No. 24-924

In the Supreme Court of the United States

WINSTON TYLER HENCELY,

Petitioner,

v.

FLUOR CORPORATION, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Fluor has abandoned the Fourth Circuit's rationale. The Fourth Circuit grounded its preemption analysis on the "exten[sion]" of "*Boyle*'s logic to the FTCA's combatant activities exception," and derived purportedly uniquely federal interests from that exception. Pet.App.21. Rather than defend that reasoning, Fluor now says "the Constitution's text and design" supply the uniquely federal interests, and that the combatant-activities exception merely "supplies the rule of decision." Fluor.Br.13. To decide whether to preempt Hencely's claims, the Fourth Circuit asked whether Fluor was "integrated into combatant activities over which the military retains command authority." Pet.App.21 (citation modified). But Fluor now says the proper test is whether "a military contractor takes action … within the scope of a valid contract," Fluor.Br.23, a test rejected by every court of appeals that considered it. Fluor's abandonment of the Fourth Circuit's analysis makes it easy for this Court to reject it, too.

The Court should also reject Fluor's—and the government's—alternative grounds for affirmance. Neither the Constitution's structure nor uniquely federal interests preempt Hencely's claims.

ARGUMENT

I. The Constitution does not preempt Hencely's claims.

The Fourth Circuit based its preemption analysis on the "exten[sion]" of "*Boyle*'s logic to the FTCA's combatant activities exception." Pet.App.21. That court never addressed whether the Constitution's structure alone—without *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)—preempts Hencely's claims. And this Court granted certiorari on whether *Boyle* should be extended. Pet.i. But Fluor and the government suggest that the Constitution alone preempts Hencely's claims. Fluor.Br.30-33; U.S.Br.9-11, 31. Even if those arguments were properly presented, they are wrong.

A. Fluor argues that state law "cannot regulate private parties in a way that would indirectly burden the federal government's sovereignty." Fluor.Br.31.

This Court has "thoroughly repudiated" Fluor's indirect-burden argument. *North Dakota v. United States*, 495 U.S. 423, 434 (1990) (plurality) (citation modified). "Whatever burdens are imposed on the Federal Government by a neutral state law regulating its suppliers are but normal incidents of the organization within the same territory of two governments." *Id.* at 435 (citation modified). Indeed, after *McColluch v. Maryland*, 17 U.S. 316 (1819), this Court "later came to understand the doctrine … as prohibiting state laws that *either* regulate the United States directly *or* discriminate against the Federal Government or those with whom it deals (*e.g.*, contractors)," *United States v. Washington*, 596 U.S. 832, 838 (2022) (citation modified). Fluor doesn't argue that Hencely's claims violate this principle. It relies on indirect burden as a stand-alone basis for preempting Hencely's claims.

This Court has also confirmed that applying state law to federal contractors causes no structural constitutional concerns. In *Baltimore & Annapolis Railroad Co. v. Lichtenberg*, Maryland ordered a contractor, who was transporting federal workers, to stop its operations for failing to comply with "safety regulations" and permitting requirements. 4 A.2d 734, 386 (Md. 1939). The contractor and the United States argued that the state "regulation … amount[ed] to interference with performance of an essential governmental function." *Id.* at 393; *see also* U.S.*Baltimore*.Br., 1939 WL 48357, at *18-19 (raising *McColluch*). This Court dismissed the appeal for "want of a substantial Federal question." 308 U.S. 525 (1939).

Invoking *Baltimore*, this Court again rejected the indirect-burden argument in an "action of tort" based on a federal contractor's violation of state safety laws while constructing a federal building. *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 98 (1940). The Court rejected the argument that federal contractors must be shielded from state law lest it become "difficult or impossible for the government to obtain the service it needs" because that argument "ignores the power of Congress to protect" the government's "functions" if necessary. *Id.* at 104 (citation modified). Those cases, which Fluor never addresses, foreclose its indirect-burden argument.

B. The government, in turn, suggests that because the United States "can act only through its officers and agents," "structural constitutional preemption necessarily shields those officers and agents from state control in the performance of their duties."

U.S.Br.10 (citation modified). If the government suggests that the Constitution's structure impliedly preempts state claims against contractors as "agents" of the federal government, that's wrong.

To start, not every independent contractor is an "agent." *Logue v. United States*, 412 U.S. 521, 527 (1973). Unlike federal employees, contractors are not "'constituent parts' of the Federal Government," and "[t]he congruence of professional interests between the contractors"—who are engaged for "limited and carefully defined purposes"—and "the Federal Government is not complete." *United States v. New Mexico*, 455 U.S. 720, 740-41 (1982).

