." *Id.* at 590. (quoting *PennEast*, 594 U.S. at 502).

Suits attempting to regulate military contractors in foreign combat zones also implicate the execution of statutes and executive-branch decisions to use contractors to fill crucial roles supporting combat operations abroad. Congress has exercised its war powers by en-

acting statutes authorizing the military to use contractors in operations outside the United States. See, *e.g.*, 10 U.S.C. 4501-4508; Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 832(2), 122 Stat. 4535 ("it should be in the sole discretion" of the relevant military commander "to determine whether or not the performance of a private security contractor * * * within a designated area of combat operations is appropriate"); see also 32 C.F.R. Pt. 158 (governing "operational contract support" outside the United States); 32 C.F.R. Pt. 159 (governing certain private security contractors); 48 C.F.R. 225.371. The military, in turn, considers such contractors "part of the total force" in combat operations. 32 C.F.R. 158.4.

Those policies reflect the federal government's judgment that military contractors are often necessary to accomplish military missions overseas, and the government relies heavily on such contractors. See *In re KBR, Inc.*, 893 F.3d 241, 253 (4th Cir. 2018), cert. denied, 586 U.S. 1114 (2019); Pet. App. 4; see also Heidi M. Peters, 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), https://www.congress.gov/crs-product/R43074 ("According to government officials and analysts, the military is unable to effectively execute many operations, particularly those that are large-scale and long-term in nature, without extensive operational contract support.").

Suits like petitioner's also implicate the uniquely federal interest in maintaining control of military contractors supporting combat activities overseas. Contracts for military contractor services abroad are governed by federal law, not state law. See 48 C.F.R. 52.233-4,

252.225-7040; Pet. App. 32 n.8. They are "inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." *Buckman*, 531 U.S. at 347. The Court has already recognized that contracts with military contractors "obviously implicate[]" uniquely federal interests. *Boyle*, 487 U.S. at 505-507. That recognition *a fortiori* applies to regulation of contractors in combat zones abroad. Indeed, management of contractors on the battlefield is a core aspect of the military's modern operations. Pet. App. 4 (noting that contractors often accounted for "the majority of the U.S. Department of Defense's presence in Afghanistan").

2. Petitioner's state-law claims clearly conflict with those interests

Those uniquely federal interests preempt the claims at issue here. The analysis may be understood as field preemption because the federal government's exercise of its war powers "occup[ies] the field" of regulation on foreign battlefields. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citation omitted). And it may be understood as "conflict" preemption because the intrusion of state tort regulation conflicts with those uniquely federal interests and poses an obstacle to the execution of federal statutes and policies in exercise of Congress and the President's war powers. *Ibid.*; see *id.* at 372 n.6 (noting that "field" and "conflict" preemption overlap and are not "rigidly distinct") (citation omitted); see also Bradford R. Clark, Boyle *as Constitutional Preemption*, 92 Notre Dame L. Rev. 2129, 2130-2131, 2141-2142 (2017) (concluding that federal statutes preempt state tort claims against military contractors).

As an initial matter, given the "supremacy of federal power in the area of military affairs" and the States' relinquishment of control in that area, *Perpich* v. *Department of Defense*, 496 U.S. 334, 351 (1990), foreign battlefields do not present an area of regulation that "the States have traditionally occupied." *Buckman*, 531 U.S. at 347 (citation omitted). Thus, not only is there no presumption against preemption in this context, but "[t]he conflict with federal policy need not be as sharp" to justify preemption. *Boyle*, 487 U.S. at 507.

The conflict is nevertheless clear. Tort suits could conceivably be attempted by many plaintiffs—active or former members of the military, their family members, civilians in other countries, and perhaps even other countries themselves alleging a nexus to a State. Many individual suits could spawn class actions against military contractors, creating more incentives to instigate suits against current or former contractors.

