

IN THE SUPREME COURT OF THE UNITED STATES

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13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:02 a.m.
16
17 APPEARANCES:
18 FRANK H. CHANG, ESQUIRE, Arlington, Virginia; on
19 behalf of the Petitioner.
20 MARK W. MOSIER, ESQUIRE, Washington, D.C.; on behalf
21 of the Respondents.
22 CURTIS E. GANNON, Deputy Solicitor General, Department
23 of Justice, Washington, D.C.; for the United
24 States, as amicus curiae, supporting the
25 Respondents.

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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: No 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?

22 If you took that line of analysis, I
23 don't think you necessarily lose even under
24 that line of analysis, was my point.

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

1 Honor.

2 JUSTICE BARRETT: Do you understand --

3 JUSTICE ALITO: Mr. Chang --

4 JUSTICE BARRETT: -- Boyle then --

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

6 JUSTICE BARRETT: Sorry. Can I -- can

7 I just finish?

8 JUSTICE ALITO: Yeah, sure.

9 JUSTICE BARRETT: Do you understand

10 Boyle then to create a very narrow kind of

11 preemption that's not constitutional, that

12 really is just about the conflict of conflict

13 terms -- sorry -- contract terms?

14 MR. CHANG: Yes, that's how we

15 understand it. And that -- and that's what the

16 opinion in Boyle said as well because Boyle

17 carves out two hypotheticals where you're

18 dealing with a government contractor.

19 JUSTICE BARRETT: Like the air

20 conditioner, yeah. Yeah.

21 MR. CHANG: Correct. And a stock

22 helicopter example as well. So that clearly

23 shows that contractors -- or Justice Scalia

24 envisioned a system where contractors are still

25 subject to state law liability.

1 JUSTICE BARRETT: Thank you.

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

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

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

22 Did I read too much into your brief?

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

1 certainly, the only reason that this --

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

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

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

11 (Laughter.)

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

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

18 Who wrote Boyle?

19 MR. CHANG: Justice Scalia wrote it.

20 JUSTICE ALITO: I mean, so you're
21 saying the Founding Father of textualism
22 doesn't understand textualism.

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

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

1 that's what I took.

2 (Laughter.)

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

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

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

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

23 JUSTICE ALITO: Oh. Well --

24 MR. CHANG: -- involving a --

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

1 JUSTICE KAVANAUGH: It's Bagram.

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

4 JUSTICE KAVANAUGH: Come on.

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

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

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

1 MR. CHANG: I -- it depends on what
2 the Army's understanding was. And Boyle
3 contemplates this too, Your Honor.

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

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

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

13 JUSTICE ALITO: Seriously?

14 JUSTICE KAVANAUGH: But, on --

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

23 But you could have a more deferential
24 rule which still allows some forms of state
25 liability to come in, which is that the

1 contractor was liable if but only if the
2 plaintiff can show that the contractor violated
3 military policy.

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

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

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

23 And this is -- this ended up injuring
24 multiple U.S. soldiers on the base because
25 Fluor didn't do what the Army told it to do.

1 So, if we're thinking about what kind of rule
2 applies, the rule has to be one that saves
3 soldiers.

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

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

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

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

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

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

1 enemy's law?

2 JUSTICE BARRETT: Which seems bizarre.

3 If this happened on an American base, I

4 wouldn't understand a base to be Afghan soil.

5 I would understand it to be U.S. soil. So, if

6 that -- seriously?

7 MR. CHANG: Certainly, I mean, there

8 are some courts that have -- lower courts that

9 have applied Afghan law in situations like

10 this. However, there are certainly other

11 things that factor in as well, like, you know,

12 whether there's an agreement with the --

13 between the U.S. and the --

14 JUSTICE BARRETT: Doesn't that seem

15 like a pretty big problem for your theory if

16 that's the state law if -- or if the default is

17 whatever law would otherwise apply, as Justice

18 Kavanaugh is saying, the enemy's law is going

19 to apply to the -- I mean, that suggests that

20 maybe a federal common law should apply, maybe

21 not the common law rule that Fluor and the

22 government want, but if the alternative is a

23 default to Afghan law?

24 MR. CHANG: So -- so two responses to

25 that, Your Honor. The first is that -- so,

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

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

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

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

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

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

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

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

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

15 JUSTICE KAVANAUGH: What is the
16 difference?

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

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

24 MR. CHANG: I mean, yes, Your Honor,
25 because one is saying that states cannot act in

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

5 So -- so, when it comes --

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

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

1 MR. CHANG: We don't think so, Your
2 Honor. Given cases like Little and Mitchell,
3 we think the default is that common law rule is
4 in place unless Congress affirmatively
5 displaces the operation of the state law.

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

14 So doesn't it come out differently?

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

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

20 MR. CHANG: I --

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

24 MR. CHANG: That is not even the
25 analysis in Boyle. Boyle -- uniquely federal

1 interest was a starting point in Boyle.

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

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

13 JUSTICE JACKSON: So can you just --

14 JUSTICE ALITO: Would --

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

21 MR. CHANG: So -- so we think that the
22 Badilla test is more faithful to -- to what
23 this Court's teaching in Boyle. Again, Boyle
24 zeroed in on the federal government's interest
25 in getting its work done and making sure that

1 there wasn't a conflict between that decision
2 and -- and the state law duty.

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

8 JUSTICE ALITO: If the --

9 JUSTICE GORSUCH: Please.

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

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

1 JUSTICE ALITO: No -- well, not that
2 it would be preclusive against Fluor. Would it
3 be preclusive against you on the issue of
4 preemption?

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

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

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

24 CHIEF JUSTICE ROBERTS: I'm sorry.

25 Justice Thomas, anything further?

1 JUSTICE THOMAS: As I understand your
2 argument, you're not saying that the government
3 is precluded from preempting the lawsuit, your
4 lawsuit?

5 MR. CHANG: Correct, Your Honor.

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

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

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

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

25 JUSTICE SOTOMAYOR: No.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 Justice Gorsuch?

3 Justice Kavanaugh?

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

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

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

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

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

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

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

1 right?

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

4 JUSTICE KAVANAUGH: It's a contractor.

5 MR. CHANG: To a contractor?

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

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

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

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

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

1 whatever it was at the starting line? That --
2 that's going to be a lot of finger-pointing on
3 that.

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

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

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

14 MR. CHANG: Oh, certainly. I mean, so
15 there might be finger pointing, but --

16 JUSTICE KAVANAUGH: Certainly Fluor is
17 not going to agree with that, right?

18 MR. CHANG: At -- at the end of the
19 day if -- just there is a possibility of things
20 that might unfold during discovery or
21 evidentiary issues --

22 JUSTICE KAVANAUGH: Can you imagine in
23 state court, like, generals, military officers,
24 coming in for -- for testimony about what our
25 rules were for the -- the people who worked in

1 the vehicle yard, what our rules were for who
2 could run in a 5K, what -- why we had former
3 Taliban working on a U.S. base at Bagram, you
4 know, that would be an interesting discussion
5 I'm sure.

6 Do you envision that kind of testimony
7 happening in the state court?

8 MR. CHANG: No, not at all because
9 here the Fourth Circuit already agreed with us,
10 it's a litigation here would not lead to
11 assigning fault to the military.

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

16 JUSTICE KAVANAUGH: Have any federal
17 courts gone your way on this -- on this general
18 issue so far?

19 MR. CHANG: So the Badilla -- Badilla
20 court has agreed with us and that's why there
21 was a circuit split in this case.

22 JUSTICE KAVANAUGH: Okay. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: Just to follow up

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

8 MR. CHANG: That's correct.

9 JUSTICE BARRETT: So if there was
10 confidential information, there would be, you
11 would agree, some sort of protection?