More to the point, it doesn't matter whether every contractor becomes an "agent" on identical footing with federal employees for preemption purposes. Even if they were, the Constitution's structure contemplates the availability of "state tort liability" against the federal government's agents. *Martin v. United States*, 145 S.Ct. 1689, 1702 n.2 (2025). "The liability of an agent *for his own negligence* has long been embedded in the law." *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580 (1943) (emphasis added). Federal officials were subject to "state-tort suits" until Congress passed the Westfall Act. *Hernández v. Mesa*, 589 U.S. 93, 110 (2020); *see also Johnson v. Maryland*, 254 U.S. 51, 56 (1920) (a federal postal worker may face "liability under the common law of a State" for "negligence").

Even common-law suits against military officials for conduct in "foreign battlefields" were not unheard of. *Contra* U.S.Br.33. Captain Little was liable for trespass for unlawfully seizing a foreign vessel near Hispaniola during the Quasi-War with France. *Little v. Barreme*, 6 U.S. 170, 179 (1804). Colonel Mitchell was liable for wrongfully seizing an American citizen's property in Mexico during the Mexican-American War. *Mitchell v. Harmony*, 54 U.S. 115, 128, 137 (1851).[1] Indeed, Congress had to pass the Westfall Act to bar such suits precisely *because* the constitutional structure didn't bar them.

This Court has held that some state criminal prosecutions of—and state writs of habeas corpus directed to—federal officials may be impermissible. *See* U.S.Br.10; *In re Neagle*, 135 U.S. 1 (1890); *Tarble's Case*, 80 U.S. 397 (1871). Even so, private tort suits against federal officials remained viable until the Westfall Act because they "would not bring the 'federal and state governments into conflict.'" *Martin*, 145 S.Ct. at 1702 n.2; *see also Johnson*, 254 U.S. at 56.

Just as the Constitution's structure didn't bar state-law suits against federal employees acting as governmental agents, it doesn't bar suits against federal contractors—regardless of whether they can be

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[1] The Court in *Mitchell* might have been applying "general common law." General common law was "nonfederal." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 740 (2004) (Scalia, J., concurring in part and concurring in judgment). Historical examples applying nonfederal common law to battlefield conduct rebut Fluor and the government's assertion that Fluor's noncombat conduct on a U.S. base overseas must be governed exclusively by federal law. Indeed, had Harmony sued Mitchell in state court instead of invoking federal diversity jurisdiction, state common law could have applied.

called "agents" for preemption purposes. And it hasn't. *See Sadrakula*, 309 U.S. at 98.

None of that undermines this Court's prior recognition that "there is no liability on the part of the contractor for executing [the government's] will." *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940). Regardless of whether this principle is one of derivative sovereign "immunity," *Brady*, 317 U.S. at 583, or a Supremacy Clause defense, *see* U.S.Br.10, contractors must perform "in compliance with all federal directions" to win on this defense, *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 167 n.7 (2016). That is, to avoid liability, the contractor's challenged actions must have been "all authorized and directed by the Government of the United States" and "pursuant to the Act of Congress." *Yearsley*, 309 U.S. at 20.

Absent the *Yearsley* defense, nothing in the Constitution's structure prohibits state tort suits against contractors for their "own negligence." *Brady*, 317 U.S. at 580. Fluor forfeited the *Yearsley* defense by failing to brief it below. In any event, Fluor isn't eligible for the *Yearsley* defense because it "indisputabl[y]" failed to comply with the government's directions to supervise and escort Nayeb. Pet.App.186.

C. Next, Fluor argues that Hencely's claims "are preempted because they conflict with the federal government's exercise of its constitutional war powers." Fluor.Br.30; *see* U.S.Br.14, 31-33.

Fluor's wrong. The Constitution vests "certain enumerated powers" in Congress. *Murphy v. NCAA*, 584 U.S. 453, 471 (2018). As relevant here, Congress has the power to declare war, raise and support the military forces, make rules for the military, and provide for organizing and calling forth the Militia. U.S. Const. art. I, §8. The President is the commander in chief. *Id.* art. II, §2. All other powers—including providing tort remedies against private corporations—are "reserved for the States." *Murphy*, 584 U.S. at 471; *see Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

The Constitution's mere grant of specific war-related powers does not automatically preempt the application of state law to military contractors. *See, e.g.*, *Penn Dairies v. Milk Control Comm'n of Pa.*, 318 U.S. 261, 278-79 (1943) (upholding state regulation of military supplier); *North Dakota*, 495 U.S. at 444 (plurality) (same); *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 612 (2022) (Thomas, J., dissenting) ("States have significant residual police powers that overlap with Congress' power over the military."). When a military supplier challenged state price-control regulations, this Court held that "there is no clause of the Constitution which purports, unaided by Congressional enactment, to prohibit [state] regulations" of military contractors. *Penn Dairies*, 318 U.S. at 269.

