

IN THE SUPREME COURT OF THE UNITED STATES

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 24-924, Hencely versus
5 Fluor Corporation.

6 Mr. Chang.

7 ORAL ARGUMENT OF FRANK H. CHANG

8 ON BEHALF OF THE PETITIONER

9 MR. CHANG: Mr. Chief Justice, and may
10 it please the Court:

11 After the Army found that Fluor's
12 disregard of key contractual requirements led
13 to the bombing at Bagram, Specialist Hencely
14 tried to seek some measure of justice, but the
15 Fourth Circuit blocked his efforts on a
16 rationale that Fluor doesn't defend. Fluor's
17 alternative theories do not justify preemption
18 here either.

19 First, Fluor argues that the
20 Constitution's structure, either by itself or
21 through its emanations of federal interests,
22 preempts Hencely's claims. That argument has
23 no basis in the Constitution's text, structure,
24 and history. Our Constitution presumes that
25 state tort claims are available and leaves it

1 to Congress to alter that default rule.
2 Congress has done so in some circumstances when
3 it comes to federal contractors, but it has not
4 barred claims by American soldiers injured by
5 contractor negligence.

6 Second, Fluor seeks to radically
7 expand Boyle. Boyle is a basis for reversing
8 and not affirming the judgment. Boyle
9 recognized a limited defense for contractors
10 who do what the government says. Boyle doesn't
11 apply here because the Army itself found that
12 Fluor violated the Army's instructions.

13 Fluor's contrary reading of Boyle
14 contradicts Boyle itself, and it cannot be
15 harmonized with the warning in Rodriguez that
16 judicial lawmaking should play a modest role or
17 the teaching in Garcia that preemption cannot
18 be based on uncodified interests.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Did Respondent make
21 the constitutional arguments below?

22 MR. CHANG: I believe it was included
23 in a small portion of their -- Appellee's brief
24 below, Your Honor.

25 JUSTICE THOMAS: Does it -- in -- in

1 your case, is there any portion of activity
2 that we're talking about that was done at the
3 direction of the military that's involved here?

4 MR. CHANG: We don't think so, Your
5 Honor, and the reason is supervision and
6 escorting were left entirely to Fluor under the
7 contract. Once the bomber was hired and -- and
8 was on the base, it was up to Fluor under its
9 contractual obligations to supervise him at his
10 worksite, as well as to escort him.

11 JUSTICE THOMAS: And would you spend
12 just a brief moment discussing why Boyle is not
13 dispositive or why it doesn't control here?

14 MR. CHANG: Sure. So Boyle is all
15 about a contractor who does what the government
16 says. That is the heart and soul of Boyle. It
17 starts at page 505 by saying the government's
18 interest is in getting its work done. And at
19 step 2, it says there was a significant
20 conflict between state tort duty and what the
21 government required that was precisely contrary
22 to what the government required. And at step
23 3, Boyle made it very clear that its defense is
24 for contractors who adhere to the government's
25 specifications.

1 JUSTICE KAVANAUGH: What do you do
2 with the entire text and history of the
3 Constitution, which says war-making,
4 war-fighting in combat zones is a federal
5 interest, and the states, Article I,
6 Section 10, and otherwise, have nothing to do
7 with how America conducts its operations in a
8 combat zone?

9 MR. CHANG: Certainly, Your Honor. So
10 Articles I and II do not automatically preempt
11 state law when it comes to federal contractors,
12 and we know that from cases like Penn Dairies
13 and North Dakota. In Penn Dairies, this Court
14 said there is no clause of the Constitution
15 which purports, unaided by congressional
16 enactment, to prohibit such regulations. And
17 such regulations there was regulations of -- of
18 military contractors.

19 And, of course, Justice Kavanaugh --

20 JUSTICE KAVANAUGH: Well, in -- in a
21 war zone, though, in a combat zone, we have
22 a -- a line of cases, Garamendi, Crosby, you
23 know all the cases -- put aside Boyle; Boyle
24 Footnote 4 talks about this but not Boyle, the
25 rest of it -- that says that there are certain

1 areas where there's a uniquely federal
2 interest, and in those areas, the usual
3 preemption rules don't apply, that we expect
4 Congress actually to speak clearly if they want
5 to provide for something like state tort suits.
6 And that's -- so that's flipped.

7 And you would think, if you're talking
8 about uniquely federal interests, there's
9 nothing that's more uniquely federal than
10 successfully fighting a war in a combat zone.

11 MR. CHANG: Certainly, Your Honor. We
12 agree that Texas can't declare war on Mexico or
13 New York can't invade Canada. We agree with --

14 JUSTICE KAVANAUGH: But can Texas
15 regulate how the military structures its
16 operations at Bagram, or can South Carolina
17 regulate it? And, you know, that raises
18 another question here which is pointed out by
19 Judge Silberman in his opinion on this, which
20 you're familiar with, which is can 50 different
21 jurisdictions regulate what's going on at
22 Bagram?

23 MR. CHANG: Certainly, I'll address in
24 turn. So, as to the constitutional structural
25 point, we know the default is common law claims

1 are available. And it goes all the way back to
2 cases like Little v. Barreme, where Chief
3 Justice Marshall, he upheld damages award
4 against a Navy captain who was following the
5 president's order. And also in cases like
6 Mitchell versus Harmony, there was a common law
7 claim against an Army colonel who seized an
8 American citizen's property during the
9 Mexican-American war in that case.

10 So we do know this is certainly an
11 area where Congress can certainly act and
12 Congress has done so --

13 JUSTICE KAVANAUGH: Well, I -- I agree
14 with that, so I don't want this to sound like I
15 disagree with that. Congress can certainly
16 act. The question is, what's the baseline?

17 MR. CHANG: So -- so the baseline --

18 JUSTICE KAVANAUGH: And the baseline I
19 thought under our case law going back, way
20 back, if it's a uniquely federal interest, we
21 have lots of cases saying something along those
22 lines, that we require Congress to act to allow
23 such suits. And -- and we've said in, you
24 know, Crosby, for example, a failure to provide
25 for preemption expressly may reflect nothing

1 more than the settled character of implied
2 preemption doctrine that courts will dependably
3 apply.

4 And so Congress looking at this area,
5 the idea that state tort law is going to
6 regulate what goes on at Bagram, I think
7 Congress would be, like, hmm, sounds way out
8 there and not something that they need to get
9 involved in because of the doctrine, as -- as
10 Crosby says, that is dependably applied.

11 MR. CHANG: Sure. So two responses,
12 Your Honor. The first is the fact that
13 military contractors might face some liability
14 for acts occurring at overseas U.S. bases was
15 not lost on Congress. So Congress in 1941
16 passed a law called Defense Base Act, and what
17 Congress did there was to exclude -- or
18 preclude liability for government contractors
19 occurring on U.S. bases as to their civilian
20 employees that are -- that are under their
21 supervision.

22 So what that says is the fact that,
23 you know -- Congress, of course, operating
24 against a background law like Little and
25 Mitchell, knew that common law had a reach,

1 even -- even on foreign soil, and Congress
2 certainly could have acted to take that back as
3 to when it comes to a American soldier who is
4 injured by contractors.

5 JUSTICE SOTOMAYOR: Counsel, isn't the
6 simple answer to Judge Kavanaugh is the 50
7 states can't tell the military what to do,
8 correct?

9 MR. CHANG: Certainly, absolutely
10 correct, Your Honor.

11 JUSTICE SOTOMAYOR: They don't have --
12 we've already said that in Boyle.

13 MR. CHANG: Correct. Correct.

14 JUSTICE SOTOMAYOR: And we've -- that
15 we made it clear, if the military orders them
16 to do something, they have to do it.

17 MR. CHANG: Correct.

18 JUSTICE SOTOMAYOR: And they're
19 immune, the --

20 JUSTICE KAVANAUGH: Military
21 contractors, though.

22 JUSTICE SOTOMAYOR: Well, the military
23 contractor. So what Justice Kavanaugh is
24 talking about is almost a field preemption
25 concept --

1 JUSTICE KAVANAUGH: Yeah.

2 JUSTICE SOTOMAYOR: -- that absent a
3 conflict, an entire field is preempted. And
4 what you're saying, I think, by using Little
5 and Mitchell, is that an entire field in our
6 history has not been considered preempted,
7 correct?

8 MR. CHANG: That -- that is correct,
9 Your Honor.

10 JUSTICE SOTOMAYOR: All right. So now
11 let's go down to something more, I think. The
12 interest that's being protected is military
13 interests, correct?

14 MR. CHANG: Yes.

15 JUSTICE SOTOMAYOR: All right. It's
16 the federal government's military interests.

17 MR. CHANG: Correct.

18 JUSTICE SOTOMAYOR: You only get
19 liability if the state law conflicts with
20 military orders in some way.

21 MR. CHANG: Correct.

22 JUSTICE SOTOMAYOR: And so, if there's
23 no conflict, there's no interest to protect,
24 correct?

25 MR. CHANG: There's nothing here

1 because Fluor violated what the military wanted
2 it to do.

3 JUSTICE SOTOMAYOR: That's the
4 question that Justice Thomas asked you, which
5 is there has been no directive by the state
6 that the contractor had to do X, Y, and Z. It
7 was a -- it was a directive of the military,
8 correct?

9 MR. CHANG: Correct, Your Honor. I
10 mean, so we -- we think that the state -- state
11 law duty also applies here, the duty of
12 reasonable supervision.

13 JUSTICE SOTOMAYOR: It does because
14 the government didn't direct unreasonable
15 conduct.

16 MR. CHANG: Correct.

17 JUSTICE SOTOMAYOR: If the government
18 directed unreasonable conduct, there would be
19 no liability, correct?

20 MR. CHANG: Correct. The government
21 did not direct Fluor to disregard supervision
22 duties.

23 JUSTICE SOTOMAYOR: We'd be
24 creating --

25 JUSTICE BARRETT: Mr. Chang --

1 JUSTICE SOTOMAYOR: I'm sorry.

2 JUSTICE BARRETT: Sorry.

3 JUSTICE SOTOMAYOR: We'd be creating a
4 new area of preemption law if we say that there
5 is field preemption --

6 MR. CHANG: Especially through federal
7 interests.

8 JUSTICE SOTOMAYOR: -- when there is
9 no conflict whatsoever.

10 JUSTICE KAVANAUGH: Well --

11 JUSTICE BARRETT: And --

12 JUSTICE KAVANAUGH: -- Footnote 11 of
13 Garamendi says: If a state were simply to take
14 a position on a matter of foreign policy with
15 no serious claim to be addressing a traditional
16 state responsibility, field preemption might be
17 the appropriate doctrine.

18 I mean, there's been a lot of
19 discussion in the case law about how you
20 distinguish field and conflict, but, you know,
21 field preemption in an area of uniquely federal
22 interest, you know, you can call it conflict,
23 you can call it field, but the word "field" has
24 been in our case law at times on this kind of
25 thing.

1 I'll stop there, but --

2 JUSTICE BARRETT: Well --

3 JUSTICE KAVANAUGH: -- I just wanted
4 to get that comment out.

5 JUSTICE BARRETT: -- and -- and -- and
6 I guess I want to ask following up about the
7 field. It seems to me you don't necessarily
8 lose even under the enclave theory because I
9 understand the field -- the field preemption
10 argument to be kind of a Clearfield
11 Trust/Kimbell Foods, this is an enclave of
12 uniquely federal interests.

13 But, even if that's so, all that
14 means -- and Boyle kind of finesses this
15 question -- but all that means is that the
16 federal court would adopt a common law rule.
17 It doesn't necessarily mean that the state rule
18 would be -- that there -- there would be no
19 liability, I guess, is what I'm saying.

20 So, if -- if that were the case, we
21 would still have to decide what the rule would
22 be, and we could decide to let state law apply
23 as a matter of federal common law, right? And
24 if we look at the Federal Tort Claims Act and
25 you see that the combat activities exception

1 doesn't extend to independent contractors, you
2 might say, well, it makes sense to allow
3 liability to remain even if we're doing it as a
4 matter of federal common law, right?