12 MR. CHANG: 100 percent. And -- and
13 the reason why -- and the fact that there are
14 other mechanisms to protect the government's
15 interests like that, undercuts the need to
16 displace state law over federal common law in
17 this case.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

20 JUSTICE JACKSON: And is it your view
21 that really the rule that you want us to adopt
22 or the one that you're focused on is applicable
23 in the situation in which the contractor acts
24 contrary to the military's interests because
25 it's doing something negligently; that is not

1 -- it has not been authorized by the military
2 to behave in this way, the particular way that
3 is being claimed as causing the injury in this
4 case?

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

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

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

23 And we also have the fact that
24 Congress has not acted to displace state law
25 here.

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

9 MR. CHANG: Not at all.

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

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

20 JUSTICE JACKSON: And finally, let's
21 say if we -- if we think Badilla is the correct
22 test, should we vacate and remand for further
23 proceedings under that test? That was not what
24 was applied here, correct?

25 MR. CHANG: No. But you should not --

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

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Mosier.

12 ORAL ARGUMENT OF MARK W. MOSIER

13 ON BEHALF OF THE RESPONDENTS

14 MR. MOSIER: Mr. Chief Justice and may
15 it please the Court:

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

21 Those state law claims are preempted
22 because they conflict with uniquely federal
23 interests. Petitioner's claims interfere with
24 the federal government's exclusive war-making
25 powers.

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

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

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

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

22 Petitioner's claims undermine the
23 military's authority to punish and deter
24 misconduct. Congress has given the military
25 the necessary tools to enforce its contracts

1 and to ensure compliance with its orders. The
2 military must decide how to address
3 non-compliance by balancing sensitive national
4 security and foreign policy interests.

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

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Are all contractors
14 immune from suit on military bases?

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

22 JUSTICE THOMAS: What about, for
23 example, the food service contractor on the --
24 on the same base?

25 MR. MOSIER: Yes.

1 JUSTICE THOMAS: And assume there was
2 food poisoning.

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

10 JUSTICE THOMAS: So are contract
11 contractors under those circumstances subject
12 to military laws or, say, court-martial?

13 MR. MOSIER: Yes, absolutely. The --
14 first of all, the -- the -- the military can
15 terminate a contract. It can seek damages
16 under the contract. Contractors and their
17 employees are subject to criminal prosecutions
18 and court marshals and Congress has over the
19 years changed the provisions and given
20 additional tools to the military to police its
21 contractors and ensure that they comply with
22 their contractual obligations.

23 JUSTICE KAGAN: Mr. Mosier, you would
24 -- your position extends to a case in which the
25 contractor does something that's in explicit

1 violation of government policy. So just
2 assume, which I know you contest, but just
3 assume for a moment that a provision in the
4 Fluor contract made it quite clear that Fluor
5 was not to operate in the way that Fluor, in
6 fact, did.

7 What is the uniquely federal interest
8 there?

9 MR. MOSIER: So the uniquely federal
10 interest we would still define it as the
11 federal government's exclusive authority and
12 determining how to wage war.

13 Where we would see the conflict even
14 within this situation in which there has been a
15 finding of breach is when state law is trying
16 to impose additional or different sanctions
17 than the military.

18 So here they point to the finding and
19 the determination where the Army has said there
20 was a violation of contract, but the Army
21 determined that what was in the military's best
22 interest was not to terminate the contract but
23 to continue to work with Fluor going forward.

24 That conflict looks a lot like the
25 conflict that the Court found sufficient to

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

15 And we think the same analysis applies
16 here. It -- it is, you know, the military
17 could've -- could have contract --

18 JUSTICE GORSUCH: If that's the
19 case --

20 MR. MOSIER: Yeah.

21 JUSTICE GORSUCH: -- what you're
22 saying is the military should decide this.
23 What do you do with the regulations, which as
24 was discussed earlier, would seem to permit
25 liability in just these circumstances?

1 MR. MOSIER: I'm not saying not in
2 these circumstances. The regulation recognized
3 and told contractors there could be liability
4 in certain circumstances --

5 JUSTICE GORSUCH: Yeah.

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

7 JUSTICE GORSUCH: Yeah.

8 MR. MOSIER: Under the test, as I was
9 talking about --

10 JUSTICE GORSUCH: And it says unless
11 -- unless you're exercising specific control
12 over the actions and decisions, you're not
13 going to get Boyle. That's what -- that's what
14 the government told contractors like Fluor.
15 Why -- why isn't it fair to hold you to that?

16 MR. MOSIER: So we're not asking for
17 Boyle, the preemption under the rule in Boyle,
18 which applied the discretionary function
19 exception. And what was different about Boyle,
20 although it did involve a military contractor,
21 obviously away from the battlefield in time of
22 war, it adopted a rule not based on the war
23 powers because that rule applied to all
24 government contractors, but what the government
25 has been consistent in saying for over a

1 decade --

2 JUSTICE GORSUCH: So you're asking for
3 something different than Boyle because that was
4 a contract case, and the -- and DoD told folks
5 under Boyle you're -- you're going to lose in
6 circumstances like this, and you might lose in
7 circumstances like this? So you're asking us
8 to invent a new -- a new supplement to Boyle?

9 MR. MOSIER: It's a different rule
10 that is based on the different uniquely federal
11 interest. The uniquely federal interest that
12 the Court fashioned the test on in Boyle was a
13 uniquely federal interest in --

14 JUSTICE GORSUCH: All right. Let me
15 -- let me ask you --

16 JUSTICE KAVANAUGH: You should fight
17 back a little harder than that.

18 JUSTICE GORSUCH: If I might just
19 finish.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch.

22 JUSTICE GORSUCH: Thank you. You're
23 going to have your shot, my friend.

24 Boyle was about contracts. And -- and
25 it was about, you know, if it's specifically

1 directed, well, then you're out of luck. I --
2 I totally get that contractors in -- in -- in
3 wartime play increasingly significant role. I
4 mean, we've got briefs before us from the
5 Veterans of Foreign Wars pointing out that the
6 Gulf War in the '90s, it was like one in a
7 hundred -- I'm making that up -- and now it's
8 over 50 percent more recently.

9 And that certainly raises some
10 significant policy issues. One might -- might
11 think that it would help the military to
12 immunize all contractors, and there's some good
13 arguments for that. But there's another good
14 argument on the other side, which is, well,
15 maybe the military benefit most from having
16 efficient contractors who are less likely to
17 cause harm to military members. And we've got
18 competing amici making both sides of those.

19 Why isn't that a judgment that really
20 cries out for congressional decision and what
21 -- what expertise do we have in setting that
22 rule?

23 MR. MOSIER: So on that point, I would
24 say this Court doesn't have expertise, and it
25 said that in a number of cases, in determining

1 what would best serve the military's interest
2 on the battlefield. But this gets back, I
3 think, to Justice Kavanaugh's --

4 JUSTICE GORSUCH: So why not just
5 apply Boyle and be done with it?

6 MR. MOSIER: Because what we have at
7 issue here is the uniquely federal interest of
8 the federal government's exclusive power to
9 wage war. That was not what the Court
10 addressed in Boyle. And I think -- you know, I
11 think what is notable --

12 JUSTICE GORSUCH: Answer the question.
13 We have to decide how important is it for the
14 military to have contractors not fearful of
15 liability versus how is it -- important is it
16 as for the military to have contractors who
17 don't injure military members? Right? That's
18 a -- that is a -- that is what you're asking us
19 to -- to weigh. And you're asking us to come
20 down on one side rather than the other.

21 And I'm just suggesting to you there
22 are really good arguments, on both sides of
23 this, which would advance the war --
24 -war-making function of the federal government,
25 and I don't know.

1 JUSTICE BARRETT: Well -- and,
2 counsel -- sorry.

3 JUSTICE GORSUCH: Okay.

4 JUSTICE BARRETT: Did you have a
5 response to that or is that --

6 MR. MOSIER: Yeah, I --

7 JUSTICE BARRETT: I thought it was
8 kind of rhetorical, but --

9 (Laughter.)