The foreseeable multiplication of suits against such contractors would "hamper" the military's ability to use contractors to support combat missions abroad. *Saleh* v. *Titan Corp.*, 580 F.3d 1, 8 (D.C. Cir. 2009), cert. denied, 564 U.S. 1037 (2011). To start, such suits could "undermine military discipline" in numerous ways. Pet. App. 64. Suits by current service members against contractors with whom they work would dangerously interfere with order on a military base. State tort suits would likely distract service members and civilian contractors in war zones with burdensome discovery, including depositions. And the allegations in such suits—whether true or not—would inspire distrust. Cf. *United States* v. *Stanley*, 483 U.S. 669, 682-683 (1987) (concluding that *Bivens* claims by service members would "call into question military discipline and decisionmaking").

Moreover, requiring military contractors in the high-risk context of foreign war zones to operate "in the shadow of 50 States' tort regimes [would] dramatically increase the burdens facing" those contractors in ways "not contemplated by Congress." *Buckman*, 531 U.S. at 350; see *Saleh*, 580 F.3d at 7 (noting the additional "uncertainty" that would arise). Indeed, basic tort-law principles "are singularly out of place in combat situations, where risk-taking is the rule." *Saleh*, 580 F.3d at 7. Some contractors would be subjected to second-guessing of decisions made in fast-evolving circumstances. Others could become less effective in their duties due to "unwarranted timidity." *Filarsky* v. *Delia*, 566 U.S. 377, 389 (2012) (citation omitted). And some "may prove reluctant to expose their employees to litigation-prone combat situations," *Saleh*, 580 F.3d at 8, particularly in high-risk or politically controversial operations that could be likelier to lead to suits. Those adverse impacts on contractors that the military relies on for critical services would inevitably impinge on the military's ability to wage war. Cf. *Torres*, 597 U.S. at 594 ("[T]he power to wage war is the power to wage war successfully.") (citation omitted).

State-law tort suits would additionally "interfere with the federal government's authority to punish and deter misconduct by its own contractors" through its "numerous criminal and contractual enforcement options." *Saleh*, 580 F.3d at 8. For instance, the government may terminate a contract, 48 C.F.R. 52.249-6; seek liquidated damages, 48 C.F.R. 52.211-11; direct the contractor to remove and replace contractor personnel who violate contract requirements, 48 C.F.R. 52.225-19(h); issue a stop-work order, 48 C.F.R. 52.242-14, 52.242-15; or potentially pursue remedies under the Contract Dis-

putes Act of 1978, 41 U.S.C. 7101 *et seq.* The government may also press charges for violations of criminal laws. See, *e.g.*, 18 U.S.C. 3261(a)(1) (creating federal criminal jurisdiction over certain offenses committed by someone "employed by or accompanying the Armed Forces outside the United States"); 10 U.S.C. 802(a)(10) (applying the Uniform Code of Military Justice to "persons serving with or accompanying an armed force in the field" "[i]n time of declared war or a contingency operation").

Legal avenues for obtaining compensation within the federal system are also available to service members and others injured by contractor negligence. For example, the Department of Veterans Affairs provides compensation to veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty." 38 U.S.C. 1110; see, *e.g.*, 10 U.S.C. 1413a, 38 U.S.C. 1131. In addition, survivors of servicemembers who die on active duty are eligible for a variety of benefits, including a death gratuity of $100,000, see 10 U.S.C. 1475, 1478. And Congress also provides compensation for enhanced *risks* of injury by providing additional combat pay to service members. See, *e.g.*, 37 U.S.C. 310, 352, and 26 U.S.C. 112. By providing carefully channeled remedies, Congress struck a balance between compensation for combat injuries and military effectiveness—a balance that state-law tort litigation would disrupt.

At a minimum, the possibility of state tort liability would "predictably" lead contractors to "raise their prices to cover, or to insure against, contingent liability." *Boyle*, 487 U.S. at 512; see also *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 349 n.11 (4th Cir. 2014), cert. denied, 574 U.S. 1120 (2015); *Saleh*, 580 F.3d at 7.

Moreover, in limited circumstances, some military contracts contain indemnification or cost-reimbursement clauses that pass costs to the United States in certain circumstances. See 48 C.F.R. 50.104-3, 52.228-7(c). The adverse effect of increasing such costs on the United States is itself a significant conflict.