5 MR. CHANG: That -- that -- that is
6 certainly correct, Your Honor. So there is a
7 line of cases that say, as a federal -- as a
8 matter of federal common law rule, we're going
9 to adopt a state law rule here.

10 But I think the simplest way here is
11 to just -- just read Boyle as it is, and it's
12 about a contractor who does what the government
13 says.

14 JUSTICE BARRETT: No, no, I -- I
15 understand that. I guess what I'm saying is I
16 think you could win even if this federal --
17 even if we're looking at it as a matter of,
18 listen, the Constitution carves out war powers
19 and that sort of thing as an enclave of
20 uniquely federal interests, which it does,
21 right? If you took that line of analysis, I
22 don't think you necessarily lose even under
23 that line of analysis, was my point.

24 MR. CHANG: We -- we wouldn't, Your
25 Honor.

1 JUSTICE BARRETT: Do you understand --

2 JUSTICE ALITO: Mr. Chang --

3 JUSTICE BARRETT: -- Boyle then --

4 JUSTICE JACKSON: If -- if you took --

5 JUSTICE BARRETT: Sorry. Can I -- can
6 I just finish?

7 JUSTICE ALITO: Yeah, sure.

8 JUSTICE BARRETT: Do you understand
9 Boyle then to create a very narrow kind of
10 preemption that's not constitutional, that
11 really is just about the conflict of conflict
12 terms -- sorry, contract terms?

13 MR. CHANG: Yes, that's how we
14 understand it. And that -- and that's what the
15 opinion in Boyle said as well because Boyle
16 carves out two hypotheticals where you're
17 dealing with a government contractor.

18 JUSTICE BARRETT: Like the air
19 conditioner, yeah. Yeah.

20 MR. CHANG: Correct. And a stock
21 helicopter example as well. So that clearly
22 shows that contractors -- or Justice Scalia
23 envisioned a system where contractors are still
24 subject to state law liability.

25 JUSTICE BARRETT: Thank you.

1 JUSTICE ALITO: Well, Mr. Chang,
2 you're backtracking a lot from the position
3 that I took when I read -- that -- that I took
4 from your brief.

5 Basically, the -- the thrust of your
6 brief is Boyle is inconsistent with textualism.
7 The whole idea of uniquely federal interest
8 preemption is wrong. "Boyle's" -- this, I'm
9 quoting you: "Boyle's uniquely federal
10 interest preemption is difficult to reconcile
11 with the Supremacy Clause and this Court's
12 preemption cases. Brooding federal interests
13 and judicial policy inquiries cannot support
14 preemption, yet Boyle invites precisely those
15 types of" -- "of those inquiries."

16 So you can't quite bring yourself to
17 say Boyle's inconsistent with textualism and it
18 should be overruled. But what I got from your
19 brief was you want us to, you know, limit it as
20 much as possible.

21 Did I read too much into your brief?

22 MR. CHANG: No. So our position is
23 that this Court does not have to overrule Boyle
24 because we win even under Boyle's terms. And,
25 certainly, the only reason that this --

1 JUSTICE ALITO: Well, was Boyle
2 correctly decided? Suppose it was before us
3 today. What would you say?

4 MR. CHANG: I would follow what you
5 wrote in Garcia, Your Honor, that the Supremacy
6 Clause is limited to the Constitution and
7 federal statutes and treaties.

8 JUSTICE ALITO: Well, I don't think
9 that's quite what I wrote, but --

10 (Laughter.)

11 JUSTICE KAVANAUGH: Even if you
12 didn't -- even if you --

13 JUSTICE ALITO: -- that's something
14 else. I mean, what I took from your brief is
15 you're saying Boyle's inconsistent with
16 textualism.

17 Who wrote Boyle?

18 MR. CHANG: Justice Scalia wrote it.

19 JUSTICE ALITO: I mean, so you're
20 saying the founding father of textualism
21 doesn't understand textualism.

22 MR. CHANG: No, that's not what I'm
23 saying at all, Your Honor.

24 JUSTICE ALITO: Well, that's what I --
25 that's what I took.

1 (Laughter.)

2 JUSTICE ALITO: Well, do you -- are
3 you willing to -- are there situations in which
4 the -- the Supremacy Clause itself has a
5 preemptive effect?

6 MR. CHANG: This Court has understood
7 it so, and in -- as this Court said in United
8 States versus Washington, there are
9 circumstances where the state law directly
10 regulates the federal government or it
11 discriminates against the federal government or
12 its contractors.

13 JUSTICE ALITO: So why wouldn't that
14 apply when what is at issue are actions taken
15 by a military contractor basically on the
16 battlefield, and you want state courts and
17 state juries to decide whether what the
18 military contractor did is justified?

19 MR. CHANG: No, Your Honor. First,
20 we're dealing with something that occurred on a
21 civilian part of the base --

22 JUSTICE ALITO: Oh. Well --

23 MR. CHANG: -- involving a --

24 JUSTICE ALITO: -- it's -- it's a --

25 JUSTICE KAVANAUGH: It's Bagram.

1 JUSTICE ALITO: -- it's a
2 beleaguered --

3 JUSTICE KAVANAUGH: Come on.

4 JUSTICE ALITO: -- it -- it -- yeah,
5 it's a military base in a war zone. And the
6 very fact that there was this terrorist attack
7 there shows a connection with the conduct of
8 the war, doesn't it?

9 MR. CHANG: So we're dealing with
10 something that the Army left entirely to Fluor
11 to do. And this is a natural consequence of
12 the fact that Congress knew about contractor
13 liability but has not limited -- limited
14 servicemembers to be able to sue contractors
15 when they're injured.

16 JUSTICE ALITO: I mean, suppose a
17 contractor said -- a contract says that the
18 contractor is to provide appropriate suit --
19 appropriate protection when it is accompanying
20 a convoy through a dangerous area, all right?
21 Would a claim -- and let's say that a member of
22 the military is injured. Could that member of
23 the military sue the contractor on the theory
24 that the contractor was negligent?

25 MR. CHANG: It depends on what the

1 Army's understanding was. And Boyle
2 contemplates this too, Your Honor.

3 So Boyle says you look first at
4 whether there was a reasonably precise
5 specification and what -- and the step 2 is
6 whether or not the contractor adhered to that
7 standard.

8 JUSTICE ALITO: I mean, what if it's
9 just provide appropriate protection?

10 MR. CHANG: I think -- I think Boyle
11 contemplates litigation over that issue.

12 JUSTICE ALITO: Seriously?

13 JUSTICE KAVANAUGH: But, on --

14 JUSTICE KAGAN: You know, just -- I
15 was thinking of a similar question to Justice
16 Alito, that you could have the rule that you're
17 suggesting here, and it's -- it's the rule that
18 I do think follows from Boyle, which is that
19 the contract is -- the contractor is liable as
20 long as the military didn't specifically
21 approve or direct the conduct.

22 But you could have a more deferential
23 rule which still allows some forms of state
24 liability to come in, which is that the
25 contractor was liable if but only if the

1 plaintiff can show that the contractor violated
2 military policy.

3 In other words, so in the set of
4 circumstances of the kind that Justice Alito
5 was giving where the government doesn't really
6 say one way or the other, maybe doesn't say
7 anything at all, or maybe leaves it to the
8 contractor to decide, there, liability would
9 not be all right. Instead, liability could
10 come into effect only if you could show that
11 the contractor violated military policy.

12 What would you think of a rule like
13 that?

14 MR. CHANG: I -- we -- we would
15 certainly be okay with that rule. Certainly,
16 if the Court is already thinking about creating
17 some sort of a federal common law rule in this
18 area, we think it should be the one that
19 furthers the government's interests by avoiding
20 contractor negligence and -- and incentivizes
21 contractor adherence in a -- in a war zone.

22 And this is -- this ended up injuring
23 multiple U.S. soldiers on the base because
24 Fluor didn't do what the Army told it to do.
25 So, if we're thinking about what kind of rule

1 applies, the rule has to be one that saves
2 soldiers.

3 JUSTICE BARRETT: Mr. Chang, as a
4 matter of conflict of laws, why does South
5 Carolina law even apply? And I understand we
6 don't have to decide that question to decide
7 this case, but it does seem perplexing.

8 MR. CHANG: Certainly. So part of it
9 is it's largely a choice of Fluor's. Fluor was
10 the one who put a principal place of business
11 in South Carolina.

12 It should be not surprising at all
13 sometimes, when you apply choice of law
14 principles, that the forum state's law might
15 apply to you. And, here, Fluor hasn't disputed
16 our assertion that South Carolina law controls.

17 JUSTICE KAVANAUGH: Is -- is it
18 possible that Afghan law can apply based on
19 choice-of-law principles?

20 MR. CHANG: You know, it's -- it's
21 certainly possible, Your Honor.

22 JUSTICE KAVANAUGH: So it's possible
23 that a suit against a military contractor at
24 a -- in a war zone could be based on the
25 enemy's law?

1 JUSTICE BARRETT: Which seems bizarre.
2 If this happened on an American base, I
3 wouldn't understand the base to be Afghan soil.
4 I would understand it to be U.S. soil. So, if
5 that -- seriously?

6 MR. CHANG: Certainly, I mean, there
7 are some courts that have -- lower courts that
8 have applied Afghan law in situations like
9 this. However, there are certainly other
10 things that factor in as well, like, you know,
11 whether there's an agreement with the --
12 between the U.S. and the --

13 JUSTICE BARRETT: Doesn't that seem
14 like a pretty big problem for your theory if
15 that's the state law if -- or if the default is
16 whatever law would otherwise apply, as Justice
17 Kavanaugh is saying, the enemy's law is going
18 to apply to the -- I mean, that suggests that
19 maybe a federal common law should apply, maybe
20 not the common law rule that Fluor and the
21 government want, but if the alternative is a
22 default to Afghan law?

23 MR. CHANG: So -- so two responses to
24 that, Your Honor. The first is that -- so,
25 when it comes to applying foreign law to judge

1 the acts of a military contractor, again,
2 that's an ordinary working of the fact that
3 Congress has not displaced state law, which
4 includes the operation of choice-of-law
5 principles under that state law.

6 And the second is that, you know, this
7 is obviously not at issue in this case because
8 we're solely talking about preemption here and
9 Fluor hasn't raised any choice-of-law issues,
10 but there might be other doctrines that
11 preclude application of foreign law in
12 situations like this.

13 JUSTICE KAVANAUGH: Can I circle back
14 to something Justice Alito asked? He asked you
15 what the scope of -- if you thought there was
16 constitutional preemption as a principle, and
17 you said yes, I believe, but correct me if I'm
18 wrong.

19 And I wanted to know, is uniquely
20 federal interest a branch of constitutional
21 preemption in your view?

22 MR. CHANG: We believe it's -- it's a
23 branch of federal common law preemption, Your
24 Honor, so --

25 JUSTICE KAVANAUGH: What's the

1 difference then between what you're calling
2 constitutional preemption and federal common
3 law preemption as to the concept of uniquely
4 federal interests, or is there any difference
5 at all?

6 MR. CHANG: So -- so what I was
7 talking to Justice Alito about was cases like
8 U.S. v. Washington and Penn Dairies and North
9 Dakota --

10 JUSTICE KAVANAUGH: Can you just
11 answer my question? Is there any difference?

12 MR. CHANG: There is a difference,
13 Your Honor.

14 JUSTICE KAVANAUGH: What is the
15 difference?

16 MR. CHANG: The difference -- the
17 difference is one -- one comes from the
18 structure of the Constitution and -- and this
19 Court's decisions.

20 JUSTICE KAVANAUGH: Difference in
21 application. Is there any difference in
22 application? I'm sorry.

23 MR. CHANG: I mean, yes, Your Honor,
24 because one is saying that states cannot act in
25 a discriminatory manner against -- against a

1 contractor, and the other is that you're
2 displacing the operation of the entire state
3 law from -- from that area.