10 MR. MOSIER: Yeah, I was going to say
11 that obviously the military, the military is
12 well positioned to make that determination and
13 when to hold -- you know, hold a contractor
14 accountable for an alleged breach and whether
15 they think that is a situation that will lead
16 to better performance by the contractor. So
17 it's left -- under our view, it's left to the
18 military to make that determination and balance
19 those competing interests. And -- and the
20 military does that.

21 JUSTICE BARRETT: But, counsel, so I
22 guess one problem I'm having is just the
23 analytical one. I mean, let's -- let's assume
24 that we think you're right and that there's
25 preemption. You still have to decide if -- if

1 you're saying that state law can't control,
2 then some federal common law does. And in
3 Boyle, the conflict, you're right, it was
4 different, but there was actually -- they were
5 contractual terms. And so the Court was very
6 focused on the specific conflict between the
7 contract that the helicopter design fulfilled
8 and the state tort law.

9 Here, if we say that because of the
10 uniquely federal interest in waging war state
11 law can't operate, I take it what you're asking
12 us to do is say: And then as the federal
13 common law rule you should adopt, you should go
14 look at the combatant activities exception in
15 the Federal Tort Claims Act and extend it to
16 contractors.

17 So it seems like a very fancy way of
18 just saying you should look at the Federal Tort
19 Claims Act and extend it beyond its text to
20 cover contractors.

21 MR. MOSIER: So that is -- that is
22 part of what -- the argument that the combatant
23 activities exception can use -- be used as
24 evidence of Congress's intent on the types of
25 claims that would interfere with the military,

1 just like the Court used it in Boyle. It was
2 the other -- the discretionary functions
3 exception, but it was the same way that it used
4 it.

5 And I think, more fundamentally, where
6 we see the conflict and why between, you know,
7 applying tort law or even a tort law claim as a
8 matter of federal common law to combat
9 operations on a foreign battlefield is we think
10 there's inherently a conflict between what the
11 military needs of its soldiers and contractors,
12 of how they wage war and a duty to impose
13 reasonable care for the protection of others.

14 JUSTICE BARRETT: So it's two-step.
15 It's two-step. One is that state law can't
16 operate, and then, second, please adopt as a
17 matter of federal common law an immunity for
18 independent contractors?

19 MR. MOSIER: It would -- we would
20 consider it preemption. That would be the --

21 JUSTICE BARRETT: Well --

22 MR. MOSIER: -- step -- if you went
23 through Boyle.

24 JUSTICE BARRETT: Well, right. But, I
25 mean, it seems to me you're saying state law

1 can't operate because this is a federal enclave
2 that has to be governed exclusively by federal
3 law because of the federal interest in the
4 war-making power that states don't have, but
5 then you still have to decide what rule
6 operates. And you're saying: And the rule
7 that should operate is one of immunity for
8 contractors.

9 MR. MOSIER: What the -- what the rule
10 that would operate is that the Court would
11 leave this area of common law to Congress's
12 control. Congress has legislated in this area.
13 Congress can adopt rules and create causes of
14 action. But in the absence of congressional
15 action, yes, we would say a state law claim or
16 tort claim would not be --

17 JUSTICE KAVANAUGH: Can I --

18 JUSTICE SOTOMAYOR: Could I ask you --
19 I'm sorry.

20 CHIEF JUSTICE ROBERTS: I'm sorry.
21 Could you finish that? In the absence of
22 congressional action, what?

23 MR. MOSIER: A tort law claim would
24 not be allowed to proceed.

25 JUSTICE SOTOMAYOR: Counsel, that's

1 sort of turning things on its head, preemption
2 on its head. It's like Congress has to act to
3 overturn our presumption.

4 But why do we have Boyle at all? You
5 say this is based on some exclusive Article I
6 power, the power to raise and support an Army
7 includes training an Army. It's exclusive to
8 the federal government. States could have
9 militias but not Army. So why do we bother
10 with Boyle at all?

11 MR. MOSIER: Because --

12 JUSTICE SOTOMAYOR: You're -- you're
13 sort of saying -- you're going to step further
14 and saying that the war power is somehow more
15 -- more important than the power to support and
16 raise an Army, correct?

17 MR. MOSIER: So, certainly, when
18 you're talking about combat operations on a
19 foreign battlefield, that's different. And I
20 think maybe why --

21 JUSTICE SOTOMAYOR: But -- but then
22 why did the military issue its regulation?
23 There a military contractor asked for
24 indemnification, and the military said no
25 because under Boyle you -- if you're making a

1 judgment contrary to our directives, you're
2 liable. And we don't see why you should be
3 indemnified.

4 The government -- and that was in the
5 middle of the Iraq and Afghanistan war. It was
6 a wartime regulation that they were considering
7 under a Republican president, 2008, under
8 President Bush. And they're saying no. In a
9 time of war we're telling you you're
10 responsible.

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

21 MR. MOSIER: So if I can start with
22 the --

23 JUSTICE SOTOMAYOR: Congress and the
24 military. The military could write its
25 contracts more specifically to indemnify or

1 direct.

2 MR. MOSIER: I mean -- I mean, you'll
3 hear from the government shortly, but I'll
4 point out the government has consistently
5 maintained the position it does now since at
6 least 2012, that claims asserted against a
7 contractor for combat operations on a foreign
8 battlefield are preempted. They are not
9 covered by the discussion in that -- in the
10 2008 regulation. That's their position.

11 I mean, the broader point that you
12 raised -- and I think this goes back to Justice
13 Kavanaugh's talk about what should be the
14 default rule and why couldn't Congress, if they
15 want to, provide relief for contractors here
16 speak clearly? That's an argument that is made
17 and could be made in almost every case for
18 implied preemption.

19 Chief Justice Marshall acknowledged
20 and rejected that -- that argument in Osborn.
21 Justice Kavanaugh quoted the language from
22 Crosby that says, you know, that Congress, the
23 fact that they didn't expressly preempt
24 something just maybe show that they understand
25 implied preemption.

1 I think the default rule --

2 JUSTICE SOTOMAYOR: After Boyle, why
3 would they understand that?

4 MR. MOSIER: So, after Boyle, they
5 would have understood that the way the Court
6 interpreted and provide preemption to a
7 contractor based on a FTA -- FTCA exemption,
8 they -- they reasonably could have understood
9 that courts could hold, as -- as all of them
10 have, that there is preemption for combatant
11 activities.

12 JUSTICE SOTOMAYOR: Yeah, but all of
13 the exemptions that have been created by the
14 circuits all involve to some extent military
15 directions that are -- that have specified in
16 some form the directive the contractor
17 followed.

18 MR. MOSIER: I -- I -- I would
19 disagree with that. I think the majority of
20 the courts don't go that -- that -- that way.

21 JUSTICE SOTOMAYOR: No, the Fourth
22 Circuit is broader. Thank you.

23 JUSTICE KAVANAUGH: Justice Gorsuch's
24 good questions earlier about Boyle and the
25 interaction of Boyle with other branches of

1 preemption, I think this is very important
2 analytically that we have this straight, so I
3 want to make sure we have it straight, which is
4 I think you're saying put aside Boyle.

5 We're not inventing another branch of
6 preemption law. We are applying the
7 longstanding uniquely federal interest branch,
8 which naturally would encompass at its core
9 war-making on a -- in combat, in a foreign
10 country, in a war zone, right? So that's not a
11 new branch.

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

13 JUSTICE KAVANAUGH: But -- but it also
14 means you don't need Boyle. Like Judge
15 Silberman said, even in the absence of Boyle,
16 there's preemption in this kind of
17 circumstance. And --

18 MR. MOSIER: Yes.

19 JUSTICE KAVANAUGH: -- that's your
20 point. Put aside Boyle. Sweep -- it's gone.
21 You still win under this other branch of
22 preemption law is your argument?

23 MR. MOSIER: Our -- yes. Our argument
24 at its highest level is that the claims are
25 preempted because they conflict with the

1 Constitution. The Constitution not only vests
2 the war powers in the federal government, but,
3 importantly, Article I, Section 10, Clause 3
4 expressly withdraws the power from --

5 JUSTICE KAVANAUGH: And when --

6 MR. MOSIER: -- the states to engage
7 in war.

8 And these stort -- state tort claims,
9 by imposing common law duties of reasonable
10 care onto the battlefield, would interfere with
11 the federal government's exercise of its
12 powers.