Of course, "Congress, in aid of its granted power to raise and support armies, and with the support of the supremacy clause, could declare state regulations … inapplicable to sales to the government." *Id.* (citations omitted); *cf. Torres*, 597 U.S. at 595 (Congress enacted USERRA). But Congress hasn't preempted state tort claims against contractors for negligence, and state tort suits against contractors are "normal incidents of the operation of … a dual system of government." *Penn Dairies*, 318 U.S. at 271. It's up to Congress to "act to remove them." *Id.*

Nor do this Court's foreign-commerce and admiralty cases support structural preemption of state tort claims against government contractors without federal legislation. *Cf.* U.S.Br.32. Though this Court has interpreted the Foreign Commerce Clause and Article III to contain a "negative," "self-operative prohibition" on state law that touches foreign commerce, *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78 (1993) (Scalia, J., concurring in part and concurring in judgment), and admiralty, *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917), this Court hasn't interpreted the Constitution's war-related provisions the same way, *Penn Dairies*, 318 U.S. at 269, 271; *Torres*, 597 U.S. at 612-13 (Thomas, J., dissenting).

Again, the Court has upheld state regulations of military contractors. *Penn Dairies*, 318 U.S. at 278-79; *North Dakota*, 495 U.S. at 444 (plurality). If Fluor were right, those cases would be wrong. *No* state claims could proceed against any DOD contractors—mess-hall workers who spread E.coli at boot camp, *Grano v. Sodexo Mgmt.*, 2023 WL 125590, *1-2, *26 (S.D. Cal.), military housing managers who fail to treat mold, *Federico v. Lincoln Mil. Hous.*, 127 F. Supp. 3d 623, 627 (E.D. Va. 2015), constructors of live-fire training sites that injure servicemembers, *Ghane v. Mid-South Inst. of Self Def. Shooting*, 137 So.3d 212, 214 (Miss.), *cert. denied* 574 U.S. 821 (2014), or a computer technician who commits a mass shooting on base, *Delorenzo v. HP Enters. Servs.*, 2016 WL 6459550, at *1 (D.D.C.). And *Boyle* should have been a much shorter decision. Military helicopters surely implicated Congress's power to raise and support the military. *Boyle* instead strained to craft uniquely-federal-interests preemption, not structural preemption.

The foreign-affairs cases Fluor cites are inapposite for the same reason and for others. Fluor.Br.32 (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *United States v. Belmont*, 301 U.S. 324 (1937)). *Crosby* was a statutory preemption case involving a state law that "conflict[ed] with [a] federal [statute]" and thus cannot support Fluor's structural preemption argument. 530 U.S. at 378.

Garamendi and *Belmont*, in turn, involved executive claims-settlement agreements—coupled with "200 years" of "congressional acquiescence" in this area—that this Court said could preempt state law. *Garamendi*, 539 U.S. at 415. Contrast that with this Court's refusal to displace state law beyond executive claims-settlement agreements—even when the state law touched on foreign relations. *See, e.g.*, *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (declining to "set aside first principles" despite the "plainly compelling" foreign-relations considerations implicated in Texas's execution of Mexican nationals who received no consular visitations); *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp.*, 493 U.S. 400, 406, 408-09 (1990) (declining to bar state claims that required finding foreign officials accepted bribes and so would "impugn" or "embarrass" them).[2]

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For these reasons, Fluor and the government's structural preemption arguments fail.

II. Uniquely federal interests do not preempt Hencely's claims.

Fluor insists that "uniquely federal interests"—without conflicting federal constitutional or statutory text—preempt Hencely's claims. Fluor.Br.14-30, 37-42; *see* U.S.Br.14-28. Those arguments are wrong.

A. Fluor fails to reconcile its preemption theory with the Supremacy Clause.

Fluor insists that "in 'a few areas,' preemption can arise from a conflict between state law and 'uniquely federal interests.'" Fluor.Br.34; *see also* U.S.Br.30. But Fluor never explains how extending uniquely-federal-interests preemption here can be reconciled with the Supremacy Clause's text.