4 So -- so, when it comes --

5 JUSTICE KAVANAUGH: Unless Congress
6 specifies otherwise. Always important to put
7 that on there. Congress could provide for
8 state tort law in this area. That's -- that's
9 my point, which is this whole -- whole case in
10 my view starts with what's your baseline, state
11 tort law regulating military contractors in a
12 war zone. Is your baseline that Congress has
13 to speak to displace that or that Congress has
14 to speak to provide for that? And I would
15 think our uniquely federal interest branch of
16 preemption law makes, I thought, fairly clear
17 that Congress would have to speak to provide
18 for that.

19 And, look, what happened here is
20 terrible, so I'm completely sympathetic to
21 that. But, in terms of the legal framework
22 that applies for situations like this, my
23 thought based on the precedent was Congress has
24 to speak to provide for it.

25 MR. CHANG: We don't think so, Your

1 Honor. Given cases like Little and Mitchell,
2 we think the default is that common law rule is
3 in place unless Congress affirmatively
4 displaces the operation of the state law.

5 JUSTICE JACKSON: And is it your view
6 that Boyle comes out differently under Justice
7 Kavanaugh's theory? I mean, I guess I'm trying
8 to understand that if we sweep as broadly as
9 this is a war zone and there's a uniquely
10 federal interest, I -- I thought that was also
11 the case, not maybe the war zone part but the
12 uniquely federal interest part, in Boyle.

13 So doesn't it come out differently?

14 MR. CHANG: Your Honor, there is
15 certainly a tension --

16 JUSTICE JACKSON: Or at least
17 doesn't -- we don't need all the analysis that
18 Boyle has to get to preemption, I guess --

19 MR. CHANG: I -- the --

20 JUSTICE JACKSON: -- if -- if -- if we
21 could just say at step 1 uniquely federal
22 interest and that's the end of it, right?

23 MR. CHANG: That is not even the
24 analysis in Boyle. Boyle -- uniquely federal
25 interests was a starting point in Boyle.

1 JUSTICE JACKSON: Correct. So there
2 was more to it, and there was a reason because
3 the understanding was that there still might be
4 an opportunity or a circumstance in which you
5 would have liability even though we're talking
6 about a federal government contractor dealing
7 with the procurement of military equipment in a
8 way that is obviously implicating federal
9 interests.

10 MR. CHANG: That -- that's certainly
11 right, Your Honor.

12 JUSTICE JACKSON: So can you just --

13 JUSTICE ALITO: Would --

14 JUSTICE JACKSON: -- say a little
15 about the Badilla test? As I read your brief,
16 in the last few pages, you seemed to say that
17 if the Court applies the kind of Boyle analysis
18 here, it's the Badilla test that you would
19 suggest. Why -- why is that?

20 MR. CHANG: So -- so we think that the
21 Badilla test is more faithful to -- to what
22 this Court's teaching in Boyle. Again, Boyle
23 zeroed in on the federal government's interest
24 in getting its work done and making sure that
25 there wasn't a conflict between that decision

1 and -- and the state law duty.

2 So Badilla looks close to that and --
3 if we get to that because Badilla actually
4 looks at what the military has authorized and
5 directed, so it is a test that closely tracks
6 the military's decision and Boyle.

7 JUSTICE ALITO: If the --

8 JUSTICE GORSUCH: Please.

9 JUSTICE ALITO: If preemption depends
10 on the interpretation of a contract and whether
11 the contractor violated the terms of the
12 contract, do you want us to adopt something
13 like the -- the rule that used to apply in
14 foreign sovereign immunities cases so that if
15 the government says there was no violation of
16 the contract, that's the end of the matter?
17 Would you say no, the plaintiff still has the
18 opportunity to litigate that issue in state
19 court, presumably, possibly in front of a jury?

20 MR. CHANG: We don't have a strong
21 position on that, Your Honor. Certainly, if
22 the Court says what the military says is
23 preclusive, that's good for us because the
24 military favored us in this case.

25 JUSTICE ALITO: No -- well, not that

1 it would be preclusive against Fluor. Would it
2 be preclusive against you on the issue of
3 preemption?

4 MR. CHANG: Like I said, we don't have
5 a position one way or another on that.

6 JUSTICE ALITO: How can you not have a
7 position on that? That seems to me quite
8 critical to what's at stake here.

9 MR. CHANG: Certain -- certainly,
10 Boyle at step 1 leaves that possibility open in
11 this area. It anticipates litigation over what
12 the specification meant and whether there was a
13 compliance with that specification.

14 It would be a really hard case for any
15 plaintiff to disagree with an army coming in.
16 And even if a judge disagrees with that, that
17 would give the contractor a great reason on
18 appeal. And that is not a reason to displace
19 state law.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 JUSTICE ALITO: I don't know what --

23 CHIEF JUSTICE ROBERTS: I'm sorry.

24 Justice Thomas, anything further?

25 JUSTICE THOMAS: As I understand your

1 argument, you're not saying that the government
2 is precluded from preempting the lawsuit, your
3 lawsuit?

4 MR. CHANG: Correct, Your Honor.

5 JUSTICE THOMAS: Would you walk me
6 through the argument for the Federal Tort Claim
7 Act -- a Federal Tort Claim Act exception
8 operating as a preemption statute?

9 MR. CHANG: So, obviously, we don't
10 believe that it does, Your Honor. And that
11 argument has sort of fallen to the wayside
12 during -- during the merits briefing here
13 because Fluor is now relying on a completely
14 different source of federal interest in this
15 case.

16 As I understood it, it was that as the
17 Fourth Circuit said, the combatant activity --
18 activities exception has a policy of -- of
19 protecting the military's judgment, and that
20 meant that even the imposition per se of state
21 law was -- was a problematic imposition.

22 CHIEF JUSTICE ROBERTS: Justice Alito?
23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: No.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: Just if states
4 wanted to do this not by tort law but wanted to
5 do it by regulatory law, they could do that, I
6 assume, as well, correct?

7 MR. CHANG: But -- but -- but it
8 would -- it would be limited. Its ability to
9 be -- its ability to do that would be severely
10 limited, Justice Kavanaugh.

11 JUSTICE KAVANAUGH: Tell me what the
12 limits are.

13 MR. CHANG: The limits are the
14 non-discrimination principle that we discussed,
15 and also, we certainly do not argue that there
16 is --

17 JUSTICE KAVANAUGH: The general state
18 regulation of workplace safety, that would be
19 non-discriminatory, right?

20 MR. CHANG: That would be
21 non-discriminatory, but, again, that might
22 conflict with the provision of --

23 JUSTICE KAVANAUGH: Or of employee
24 rights, that would be non-discriminatory,
25 right?

1 MR. CHANG: It's not clear if that
2 would include a soldier overseas. And also --

3 JUSTICE KAVANAUGH: It's a contractor.

4 MR. CHANG: To a contractor?

5 JUSTICE KAVANAUGH: A military
6 contractor overseas. A state wants to apply
7 its employee rules, its workplace safety rules
8 on a non-discriminatory basis. Yes or no?

9 MR. CHANG: No, because the DBA
10 already precludes things like that.

11 JUSTICE KAVANAUGH: What kinds of
12 regulatory -- but you said some could be
13 applied, right?

14 MR. CHANG: If -- if it was, like, a
15 safety regulation, like here, that could
16 certainly be it.

17 JUSTICE KAVANAUGH: What do you say to
18 the retired military brief that says that this
19 is going to -- your rule would lead to
20 finger-pointing, which I think this suit would
21 lead to finger-pointing by the defendant
22 against the military, and -- and back-and-forth
23 on that? You know, how does someone who used
24 to be in the Taliban end up running a 5K or
25 whatever it was at the starting line? That --

1 that's going to be a lot of finger-pointing on
2 that.

3 And the retired military officers say,
4 in military theaters, legal uncertainty and
5 finger-pointing are an invitation to ruin. And
6 I'm just curious your response to that.

7 MR. CHANG: So this is a situation
8 where the military already found that it was
9 not responsible. It was Fluor's
10 responsibility.

11 JUSTICE KAVANAUGH: Well, the military
12 found that, right?

13 MR. CHANG: Oh, certainly. I mean,
14 so --

15 JUSTICE KAVANAUGH: Yeah.

16 MR. CHANG: -- there -- there might be
17 finger-pointing, but --

18 JUSTICE KAVANAUGH: Certainly, Fluor
19 is not going to agree with that, right?

20 MR. CHANG: At -- at the end of the
21 day, if just the possibility of things that
22 might unfold during discovery or evidentiary
23 issues --

24 JUSTICE KAVANAUGH: Well, do you
25 imagine in state court, like, generals,

1 military officers, coming in for -- for
2 testimony about what our rules were for the --
3 the people who worked in the vehicle yard, what
4 our rules were for who could run in a 5K,
5 what -- why we had former Taliban working on a
6 U.S. base at Bagram? You know, that would be
7 an interesting discussion, I'm sure.

8 Do you envision that kind of testimony
9 happening in the state court?

10 MR. CHANG: No, not at all because,
11 here, the Fourth Circuit already agreed with us
12 that the litigation here would not lead to
13 assigning fault to the military.

14 We can -- we can assume the military
15 made decisions that it made and we can judge
16 Fluor's actions under -- under those military
17 decisions as a given. We can take that as a
18 given.

19 JUSTICE KAVANAUGH: Have any federal
20 courts gone your way on this -- on this general
21 issue so far?

22 MR. CHANG: So the Badilla -- Badilla
23 court has agreed with us, and that's why there
24 was a circuit split in this case.

25 JUSTICE KAVANAUGH: Okay. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: Just to follow up
4 quickly on Justice Kavanaugh's question about
5 the finger-pointing and the kinds of questions
6 that the United States would be asked, it's my
7 understanding in the United States' brief that
8 it said that it could assert the state secrets
9 privilege and reserve the right to do so,
10 although it had not yet in this case, right?

11 MR. CHANG: That's correct.

12 JUSTICE BARRETT: So, if there was
13 confidential information, there would be, you
14 would agree, some sort of protection?

15 MR. CHANG: A hundred percent. And --
16 and the reason why -- and the fact that there
17 are other mechanisms to protect the
18 government's interests like that undercuts the
19 need to displace state law with federal common
20 law in this case.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: And is it your view
24 that really the rule that you want us to adopt
25 or the one that you're focused on is applicable

1 in the situation in which the contractor acts
2 contrary to the military's interests because
3 it's doing something negligently, that it is
4 not -- it has not been authorized by the
5 military to behave in this way, the particular
6 way that is being claimed as causing the injury
7 in this case?

8 MR. CHANG: That -- that's correct. I
9 mean, if we're creating a federal rule to
10 further the government's interests, the
11 violations have to be factored in too.

12 JUSTICE JACKSON: How do we think
13 about the fact that, apparently, DoD in its
14 regulations left open the opportunity or said
15 to contractors that you could be held liable?
16 So it's the government's understanding that
17 there's some operation of common law
18 potentially against contractors in this
19 universe, right?

20 MR. CHANG: That's huge, Your Honor.
21 I mean, the fact that DoD has been telling
22 contractors that they could be liable and that
23 the public policy -- policy rationale of Boyle
24 will not protect you if the government's
25 decisions are not at issue, that's huge.

1 And we also have the fact that
2 Congress has not acted to displace state law
3 here.

4 JUSTICE JACKSON: And the -- with
5 respect to the FTCA and the combat -- combatant
6 activities, in your exchange with Justice
7 Thomas, I guess I'm also curious about the
8 point that I think Justice Barrett made
9 earlier, which is that the combatant activities
10 exception doesn't apply to contractors,
11 correct?

12 MR. CHANG: Not at all.

13 JUSTICE JACKSON: So Congress did not
14 envision a world necessarily in which
15 contractors would not be held liable for these
16 kinds of things?

17 MR. CHANG: Not at all. And that
18 Congress doubled down in the Westfall Act when
19 it passed Westfall Act to protect federal
20 officials from lawsuits. It adopted the
21 definition of the FTCA, which is the same
22 excluding contractors.