13 You can get there through Boyle.
14 That's one line of cases to get there. You can
15 get there through Garamendi, Crosby, Journeg,
16 those cases recognize simply you can weigh the
17 way that a state law -- a state law or state
18 law cause of action would interfere with the
19 federal government's exercise of its powers,
20 and if that's enough of a conflict, there can
21 be preemption.

22 As Your Honor pointed out, Footnote 11
23 of Garamendi said, if we're dealing with an
24 interest where the states don't have a
25 historical role in regulating, maybe we should

1 treat treat this more as field preemption.
2 That's the circumstance we're dealing with
3 here.

4 JUSTICE KAVANAUGH: Two -- two quick
5 follow-ups. Congress could provide for state
6 law tort law to apply. So, when we say the
7 Constitution preempts, that gives it to
8 Congress and the executive, but they could
9 enact laws allowing this, correct?

10 MR. MOSIER: Correct.

11 JUSTICE KAVANAUGH: Okay. And then,
12 secondly, on Justice Barrett's question about
13 what would the federal rule then be, I think
14 your answer is, well, that's defined, but
15 correct me if I'm wrong, defined by the scope
16 of preemption, and the scope of preemption, you
17 think, is, if we're talking about a war zone,
18 combat activities in a war zone, that is at the
19 core of a uniquely federal interest.

20 MR. MOSIER: Correct. There could be
21 the scope of the rule, the common law rule the
22 court would adopt is like it did in Boyle, is a
23 rule for determining where there would be
24 preemption and what areas would be left to
25 federal common law and what would -- what would

1 fall outside of there when state law claims
2 would be allowed to proceed.

3 JUSTICE JACKSON: So you -- you say
4 that Congress could allow for liability in that
5 exchange with Justice Kavanaugh, and I guess
6 I'm just trying to understand how we fit that
7 concept into the understanding then, in the
8 FTCA, Congress decided that even with respect
9 to combatant activities for which the
10 government itself could not be held liable,
11 there would still be general contractor
12 liability.

13 I don't -- I guess I'm struggling with
14 thinking about what Congress may have intended
15 with respect to contractors and their
16 liabilities concerning combatant activity when
17 we do have a pretty substantial and significant
18 carveout in the context of the FTCA for those
19 same kinds of activities.

20 MR. MOSIER: So the FTCA itself carved
21 out contractors because that was a decision by
22 Congress that the United States would -- would
23 defend and -- and -- claims and accept
24 liability for actions by its employees but not
25 for its contractors.

1 But the reason we think the combatant
2 activities exception is -- is relevant is for
3 the same reason that the Court looked to it in
4 Boyle, as just evidence of the types of claims
5 that Congress would think poses the greatest
6 interference with the exercise of the federal
7 powers. But, as I was saying to -- to Justice
8 Kavanaugh, in relying on cases like Garamendi
9 and Crosby, you don't need to rely on the FTCA
10 or the combatant activities exception.

11 Justice Kavanaugh was exactly right
12 that the majority test, the test applied by the
13 Fourth Circuit, is based both on Boyle and
14 constitutional preemption apart from that.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 JUSTICE THOMAS: Aside from your --
20 from the combat situation, how would you define
21 uniquely federal interests?

22 MR. MOSIER: What the Court said in
23 Boyle and we think is right is those issues
24 that the Constitution and the laws of the
25 United States commit to the control of the

1 federal government, so, here, I think --

2 JUSTICE THOMAS: What does that mean?

3 MR. MOSIER: It's -- you can look to
4 the Constitution, and I -- I think this should
5 be an easier case for determining a uniquely
6 federal interest. The Constitution vests the
7 war powers in the federal government and
8 expressly states that states may not engage in
9 war. So the reason that war-making is uniquely
10 federal is that the states do not have power to
11 engage in war-making.

12 JUSTICE THOMAS: I mean, you could
13 argue that the interstate highway system is
14 uniquely federal. I just -- I don't understand
15 how we are going to limit that.

16 MR. MOSIER: So, no, I mean, there are
17 very few areas that the Constitution expressly
18 withdraws the power from the states to
19 regulate. In most areas --

20 JUSTICE THOMAS: Give me a couple of
21 examples.

22 MR. MOSIER: Obviously, war-making
23 treaties, coining money, the things in Article
24 I, Section 10 provide a list of the things the
25 states cannot do.

1 CHIEF JUSTICE ROBERTS: Justice Alito?

2 JUSTICE ALITO: Can -- is

3 Mr. Hencely's suit a tort suit or a contract
4 suit?

5 MR. MOSIER: He brought both claims.

6 The remaining claims are tort claims. For his
7 breach-of-contract claim, that was dismissed
8 because he's not a third-party beneficiary to
9 the contract, and so that obviously, you know,
10 is one of the oddities of the rule he proposes,
11 is that he's going to litigate a breach of
12 contract without a contract claim.

13 JUSTICE ALITO: So is it -- would it
14 be odd to have a rule in which the scope of
15 preemption for a tort suit depends upon whether
16 or not there was a breach of a contract as to
17 which he was not a third-party beneficiary?

18 MR. MOSIER: Yes. Yes. That would be
19 very strange in my view.

20 JUSTICE ALITO: Suppose that a -- a
21 contractor is building a building and hires a
22 subcontractor and specifies exactly what the
23 subcontractor is to do, and then someone is
24 injured by falling debris and that person sues
25 the subcontractor.

1 Would it be a complete defense for the
2 subcontractor -- subcontractor to say: Hey, we
3 weren't negligent, we were doing exactly what
4 the contractor told us to do? Would that be a
5 complete defense?

6 MR. MOSIER: Not under general tort
7 law principles.

8 JUSTICE ALITO: Can -- can the federal
9 government by regulation provide a conclusive
10 interpretation of the scope of preemption?

11 MR. MOSIER: No. They haven't
12 attempted to, but I think they probably would
13 not be able to. That would be left to the
14 Court.

15 JUSTICE ALITO: When the FTCA and I
16 think the provision that's been discussed was
17 adopted, is there anything to indicate that
18 Congress had activities on the battlefield in
19 mind?

20 MR. MOSIER: There's no -- there's
21 really no legislative history about that. The
22 fact that it was adopted shortly after World
23 War II to address combatant activities in time
24 of war would suggest that they had the -- had
25 that in mind.

1 JUSTICE ALITO: It's been suggested
2 that the federal government has no interest
3 when it is -- when there -- when what the --
4 the military contractor does is a violation of
5 the contract. Is -- is that simplistic? There
6 can be several different situations.

7 One, there could be a situation where
8 it is absolutely undisputed that there was a
9 material breach of the contract. There could
10 be a situation where the military says there
11 was a breach of the contract. And when
12 something goes wrong like the bombing on the
13 Bagram base, the military has an interest in
14 trying to exonerate itself.

15 So you could have the situation where
16 the military says: There was a breach, the
17 contractor says there wasn't a breach. There
18 could be the situation where the military says:
19 There was no breach, the contractor says there
20 was not a breach.

21 So wouldn't the rule that we adopt
22 have to deal with all three of those
23 situations?

24 MR. MOSIER: I think it would. And I
25 think what's critical here is we are clearly in

1 the situation where there is a disagreement
2 between Fluor and the government about whether
3 there was a breach. The government ultimately
4 made a determination that the best way to
5 continue waging war was to allow the parties to
6 agree to disagree and to move forward and
7 continue to fight the war.

8 But, if the -- if the decisions of a
9 contractor are going to be subject to state
10 tort suits a decade after the fact, the
11 contractor is going to have to act very
12 differently when an accident happens. The
13 immediate thing that -- that the military needs
14 when there's an accident like this is for
15 soldiers and contractors to work together to
16 make sure there's not a similar attack later
17 that day, the next day, and so you need
18 cooperation.