Preemption requires a conflict between state law and "[t]he Constitution," "the Laws of the United States" made by Congress, or "Treaties." U.S. Const. art. VI, cl. 2. "In *all* cases, the federal restrictions or rights that are said to conflict with state law must

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[2] *Garamendi* relied on *Zschernig v. Miller*, 389 U.S. 429 (1968), which preempted state law that touched on foreign relations. But this Court "ha[d] not relied on *Zschernig* since it was decided" until *Garamendi*, 539 U.S. at 439 (Ginsburg, J., dissenting), and hasn't relied on it since.

stem from either the Constitution itself or a valid statute enacted by Congress." *Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (emphasis added). The tension between the Supremacy Clause's text and uniquely-federal-interests preemption is reason enough not to extend *Boyle*. Hencely.Br.31-35.

Fluor asserts that this Court "reiterated" uniquely-federal-interests preemption in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 596 U.S. 107 (2022). Fluor.Br.34. *Cassirer* refused to displace state law though the dispute involved foreign-relations interests. 596 U.S. at 116-17. And no party in *Cassirer* asked the Court to reconcile uniquely-federal-interests preemption with the Supremacy Clause. Besides, Fluor's muscular expansion of uniquely-federal-interests preemption beyond *Boyle*'s limits contradicts the admonition that "[j]udicial lawmaking … plays a necessarily modest role." *Rodriguez v. FDIC*, 589 U.S. 132, 136 (2020).

Fluor also incorrectly asserts that reversing the judgment below would require the Court to "overrule *Boyle* and the many cases on which it relied." Fluor.Br.34. Not so. This Court routinely declines to "extend" old holdings to new contexts without "overrul[ing]" prior decisions or doctrines. *Hein v. FFRF*, 551 U.S. 587, 615 (2007); *see also Hernández*, 589 U.S. at 96 (not extending but not overruling *Bivens*). Under *stare decisis*, reversing the judgment below will not upset the holdings of *Boyle* and other cases.

Adopting Fluor's proposed rule, in contrast, would stretch *Boyle* beyond its limits. *Boyle* applied uniquely-federal-interests preemption when the alleged conflict arose from the government's specific, discretionary helicopter design choices and the contractor merely acted as the government's *alter ego* by "conform[ing]" to the government's specifications. 487 U.S. at 512. That's why *Boyle* is a defense when "the government has directed a contractor to do the very thing that is the subject of the claim." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001); *see also* Hencely.Br.36-41. By contrast, Fluor asks this Court to make uniquely-federal-interests preemption available even when the contractor failed to conform to the government's instructions and the plaintiff isn't second-guessing the government's specific decisions. *See* Fluor.Br.25, 37. Rather than respecting *Boyle*'s core holding, Fluor distorts *Boyle* beyond recognition.

B. *Boyle* does not shield contractors who breach their contract and disobey the government's instructions.

Fluor's arguments for extending uniquely-federal-interests preemption fail under *Boyle*'s own terms. Rather than defend the Fourth Circuit's test, Fluor proffers a new one. Fluor would preempt state law so long as the contractor's negligence implicates an act within the scope of the contract. Fluor.Br.23. Fluor's version makes the defense available regardless of whether the contractor violates the contract or disobeys the government's explicit instructions.

Fluor gets every step of *Boyle*'s analysis wrong. It defines the relevant federal interests at the highest level of generality and fails to identify significant conflicts that warrant broadly displacing state claims. Its resulting test is virtually limitless and untethered to precedent or the Constitution.

1. The relevant federal interest is shielding the military's own conduct and decisions, not "war."

a. To justify federal common-lawmaking, Fluor must identify uniquely federal interests that are "specific," "concrete," and "genuinely identifiable." *O'Melveny v. FDIC*, 512 U.S. 79, 88-89 (1994). But Fluor identifies the federal interest only as "the power to wage war." Fluor.Br.15. That's anything but specific, concrete, and genuinely identifiable. *See* Hencely.Br.46-48. For that reason alone, Hencely's claims aren't preempted.

Fluor's repeated references to the federal government's war power are the wrong place to start and end. Tort liability falls in the heartland of the States' competence. It's *not* an exclusively federal function. *Supra* 2-9.

If private corporations—which are not soldiers and lack the constitutional power to wage war—are involved in the military's operations, it is only because the military contracted with them to provide services. Those services can often be "judged separate and apart from combat activities of the U.S. military." *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009). Tort suits against a contractor could be said to undermine the military's interests only insofar as the contractor's "challenged action can reasonably be considered the military's *own* conduct or decision." *Badilla v. Midwest Air Traffic Control*, 8 F.4th 105, 128 (2d

Cir. 2021). Conduct that violates the military's instructions or the contract—like Fluor's failure to escort and supervise its Afghan employees—cannot be deemed the military's decisions because such violations are "necessarily made independently of the military's battlefield conduct and decisions." *Harris v. Kellogg Brown & Root Servs.*, 724 F.3d 458, 481 (3d Cir. 2013).