23 JUSTICE JACKSON: And, finally, let's
24 say, if we -- if we think Badilla is the
25 correct test, should we vacate and remand for

1 further proceedings under that test? That was
2 not what was applied here, correct?

3 MR. CHANG: No. But you should not --
4 there's no need to, Your Honor, because we made
5 arguments about why our position is correct
6 under the Badilla test. It has not been
7 disputed that they could -- Fluor could somehow
8 meet that test here. And that is not the case
9 because they violated whatever the military
10 authorized and directed in this case.

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Mosier.

15 ORAL ARGUMENT OF MARK W. MOSIER

16 ON BEHALF OF THE RESPONDENTS

17 MR. MOSIER: Mr. Chief Justice, and
18 may it please the Court:

19 This case arises out of an enemy
20 attack on U.S. military forces on a foreign
21 battlefield in time of war. Petitioner sued
22 Fluor under South Carolina tort law for failing
23 to prevent that act of war.

24 Those state law claims are preempted
25 because they conflict with uniquely federal

1 interests. Petitioner's claims interfere with
2 the federal government's exclusive war-making
3 powers.

4 The Constitution vests all war powers
5 in the federal government and expressly
6 withdraws from the states the power to engage
7 in war. Applying tort law on a foreign
8 battlefield would hinder the federal
9 government's exercise of those powers.

10 The purpose of tort law is to
11 discourage risk-taking, but waging war often
12 requires contractors to take risks, putting
13 their lives and the lives of others in danger.

14 Petitioner's claims also weaken the
15 military's control over combat operations.
16 Contractors are part of the total force, and
17 the military cannot successfully wage war
18 without them.

19 Success on the battlefield requires
20 trust and cooperation between soldiers and
21 contractors. Permitting soldiers to sue
22 contractors for combat-related injuries would
23 destroy that trust and discourage that
24 cooperation.

25 Petitioner's claims undermine the

1 military's authority to punish and deter
2 misconduct. Congress has given the military
3 the necessary tools to enforce its contracts
4 and to ensure compliance with its orders. The
5 military must decide how to address
6 non-compliance by balancing sensitive national
7 security and foreign policy interests.

8 Allowing state law to impose
9 additional sanctions on contractors would upset
10 the balance struck by the federal government.
11 The government has determined that Petitioner's
12 claims would inflict grave harms on its ability
13 to wage war. Rather than second-guessing the
14 military's judgment, the Court should affirm.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Are all contractors
17 immune from suit on military bases?

18 MR. MOSIER: No. We would agree with
19 the test that the -- that the government has
20 proposed here, and to establish preemption
21 here, you would have to show that the injuries
22 and the claims arose out of combatant
23 activities and that the contractor was acting
24 within the scope of its contracts.

25 JUSTICE THOMAS: What about, for

1 example, the food service contractor --

2 MR. MOSIER: On --

3 JUSTICE THOMAS: -- on -- on the same
4 base?

5 MR. MOSIER: Yes.

6 JUSTICE THOMAS: And assume there was
7 food poisoning.

8 MR. MOSIER: Yes. We would say that
9 would be preempted. In Bagram, the conditions
10 on the ground there, it was under constant
11 attack by the Taliban and rocket attacks on a
12 daily basis. We think there's very little that
13 was going on at Bagram, if anything, that was
14 not closely connected to combatant activities.

15 JUSTICE THOMAS: So are -- are
16 contractors under those circumstances subject
17 to military laws or, say, court-martial?

18 MR. MOSIER: Yes, absolutely. The --
19 first of all, the -- the -- the military can
20 terminate a contract. It can seek damages
21 under the contract. Contractors and their
22 employees are subject to criminal prosecutions
23 and court-martials, and Congress has over the
24 years changed the provisions and given
25 additional tools to the military to police its

1 contractors and ensure that they comply with
2 their contractual obligations.

3 JUSTICE KAGAN: Mr. Mosier, you
4 would -- your position extends to a case in
5 which the contractor does something that's in
6 explicit violation of government policy. So
7 just assume, which I know you contest, but just
8 assume for a moment that a provision in the
9 Fluor contract made it quite clear that Fluor
10 was not to operate in the way that Fluor, in
11 fact, did.

12 What is the uniquely federal interest
13 there?

14 MR. MOSIER: So the uniquely federal
15 interest, we would still define it as the
16 federal government's exclusive authority in
17 determining how to wage war.

18 Where we would see the conflict even
19 within this situation in which there has been a
20 file -- finding of breach is when state law is
21 trying to impose additional or different
22 sanctions than the military.

23 So, here, they point to the finding
24 and the determination where the Army has said
25 that there was a violation of contract, but the

1 Army determined that what was in the military's
2 best interest was not to terminate the contract
3 but to continue to work with Fluor going
4 forward.

5 That conflict looks a lot like the
6 conflict that the Court found sufficient to
7 find preemption in Arizona versus United
8 States, where there was a different method of
9 enforcement, in Buckman, where the state was
10 trying to impose additional restrict -- or
11 liability for fraud to the FDA, and even in
12 Garamendi, and what the Court said in Garamendi
13 is that if the federal government decides as a
14 matter of foreign policy to use kid gloves in
15 addressing an issue of foreign policy and a
16 state wants to address the same issue, but they
17 want to do it through an iron fist, that is a
18 conflict that warrants preemption because it's
19 left to the executive branch to calibrate the
20 appropriate remedy.

21 And we think the same analysis applies
22 here. It -- it is, you know, the military
23 could have -- it could have terminated the
24 contract.

25 JUSTICE GORSUCH: Mr. Mosier, if

1 that -- if that's the case --

2 MR. MOSIER: Yeah.

3 JUSTICE GORSUCH: -- what you're
4 saying is the military should decide this.
5 What do you do with the regulations, which, as
6 was discussed earlier, would seem to permit
7 liability in just these circumstances?

8 MR. MOSIER: I'm saying not in these
9 circumstances. The regulation recognized and
10 told contractors there could be liability in
11 certain circumstances --

12 JUSTICE GORSUCH: Yeah.

13 MR. MOSIER: -- and we recognize that.

14 JUSTICE GORSUCH: Yeah.

15 MR. MOSIER: Under the test, as I was
16 talking about --

17 JUSTICE GORSUCH: And it says,
18 unless -- unless you're exercising specific
19 control over the actions and decisions, you're
20 not going to get Boyle. That's what -- that's
21 what the government told contractors like
22 Fluor. Why -- why isn't it fair to hold you to
23 that?

24 MR. MOSIER: So we're not asking for
25 Boyle, the preemption under the rule in Boyle,

1 which applied the discretionary function
2 exception. And what was different about Boyle,
3 although it did involve a military contractor
4 obviously away from the battlefield in a time
5 of war, it adopted a rule not based on the war
6 powers because that rule applied to all
7 government contractors, but what the government
8 has been consistent in saying for over a
9 decade --

10 JUSTICE GORSUCH: So you're asking for
11 something different than Boyle because that was
12 a contract case, and -- and DoD told folks
13 under Boyle you're -- you're going to lose in
14 circumstances like this, or you might lose in
15 circumstances like this? So you're asking us
16 to invent a new -- a new supplement to Boyle?

17 MR. MOSIER: It's a different rule
18 that is based on the different uniquely federal
19 interest. The uniquely federal interest that
20 the Court fashioned the test on in Boyle was a
21 uniquely federal interest in --

22 JUSTICE GORSUCH: All right. Let --
23 let me ask you --

24 JUSTICE KAVANAUGH: You should fight
25 back on the word "invent."

1 JUSTICE GORSUCH: If I might just
2 finish.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch.

5 JUSTICE GORSUCH: Thank you.
6 You know, you're going to have your
7 shot, my friend.

8 JUSTICE KAVANAUGH: I'm ready.

9 JUSTICE GORSUCH: Boyle was about
10 contracts, and -- and it was about, you know,
11 if it's specifically directed, well, then
12 you're out of luck. I -- I totally get that
13 contractors in -- in -- in wartime play an
14 increasingly significant role. I mean, we've
15 got briefs before us from the Veterans of
16 Foreign Wars pointing out that in the Gulf War
17 in the '90s, it was like one in a hundred --
18 I'm making that up -- and now it's over
19 50 percent more recently.

20 And that certainly raises some
21 significant policy issues. One might -- might
22 think that it would help the military to
23 immunize all contractors, and there's some good
24 arguments for that. But there's another good
25 argument on the other side, which is, well,

1 maybe the military would benefit most from
2 having efficient contractors who are less
3 likely to cause harm to military members, and
4 we've got competing amici making both sides of
5 those.

6 Why isn't that a judgment that really
7 cries out for congressional decision and -- and
8 what -- what expertise do we have in setting
9 that rule?

10 MR. MOSIER: So, on that point, I
11 would say this Court doesn't have expertise,
12 and it said that in a number of cases, in
13 determining what would best serve the
14 military's interests on the battlefield. But
15 this gets back, I think, to Justice
16 Kavanaugh's --

17 JUSTICE GORSUCH: So why not just
18 apply Boyle and be done with it?

19 MR. MOSIER: Because what we have at
20 issue here is the uniquely federal interest of
21 the federal government's exclusive power to
22 wage war. That was not what the Court
23 addressed in Boyle. And I think -- you know, I
24 think what is notable --

25 JUSTICE GORSUCH: But answer that

1 question. We have to decide how important is
2 it for the military to have contractors not
3 fearful of liability versus how is it --
4 important is it for the military to have
5 contractors who don't injure military members?
6 Right? That's a -- that is a -- that is what
7 you're asking us to -- to weigh, and you're
8 asking us to come down on one side rather than
9 the other.

10 And I'm just suggesting to you there
11 are really good arguments on both sides of
12 this which would advance the war -- war-making
13 function of the federal government, and I don't
14 know.

15 JUSTICE BARRETT: Well, and,
16 counsel --

17 MR. MOSIER: And --

18 JUSTICE BARRETT: Oh, sorry.

19 JUSTICE GORSUCH: Okay.

20 JUSTICE BARRETT: Did you have a
21 response to that, or is that --

22 MR. MOSIER: Yeah.

23 JUSTICE BARRETT: I thought it was
24 kind of rhetorical, but --

25 (Laughter.)

1 MR. MOSIER: Yeah. No, but I was
2 going to say that obviously, the military, the
3 military is well-positioned to make that
4 determination in when to hold -- you know, hold
5 a contractor accountable for an alleged breach
6 and whether they think that is a situation that
7 will lead to better performance by the
8 contractor. So it's left -- under our view,
9 it's left to the military to make that
10 determination and balance those competing
11 interests, and -- and the military does that.

12 JUSTICE BARRETT: But, counsel, so I
13 guess one problem I'm having is just the
14 analytical one. I mean, let's -- let's assume
15 that we think you're right and that there's
16 preemption. You still have to decide -- if --
17 if you're saying that state law can't control,
18 then some federal common law does. And in
19 Boyle, the conflict, you're right, it was
20 different, but there was actually -- they were
21 contractual terms, and so the Court was very
22 focused on the specific conflict between the
23 contract that the helicopter design fulfilled
24 and the state tort law.

25 Here, if we say that because of the

1 uniquely federal interest in waging war state
2 law can't operate, I take it what you're asking
3 us to do is say: And then, as the federal
4 common law rule you should adopt, you should go
5 look at the combatant activities exception in
6 the Federal Tort Claims Act and extend it to
7 contractors.

8 So it seems like a very fancy way of
9 just saying you should look at the Federal Tort
10 Claims Act and extend it beyond its text to
11 cover contractors.

12 MR. MOSIER: So that is -- that is
13 part of what -- the argument that the combatant
14 activities exception can use -- be used as
15 evidence of Congress's intent on the types of
16 claims that would interfere with the military,
17 just like the Court used it in Boyle. It was
18 the other -- the discretionary functions
19 exception, but it was the same way that it used
20 it.

21 I think, more fundamentally, where we
22 see the conflict and why between, you know,
23 applying tort law or even a tort law claim as a
24 matter of federal common law to combat
25 operations on a foreign battlefield is we just

1 think there's inherently a conflict between
2 what the military needs of its soldiers and
3 contractors, of how they wage war and a duty to
4 impose reasonable care for the protection of
5 others.