In addition, state-law claims against battlefield contractors would embroil the armed forces in "distracting" and intrusive litigation more broadly. See *Saleh*, 580 F.3d at 8. Both sides in such a suit are likely to seek to interview, depose, or subpoena military commanders, enlisted men and women, contracting officers, or even senior policymakers, and to demand discovery of military records. The proceedings could easily "devolve into an exercise in finger-pointing between the defendant contractor and the military" (and perhaps between different military officers), as well as "requir[e] extensive judicial probing of the government's wartime policies." *Ibid.*; cf. *Stanley*, 483 U.S. at 682-683 (refusing to allow *Bivens* claims by service members, which would "rais[e] the prospect of compelled depositions and trial testimony by military officers concerning the details of their military commands" and "disrupt the military regime"). Any requests for sensitive or classified information will divert government resources toward evaluating such requests, or, in appropriate cases, considering whether to invoke the state-secrets privilege. See, *e.g.*, *United States* v. *Zubaydah*, 595 U.S. 195, 204-205 (2022).[1] Discovery involving service members—such as,

[1] The United States has not yet determined whether to invoke the state-secrets privilege in this case. The district court has said that, "were this case to continue in the absence of preemption, the withholding of classified information central to material questions of causation would present a major hurdle, if not a prohibitive event,

in this case, soldiers on active duty on the battlefield who may have witnessed the suicide attack—would also present significant burdens.

Opening the door to such suits would greatly burden "separation-of-powers principles" in other ways as well. Pet. App. 64-65. Those suits would frequently present "indirect challenges to the actions of the U.S. military" (whether by plaintiffs or by contractor defendants). *Saleh*, 580 F.3d at 7. To the extent that foreign entities or citizens attempted to bring suit, they could seek remedies that exceed or contradict the federal government's foreign-affairs decisions. And given the reality that some combat activities will be politically controversial, opening that door could lead to attempts by "States to thwart national military [policy]" through the medium of tort law, likely leading to litigation under the intergovernmental-immunity doctrine. Cf. *Torres*, 597 U.S. at 599 (noting a similar risk from policies barring servicemembers from state employment); *Washington*, 596 U.S. at 835-839 (holding unconstitutional a Washington law that targeted federal contractors at a nuclear cleanup site); *CoreCivic, Inc.* v. *Governor of New Jersey*, 145 F.4th 315, 319 (3d Cir. 2025) (holding unconstitutional a New Jersey law interfering with immigration-detention contractors).

3. The FTCA's combatant-activities exception confirms the conflict in this case

Congress's decision to carve out similar claims in a related context further "demonstrates the * * * 'significant conflict' between federal interests and state law"

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to the resolution of this matter on the merits." Pet. App. 46 n.8. Should the case continue, the United States will assess whether invocation of the privilege is warranted.

that arises from state tort regulation in this area. *Boyle*, 487 U.S. at 511. In the FTCA, Congress generally waived the United States' sovereign immunity and created a cause of action with respect to certain torts of federal employees. See 28 U.S.C. 1346(b)(1). But Congress expressly barred "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. 2680(j).

As every court of appeals to consider the question has concluded, Congress's decision to bar claims arising from wartime combat in that analogous context reinforces the federal nature of the interests at stake. See, e.g., *In re KBR*, 744 F.3d at 351; *Saleh*, 580 F.3d at 9; *Harris* v. *Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 480 (3d Cir. 2013), cert. denied, 574 U.S. 1120 (2015); *Badilla* v. *Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 128 (2d Cir. 2021), cert. denied, 143 S. Ct. 2512 (2023). The claims here would plainly fall within Congress's carveout in the FTCA if brought against the federal government itself. As in *Boyle*, permitting the same kinds of suits against the military's contractors would "produce the same effect sought to be avoided by the FTCA exemption." 487 U.S. at 511.