This comports with how *Boyle* analyzed uniquely-federal-interests preemption. *Boyle* zeroed in on the specific federal interest in "getting the Government's work done" by obtaining a specific military helicopter design through a "procurement contract." 487 U.S. at 505. Though procuring military helicopters implicated Congress's power to raise and support the military, *Boyle* didn't analyze the relevant federal interest at that high level of generality. It zoomed in.

Fluor tries to distinguish this case from *Boyle* by contending that tort suits would intrude on the federal government's "exercise[] [of] exclusive control over the design and implementation of military operations." Fluor.Br.41. But tort suits by *a private party* against *a private corporation*—for its own negligence untethered to specific military decisions—do not wrest on-the-ground operational control away from the federal government and give it to the States. *Cf. Clendening v. United States*, 143 S.Ct. 11, 13 (2022) (Thomas, J., dissenting from denial of certiorari) ("[T]ort judgments," unlike injunctions, do not tell the military "what they must do and what they must not do."); *see also Martin*, 145 S.Ct. at 1702 n.2.

More to the point, Congress knows how to displace tort suits based on events occurring on U.S. bases overseas. Congress did so for the federal government (FTCA exceptions), for soldiers and sailors (Westfall Act), and for contractors *only as to* suits by contractor employees (Defense Base Act). *See* Hencely.Br.30, 38-39. But Congress hasn't precluded state tort suits by U.S. soldiers injured by contractor negligence on foreign (or domestic) bases. And DOD, citing cases involving state-law claims, warned military contractors that they could be held liable for their own negligence unconnected to the government's decisions. 73 Fed. Reg. 16,764, 16,768 (Mar. 31, 2008). That's no surprise; it's not unusual for state tort law to touch conduct that occurs in foreign countries. *See Cassirer*, 596 U.S. at 110-11 (painting appropriated in Germany and sold to Spain); *Kirkpatrick*, 493 U.S. at 401-02 (bribery-tainted contract in Nigeria). This Court has also applied common-law torts even to battlefield conduct in Mexico. *See Mitchell*, 54 U.S. at 128.

Fluor thinks its negligence (and failure to follow the government's instructions) should have no consequences under any State's law because the combatant-activities exception "reflects the fact that 'all of the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, where risk-taking is the rule.'" Fluor.Br.17 (quoting *Saleh*, 580 F.3d at 7). But that exception speaks only to the federal government's liability arising out of the military's combatant activities. Civilian contractors like Fluor are not the military. They cannot—and do not—engage in combat.

Hencely.Br.23-27; U.S.Br.28. And Fluor's supervision and escorting failures occurred "within the civilian portions of the base," Pet.App.160, where Fluor was providing non-combat, vehicle-maintenance support.[3] It defies common sense to suggest that "risk-taking" is "the rule" when it comes to supervising and escorting Afghan employees. The rule actually requires the opposite—"avoid injuring third parties." 73 Fed. Reg. at 16,768.

b. Fluor also asserts, in passing, an interest in "getting the Government's work done." Fluor.Br.15 (quoting *Boyle*, 487 U.S. at 505). But violating the contract and disobeying the government—as Fluor has done—is the opposite of "getting the Government's work done." *Cf. Malesko*, 534 U.S. at 74 n.6; *see also* Hencely.Br.49-52.

Fluor's government-rights-and-obligations rationale doesn't apply because "only the rights of private litigants are at issue." *Miree v. DeKalb County*, 433 U.S. 25, 30 (1977). Even *Boyle*'s expansion of the government-rights-and-obligations rationale doesn't apply here. *Boyle* acknowledged that the claims there against the helicopter manufacturer involved "liability to third persons," "not … an obligation to the United States under its contract." 487 U.S. at 505. *Boyle* deemed that interest relevant because the fallen

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[3] Contrary to Fluor's assertion (at 27), Hencely expressly "preserve[d]" the argument that "Fluor's work at the NTV Yard was not combat" and merely acknowledged that binding Fourth Circuit caselaw treated logistics support as combatant activities. Hencely.CA4.Br.29 n.14.

Marine's father's claims involved Sikorsky's "performance of the contract" in conformance with the government's specifications. *Id.* Fluor, in contrast, violated its contract and disobeyed the military's instructions. Hencely's claims therefore would not *undermine* the government's rights and interests.