6 JUSTICE BARRETT: So it's two-step.
7 It's two-step. One is that state law can't
8 operate, and then, second, please adopt as a
9 matter of federal common law an immunity for
10 independent contractors?

11 MR. MOSIER: It would -- we would
12 consider it preemption. That would be the --

13 JUSTICE BARRETT: Well, it --

14 MR. MOSIER: -- step if you went
15 through Boyle.

16 JUSTICE BARRETT: Well -- well, right.
17 But, I mean, it seems to me you're saying state
18 law can't operate because this is a federal
19 enclave that has to be governed exclusively by
20 federal law because of the federal interest in
21 the war-making power that states don't have,
22 but then you still have to decide what rule
23 operates. And you're saying: And the rule
24 that should operate is one of immunity for
25 contractors.

1 MR. MOSIER: What the -- what the rule
2 that would operate is that the Court would
3 leave this area of common law to Congress's
4 control. Congress has legislated in this area.
5 Congress can adopt rules and create causes of
6 action. But, in the absence of congressional
7 action, yes, we would say a state law claim or
8 a tort -- a tort claim would not be allowed to
9 proceed.

10 JUSTICE KAVANAUGH: Can I -- can I --

11 JUSTICE SOTOMAYOR: Why aren't you --
12 I'm sorry.

13 CHIEF JUSTICE ROBERTS: I'm sorry.
14 Could you finish that? In the absence of
15 congressional action, what?

16 MR. MOSIER: A tort law claim would
17 not be allowed to proceed.

18 JUSTICE SOTOMAYOR: Counsel, that's
19 sort of turning things on its head, preemption
20 on its head. It's like Congress has to act to
21 overturn our presumption.

22 But why do we have Boyle at all? You
23 say this is based on some exclusive Article I
24 power. The power to raise and support an army
25 includes training an army. It's exclusive to

1 the federal government. States can have
2 militias but not army. So why do we bother
3 with Boyle at all?

4 MR. MOSIER: Because --

5 JUSTICE SOTOMAYOR: You're -- you're
6 sort of saying -- you're going a step further
7 and saying that the war power is somehow
8 more -- more important than the power to
9 support and raise an army, correct?

10 MR. MOSIER: So, certainly, when
11 you're talking about combat operations on a
12 foreign battlefield, that's different. And I
13 think maybe why --

14 JUSTICE SOTOMAYOR: But -- but then
15 why did the military issue its regulation?
16 There, a military contractor asked for
17 indemnification, and the military said no
18 because, under Boyle, you -- if you're making a
19 judgment contrary to our directives, you're
20 liable and we don't see why you should be
21 indemnified.

22 The government -- and that was in the
23 middle of the Iraq and Afghanistan war. It was
24 a wartime regulation that they were considering
25 under a Republican president, 2008, under

1 President Bush. And they're saying no. In a
2 time of war, we're telling you you're
3 responsible.

4 You said earlier that we should leave
5 this to military judgment. So why shouldn't we
6 leave this, something -- a field preemption
7 that's contrary to two Supreme Court
8 precedents, Little and Mitchell, that never
9 thought there was a wartime exemption for
10 anyone, 1801, 1857, certainly closer to the
11 revolution than now to our founding. Where are
12 we going? Why aren't we leaving this to the
13 parties who should decide this --

14 MR. MOSIER: So, if I can start, I
15 think, with the --

16 JUSTICE SOTOMAYOR: -- Congress and
17 the military. The military could write its
18 contracts more specifically to indemnify or
19 direct.

20 MR. MOSIER: I mean -- I mean, you'll
21 hear from the government shortly, but I would
22 point out the government has consistently
23 maintained the position it does now since at
24 least 2012, that claims asserted against a
25 contractor for combat operations on a foreign

1 battlefield are preempted. They are not
2 covered by the discussion in the -- in the 2008
3 regulation. That's their position.

4 I mean, the broader point that you
5 raised -- and I think this goes back to Justice
6 Kavanaugh's talk about what should be the
7 default rule and why couldn't Congress, if they
8 want to provide relief for contractors here,
9 speak clearly -- that's an argument that is
10 made and could be made in almost every case for
11 implied preemption.

12 Chief Justice Marshall acknowledged
13 and rejected that -- that argument in Osborn.
14 Justice Kavanaugh quoted the language from
15 Crosby that says, you know, that Congress, the
16 fact that they didn't expressly preempt
17 something just maybe show that they understand
18 implied preemption.

19 I think the default rule --

20 JUSTICE SOTOMAYOR: After Boyle, why
21 would they understand that?

22 MR. MOSIER: So, after Boyle, they
23 would have understood that the way the Court
24 interpreted and provide preemption to a
25 contractor based on a FTA -- FTCA exemption,

1 they -- they reasonably could have understood
2 that courts could hold, as -- as all of them
3 have, that there is preemption for combatant
4 activities.

5 JUSTICE SOTOMAYOR: Yeah, but all of
6 the exemptions that have been created by the
7 circuits all involve to some extent military
8 directions that are -- that have specified in
9 some form the directive the contractor
10 followed.

11 MR. MOSIER: I -- I -- I would
12 disagree with that. I think the majority of
13 the courts don't go that -- that -- that way.

14 JUSTICE SOTOMAYOR: No, the Fourth
15 Circuit is broader. Thank you.

16 JUSTICE KAVANAUGH: Justice Gorsuch's
17 good questions earlier about Boyle and the
18 interaction of Boyle with other branches of
19 preemption, I think this is very important
20 analytically that we have this straight, so I
21 want to make sure we have it straight, which is
22 I think you're saying put aside Boyle.

23 We're not inventing another branch of
24 preemption law. We are applying the
25 longstanding uniquely federal interest branch,

1 which naturally would encompass at its core
2 war-making on a -- in combat, in a foreign
3 country, in a war zone, right? So that's not a
4 new branch.

5 MR. MOSIER: That -- that's not new.

6 JUSTICE KAVANAUGH: But -- but it also
7 means you don't need Boyle. Like Judge
8 Silberman said, even in the absence of Boyle,
9 there's preemption in this kind of
10 circumstance. And --

11 MR. MOSIER: Yes.

12 JUSTICE KAVANAUGH: -- that's your
13 point. Put aside Boyle. Sweep -- it's gone.
14 You still win under this other branch of
15 preemption law, is your argument?

16 MR. MOSIER: Our -- yes. Our argument
17 at its highest level is that the claims are
18 preempted because they conflict with the
19 Constitution. The Constitution not only vests
20 the war powers in the federal government, but,
21 importantly, Article I, Section 10, Clause 3
22 expressly withdraws the power from --

23 JUSTICE KAVANAUGH: And when --

24 MR. MOSIER: -- the states to engage
25 in war.

1 And these stort -- state tort claims,
2 by imposing common law duties of reasonable
3 care onto the battlefield, would interfere with
4 the federal government's exercise of its
5 powers.

6 You can get there through Boyle.
7 That's one line of cases to get there. You can
8 get there through Garamendi, Crosby, Journeg,
9 those cases recognize simply you can weigh the
10 way that a state law -- a state law or state
11 law cause of action would interfere with the
12 federal government's exercise of its powers,
13 and if that's enough of a conflict, there can
14 be preemption.

15 As Your Honor pointed out, Footnote 11
16 of Garamendi said, if we're dealing with an
17 interest where the states don't have a
18 historical role in regulating, maybe we should
19 treat this more as field preemption. That's
20 the circumstance we're dealing with here.

21 JUSTICE KAVANAUGH: Two -- two quick
22 follow-ups. Congress could provide for state
23 law tort law to apply. So, when we say the
24 Constitution preempts, that gives it to
25 Congress and the executive, but they could

1 enact laws allowing this, correct?

2 MR. MOSIER: Correct.

3 JUSTICE KAVANAUGH: Okay. And then,
4 secondly, on Justice Barrett's question about
5 what would the federal rule then be, I think
6 your answer is, well, that's defined, but
7 correct me if I'm wrong, defined by the scope
8 of preemption, and the scope of preemption, you
9 think, is, if we're talking about a war zone,
10 combat activities in a war zone, that is at the
11 core of a uniquely federal interest.

12 MR. MOSIER: Correct. There could be
13 the scope of the rule, the common law rule the
14 court would adopt is like it did in Boyle, is a
15 rule for determining where there would be
16 preemption and what areas would be left to
17 federal common law and what would -- what would
18 fall outside of there when state law claims
19 would be allowed to proceed.

20 JUSTICE JACKSON: So you -- you say
21 that Congress could allow for liability in that
22 exchange with Justice Kavanaugh, and I guess
23 I'm just trying to understand how we fit that
24 concept into the understanding then, in the
25 FTCA, Congress decided that even with respect

1 to combatant activities for which the
2 government itself could not be held liable,
3 there would still be general contractor
4 liability.

5 I don't -- I guess I'm struggling with
6 thinking about what Congress may have intended
7 with respect to contractors and their
8 liabilities concerning combatant activity when
9 we do have a pretty substantial and significant
10 carveout in the context of the FTCA for those
11 same kinds of activities.

12 MR. MOSIER: So the FTCA itself carved
13 out contractors because that was a decision by
14 Congress that the United States would -- would
15 defend and -- and -- claims and accept
16 liability for actions by its employees but not
17 for its contractors.

18 But the reason we think the combatant
19 activities exception is -- is relevant is for
20 the same reason that the Court looked to it in
21 Boyle, as just evidence of the types of claims
22 that Congress would think poses the greatest
23 interference with the exercise of the federal
24 powers. But, as I was saying to -- to Justice
25 Kavanaugh, in relying on cases like Garamendi

1 and Crosby, you don't need to rely on the FTCA
2 or the combatant activities exception.

3 Justice Kavanaugh was exactly right
4 that the majority test, the test applied by the
5 Fourth Circuit, is based both on Boyle and
6 constitutional preemption apart from that.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas?

11 JUSTICE THOMAS: Aside from your --
12 from the combat situation, how would you define
13 uniquely federal interests?

14 MR. MOSIER: What the Court said in
15 Boyle and we think is right is those issues
16 that the Constitution and the laws of the
17 United States commit to the control of the
18 federal government, so, here, I think --

19 JUSTICE THOMAS: What does that mean?

20 MR. MOSIER: It's -- you can look to
21 the Constitution, and I -- I think this should
22 be an easier case for determining a uniquely
23 federal interest. The Constitution vests the
24 war powers in the federal government and
25 expressly states that states may not engage in

1 war. So the reason that war-making is uniquely
2 federal is that the states do not have power to
3 engage in war-making.

4 JUSTICE THOMAS: I mean, you could
5 argue that the interstate highway system is
6 uniquely federal. I just -- I don't understand
7 how we are going to limit that.

8 MR. MOSIER: So, no, I mean, there are
9 very few areas that the Constitution expressly
10 withdraws the power from the states to
11 regulate. In most areas --

12 JUSTICE THOMAS: Give me a couple of
13 examples.

14 MR. MOSIER: Obviously, war-making
15 treaties, coining money, the things in Article
16 I, Section 10 provide a list of the things the
17 states cannot do.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

19 JUSTICE ALITO: Can -- is
20 Mr. Hencely's suit a tort suit or a contract
21 suit?

22 MR. MOSIER: He brought both claims.
23 The remaining claims are tort claims. For his
24 breach-of-contract claim, that was dismissed
25 because he's not a third-party beneficiary to

1 the contract, and so that obviously, you know,
2 is one of the oddities of the rule he proposes,
3 is that he's going to litigate a breach of
4 contract without a contract claim.

5 JUSTICE ALITO: So is it -- would it
6 be odd to have a rule in which the scope of
7 preemption for a tort suit depends upon whether
8 or not there was a breach of a contract as to
9 which he was not a third-party beneficiary?