4. The facts of this case demonstrate the inherent conflict

The facts of this case demonstrate that the inherent conflicts described above are far from speculative. Although the Army found that respondent violated its contract, it expressly chose, in light of "the [g]overnment's best interest," not to terminate the contract. Pet. App. 187. The suit here nonetheless seeks to impose damages —including punitive damages—without regard for that wartime decision. Moreover, the claims expressly chal-

lenge the military contractor's implementation of a military policy of employing local nationals as part of a counterinsurgency strategy. See *id.* at 3, 5, 11. Had the prospect of state tort liability been clear at the outset, it is possible that military contractors like respondent would have refused work (or substantially increased the cost of their assistance) due to the additional risk involved in hiring local nationals—putting pressure on the military to change or soften its wartime strategy.

The litigation's effects on the military are similarly disruptive. Respondent asserts the need for sensitive or classified information to properly defend against petitioner's claims. See Resp. Br. 45-46. Respondent has sought evidence from the military and publicly sought to blame the military for petitioner's injuries. See *id.* at 6-8, 45-46. And the district court noted that, in a deposition, one military officer has disagreed with findings of another officer, which demonstrates the "great harm to military discipline" and "separation-of-powers principles" that this suit could engender. Pet. App. 65. Even if the Court declines to decide the full extent of preemption on foreign battlefields under the Constitution, it should hold at the very least that preemption must apply under the circumstances of this case.[2]

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[2] Although preemption applies, the court of appeals was correct that the political-question doctrine does not bar the claims here, at least at this stage. See Pet. App. 12-19. That doctrine applies when questions are textually committed to "a coordinate political department" and courts lack "judicially * * * manageable standards" to assess them. See *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 195 (2012) (citation omitted). Accordingly, the doctrine bars suits that seek to review military or foreign-policy judgments. See, *e.g.*, *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 982, 984 (9th Cir. 2007); *Tiffany* v. *United States*, 931 F.2d 271, 275, 277-278 (4th Cir. 1991), cert. denied, 502 U.S. 1030 (1992). But because evaluation of peti-

C. A Conflict Exists Here Regardless Of Whether State-Law Tort Claims Challenge The Contractor's Contractual Violations Or Discretionary Actions

The conflict in this case stems from two aspects of petitioner's lawsuit. First, the lawsuit arises from the federal government's combat activities during war in a foreign country. That feature places the case in the heartland of war powers constitutionally vested in Congress and the President—and outside any traditional realms of state regulation. See pp. 15-17, *supra*. Second, the claims challenge the federal contractor's activities carrying out its federal contract on a foreign battlefield (rather than unrelated or off-duty conduct). Thus, petitioner's claims would result in state regulation of a contractor's execution of obligations to the federal government on the battlefield, leading to the inherent conflicts described above. See pp. 17-22, *supra*.

Petitioner contends (Br. 43, 49) that, even when a plaintiff seeks to subject a contractor's performance of battlefield obligations to state tort regulation, no conflict exists when the contractor "violates its contract" or when it can in theory "comply with both state law and the military's instructions." Petitioner reasons (*id.* at 29) that *Boyle* applied preemption to domestic design-defect claims only when a contractor followed government instructions to include the alleged defect. See 487 U.S. at 509. Two courts of appeals have reached similar conclusions. See *Badilla*, 8 F.4th at 128; *Harris*, 724 F.3d at 480-481.

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tioner's causation arguments under South Carolina law does not appear to require the factfinder to apportion fault to the United States, it "does not yet appear" that petitioner's claims would inevitably require review of military decisions. Pet. App. 19.

As the decision below explained, however, a conflict with federal war powers being exercised on a foreign battlefield "'is much broader' than the discrete inconsistency between federal and state duties in *Boyle*." Pet. App. 21 (citation omitted). Unlike in the domestic context in *Boyle*, preemption of state regulation of battlefield activities is necessary to "preserve[] the field of wartime decisionmaking exclusively [to] the federal government" and "to avoid potential interference 'with the federal government's authority to punish and deter misconduct by its own contractors.'" *Id.* at 30 (citation omitted). If state tort law's applicability turns on contract compliance or contractor discretion, a contractor must not only satisfy federal contracting officers but also consider the risks that a court might disagree about whether it complied or, applying any of "50 States' tort regimes," *Buckman*, 531 U.S. at 350, whether it negligently exercised discretion.