19 If the contractor knows we could be
20 blamed for this, they're going to want to do
21 their own investigation. They're going to want
22 to collect their own evidence. There will
23 already start to be considerations of, was it
24 the military's fault? Was it -- was it our
25 fault?

1 I think one thing, if I can address a
2 statement made before, the district court made
3 clear if this case went forward, Fluor would be
4 able to try the empty chair and say this was
5 entirely the military's fault. You should not
6 hold us liable because the military first made
7 a decision of foreign policy that we're going
8 to allow former members of the Taliban onto
9 Bagram because that's a good way to
10 rehabilitate them.

11 The military then decided that
12 Mr. Nayeb was a former member of the Taliban,
13 not a current member of the Taliban. Fluor
14 didn't know he had any ties to the Taliban.
15 That was entirely the -- the military's
16 judgment that he was former. Mr. Nayeb, the
17 evidence showed, smuggled explosives onto the
18 base to build a bomb. It was the military's
19 entire responsibility to prevent that from
20 happening. So there's no way this case could
21 go forward.

22 You know, the plaintiffs say --

23 JUSTICE ALITO: All right.

24 MR. MOSIER: -- if they tried the
25 case, they're --

1 JUSTICE ALITO: Thank -- thank you.

2 Thank you.

3 MR. MOSIER: Yeah. Okay.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor?

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

10 (Laughter.)

11 JUSTICE SOTOMAYOR: A very odd
12 argument. Okay.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh?

15 Justice Gorsuch?

16 Justice Kavanaugh?

17 JUSTICE KAVANAUGH: Can you just
18 continue with that?

19 (Laughter.)

20 MR. MOSIER: Yeah. I mean, where I
21 was ending with that is, you know, the
22 plaintiffs said that they wouldn't put the
23 military's judgments on trial and, therefore,
24 we would.

25 JUSTICE KAVANAUGH: You're going to

1 be.

2 MR. MOSIER: Of course. And we
3 already --

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

6 MR. MOSIER: Yes, of course.

7 JUSTICE KAVANAUGH: That's going to be
8 the whole deal.

9 MR. MOSIER: And --

10 JUSTICE KAVANAUGH: And that's going
11 to be a lot of -- I mean, you all are together
12 today but would not be together in that part of
13 the case. And in a South Carolina courtroom,
14 right, there's going to be questions about the
15 military -- and the military was supposed to
16 prevent him from bringing this stuff onto the
17 base. That wasn't your responsibility, right?

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

20 JUSTICE KAVANAUGH: And then the
21 military runs a 5K, right, and -- and anyone
22 who's run a 5K, there are lots of people
23 stacked together at the starting line, right?

24 MR. MOSIER: And there was a lot --
25 and just, by the way, there's a lot of

1 disagreement about what it meant that --
2 Fluor's duty to supervise. Our position was
3 that it was our duty to supervise to ensure
4 that the employees carried out the work that
5 they were supposed to do to fulfill the
6 obligations under the contract, not to provide
7 security, not to provide force protection.
8 That remained the military's responsibility.

9 JUSTICE KAVANAUGH: Right. And --

10 MR. MOSIER: The military --

11 JUSTICE KAVANAUGH: -- they're going
12 to be pointing out to you -- and I know you
13 disagree with this -- that you all didn't do
14 enough to supervise on the -- at the vehicle
15 yard, et cetera, right? So that's going to be
16 a back-and-forth on this.

17 MR. MOSIER: That will be a
18 back-and-forth. And our position would be that
19 the evidence showed that he was a perfectly
20 acceptable employee, was performing up to
21 the -- up to doing the job that he needed to.

22 JUSTICE KAVANAUGH: When did you
23 learn -- don't tell me if you shouldn't at this
24 point obviously. When did you learn that he
25 was a member of the Taliban or former member of

1 the Taliban?

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

6 JUSTICE KAVANAUGH: All right. Okay.
7 That's it.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: Just a few
11 clarifying questions.

12 First is I just want to be sure that I
13 understand you are asking for a rule that is
14 different from Boyle because you agree that if
15 we just applied Boyle because there is not the
16 one-on-one conflict, you know, the air
17 conditioner hypothetical, you would lose, so
18 this is something that's different from Boyle
19 that you want, correct?

20 MR. MOSIER: It's different --

21 JUSTICE BARRETT: Okay.

22 MR. MOSIER: Yes, it's different from
23 Boyle.

24 JUSTICE BARRETT: Second, can you just
25 say a little bit what the scope of the combat

1 exception is? I mean, you know, you said that
2 Bagram was under siege constantly from rockets,
3 et cetera. That's certainly not true of every
4 base abroad.

5 MR. MOSIER: Mm-hmm.

6 JUSTICE BARRETT: But you could still
7 have terrorist attacks. You could have -- so
8 how is a court supposed to decide when your
9 proposed exception would apply?

10 MR. MOSIER: So, under the test that
11 we've supported and the government has
12 proposed, for the first element, you would look
13 to the text from the combatant activities
14 exception, and so is it any claims arising out
15 of combatant activities in time of war?

16 In the first decision after the
17 adoption of the FTCA, the Ninth Circuit in
18 Johnson interpreted combatant activities and
19 said it includes not only physical violence but
20 also actions necessary to and taken into
21 connection with. And every court of appeals
22 has kind of relied on that test, which seems
23 consistent with the plain language.

24 And so courts would look to that.
25 Does the activities -- are they, you know,

1 supporting, arising out of, supporting the
2 military's combatant activities? Here, this is
3 at the heartland, right? These are injuries
4 from an enemy attack, right?

5 JUSTICE BARRETT: But that's surely
6 pretty broad. I mean, Justice Thomas was
7 asking you about, you know, the food services
8 and an E. coli outbreak. I mean, supporting
9 the military's activities, I mean, that is
10 pretty broad, and it seems to me that if you
11 want courts to look at the combatant activities
12 exception from the Federal Tort Claims Act,
13 we're right back to this question of is what
14 you're really asking for a virtual extension of
15 the text of that exception?

16 MR. MOSIER: So I would -- the -- the
17 hypothetical I got was E. coli on Bagram, and I
18 would say yes, you may -- it may be a different
19 conclusion, E. coli in San Diego or at a base
20 to troops that aren't ready to deploy. It's
21 not -- every base is not looked at the same.
22 The actual injury is examined to determine its
23 connection to combat activities, which is not
24 viewed as everything the military does.

25 And so you would have a much more

1 limited scope of protection at U.S.-based
2 military bases. You know, that's not to say
3 that there aren't things, because there are
4 things, going on at U.S. military bases right
5 now that are connected to combatant activities.
6 But what I was saying in -- in response to the
7 earlier hypothetical is that everything, if not
8 everything, virtually everything going on at
9 Bagram in 2016 --

10 JUSTICE BARRETT: Would be.

11 MR. MOSIER: -- because of the way it
12 was under attack, was related.

13 JUSTICE BARRETT: So it could
14 potentially extend to domestic activities if
15 they were supporting the combatant activities
16 abroad?

17 MR. MOSIER: It could.

18 JUSTICE BARRETT: Okay.

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

20 JUSTICE BARRETT: Oh, go ahead. Yeah,
21 well, that's okay.

22 MR. MOSIER: Okay.

23 JUSTICE BARRETT: You don't need to
24 say anything more. And just finally, do you
25 see yourself as standing completely united with

1 the government's understanding of the rule, or
2 do you see any differences between your
3 position and the government's?

4 MR. MOSIER: We -- we support the
5 government's position, the way it played out.
6 Some of the courts of appeals have adopted a
7 slightly different rule than the government,
8 but there's not a lot of daylight between those
9 rules, and we see benefits in the -- in the
10 government's rule.

11 JUSTICE BARRETT: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: And just to clarify,
15 you -- your rule is tantamount to a field
16 preemption kind of concept. I think you
17 accepted that, is that right? That's what
18 you're seeking essentially?