10 MR. MOSIER: Yes. Yes. That would be
11 very strange in my view.

12 JUSTICE ALITO: Suppose that a -- a
13 contractor is building a building and hires a
14 subcontractor and specifies exactly what the
15 subcontractor is to do, and then someone is
16 injured by falling debris and that person sues
17 the subcontractor.

18 Would it be a complete defense for the
19 subcontractor -- subcontractor to say: Hey, we
20 weren't negligent, we were doing exactly what
21 the contractor told us to do? Would that be a
22 complete defense?

23 MR. MOSIER: Not under general tort
24 law principles.

25 JUSTICE ALITO: Can -- can the federal

1 government by regulation provide a conclusive
2 interpretation of the scope of preemption?

3 MR. MOSIER: No. They haven't
4 attempted to, but I think they probably would
5 not be able to. That would be left to the
6 Court.

7 JUSTICE ALITO: When the FTCA and the
8 provision that's been discussed was adopted, is
9 there anything to indicate that Congress had
10 activities on the battlefield in mind?

11 MR. MOSIER: There's no -- there's
12 really no legislative history about that. The
13 fact that it was adopted shortly after World
14 War II to address combatant activities in time
15 of war would suggest that they had the -- had
16 that in mind.

17 JUSTICE ALITO: It's been suggested
18 that the federal government has no interest
19 when it is -- when there -- when what the --
20 the military contractor does is a violation of
21 the contract. Is -- is that simplistic? There
22 can be several different situations.

23 One, there could be a situation where
24 it is absolutely undisputed that there was a
25 material breach of the contract. There could

1 be the situation where the military says there
2 was a breach of the contract. And when
3 something goes wrong like the bombing on the
4 Bagram base, the military has an interest in
5 trying to exonerate itself.

6 So you could have the situation where
7 the military says: There was a breach, the
8 contractor says there wasn't a breach. There
9 could be the situation where the military says:
10 There was no breach, the contractor says there
11 was not a breach.

12 So wouldn't the rule that we adopt
13 have to deal with all three of those
14 situations?

15 MR. MOSIER: I think it would. And I
16 think what's critical here is we are clearly in
17 the situation where there is a disagreement
18 between Fluor and the government about whether
19 there was a breach. The government ultimately
20 made a determination that the best way to
21 continue waging war was to allow the parties to
22 agree to disagree and to move forward and
23 continue to fight the war.

24 But, if the -- if the decisions of a
25 contractor are going to be subject to state

1 tort suits a decade after the fact, the
2 contractor is going to have to act very
3 differently when an accident happens. The
4 immediate thing that -- that the military needs
5 when there's an accident like this is for
6 soldiers and contractors to work together to
7 make sure there's not a similar attack later
8 that day, the next day, and so you need
9 cooperation.

10 If the contractor knows we could be
11 blamed for this, they're going to want to do
12 their own investigation. They're going to want
13 to collect their own evidence. There will
14 already start to be considerations of, was it
15 the military's fault? Was it -- was it our
16 fault?

17 I think one thing, if I can address a
18 statement made before, the district court made
19 clear if this case went forward, Fluor would be
20 able to try the empty chair and say this was
21 entirely the military's fault. You should not
22 hold us liable because the military first made
23 a decision of foreign policy that we're going
24 to allow former members of the Taliban onto
25 Bagram because that's a good way to

1 rehabilitate them.

2 The military then decided that
3 Mr. Nayeb was a former member of the Taliban,
4 not a current member of the Taliban. Fluor
5 didn't know he had any ties to the Taliban.
6 That was entirely the -- the military's
7 judgment that he was former. Mr. Nayeb, the
8 evidence showed, smuggled explosives onto the
9 base to build a bomb. It was the military's
10 entire responsibility to prevent that from
11 happening. So there's no way this case could
12 go forward.

13 You know, the plaintiffs say --

14 JUSTICE ALITO: All right.

15 MR. MOSIER: -- if they tried the
16 case, they're --

17 JUSTICE ALITO: Thank -- thank you.

18 Thank you.

19 MR. MOSIER: Yeah. Okay.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

22 JUSTICE SOTOMAYOR: This is the first
23 time I've heard a defense attorney on behalf of
24 his client say I'm going to take away an empty
25 chair that I could attack.

1 (Laughter.)

2 JUSTICE SOTOMAYOR: A very odd
3 argument. Okay.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?

6 Justice Gorsuch?

7 Justice Kavanaugh?

8 JUSTICE KAVANAUGH: Can you just
9 continue with that?

10 (Laughter.)

11 MR. MOSIER: Yeah. I mean, where I
12 was ending with that is, you know, the
13 plaintiffs said that they wouldn't put the
14 military's judgments on trial and, therefore,
15 we would.

16 JUSTICE KAVANAUGH: You're going to
17 be.

18 MR. MOSIER: Of course. And we
19 already --

20 JUSTICE KAVANAUGH: Yeah, of course.
21 What are the Taliban doing at Bagram, right?

22 MR. MOSIER: Yes, of course.

23 JUSTICE KAVANAUGH: That's going to be
24 the whole deal.

25 MR. MOSIER: And --

1 JUSTICE KAVANAUGH: And that's going
2 to be a lot of -- I mean, you all are together
3 today but would not be together in that part of
4 the case. And in a South Carolina courtroom,
5 right, there's going to be questions about the
6 military -- and the military was supposed to
7 prevent him from bringing this stuff onto the
8 base. That wasn't your responsibility, right?

9 MR. MOSIER: That was -- that's
10 correct. And another thing, the escort --

11 JUSTICE KAVANAUGH: And then the
12 military runs a 5K, right, and -- and anyone
13 who's run a 5K, there are lots of people
14 stacked together at the starting line, right?

15 MR. MOSIER: And there was a lot --
16 and just, by the way, there's a lot of
17 disagreement about what it meant that --
18 Fluor's duty to supervise. Our position was
19 that it was our duty to supervise to ensure
20 that the employees carried out the work that
21 they were supposed to do to fulfill the
22 obligations under the contract, not to provide
23 security, not to provide force protection.
24 That remained the military's responsibility.

25 JUSTICE KAVANAUGH: Right. And --

1 MR. MOSIER: The military --

2 JUSTICE KAVANAUGH: -- they're going
3 to be pointing out to you -- and I know you
4 disagree with this -- that you all didn't do
5 enough to supervise on the -- at the vehicle
6 yard, et cetera, right, so that's going to be a
7 back-and-forth on this.

8 MR. MOSIER: That will be a
9 back-and-forth. And our position would be that
10 the evidence showed that he was a perfectly
11 acceptable employee, was performing up to
12 the -- up to doing the job that he needed to.

13 JUSTICE KAVANAUGH: When did you
14 learn -- don't tell me what you shouldn't at
15 this point obviously. When did you learn that
16 he was a member of the Taliban or former member
17 of the Taliban?

18 MR. MOSIER: It was certainly after
19 the attack. And I'm not sure. It was likely
20 when, you know, the AR 15-6 report came out or
21 maybe in the course of the investigation.

22 JUSTICE KAVANAUGH: All right. Okay.
23 That's it.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: Just a few
2 clarifying questions.

3 First is I just want to be sure that I
4 understand you are asking for a rule that is
5 different from Boyle because you agree that if
6 we just applied Boyle because there is not the
7 one-on-one conflict, you know, the air
8 conditioner hypothetical, you would lose, so
9 this is something that's different from Boyle
10 that you want, correct?

11 MR. MOSIER: It's different --

12 JUSTICE BARRETT: Okay.

13 MR. MOSIER: Yes, it's different from
14 Boyle.

15 JUSTICE BARRETT: Second, can you just
16 say a little bit what the scope of the combat
17 exception is? I mean, you know, you said that
18 Bagram was under siege constantly from rockets,
19 et cetera. That's certainly not true of every
20 base abroad. But you could still have
21 terrorist attacks. You could have -- so how is
22 a court supposed to decide when your proposed
23 exception would apply?

24 MR. MOSIER: So, under the test that
25 we've supported and the government has

1 proposed, for the first element, you would look
2 to the text from the combatant activities
3 exception, and so is it any claims arising out
4 of combatant activities in time of war?

5 In the first decision after the
6 adoption of the FTCA, the Ninth Circuit in
7 Johnson interpreted combatant activities and
8 said it includes not only physical violence but
9 also actions necessary to and taken in
10 connection with. And every court of appeals
11 has kind of relied on that test, which seems
12 consistent with the plain language.

13 And so courts would look to that.
14 Does the activities -- are they, you know,
15 supporting, arising out of, supporting the
16 military's combatant activities? Here, this is
17 at the heartland, right? These are injuries
18 from an enemy attack, right?

19 JUSTICE BARRETT: But that's surely
20 pretty broad. I mean, Justice Thomas was
21 asking you about, you know, the food services
22 and an E. coli outbreak. I mean, supporting
23 the military's activities, I mean, that is
24 pretty broad, and it seems to me that if you
25 want courts to look at the combatant activities

1 exception from the Federal Tort Claims Act,
2 we're right back to this question of is what
3 you're really asking for a virtual extension of
4 the text of that exception?

5 MR. MOSIER: So I would -- the -- the
6 hypothetical I got was E. coli on Bagram, and I
7 would say yes, you may -- it may be a different
8 conclusion, E. coli in San Diego or at a base
9 to troops that aren't ready to deploy. It's
10 not -- every base is not looked at the same.
11 The actual injury is examined to determine its
12 connection to combat activities, which is not
13 viewed as everything the military does.

14 And so you would have a much more
15 limited scope of protection at U.S.-based
16 military bases. You know, that's not to say
17 that there aren't things, because there are
18 things, going on at U.S. military bases right
19 now that are connected to combatant activities.
20 But what I was saying in -- in response to the
21 earlier hypothetical is that everything, if not
22 everything, virtually everything going on at
23 Bagram in 2016 --

24 JUSTICE BARRETT: Would be.

25 MR. MOSIER: -- because of the way it

1 was under attack, was related.

2 JUSTICE BARRETT: So it could
3 potentially extend to domestic activities if
4 they were supporting the combatant activities
5 abroad?

6 MR. MOSIER: It could.

7 JUSTICE BARRETT: Okay.

8 MR. MOSIER: You know, it -- yeah.

9 JUSTICE BARRETT: Oh, go ahead. Yeah,
10 well, that's okay.

11 MR. MOSIER: Okay.

12 JUSTICE BARRETT: You don't need to
13 say anything more. And just finally, do you
14 see yourself as standing completely united with
15 the government's understanding of the rule, or
16 do you see any differences between your
17 position and the government's?

18 MR. MOSIER: We -- we support the
19 government's position. The way it played out,
20 some of the courts of appeals have adopted a
21 slightly different rule than the government,
22 but there's not a lot of daylight between those
23 rules, and we see benefits in the -- in the
24 government's rule.

25 JUSTICE BARRETT: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?

3 JUSTICE JACKSON: And just to clarify,
4 you -- your rule is tantamount to a field
5 preemption kind of concept. I think you
6 accepted that, is that right? That's what
7 you're seeking essentially?

8 MR. MOSIER: So, certainly, with
9 respect to claims on a foreign battlefield, I
10 think you would view it as field preemption.
11 And that's largely because applying conflict
12 preemptions, we just think there's an inherent
13 conflict between duties of reasonable care
14 under state tort law and what the military
15 demands and needs on a battlefield in combat
16 operations.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Gannon.

21 ORAL ARGUMENT OF CURTIS E. GANNON
22 FOR THE UNITED STATES, AS AMICUS CURIAE,
23 SUPPORTING THE RESPONDENTS

24 MR. GANNON: Thank you, Mr. Chief
25 Justice, and may it please the Court:

1 The Constitution has vested the
2 nation's war powers in the president and
3 Congress and has expressly divested the states
4 of such powers. This Court should hold that
5 Petitioner's tort claims are preempted because
6 of the uniquely federal interests at stake in
7 overseas combat operations.

8 Petitioner indisputably cannot sue the
9 U.S. Army directly, and he should not be
10 permitted to sue its combat support contractors
11 instead. Applying that principle requires no
12 extension of Boyle, which correctly looked to a
13 closely related FTCA exception as a model.