Under petitioner's theory, courts (and juries) thousands of miles from the battlefield would have to evaluate a contractor's compliance with a federal contract—a surpassingly odd result when the government is not a party and the plaintiffs are not third-party beneficiaries of the contract, see Pet. App. 33-34. Alternatively, courts would have to decide what directions the military had actually given. Those inquiries would inevitably intrude on the military's decisions about compliance or contractor fault and would risk inconsistent decisions. One court might find a violation or negligence where the government has not, and such judicial findings could pressure the government to cease or curtail business with that contractor. Conversely, some court might find no liability where the government has found fault. Such litigation would likely involve disputes about what the

military might have communicated to a contractor—leading to the litigation burdens described above. See pp. 21-22, *supra*.

Those suits would additionally interfere with the military's relations with the contractor and contract enforcement in ways that this Court has already recognized can pose a serious conflict. The military has numerous tools available for enforcing its contracts and policing negligence, but state tort suits would add an additional "state-law penalty" beyond the military's control. *Arizona*, 567 U.S. at 400, 406; see, *e.g.*, *Garamendi*, 539 U.S. at 423-425; *Crosby*, 530 U.S. at 376. As to some violations, for example, the government might prefer not to take any adverse action and instead informally obtain assurances of improved performance so as to avoid disruption during hostilities. That kind of "conflict in the method of enforcement" can cause serious disruption, even where state law is "attempt[ing] to achieve * * * the same goals as federal law." *Arizona*, 567 U.S. at 400, 406; *Buckman*, 531 U.S. at 348 (explaining that an agency's "delicate balance" of enforcement "can be skewed by allowing * * * claims under state tort law"). Moreover, contractors and the federal government could be placed in an adversarial position in court—even during their engagement together in active hostilities against America's foes. See pp. 18-19, 21-22, *supra*.

Less drastic effects would be disruptive, too. For example, such a rule would disincentivize contractors from agreeing to performance-based contracts that permit greater discretion in deciding how to achieve objectives. See Pet. App. 28; *Harris*, 724 F.3d at 481 (concluding that preemption would not apply to suits involving performance-based contracts). And the same incentives

could lead other contractors to "deluge" the military with requests for express approval of every step they take, "resulting in additional burdens" on efficient support of combat activities. *Buckman*, 531 U.S. at 351.

In one regard, however, the decision below erred in its description of the extent of the conflict at issue here. Like some other courts of appeals, it held that preemption should turn on whether a contractor was "integrated" into combatant activities and whether the military "retained command." Pet. App. 31; see *Saleh*, 580 F.3d at 9. The practical effect of that inquiry would likely extend preemption to suits challenging actions taken within the scope of a federal contract. But the phrase "integrated into combatant activities" is imprecise and could lead to intrusive inquiries into how the military structured its battlefield operations. It also risks confusion by suggesting that contractors themselves may engage in combat. By law, civilian contractors cannot engage in combat. See *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, DoD Instruction 3020.41, para. 3.5 (Nov. 27, 2024); *Policy & Procedures for Determining Workforce Mix*, DoD Instruction 1100.22, Encl. 4, para. 1.c(1)(b) (Apr. 12, 2010); 73 Fed. Reg. 16,764, 16,765 (Mar. 31, 2008). The more accurate and straightforward inquiry focuses on two factors that demonstrate conflict with the federal powers at issue: whether the action arises from both combatant activities and a contractor's actions within the scope of its contract.

D. Petitioner's Arguments Regarding The FTCA And *Boyle* Do Not Support Reversal

Petitioner contends (Br. 19) at length that "[t]he FTCA does not speak to government contractor liability." See Br. 14-31. But as petitioner appears to

acknowledge (Br. 32-33), this Court has looked to related statutes to "bolster [the] finding of a conflict" in a case. And here the FTCA and its combatant-activities exception illustrate that, in an analogous context, Congress identified a conflict between state tort law and the same federal interests.