2. Fluor identifies no significant conflicts requiring displacement of state law.

Fluor's unique-federal-interests preemption theory fails also because Fluor fails to identify significant conflicts that require displacing Hencely's claims. By themselves, uniquely federal interests do "not … suffic[e]" to displace state law. *Id.* at 507. "Displacement will occur only where … a significant conflict exists between an identifiable federal policy or interest and the operation of state law." *Id.* (citation modified).

a. Fluor's examples of purported conflicts do not warrant displacing Hencely's claims.

First, Fluor argues that Hencely's claims would "undermine military discipline" and cause military personnel "to point the finger at one another to avoid liability themselves." Fluor.Br.23-24 (citation modified). Fluor doesn't explain how suits against *contractors* (who violate the contract and the military's instructions) for their own negligence will result in liability for military personnel (who likely would be immune anyhow).

Fluor also cites self-interested testimony from a Fluor employee (a former Army officer), who disagreed with the Army investigation report's conclusion that Fluor was the primary contributing factor to the attack, as undermining military discipline. Fluor.Br.23; D.Ct.Doc.153-1, 16:15-16. This is *Fluor* pointing fingers at the military to avoid liability. Nor does Fluor explain how Hencely's claims will undermine military discipline when contractors are outside the military chain of command.

Second, Fluor asserts that allowing Hencely's suit to proceed "would require civilian judges and juries to sit in judgment of sensitive military decisions." Fluor.Br.24. Not so. Services provided by contractors can be "judged separate and apart from combat activities of the U.S. military." *Saleh*, 580 F.3d at 9. Under performance-based contracts like LOGCAP, the military generally "does not, in fact, exercise specific control over the actions and decisions of the contractor." *Id.* at 10 (quoting 73 Fed. Reg. at 16,768). And conduct that violates the military's instructions or the contract—like Fluor's failure to escort and supervise its Afghan employees—"is necessarily made independently of the military's battlefield conduct and decisions." *Harris*, 724 F.3d at 481.

Though Fluor has abandoned justiciability arguments, *cf.* Fluor.BIO.29, lower courts have also developed extensive political-question caselaw that further insulates the military's decisions. *See* Pet.App.12-15. The Fourth Circuit already concluded that Hencely's claims would "not inevitably require[]" a court "to evaluate the reasonableness of military judgments."

Pet.App.16. The government agrees. U.S.Br.24-25 n.2. Justiciability arguments provide no basis for displacing state claims against contractors who violate the government's instructions.

Fluor mischaracterizes Hencely's claims as second-guessing the military's decisions. Fluor.Br.23-24, 27-30. Hencely does *not* challenge the military's "base security" measures or decision to "hire Afghan employees" and to give Nayeb "access privileges" on the base. *Contra* Fluor.Br.27-28. After Nayeb had been hired and was on base, it was Fluor's responsibility—not the military's—to supervise him and ensure he was escorted "in all areas," in "close proximity," and in "constant view" outside his work area. Pet.App.6. Hencely's claims target Fluor's (1) failure to implement "measures … to keep [Afghans] from leaving the work area without escorts," which enabled Nayeb to carry out his attack, Pet.App.174-76, 186; (2) "sporadic supervision," which enabled Nayeb "to freely acquire" the bomb components and "complete" the bomb's construction, Pet.App.169-71, 179-80, 186; (3) giving Nayeb unfettered access to tools, Pet.App.169, 172-74; and (4) retaining Nayeb despite terminable workplace infractions, Pet.App.171-72.

Fluor asserts that the Army declined Fluor's offer to "increase its escorting duties beyond those required by the [existing] policy." Fluor.Br.30. But Hencely's claims concern Fluor's failure to carry out its escorting responsibilities under the *existing* policy. *See* Pet.App.186. Claims about Fluor's own failures don't require second-guessing the military's decisions.

Third, Fluor also asserts that the possibility of applying "dozens of different state tort regimes" might cause contractors to "hesitate to follow the military's orders" for fear of incurring liability. Fluor.Br.22; *see also* U.S.Br.19. But immunizing violations of the military's explicit instructions will not incentivize adherence to military orders. Fluor's suggestion that it will defies common sense.

It's also inaccurate to suggest that "dozens" of state tort regimes will apply. Established choice-of-law principles will limit the range of applicable state laws. Indeed, Hencely sued Fluor in South Carolina because that's where Fluor maintains its principal place of business. As DOD explained, "[c]ontractors are in the best position to plan and perform their duties in ways that avoid injuring third parties" in the first place. 73 Fed. Reg. at 16,768. And regardless of which state tort regime applies, existing doctrines like *Yearsley* would ensure "no liability on the part of the contractor for executing [the government's] will." 309 U.S. at 21. And "unwarranted timidity" "is less likely" when "a private company" is "subject to competitive market pressure" that incentivizes contractors to take actions that are "safer" and "more effective." *Richardson v. McKnight*, 521 U.S. 399, 409 (1997).