14 Under the government's proposed test,
15 Petitioner's claims are preempted because they,
16 one, arise out of the military's combatant
17 activities and, two, arise from the
18 contractor's actions within the scope of the
19 contract, whether or not they involved a
20 violation of the contract, because the
21 government is harmed either way.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: Could you define,
24 beyond the combat situation -- scenario, what
25 you mean by "uniquely federal interests"?

1 MR. GANNON: Well, I agree with much
2 of the answer that my friend just gave you to
3 that, Justice Thomas, that we start with the
4 Constitution's structure here. And we have a
5 list at the top of page 12 of our brief of
6 other areas where the Court has found there to
7 be uniquely federal interests. They include
8 things like foreign affairs, rules implementing
9 federal loan programs, civil immunity of
10 federal officials. They're areas where the
11 Constitution and the statutes and the laws of
12 the United States have made it clear that this
13 is an area of exclusive federal interest. And
14 I think that that's clearest in this context
15 because federal powers are at their zenith --

16 JUSTICE THOMAS: Well, I'm grant --
17 let's say I grant you the combat. Beyond that,
18 how -- how do we define it?

19 MR. GANNON: Well --

20 JUSTICE THOMAS: Because this isn't
21 going -- once we -- once we say that this
22 uniquely federal interest carries the day, why
23 wouldn't someone from, say, our military bases
24 in San Diego or in Norfolk, Virginia, who's
25 servicing aircraft carriers or nuclear subs,

1 why don't -- why isn't that unique?

2 MR. GANNON: Well, I -- I think that
3 there, the states would have more interest in
4 what's going on in California than they do in
5 what's going on in Bagram. But we're not
6 asking the Court to invent a new type of -- of
7 preemption here.

8 We think that when Boyle talked about
9 uniquely federal interests, that's a concept
10 that this Court used in Sabbatino to say the
11 active state doctrine is an area of uniquely
12 federal interest.

13 And the way the Court determines that
14 it was was by looking to the Constitution,
15 which it said didn't dictate the content of the
16 active state doctrine, it looked to statutes
17 that said that they provided indirect support
18 for the active state doctrine, but it said the
19 very idea that we have U.S. courts questioning
20 the acts of foreign territories in the --

21 JUSTICE THOMAS: But Boyle didn't say
22 all of that.

23 MR. GANNON: -- in -- foreign
24 sovereigns in their territory is something that
25 is of -- uniquely interested to the federal

1 government.

2 JUSTICE THOMAS: I know, but Boyle
3 didn't say as much. You're making Boyle do a
4 lot of work that I didn't read into Boyle.

5 MR. GANNON: I think Boyle is standing
6 on a line of case law that talks about uniquely
7 federal interests as being a source of
8 preemption that this Court has continued to
9 repeat that category as being out there as
10 recently as Cassirer and Rodriguez, where the
11 Court acknowledged that this is there.

12 And I think this is an easy case for
13 determining that it's a uniquely federal
14 interest because of both halves. The federal
15 power is at its zenith because of the way the
16 Constitution has vested war powers in the
17 federal government, and state powers are at
18 their nadir because it has expressly divested
19 states of those types of powers.

20 CHIEF JUSTICE ROBERTS: Counsel,
21 how -- I'm interested in the determination --
22 limitation to a foreign battlefield. Does that
23 that mean, for example, there are bases in --
24 or where we're operating from in Afghanistan at
25 the same time that would not be in a foreign

1 battlefield because it's not as directly
2 engaged as Bagram was in this case?

3 MR. GANNON: Well, the rule that we're
4 asking for would talk about whether there are
5 combatant activities, and we're using the
6 exception in the FTCA as a model. And just as
7 the Court did in Boyle, it used a different
8 exception. It was looking at general
9 procurement contracting and so it was looking
10 at the discretionary function exception.

11 But I think that I would say that most
12 everything that the government was doing that
13 the U.S. military was doing in Afghanistan in
14 2016 was likely very closely connected with
15 combat -- with combat activities. And -- and
16 there's -- there's no doubt that -- that
17 Respondents' activities at Bagram were
18 supporting the military's combat function,
19 combatant activities.

20 And so the E. coli in the lettuce that
21 the troops are eating before they go out on
22 patrols, you know, outside the wire in Bagram,
23 that is arising from combatant activities. And
24 so this --

25 CHIEF JUSTICE ROBERTS: Well, what if

1 the E. coli infection takes place, you know,
2 700 miles away in a base that is supporting the
3 activities at Bagram?

4 MR. GANNON: I -- I think that if --
5 if -- that that's going to be a question about
6 what's -- what -- what it means to arise from
7 the military's combatant's activities. And
8 we -- we also have the second prong, which is
9 about -- and -- and just to finish the answer
10 to the first prong, that can certainly extend
11 to people who are supplying the troops, who are
12 on the very front lines.

13 The -- the -- the Johnson decision
14 that my friend referenced from the Ninth
15 Circuit shortly after the FTCA was first
16 enacted recognized that, you know, ferrying
17 ammunition to the troops is something that just
18 helping somebody get ready to wield combat
19 is -- is a combatant activity.

20 And, here, the question by analogy is
21 also whether the contractor was performing
22 within the scope of its contract. And if --

23 CHIEF JUSTICE ROBERTS: Well, okay.

24 MR. GANNON: -- it was --

25 CHIEF JUSTICE ROBERTS: So ferrying

1 the troops. What about about preparing the
2 rations of food that is going to eventually be
3 used at Bagram and there's some, you know,
4 infection at the food plant in, you know, I
5 don't know, someplace in the United States?

6 MR. GANNON: Yeah. I -- I think
7 that -- I'm not sure how the combatant
8 activities exception in the FTCA has been
9 construed in a context like that. I think that
10 for preemption purposes here, this goes to a
11 question that Justice Barrett just asked
12 whether this really needs to be overseas.

13 I think, for overseas, it's
14 overdetermined that the federal government's
15 interests are at their height and the state's
16 interests are at their lowest and, therefore,
17 it's easiest to say when it's an overseas
18 situation and it's, you know, that -- that
19 the -- the E. coli is -- is happening in
20 Afghanistan, then it -- then that's the --
21 that's where the -- the claim is arising. It's
22 arising from the military's combatant
23 activities there.

24 JUSTICE KAGAN: So help me,
25 Mr. Gannon, try to figure out what the harm is

1 to the federal government.

2 MR. GANNON: Yeah.

3 JUSTICE KAGAN: In Bagram, take the --
4 the contractor that doesn't properly cook the
5 chicken, take the contractor that doesn't
6 properly maintain the trucks, take the
7 contractor that does a whole series of things
8 that are going to injure or kill soldiers, in
9 violation of what the government has said is
10 its policies, you know, the government has a
11 policy manual, here is how to maintain the
12 trucks, here is how to cook the chicken, and
13 the contractor has operated in violation of
14 that.

15 MR. GANNON: Yeah.

16 JUSTICE KAGAN: Why it is that state
17 liability would be so injurious to the
18 government's interests in that context, which
19 is, I thought, the context that we're concerned
20 about in this very case.

21 MR. GANNON: That -- that's right.
22 And -- and, obviously, we want our contractors
23 to obey their contracts. We want them to obey
24 military orders. But that doesn't mean that we
25 aren't threatened by the imposition of the

1 specter of tort regulation in the relationship
 2 between the military and its contractors
 3 whether or not the contract has been complied
 4 with, as has already been mentioned that that's
 5 first of all going to lead to disputes about
 6 whether it's been complied with that are going
 7 to be adjudicated half a world away maybe with
 8 the government in an empty chair.

9 But, even when the state thinks it is
 10 trying to help the federal government enforce
 11 its own standards, this Court has recognized
 12 that the imposition of state law can be a
 13 threat. My friend --

14 JUSTICE KAGAN: But tell me why.

15 MR. GANNON: Why? Because it changes
 16 the relationship between the parties. It
 17 alters the behavior of the contractors on the
 18 ground. They are less willing to do risky
 19 things. They may indulge in a "mother, may I"
 20 dynamic where they have to keep asking for
 21 permission, hey, you want me to do something
 22 pretty dangerous, can you please confirm for
 23 me, sign in triplicate that you have to do it
 24 this way. And I -- I want you to be aware that
 25 that's really dangerous because I want it on

1 the record for some jury down the road --

2 JUSTICE KAGAN: Wouldn't that answer
3 apply just as well to Boyle?

4 MR. GANNON: It would apply just as
5 well to Boyle. Part of the difference, though,
6 is that Boyle was talking about general
7 procurement activities for the government writ
8 whole. It happened to arise in the context of
9 a military contract. The Court's rule is not
10 limited to military contracts.

11 The hypothetical about the air
12 conditioner is not about contracts. This is --

13 JUSTICE KAGAN: But then what you're
14 saying is that Boyle didn't really know what it
15 was doing. It had a general contracting
16 principle that would have been fine and it --
17 it -- what -- what it really should have done
18 is to say but this is the military, it's
19 different.

20 MR. GANNON: No. I'm saying that
21 because it was forming a general rule that
22 happened to apply to a military context that
23 did not involve combatant activity, which is
24 undisputed, that a -- a helicopter that goes
25 down a mile and a half off the shore of

1 Virginia in a training operation in -- in the
2 1980s is not combatant activities, even though
3 the helicopter was manufactured during the --

4 JUSTICE KAGAN: Right. I was just --

5 MR. GANNON: -- during the Vietnam
6 War.

7 JUSTICE KAGAN: -- suggesting in all
8 the arguments you were saying to me about how
9 the government needs to be in control of its
10 relationship with its contractors, applies just
11 as well to manufacturers of helicopters.

12 MR. GANNON: It -- it does, but it's
13 more important in the combatant, when -- when
14 the government is engaged in combat in a
15 foreign theater of operations that the type of
16 distrust, the finger-pointing, the threat that
17 act -- that even though we're supposed to be
18 fighting a war, we're supposed to be worried
19 about how to protect security at Bagram, people
20 are worried about -- about making record for a
21 tort trial that could be happening in one of 50
22 different states, it's --

23 JUSTICE KAGAN: Thank you.

24 MR. GANNON: And -- and so we do think
25 that there's -- that -- that -- that that's a

1 threat. And the reason why it is different in
2 Boyle and Boyle requires there to be a
3 violation, because it is considering a
4 different exception in the FTCA, and so --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 JUSTICE ALITO: In response to the
10 argument that a suit like Mr. Hencely's can
11 easily get into, is very likely to get into
12 discovery that would be very intrusive and
13 disadvantageous to the government, the argument
14 is -- is made, well, the government can always
15 invoke the state secrets privilege.

16 How frequently does the government do
17 that? And is it a good idea to adopt a rule
18 that would put the government to the choice
19 about invoking this privilege, which in my
20 understanding is used very infrequently on a
21 regular basis?

22 MR. GANNON: You're -- you're correct
23 that it's used infrequently. And the national
24 security concerns that are at interest, that --
25 that are served by the -- by the state secrets

1 privilege, are limited to only certain types of
2 information. We think that the threat of
3 having civil -- civil discovery with, you know,
4 people on the battlefield is a problem even if
5 it doesn't involve classified information.
6 It's going to mean that there are going to be
7 depositions of active servicemembers, that --
8 that -- that -- that we're distracting the
9 military and civilians from their important
10 duties. We are, again, leading to the
11 finger-pointing situation, the sowing of
12 distrust, the -- the damaging of the
13 relationship between the government and its
14 contractors, and the government still has all
15 of its other remedies, so in further response
16 to the question from Justice Kagan, that we --
17 when people don't follow their contracts, we
18 can take certain steps to enforce that. And --
19 and, in this instance, we didn't cancel the
20 contract, but we -- we could have terminated
21 the contract, stopped work, asked for
22 liquidated damages, required personnel to be
23 replaced. We could have done any of those
24 things. We didn't do those things.
25 Adding this extra layer of tort

1 incentives creates an over-deterrence that the
2 Court recognized is a problem in cases like
3 Buckman --

4 JUSTICE ALITO: Thank you. One -- one
5 last --

6 MR. GANNON: -- and in the foreign
7 affairs cases like -- like --

8 JUSTICE ALITO: Yeah. One -- one last
9 question. If we compare the likelihood that a
10 breach of contract by a military contractor
11 will cause either death or serious injury in
12 this country with the risk that a breach will
13 cause death or serious injury at a place like
14 Bagram Air Base, which is greater?