Petitioner argues (Br. 44) that the court of appeals erroneously treated the FTCA's exception "as a fount of preemption for government contractors." But the court of appeals correctly recognized that the FTCA and its exceptions "do not apply to government contractors," and it therefore relied on the FTCA only as evidence "reflect[ing] an important federal policy." Pet. App. 20. Similarly, petitioner suggests that the FTCA's combatant-activities exception is irrelevant to battlefield claims against contractors because "an activity would 'qualify as a combatant activity' under the FTCA only if 'performed by the United States.'" Br. 25 (citation omitted). But the exception's terms apply to claims "arising out of" combatant activities, 28 U.S.C. 2680(j), so its plain terms focus on application of state tort law to claims that more generally arise out of the battlefield. Congress's decision to carve out such claims is plainly informative here. In any event, even if the Court disregards Congress's determination that the United States is not liable for analogous tort claims arising from combatant activities, the claims at issue here create "obvious" conflicts with exclusively federal interests in what happens on foreign battlefields. Pet. App. 35 (citation omitted).[3]

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[3] Petitioner notes (Br. 27) that Congress has, under certain conditions, made the FTCA or other federal statutes an exclusive remedy against contractors in different contexts—namely, for federally funded health centers, 42 U.S.C. 233(a), and "contractor[s] in carry-

Petitioner also criticizes (Br. 31) this Court's prior decision in *Boyle*—which held that design-defect claims against a military contractor for domestic injuries were preempted—as "out of sync" with preemption law, although petitioner does not ask this Court to overrule it. As a threshold matter, the Constitution's structure and the federal government's interests would preempt the claims at issue here regardless of whether *Boyle* was correctly decided in the domestic context, so petitioner's arguments about *Boyle* do not support reversal. See Pet. App. 21 (explaining that the conflict here is "much broader" than in *Boyle*'s domestic context).

In all events, the decision in *Boyle* can hardly be considered "out of sync" when, as petitioner acknowledges (Br. 36-37), it applied numerous prior decisions in which this Court had identified a "uniquely federal interest" that could not be subjected to the burdens of 50 States' laws—including preemption of tort claims against contractors following federal orders and of state law's application to federal contractual relations. See 487 U.S. at 504-505. The longstanding principles that *Boyle* applied follow directly from constitutional structure, and this Court has not repudiated them. See, *e.g.*, *Cassirer*,

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ing out an atomic weapons testing program," 50 U.S.C. 2783(b)(1) and (2). Those targeted statutes in no way suggest acquiescence to state tort law on foreign battlefields. Similarly, petitioner's observation (Br. 30) that Congress preempted state workers' compensation laws for military contractors overseas, see 42 U.S.C. 1651(c), only underscores the exclusively federal nature of services under those contracts. Moreover, petitioner cites (Br. 47) a regulatory preamble explaining, in 2008, the "current law regarding the Government Contractor Defense" in response to concerns raised by commenters. 73 Fed. Reg. at 16,768. That explanation does not demonstrate that the military expected state-law tort suits arising from hostilities abroad.

596 U.S. at 116 (noting that "[j]udicial creation of federal common law to displace state-created rules must be necessary to protect uniquely federal interests") (citation omitted).

Petitioner criticizes (Br. 35) the *Boyle* Court for invoking considerations of "sound policy" when it defined the "scope of displacement" of state law. 487 U.S. at 512-513. The Court mentioned, for instance, a concern about avoiding "some incentive for the manufacturer to withhold knowledge of risks." *Id.* at 512. But *Boyle*'s crafting of a federal rule of decision in a uniquely federal context was not novel. See pp. 11-13, *supra*. And even if petitioner's challenges to that aspect of *Boyle* had merit, they are not relevant here. The Court need not craft any policy-based test for displacement in this case; it need only hold that the state-law tort claims in this case are preempted because they clearly conflict with constitutional structure that vests war powers in the federal government and with the uniquely federal interests at stake when regulating activities on a foreign battlefield.