19 MR. MOSIER: So, certainly, with
20 respect to claims on a foreign battlefield, I
21 think you would view it as field preemption.
22 And that's largely because applying conflict
23 preemptions, we just think there's an inherent
24 conflict between duties of reasonable care
25 under state tort law and what the military

1 demands and needs on a battlefield in combat
2 operations.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Gannon.

7 ORAL ARGUMENT OF CURTIS E. GANNON

8 FOR THE UNITED STATES, AS AMICUS CURIAE,

9 SUPPORTING THE RESPONDENTS

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

12 The Constitution has vested the
13 nation's war powers in the president and
14 Congress and has expressly divested the states
15 of such powers. This Court should hold that
16 Petitioner's tort claims are preempted because
17 of the uniquely federal interests at stake in
18 overseas combat operations.

19 Petitioner indisputably cannot sue the
20 U.S. Army directly, and he should not be
21 permitted to sue its combat support contractors
22 instead. Applying that principle requires no
23 extension of Boyle, which correctly looked to a
24 closely related FTCA exception as a model.

25 Under the government's proposed test,

1 Petitioner's claims are preempted because they,
2 one, arise out of the military's combatant
3 activities and, two, arise from the
4 contractor's actions within the scope of the
5 contract, whether or not they involved a
6 violation of the contract, because the
7 government is harmed either way.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Could you define,
10 beyond the combat situation -- scenario, what
11 you mean by "uniquely federal interests"?

12 MR. GANNON: Well, I agree with much
13 of the answer that my friend just gave you to
14 that, Justice Thomas, that we start with the
15 Constitution's structure here. And we have a
16 list at the top of page 12 of our brief of
17 other areas where the Court has found there to
18 be uniquely federal interests. They include
19 things like foreign affairs, rules implementing
20 federal loan programs, civil immunity of
21 federal officials. They're areas where the
22 Constitution and the statutes and the laws of
23 the United States have made it clear that this
24 is an area of exclusive federal interest. And
25 I think that that's clearest in this context

1 because federal powers are at the zenith --
2 JUSTICE THOMAS: Let's say I grant you
3 the combat. Beyond that, how -- how do we
4 define it? Because this isn't -- once we --
5 once we say that this uniquely federal interest
6 carries the day, why wouldn't someone from,
7 say, our military bases in San Diego or in
8 Norfolk, Virginia, who's servicing aircraft
9 carriers or nuclear subs, why don't -- why
10 isn't that unique?

11 MR. GANNON: Well, I -- I think that
12 there the states would have more interest in
13 what's going on in California than they do in
14 what's going on in Bagram. But we're not
15 asking the Court to invent a new type of -- of
16 preemption here.

17 We think that when Boyle talked about
18 uniquely federal interests, that's a concept
19 that this Court used in Sabbatino to say the
20 active state doctrine is an area of uniquely
21 federal interest.

22 And the way the Court determines that
23 it was was by looking to the Constitution,
24 which it said didn't dictate the content of the
25 active state doctrine, it looked to statutes

1 that said that they provided indirect support
2 for the active state doctrine but it said the
3 very idea that we have U.S. courts questioning
4 the acts of foreign territories in their --

5 JUSTICE THOMAS: But Boyle didn't say
6 all that.

7 MR. GANNON: Is something that is of
8 uniquely interested to the federal.

9 JUSTICE THOMAS: But Boyle didn't say
10 as much. You're making Boyle do a lot of work
11 that I didn't read into Boyle.

12 MR. GANNON: I think Boyle is standing
13 on a line of case law that talks about uniquely
14 federal interests as being a source of
15 preemption that this Court has continued to
16 repeat that category as being out there as
17 recently as Cassirer and Rodriguez where the
18 Court acknowledged this is there.

19 And I think this is an easy case for
20 determining that it's uniquely federal interest
21 because of both halves. The federal power is
22 at its zenith because of the way the
23 Constitution has vested war powers in the
24 federal government and state powers are at
25 their nadir because it has expressly divested

1 states of those types of powers.

2 CHIEF JUSTICE ROBERTS: Counsel, how
3 -- I'm interested in the determination --
4 limitation of a foreign battlefield. Does that
5 that mean, for example, there are bases in --
6 who are operating from in Afghanistan at the
7 same time that would not be in a foreign
8 battlefield because it's not as directly
9 engaged as Bagram was in this case?

10 MR. GANNON: Well the rule that we're
11 asking for would talk about whether there are
12 combatant activities and we're using the
13 exception in the FTCA as a model. And just as
14 the Court did in Boyle, it used a different
15 exception. It was looking at general
16 procurement contracting and so it was looking
17 at the discretionary function exception.

18 But I think that I would say that most
19 everything that the government was doing that
20 the U.S. military was doing in Afghanistan in
21 2016 was likely very closely connected with
22 combat -- with combat activities. And -- and
23 there's -- there's no doubt that -- that
24 Respondent's activities at Bagram were
25 supporting the military's combat function,

1 combatant activities.

2 And so the E. coli in the lettuce that
3 the troops are eating before they go out on
4 patrols, you know, outside the wire in Bagram,
5 that is arising from combatant activities. And
6 so this --

7 CHIEF JUSTICE ROBERTS: Well, what if
8 the E. coli infection takes place 700 miles
9 away in a base that is supporting the
10 activities at Bagram?

11 MR. GANNON: I -- I think that if --
12 if -- if -- that that's going to be a question
13 about what's -- what -- what it means to arise
14 from the military's combatant's activities.
15 And we -- we also have the second prong, which
16 is about -- and -- and just to finish the
17 answer to the first prong, that can certainly
18 extend to people who are supplying the troops,
19 who are on the very front lines.

20 The -- the Johnson decision that my
21 friend referenced from the Ninth Circuit
22 shortly after the FTCA was first enacted
23 recognized that, you know, ferrying ammunition
24 to the troops is something that just helping
25 somebody get ready to wield combat is -- is a

1 combatant's activity.

2 And here the question by analogy is
3 also whether the contractor was performing
4 within the scope of its contracts. And if --

5 CHIEF JUSTICE ROBERTS: Well, if --

6 MR. GANNON: -- it was --

7 CHIEF JUSTICE ROBERTS: -- ferrying
8 the troops, what about about preparing the
9 rations of food that is going to eventually be
10 used at Bagram and there's some, you know,
11 infection at the food plant in, you know, I
12 don't know, someplace in the United States.

13 MR. GANNON: Yeah. I -- I think that
14 -- I'm not sure how the combatant activities
15 exception in the FTCA has been construed in a
16 context like that. I think that for preemption
17 purposes here, this goes to question that
18 Justice Barrett just asked whether this needs
19 to be overseas.

20 I think for overseas, it's
21 overdetermined that the federal government's
22 interests are at their height and the state's
23 interests are at their lowest and therefore
24 it's easiest to say when it's an overseas
25 situation and it's, you know, that -- that

1 the -- the E. coli is -- is happening in
2 Afghanistan, then it -- then that's the --
3 that's where the -- the claim is arising.

4 It's arising from the military's
5 combatant activities there.

6 JUSTICE KAGAN: So help me,
7 Mr. Gannon, try to figure out what the harm is
8 to the federal government.

9 MR. GANNON: Yeah.

10 JUSTICE KAGAN: In Bagram, take the --
11 the contractor that doesn't properly cook the
12 chicken, take the contractor that doesn't
13 properly maintain the trucks. Take the
14 contractor that does a whole series of things
15 that are going to injure or kill soldiers.

16 In violation of what the government
17 has said is its policies, you know, the
18 government has a policy manual, here is how to
19 maintain the trucks, here is how to cook the
20 chicken and the contractor has operated in
21 violation of that.