Fourth, Fluor argues that state tort claims could potentially increase "contract, insurance, and indemnity costs" that contractors could pass on to the government. Fluor.Br.21. At bottom, Fluor refers to possible pass-through costs stemming from its own negligence unconnected to the military's decisions. DOD already warned contractors not to expect to avoid liability in such scenarios. 73 Fed. Reg. at 16,768. And Fluor has never explained why the government would have indemnification obligations here. *See* 48 C.F.R. §52.250-1 (indemnification only for (1) "unusually hazardous or nuclear" risk (2) that "is not compensated for by insurance or otherwise").

Beyond that, the "competitive market pressure" provides a meaningful check on the pass-through costs to the government. *Richardson*, 521 U.S. at 409. "Given the large number of firms in the industry and the competitive nature of the bidding process, it is unlikely that firms would be able to demand dramatic price increases." Hurst, *After Blackwater*, 76 Geo. Wash. L. Rev. 1308, 1324 n.103 (2008).

More to the point, increased pass-through cost to the government "is not the dispositive consideration" under *Boyle*. *In re Joint E. & S. Dist. N.Y. Asbestos Litig.*, 897 F.2d 626, 631 (2d Cir. 1990). "Had *Boyle*'s aim been to prevent military contractors from passing any liability costs on the Government, it simply could have granted military contractors a blanket immunity from all state tort liability." *Id. Boyle* insulated the government from pass-through costs because *the government* made the "judgment" about "a particular [design] feature" and simply "contract[ed] for the production." 487 U.S. at 512. This "public policy rationale behind *Boyle* does not apply" when the government "does not, in fact, exercise specific control over the actions and decisions of the contractor." 73 Fed. Reg. at 16,768.

Fifth, Fluor suggests that a servicemember's tort suit conflicts with federal veteran-benefits and contractor-dispute schemes. Fluor.Br.41-42. Neither scheme reveals any indication—much less a "clear and manifest purpose," *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)—by Congress to displace state tort law. Fluor's argument would turn large swaths of the U.S. Code that obliquely touch state law into a uniquely-federal-interests preemption rubber stamp.

"Congress ha[s] given no indication that it made the right to compensation the veteran's exclusive remedy." *United States v. Brown*, 348 U.S. 110, 113 (1954). Fluor (at 42) relies on dicta from *Hatzlachh Supply Co. v. United States* suggesting that the Veterans' Benefits Act is the "sole remedy for service-connected injuries." 444 U.S. 460, 464 (1980). Even if the VBA might provide "an upper limit of liability *for the Government* as to service-connected injuries," *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977) (emphasis added), it says nothing about excluding tort claims against negligent contractors.

Nor did Congress indicate in the Contract Dispute Act, 41 U.S.C. §7102, that the CDA displaces tort claims against federal contractors. Government contractors routinely get sued for negligence. *See* Hencely.Br.23. If Fluor were right, no tort suits against *any* government contractors could proceed. But they do. *See id*. Fluor also suggests that the availability of uniquely-federal-interests preemption should not turn on "whether the federal contractor breached their government contract" because courts cannot decide that question outside the CDA process.

Fluor.Br.43-44. That's false. Courts *do* ascertain the government's instructions, contract terms, and violations thereof while analyzing defenses under *Yearsley* and *Boyle*. *See, e.g.*, *Campbell-Ewald*, 577 U.S. at 168; *In re U.S. OPM Data Sec. Breach Litig.*, 928 F.3d 42, 69-70 (D.C. Cir. 2019); *Asbestos Litig.*, 897 F.2d at 630.

On the merits, Fluor mischaracterizes Hencely's tort claims as a breach-of-contract claim in disguise. Fluor.Br.42-44. For Hencely's tort claims, what matters is Fluor's breach of its duties of reasonable supervision, retention, entrustment, and control. Hencely.Br.53. The Army investigation report and the Army Contracting Command concluded that Fluor's "lack of reasonable supervision of its personnel" was "the primary contributing factor" to the attack, Pet.App.158, and that Fluor "indisputabl[y] … did not comply with the key contractual requirements" and "violated policy" by having no "measures in place to keep [Afghans] from leaving the work area without escorts." Pet.App.186. That constitutes powerful evidence that Fluor breached its tort duties of care. But none of this requires that Hencely first prevail on a breach-of-contract claim. *Contra* Fluor.Br.43-44; U.S.Br.26-27.[4]

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[4] Fluor mischaracterizes Hencely's claims as "seek[ing] to impose liability only for conduct that … violates federal law." FluorBr.39 (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001)). *Buckman* involved a tort theory based *solely* on fraudulent representation to a federal agency. 531 U.S. at 347. Hencely's claims are based on "traditional state tort law principles of … duty of care." *Id.* at 352.

b. The government points to additional allegedly significant conflicts with uniquely federal interests that it suggests necessitate displacing Hencely's claims. Each suggestion errs.