E. Petitioner's Remaining Arguments Lack Merit

Petitioner repeatedly urges that preemption cannot exist "*in vacuo*" and must instead rest on a conflict with "either the Constitution itself or a valid statute enacted by Congress." Br. 2, 18 (quoting *Garcia*, 589 U.S. at 202). But preemption here is based on the Constitution's express commitment of war powers to the federal government and the uniquely federal interests arising from the federal government's use of military contractors to support combat missions under exclusively federal contracts. That structural preemption does not arise from a void.

Nor does recognizing those conflicts require, as petitioner argues (Br. 3), a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Garcia*, 589 U.S. at 202 (citation omitted). The inevitable result of state tort regulation here would be to interfere with federal control on the battlefield and with the government's ability to use military contractors effectively to support combat activities abroad. See pp. 17-22, 25-28, *supra*.

Petitioner is incorrect in asserting (Br. 39-41, 45) that any conflict between state tort law and federal interests is speculative because the federal government is not a party to the suit. This Court has applied structural preemption to state laws regulating third parties where, as here, they interfere with powers that the Constitution commits wholly to the federal government. See, *e.g.*, *Zschernig*, 389 U.S. at 432 (foreign affairs); *Japan Line, Ltd.*, 441 U.S. at 448 (foreign commerce); *Jensen*, 244 U.S. at 216 (admiralty and maritime law). Here, the uniquely federal interests at stake on foreign battlefields are "obvious." *Saleh*, 580 F.3d at 11; Pet. App. 35.

Petitioner is likewise wrong to invoke a presumption against preemption "[f]or claims in traditional State fields." Br. 27-28. Petitioner has identified no long-standing history or tradition of state tort suits regarding overseas combat activities. Cf. *United States* v. *Texas*, 599 U.S. 670, 677 (2023) (rejecting standing of States to challenge federal enforcement priorities for lack of "precedent, history, or tradition" supporting it). Indeed, the events and harms at issue will have occurred in foreign lands far outside any State's jurisdiction. Cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 705 (2004) (noting the common choice-of-law rule that a tort

arises where the injury occurs). And the contracts at issue are governed solely by federal law. Pet. App. 32 n.8. Petitioner cites the States' "traditional authority to provide tort remedies." Br. 18 (citation omitted). But such generic assertions do not suffice in areas constitutionally committed to federal control. See *Buckman*, 531 U.S. at 347 (traditional state regulation of fraud did not "warrant a presumption" against preemption with respect to "fraud against federal agencies").

Petitioner is equally mistaken in arguing (Br. 3, 56) that preemption cannot apply because "Congress must make that policy choice." Congress's silence here cuts the opposite way. There is no longstanding history or tradition of state-law tort suits against military contractors carrying out federal contracts on foreign battlefields, and so, historically, there has been nothing for Congress to expressly preempt. See John F. O'Connor, *Contractor Tort Immunity under the Law of Military Occupation*, 14 UCLA J. Int'l L. Foreign Aff. 367, 369 (2009) (noting novelty of such suits during the wars in Afghanistan and Iraq). "A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply." *Crosby*, 530 U.S. at 387-388. And the clear separation-of-powers concerns presented here provide "reason to hesitate" before opening the door to such suits. Cf. *Hernández* v. *Mesa*, 589 U.S. 93, 108 (2020) (explaining that the Court has rejected *Bivens* claims in contexts involving "military discipline" and national security for that reason).

More fundamentally, the Court has long held that "the judicial power alone" may protect the federal government from incursions of state law. *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824);

see *id.* at 865 (rejecting argument that Congress needed to "expressly assert[]" that any state tax on the Bank of the United States was preempted). Congress's silence cannot cede an area constitutionally committed to the federal government, and this Court does not require Congress to anticipate and expressly preempt every conceivable State impediment to its constitutionally committed powers. See *Crosby*, 530 U.S. at 387-388 ("[T]he existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict").

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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