22 MR. GANNON: Yes.

23 JUSTICE KAGAN: Why it is that state
24 liability would be so injurious to the
25 government's interest in that context, which is

1 I thought the context that we're concerned
2 about in this very case.

3 MR. GANNON: That -- that's right.
4 And -- and obviously we want our contractors to
5 obey their contracts. We want them to obey
6 military orders. But that doesn't mean that we
7 aren't threatened by the imposition of the
8 specter of tort regulation in the relationship
9 between the military and its contractors
10 whether or not the contractor has been complied
11 with, as has already been mentioned that that's
12 first of all going to lead to disputes about
13 whether it's been complied with, that are going
14 to be adjudicated half a world away maybe with
15 a government in an empty chair.

16 But even when the state thinks it is
17 trying to help the federal government enforce
18 its own standards, this Court has recognized
19 that the imposition of state law can be a
20 threat. My friend --

21 JUSTICE KAGAN: But tell me why.

22 MR. GANNON: Because it changes the
23 relationship between the parties. It alters
24 the behavior of the contractors on the ground.
25 They are less willing to do risky things. They

1 may indulge in a "mother may I" dynamic where
2 they have to keep asking for permission, hey,
3 you want me to do something pretty dangerous,
4 can you please confirm for me, sign in
5 triplicate that you have to do it this way.

6 And I -- I want you to be aware that
7 that's really dangerous because I want it on
8 the record for some jury down the road --

9 JUSTICE KAGAN: Wouldn't that answer
10 apply just as well to Boyle?

11 MR. GANNON: It would apply just as
12 well to Boyle. Part of the difference, though,
13 is that Boyle was talking about general
14 procurement activities for the government writ
15 whole. It happened to arise in the context of
16 a military contract. The Court's rule is not
17 limited to military contracts.

18 The hypothetical about the air
19 conditioner is not about contracts. This is --

20 JUSTICE KAGAN: But then what you're
21 saying is Boyle didn't know what it was doing,
22 it had a general contracting principle that
23 would have been fine and it -- it would -- what
24 it really should have done is to say this is
25 the military, it's different.

1 MR. GANNON: No. I'm saying that
2 because it was forming a general rule that
3 happened to apply to a military context that
4 did not involve combatant activity, which is
5 undisputed, that a -- a helicopter that goes
6 down a mile and a half off the shore of
7 Virginia in a training operation in -- in the
8 1980s is not combatant activities, even though
9 the helicopter was manufactured during --

10 JUSTICE KAGAN: Right. I was just --

11 MR. GANNON: -- during the Vietnam
12 War.

13 JUSTICE KAGAN: -- suggesting in all
14 of the arguments you were saying to me about
15 how the government needs to be in control of
16 its relationship with its contractors, applies
17 just as well to manufacturers of helicopters.

18 MR. GANNON: It -- it does but it's
19 more important in the combatant, when -- when
20 the government is engaged in combat in a
21 foreign theater of operations that the type of
22 distrust, the finger pointing, the threat
23 that -- that even though we're supposed to be
24 fighting a war, we're supposed to be worried
25 about how to protect security at Bagram, people

1 are worried about -- about making record for a
2 tort trial that could be happening in one of 50
3 different states. It's --

4 JUSTICE KAGAN: Thank you.

5 MR. GANNON: And -- and so we do think
6 that there's that -- that -- that that's a
7 threat. And the reason why it is different in
8 Boyle and Boyle requires there to be a
9 violation because it is considering a different
10 exception in the FTCA.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas?

14 Justice Alito?

15 JUSTICE ALITO: In response to the
16 argument that a suit like Mr. Hencely's can
17 easily get into, is very likely to get into
18 discovery that would be very intrusive and
19 disadvantageous to the government, the argument
20 is -- is made well, the government can always
21 invoke the state secrets privilege.

22 How frequently does the government do
23 that? And is it a good idea to adopt a rule
24 that would put the government to the choice
25 about invoking this privilege, which in my

1 understanding is used very infrequently on a
2 regular basis?

3 MR. GANNON: You're -- you're correct
4 that it's used infrequently. And the national
5 security concerns that are at interest, that --
6 that are served by the -- by the state secrets
7 privilege are limited to only certain types of
8 information. We think that the threat of
9 having civil -- civil discovery with, you know,
10 people on the battlefield is a problem even if
11 it doesn't involve classified information.
12 It's going to mean that there are going to be
13 depositions of active servicemembers, that --
14 that -- that -- that we're distracting the
15 military and civilians from their important
16 duties. We are, again, leading to the
17 finger-pointing situation, the sowing of
18 distrust, the -- the damaging of the
19 relationship between the government and its
20 contractors, and it's -- the government still
21 has all of its other remedies, so in further
22 response to the question from Justice Kagan,
23 that we -- when people don't follow their
24 contracts, we can take certain steps to enforce
25 that. And -- and in this instance, we didn't

1 cancel the contract, but we -- we could have
2 terminated the contract, stopped work, asked
3 for liquidated damages, required personnel to
4 be replaced. We could have done any of those
5 things. We didn't do those things.

6 Adding this extra layer of tort
7 incentives creates an over-deterrence that the
8 Court recognized is a problem in cases like
9 Buckman --

10 JUSTICE ALITO: All right. One -- one
11 last --

12 MR. GANNON: -- and in the foreign
13 affairs cases like -- like --

14 JUSTICE ALITO: One last question. If
15 we compare the likelihood that a breach of
16 contract by a military contractor will cause
17 either death or serious injury in this country
18 with the risk that a breach will cause death or
19 serious injury at a place like Bagram Air Base,
20 which is greater?

21 MR. GANNON: I -- I mean, I -- I'm
22 sorry, I'm not quite sure I understand the --
23 the question. What -- what would cause a risk
24 of serious death or injury?

25 JUSTICE ALITO: Well, isn't there a

1 greater risk of death or serious injury as a
2 result of an alleged breach of contract in a
3 war zone as opposed to an alleged breach of
4 contract outside of a war zone?

5 MR. GANNON: Well --

6 JUSTICE ALITO: And, therefore,
7 doesn't -- isn't there a greater potential
8 interference with the interests of the federal
9 government with respect to the first?

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

21 JUSTICE ALITO: All right. Thank you.
22 Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: No.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch?
3 Justice Kavanaugh?

4 JUSTICE KAVANAUGH: A couple things
5 just to clarify.

6 Uniquely federal interest branch of
7 preemption is a separate doctrine from Boyle,
8 right, or a preexisting doctrine, a preexisting
9 doctrine?

10 MR. GANNON: Yes. It predates Boyle.
11 The Court has continued to recognize it as
12 being appropriate. We -- I think that Boyle
13 applied the doctrine --

14 JUSTICE KAVANAUGH: Right, it's not a
15 new thing, yeah.

16 MR. GANNON: And -- and it wasn't new
17 then and it -- and it hasn't been disavowed by
18 the Court since then.

19 JUSTICE KAVANAUGH: On the field
20 conflict terminology, I want to get your
21 understanding of what counsel said, which is my
22 understanding is he said when there's an
23 inherent conflict in a particular kind of area,
24 you can call that "field," and Garamendi
25 Footnote 11 and other cases in the Court's

1 jurisprudence have essentially said that. Is
2 that your understanding, or do you have a
3 slightly different understanding?

4 MR. GANNON: In our brief, we said we
5 think you could think of this in either way.
6 But, if you had to pick, I think I would say
7 that it's a form of field preemption, and I
8 think that's -- that's because we're talking
9 about an area, overseas combatant activities,
10 that is so uniquely federal. The whole area of
11 it should be considered something that is
12 beyond the scope of the states because they've
13 been divested of their powers in this context.

14 And that's consistent with the way the
15 combatant activities exception in the FTCA
16 itself is phrased. It's just everything is
17 out. No suits arising out of combatant
18 activities. There's not a bunch of
19 nickel-and-diming about exactly what's in and
20 what's out.

21 That's different from the
22 discretionary function exception --

23 JUSTICE KAVANAUGH: We've --

24 MR. GANNON: -- conditions that the
25 Court considered in Boyle.

1 JUSTICE KAVANAUGH: We've talked about
2 states, on Justice Kagan's question, states
3 that are trying to supplement or help, you
4 know, ensure that contractors comply with their
5 obligations. What are -- I mean, the rule on
6 the other side, though, I think would -- would
7 apply equally to a state that's hostile to the
8 federal -- to the United States' war effort,
9 which states sometimes have been in terms of
10 opposed to the Iraq war, opposed to the latter
11 stages of the Afghan war.