First, the government points to alleged burdens of discovery. U.S.Br.18, 21-22. But the government has no uniquely federal interest in avoiding ordinary third-party discovery. *Cf.* 5 U.S.C. §301. And "where discovery would hamper the military's mission, district courts can and must delay it." *Al Shimari v. CACI Int'l*, 679 F.3d 205, 219 (4th Cir. 2012) (en banc) (citation modified). Federal Rule of Civil Procedure 45 allows courts to limit any undue discovery burdens on the military and its personnel, further obviating any need for displacing state law.

Second, the government argues that allegations by servicemembers against contractors—"whether true or not—would inspire distrust." U.S.Br.18. This gets things backwards. A broad preemption rule that removes incentives for contractors to exercise care and forecloses any redress for the servicemembers injured or killed by contractor negligence, even when the military finds that the contractor was negligent and violated its instructions, *undermines* servicemembers' trust.

The government also asserts that servicemembers' suits against the contractor could place "contractors and the federal government … in an adversarial position in court" during "active hostilities." U.S.Br.27. But the government already often finds itself adverse to contractors when it brings False

Claims Act cases, or brings criminal prosecutions, or initiates other contract-dispute proceedings. More to the point, a servicemember's suit directly pits him against the contractor, and the government's involvement would be indirect at best.

Third, the government speculates that allowing Hencely's suit to proceed would "creat[e] more incentive" for servicemembers "to instigate suits against current or former contractors." U.S.Br.18. This also gets things backwards. Barring Hencely's suit because *other* servicemembers injured by contractors could also seek redress would undermine morale and trust. *See supra* 24. If some good policy reason supports precluding servicemembers, including Hencely, from suing contractors who injure them, "the people's elected representatives" should say so. *Johnson v. United States*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting). The government also speculates that there might be strategic suits by foreign nationals and sovereigns. U.S.Br.18. It's not even clear how such suits would find "a nexus to a State," *contra id.*, be supported by standing, survive Rule 12 (and Rule 11), or overcome other doctrines that, where they apply, shield contractors from liability. In any event, "speculations do not suffice to satisfy the conflict prong of *Boyle*." *Empire Healthchoice Assurance v. McVeigh*, 396 F.3d 136, 141 (2d Cir. 2005) (Sotomayor, J.).

3. Even if a significant conflict exists, Fluor proposes an overbroad test.

If displacement of state law is necessary, the Court should adopt the tailored test that Hencely proposes. *See* Hencely.Br.54-55.

Fluor's new scope-of-contract test is overbroad. A test that "includes contractors' contractual violations" would effectively immunize conduct "necessarily made independently of the military's battlefield conduct and decisions," *Harris*, 724 F.3d at 481, and "even actions that the military did not authorize," *In re KBR Burn Pit Litig.*, 744 F.3d 326, 350 (4th Cir. 2014). Fluor concedes that any "rule of decision" must "consider the connection between the challenged actions of the contractor and the military's control and direction." Fluor.Br.22. Fluor's test renders that connection irrelevant by shielding contractors who act outside of—or contrary to—the military's direction.

Hencely's test is properly tailored: State claims against contractors are not preempted unless "the military specifically authorized or directed the action giving rise to the claim." *Badilla*, 8 F.4th at 128. This formulation safeguards the military's battlefield decisions by barring claims when the contractor's actions "can reasonably be considered the military's *own* conduct or decision." *Id.* At the same time, it holds contractors responsible for their "own negligence." *Brady*, 317 U.S. at 580. Fluor fails to show that state law should be preempted beyond what Hencely proposes. Fluor also has no evidence that the military specifically authorized or directed it to disregard its supervisory and existing duties—which enabled Nayeb to build a bomb on company time with company tools and carry out his devasting attack. *Supra* 19; Hencely.Br.50-51.

For these reasons, uniquely-federal-interests preemption does not preempt Hencely's claims.

CONCLUSION

The Court should reverse the judgment below and remand for further proceedings.

October 15, 2025 Respectfully submitted,

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