15 MR. GANNON: I -- I mean, I -- I'm
16 sorry, I'm not quite sure I understand the --
17 the question. What -- what would cause a risk
18 of serious death or injury?

19 JUSTICE ALITO: Well, isn't there a
20 greater risk of death or serious injury as a
21 result of an alleged breach of contract in a
22 war zone as opposed to an alleged breach of
23 contract outside of a war zone?

24 MR. GANNON: Well --

25 JUSTICE ALITO: And, therefore,

1 doesn't -- isn't there a greater potential
2 interference with the interests of the federal
3 government with respect to the first?

4 MR. GANNON: Yes. And -- and this is
5 a point that the D.C. Circuit made in the Saleh
6 opinion, where it talked about the idea of tort
7 laws requiring non-risky behavior all the time
8 isn't compatible with -- with a war zone. That
9 doesn't mean that we want contractors to engage
10 in extra-risky contract with respect to
11 complying with our contracts, but it does mean
12 that we're worried about the overhanging -- the
13 overhang of having this extra liability out
14 there.

15 JUSTICE ALITO: All right. Thank you.
16 Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: No.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?
21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: A couple things
23 just to clarify.

24 Uniquely federal interest branch of
25 preemption is a separate doctrine from Boyle,

1 right, or a preexisting doctrine, a preexisting
2 doctrine?

3 MR. GANNON: Yes. It predates Boyle.
4 The Court has continued to recognize it as
5 being appropriate. We -- I think that Boyle
6 applied the doctrine --

7 JUSTICE KAVANAUGH: Right, it's not a
8 new thing, yeah.

9 MR. GANNON: And -- and it wasn't new
10 then and it -- and it hasn't been disavowed by
11 the Court since then.

12 JUSTICE KAVANAUGH: On the field
13 conflict terminology, I want to get your
14 understanding of what counsel said, which is my
15 understanding is he said, when there's an
16 inherent conflict in a particular kind of area,
17 you can call that "field," and Garamendi
18 Footnote 11 and other cases in the Court's
19 jurisprudence have essentially said that. Is
20 that your understanding, or do you have a
21 slightly different understanding?

22 MR. GANNON: In our brief, we said we
23 think you could think of this in either way.
24 But, if you had to pick, I think I would say
25 that it's a form of field preemption, and I

1 think that's -- that's because we're talking
2 about an area, overseas combatant activities,
3 that is so uniquely federal. The whole area of
4 it should be considered something that is
5 beyond the scope of the states because they've
6 been divested of their powers in this context.

7 And that's consistent with the way the
8 combatant activities exception in the FTCA
9 itself is phrased. It's just everything is
10 out. No suits arising out of combatant
11 activities. There's not a bunch of
12 nickel-and-diming about exactly what's in and
13 what's out.

14 That's different from the
15 discretionary function exception --

16 JUSTICE KAVANAUGH: We've --

17 MR. GANNON: -- conditions that the
18 Court considered in Boyle.

19 JUSTICE KAVANAUGH: We've talked about
20 states, on Justice Kagan's question, states
21 that are trying to supplement or help, you
22 know, ensure that contractors comply with their
23 obligations. What are -- I mean, the rule on
24 the other side, though, I think would -- would
25 apply equally to a state that's hostile to the

1 federal -- to the United States' war effort,
2 which states sometimes have been in terms of
3 opposed to the Iraq war, opposed to the latter
4 stages of the Afghan war.

5 Is there any difference there? I
6 mean, how do -- how do we think about a hostile
7 state? "Hostile" might be too strong a word,
8 but a state that, you know, has laws that it's
9 trying to impose different obligations on the
10 United States' conduct of war than the United
11 States itself is trying to impose?

12 MR. GANNON: Yeah. I -- I think that
13 my friend already conceded that that would
14 probably fall because it's a discrimination
15 against the government and it's treating the
16 government differently.

17 JUSTICE KAVANAUGH: Well, it could be
18 applying a neutrally applicable law, however.

19 MR. GANNON: Well, I -- I -- I guess
20 there could be a question of, if -- if you
21 thought that --

22 JUSTICE KAVANAUGH: You're not
23 concerned about that?

24 MR. GANNON: I -- I mean, I -- I'm not
25 concerned if you adopt our rule, which would

1 say that --

2 JUSTICE KAVANAUGH: Right. No.

3 MR. GANNON: -- combatant activities
4 are -- are off the table here.

5 JUSTICE KAVANAUGH: If we adopt their
6 rule, are you worried about the state that's
7 not supportive?

8 MR. GANNON: Yes, we are concerned
9 that -- that -- I mean, as I said, we're
10 worried either way. We think that the
11 imposition of the threat, the specter of tort
12 liability is affecting the relationship between
13 the government and its contractors in a war
14 zone, and we don't want that interference to
15 begin with.

16 JUSTICE KAVANAUGH: And what about the
17 Afghan law, so the state choice-of-law rules
18 lead to Afghan law being applied in a suit like
19 this and -- and who knows what that leads to?
20 Do you have a concern about that, or is that
21 not a concern?

22 MR. GANNON: That -- that is a
23 concern. And I think that -- I'm not exactly
24 sure what -- what the parties' answers to
25 that -- answer to that question really is

1 because there wasn't that much focus. The
2 Fourth Circuit has just a footnote on the
3 assumption that South Carolina law was
4 applicable here. And I understand my friend on
5 the other side to be saying that they're --
6 they're standing on the background idea that
7 the common law applies, and I guess they
8 mean -- they mean state common law instead of,
9 you know, the brooding omnipresence in
10 Afghanistan.

11 JUSTICE KAVANAUGH: Well, some courts
12 have applied Iraqi law or other foreign law in
13 these kinds of situations, correct?

14 MR. GANNON: I don't know about
15 combatant activities situations. And there may
16 be public policy reasons not to apply foreign
17 law in certain instances. That's really a
18 conflict-of-laws choice-of-law question. And,
19 as a general matter, this Court has held
20 that -- that a federal court sitting in
21 diversity has to apply the choice-of-law rules
22 for the -- for the jurisdiction in which it is
23 sitting.

24 And -- and so, you know, we are -- we
25 are looking to state courts then in order to

1 select the rule of law. I think that's a
2 reason to say field preemption, let's not --

3 JUSTICE KAVANAUGH: Thank -- thank
4 you.

5 MR. GANNON: -- let that play --
6 let -- dictate what's going to be the standards
7 at issue in this case.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 Justice Jackson?

11 JUSTICE JACKSON: So there's been a
12 lot of hypothesizing about what might happen if
13 this kind of tort liability is allowed to take
14 place, but my understanding is that right now,
15 only a few states limit liability, and so the
16 background is that we have the rule operating
17 where these kinds of lawsuits can be brought.

18 Am I wrong about that?

19 MR. GANNON: Well, I mean, there have
20 been several suits. Several of them have
21 been -- have -- have been rejected on the
22 grounds that -- that -- that there -- there
23 hadn't been a violation of the contract or --

24 JUSTICE JACKSON: Other grounds. So
25 the preemption rule is not necessarily doing

1 the work of eliminating --

2 MR. GANNON: No, they were preempted.

3 JUSTICE JACKSON: They were preempted.

4 MR. GANNON: They were -- well, in
5 most of the suits, they've been preempted, I
6 think, whether -- whether or not it required
7 there to be a violation of the contract or not.
8 I mean, Badilla may be an -- may be an -- an
9 exception from that. I'm not sure what else
10 has happened in the Badilla case. We don't
11 have --

12 JUSTICE JACKSON: But I guess I'm just
13 trying to understand whether contractors are
14 already subject to tort liability in most
15 states in these circumstances or not.

16 MR. GANNON: I mean, there have
17 obviously been a lot of suits about this.
18 Notwithstanding the 2008 regulatory preamble,
19 the government has been taking the position
20 it's taking here since -- in this Court since
21 May 2011. And so I think contractors have --
22 have had that expectation that the government
23 would be making this argument that -- that
24 there is going to be combatant activities is --
25 is going to prevent there being state court --

1 state law litigation about things that are
2 combatant activities.

3 JUSTICE JACKSON: Have all the -- the
4 policy concerns that you have articulated, have
5 they been happening, the finger-pointing and
6 the increased prices and the other problems?

7 MR. GANNON: Well, I -- I -- I don't
8 know about the -- the -- we don't have data on
9 increased prices because I -- I -- I just don't
10 think that -- that -- that we have enough of an
11 effect there. These -- these are very large
12 contracts that we've had in Afghanistan and
13 Iraq. There are a handful of companies that --
14 that successfully competed for them.

15 I'm not exactly sure, when you have
16 contracts this large, what -- what the
17 difference was at the margin. I think that
18 there would be -- there would -- the threat
19 would be much greater if this Court were to
20 say --

21 JUSTICE JACKSON: No, I understand,
22 but you --

23 MR. GANNON: -- that notwithstanding
24 Boyle --

25 JUSTICE JACKSON: -- you made the

1 argument that there are going to be increased
2 prices, and I'm just trying to understand
3 whether there's a basis for that.

4 MR. GANNON: And I think right now,
5 I'm not sure what's priced in because I think
6 that there's uncertainty about where this is
7 going to end up. But the government has been
8 taking the contractor's side in these cases
9 for -- for 14 years -- more than 14 years now.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Rebuttal, Mr. Chang?

14 REBUTTAL ARGUMENT OF FRANK H. CHANG
15 ON BEHALF OF THE PETITIONER

16 MR. CHANG: Thank you, Mr. Chief
17 Justice. A few points.

18 So we've been talking about baseline,
19 and cases and statutes tell us what the
20 baseline is. Tort law remains unless Congress
21 acts. Common law claims against Colonel
22 Mitchell was upheld by this Court in Mitchell
23 versus Harmony for something that he did in
24 Mexico. And Captain Little was held liable for
25 something that he did in Hispaniola.

1 Such suits are unthinkable today
2 because Congress has legislated suits like that
3 out of place -- out of existence with the
4 Westfall Act.

5 And also, in the '40s, Congress passed
6 the Defense Base Act. Congress knew that
7 defense contractors overseas working on U.S.
8 bases might face liability, so in exchange for
9 the employees giving up of their common law
10 claims, there -- Congress instituted a single
11 compensation regime.

12 And also, between the '40s and '60s,
13 nothing was more critical to national defense
14 than nuclear deterrence. Congress precisely
15 legislated to shield federal contractors who
16 helped with the Manhattan Project in the Atomic
17 Testing Liability Act. Congress knows how to
18 do this, hasn't done so here to bar American
19 soldiers' claims.

20 And the second point, we are in
21 federal court, not state court, and existing
22 federal protections for the military in
23 litigation already exist.

24 As litigants, we don't have unfettered
25 third-party discovery rights on the government.

1 We have to strictly follow the Touhy regulation
2 process. And the government has tight controls
3 over who we can depose, what those -- what
4 questions we can ask, and what kind of
5 documents we can seek to begin with.

6 And third, Boyle. Boyle is our case,
7 not theirs. Fluor's expansive reading of Boyle
8 and converting provisions of statutes that
9 expressly say it is inapplicable contradicts
10 Boyle and what this Court said in Garcia.

11 And we have to look at what this Court
12 has said about the Supremacy Clause because
13 that is what drives preemption. Here, the laws
14 of the United States do not preempt my client's
15 claims. And the Solicitor General's brief and
16 a brief from my friend, Fluor, are not listed
17 as one, the supreme law of the land.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 The case is submitted.

22 (Whereupon, at 12:32 p.m., the case
23 was submitted.)

24

25

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