12 Is there any difference there? I
13 mean, how do -- how do we think about a hostile
14 state? "Hostile" might be too strong a word,
15 but a state that, you know, has laws that it's
16 trying to impose different obligations on the
17 United States' conduct of war than the United
18 States itself is trying to impose?

19 MR. GANNON: Yeah. I -- I think that
20 my friend already conceded that that would
21 probably fall because it's a discrimination
22 against the government and it's treating the
23 government differently.

24 JUSTICE KAVANAUGH: Well, it could be
25 applying a neutrally applicable law, however.

1 MR. GANNON: Well, I -- I -- I guess
2 there could be a question of, if -- if you
3 thought that --

4 JUSTICE KAVANAUGH: You're not
5 concerned about that?

6 MR. GANNON: I -- I mean, I -- I'm not
7 concerned if you adopt our rule, which would
8 say that --

9 JUSTICE KAVANAUGH: Right. No.

10 MR. GANNON: -- combatant activities
11 are -- are off the table here.

12 JUSTICE KAVANAUGH: If we adopt their
13 rule, are you worried about the state that's
14 not supportive?

15 MR. GANNON: Yes, we are concerned
16 that -- that -- I mean, as I said, we're
17 worried either way. We think that the
18 imposition of the threat, the specter of tort
19 liability is affecting the relationship between
20 the government and its contractors in a war
21 zone. And we don't want that interference to
22 begin with.

23 JUSTICE KAVANAUGH: And what about the
24 Afghan law, so the state choice-of-law rules
25 lead to Afghan law being applied in a suit like

1 this and -- and who knows what that leads to?
2 Do you have a concern about that, or is that
3 not a concern?

4 MR. GANNON: That -- that is a
5 concern. And I think that -- I'm not exactly
6 sure what -- what the parties' answers to
7 that -- answer to that question really is
8 because there wasn't that much focus. The
9 Fourth Circuit has just a footnote on the
10 assumption that South Carolina law was
11 applicable here. And I understand my friend on
12 the other side to be saying that they're --
13 they're standing on the background idea that
14 the common law applies, and I guess they
15 mean -- they mean state common law instead of,
16 you know, the brooding omnipresence in
17 Afghanistan.

18 JUSTICE KAVANAUGH: Well, some courts
19 have applied Iraqi law or other foreign law in
20 these kinds of situations, correct?

21 MR. GANNON: I don't know about
22 combatant activities situations. And there may
23 be public policy reasons not to apply foreign
24 law in certain instances. That's really a
25 conflict-of-laws choice-of-law question. And,

1 as a general matter, this Court has held
2 that -- that a federal court sitting in
3 diversity has to apply the choice-of-law rules
4 for the -- for the jurisdiction in which it is
5 sitting.

6 And -- and so, you know, we are -- we
7 are looking to state courts then in order to
8 select the rule of law. I think that's a
9 reason to say field preemption, let's not --

10 JUSTICE KAVANAUGH: Thank -- thank
11 you.

12 MR. GANNON: -- let that play --
13 let -- dictate what's going to be the standards
14 at issue in this case.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 Justice Jackson?

18 JUSTICE JACKSON: So there's been a
19 lot of hypothesizing about what might happen if
20 this kind of tort liability is allowed to take
21 place, but my understanding is that right now,
22 only a few states limit liability, and so the
23 background is that we have the rule operating
24 where these kinds of lawsuits can be brought.

25 Am I wrong about that?

1 MR. GANNON: Well, I mean, there have
2 been several suits. Several of them have
3 been -- have -- have been rejected on the
4 grounds that -- that -- that there -- there
5 hadn't been a violation of the contract or --

6 JUSTICE JACKSON: Other grounds. So
7 the preemption rule is not necessarily doing
8 the work of eliminating --

9 MR. GANNON: No, they were preempted.

10 JUSTICE JACKSON: They were preempted.

11 MR. GANNON: They were -- well, in
12 most of the suits, they've been preempted, I
13 think, whether -- whether or not it required
14 there to be a violation of the contract or not.
15 I mean, Badilla may be an -- may be an -- an
16 exception from that. I'm not sure what else
17 has happened in the Badilla case. We don't
18 have --

19 JUSTICE JACKSON: But I guess I'm just
20 trying to understand whether contractors are
21 already subject to tort liability in most
22 states in these circumstances or not.

23 MR. GANNON: I mean, there have
24 obviously been a lot of suits about this.
25 Notwithstanding the 2008 regulatory preamble,

1 the government has been taking the position
2 it's taking here since -- in this Court since
3 May 2011. And so I think contractors have --
4 have had that expectation that the government
5 would be making this argument that -- that
6 there is going to be combatant activities is --
7 is going to prevent there being state court --
8 state law litigation about things that are
9 combatant activities.

10 JUSTICE JACKSON: Have all the -- the
11 policy concerns that you have articulated, have
12 they been happening, the finger-pointing and
13 the increased prices and the other problems?

14 MR. GANNON: Well, I -- I -- I don't
15 know about the -- the -- we don't have data on
16 increased prices because I -- I -- I just don't
17 think that -- that -- that we have enough of an
18 effect there. These -- these are very large
19 contracts that we've had in Afghanistan and
20 Iraq. There are a handful of companies that --
21 that successfully competed for them.

22 I'm not exactly sure, when you have
23 contracts this large, what the difference was
24 at the margin. I think that there would be --
25 there would -- the threat would be much greater

1 if this Court were to say --

2 JUSTICE JACKSON: No, I understand,
3 but you --

4 MR. GANNON: -- that notwithstanding
5 Boyle --

6 JUSTICE JACKSON: -- you made the
7 argument that there are going to be increased
8 prices, and I'm just trying to understand
9 whether there's a basis for that.

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

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Rebuttal, Mr. Chang?

20 REBUTTAL ARGUMENT OF FRANK H. CHANG

21 ON BEHALF OF THE PETITIONER

22 MR. CHANG: Thank you, Mr. Chief
23 Justice. A few points.

24 So we've been talking about baseline,
25 and cases and statutes tell us what the

1 baseline is. Tort law remains unless Congress
2 acts. Common law claims against Colonel
3 Mitchell was upheld by this Court in Mitchell
4 versus Harmony for something that he did in
5 Mexico. And Captain Little was held liable for
6 something that he did in Hispaniola.

7 Such suits are unthinkable today
8 because Congress has legislated suits like that
9 out of place -- out of existence with the
10 Westfall Act.

11 And also in the '40s, Congress passed
12 the Defense Base Act. Congress knew that
13 defense contractors overseas working on U.S.
14 bases might face liability, so in exchange for
15 the employees giving up of their common law
16 claims, there -- Congress instituted a single
17 compensation regime.

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

1 And the second point, we're in federal
2 court, not state court, and existing federal
3 protections for the military in litigation
4 already exist.

5 As litigants, we don't have unfettered
6 third-party discovery rights on the government.
7 We have to strictly follow the Touhy regulation
8 process. And the government has tight controls
9 over who we can depose, what those -- what
10 questions we can ask, and what kind of
11 documents we can seek to begin with.

12 And third, Boyle. Boyle is our case,
13 not their's. Fluor's expansive reading of
14 Boyle and converting provisions of statutes
15 that expressly say it is inapplicable
16 contradicts Boyle and what this Court said in
17 Garcia.

18 And we have to look at what this Court
19 said about the Supremacy Clause because that is
20 what drives preemption. Here the laws of the
21 United States do not preempt my client's
22 claims. And the solicitor general's brief and
23 a brief from my friend, Fluor, are not listed
24 as one, the supreme law of the land. Thank
25 you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.

3 (Whereupon, at 12:32 p.m., the case
4 was submitted.)

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