SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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WINSTON TYLER HENCELY,)

Petitioner,)

v.) No. 24-924

FLUOR CORPORATION, ET AL.,)

Respondents.)

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Pages: 1 through 104

Place: Washington, D.C.

Date: November 3, 2025

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Washington, D.C.

Monday, November 3, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

FRANK H. CHANG, ESQUIRE, Arlington, Virginia; on behalf of the Petitioner.

MARK W. MOSIER, ESQUIRE, Washington, D.C.; on behalf of the Respondents.

CURTIS E. GANNON, Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondents.

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P R O C E E D I N G S

(11:02 a.m.)

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

Mr. Chang.

ORAL ARGUMENT OF FRANK H. CHANG

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

I welcome the Court's questions.

JUSTICE THOMAS: Did Respondent make the constitutional arguments below?

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

JUSTICE THOMAS: Does it -- in -- in

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

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

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

MR. CHANG: Sure. So Boyle is all about a contractor who does what the government says. That is the heart and soul of Boyle. It starts at page 505 by saying the government's interest is in getting its work done. And at step 2, it says there was a significant conflict between state tort duty and what the government required that was precisely contrary to what the government required. And at step 3, Boyle made it very clear that its defense is

for contractors who adhere to the government's specifications.

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

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

And, of course, Justice Kavanaugh --

JUSTICE KAVANAUGH: Well, in -- in a war zone, though, in a combat zone, we have a -- a line of cases, Garamendi, Crosby, you know all the cases -- put aside Boyle; Boyle

Footnote 4 talks about this but not Boyle, the rest of it -- that says that there are certain areas where there's a uniquely federal interest, and in those areas, the usual preemption rules don't apply, that we expect Congress actually to speak clearly if they want to provide for something like state tort suits. And that's -- so that's flipped.

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

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

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

MR. CHANG: Certainly, I'll address in

turn. So, as to the constitutional structural point, we know the default is common law claims are available. And it goes all the way back to cases like Little v. Barreme, where Chief Justice Marshall, he upheld damages award against a Navy captain who was following the president's order. And also in cases like Mitchell versus Harmony, there was a common law claim against an Army colonel who seized an American citizen's property during the Mexican-American war in that case.

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

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

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

JUSTICE KAVANAUGH: And the baseline I thought under our case law going back, way back, if it's a uniquely federal interest, we have lots of cases saying something along those lines, that we require Congress to act to allow such suits. And -- and we've said in, you

know, Crosby, for example, "a failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply."

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

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

So what that says is the fact that, you know -- Congress, of course, operating against a background law like Little and

Mitchell, knew that common law had a reach, even -- even on foreign soil, and Congress certainly could have acted to take that back as to when it comes to a American soldier who is injured by contractors.

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

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

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

MR. CHANG: Correct. Correct.

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

MR. CHANG: Correct.

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

JUSTICE KAVANAUGH: Military contractors, though.

JUSTICE SOTOMAYOR: Well, the military contractor. So what Justice Kavanaugh is talking about is almost a field preemption

concept --

JUSTICE KAVANAUGH: Yeah.

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

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

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

MR. CHANG: Yes.

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

MR. CHANG: Correct.

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

MR. CHANG: Correct.

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

MR. CHANG: There's nothing here because Fluor violated what the military wanted it to do.

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

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

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

MR. CHANG: Correct.

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

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

JUSTICE SOTOMAYOR: We'd be creating --

JUSTICE BARRETT: Mr. Chang --
JUSTICE SOTOMAYOR: I'm sorry.
JUSTICE BARRETT: Sorry.
JUSTICE SOTOMAYOR: We'd be creating a new area of preemption law if we say that there is field preemption --
MR. CHANG: Especially through federal interests.
JUSTICE SOTOMAYOR: -- when there is no conflict whatsoever.
JUSTICE KAVANAUGH: Well --
JUSTICE BARRETT: And --
JUSTICE KAVANAUGH: -- Footnote 11 of Garamendi says: "If a state were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine."
I mean, there's been a lot of discussion in the case law about how you distinguish field and conflict, but, you know, field preemption in an area of uniquely federal interest, you know, you can call it conflict, you can call it field, but the word "field" has been in our case law at times on this kind of

thing.

I'll -- I'll stop there, but --

JUSTICE BARRETT: Well --

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

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

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

So, if -- if that were the case, we would still have to decide what the rule would be, and we could decide to let state law apply as a matter of federal common law, right? And if we look at the Federal Tort Claims Act and

you see that the combat activities exception doesn't extend to independent contractors, you might say, well, it makes sense to allow liability to remain even if we're doing it as a matter of federal common law, right?

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

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

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

MR. CHANG: What we -- we wouldn't,

Your Honor.

JUSTICE BARRETT: Do you understand --

JUSTICE JACKSON: If you took that --

JUSTICE ALITO: Mr. Chang --

JUSTICE BARRETT: -- Boyle then --

JUSTICE JACKSON: If -- if you took --

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

JUSTICE JACKSON: Yeah.

JUSTICE ALITO: Yeah, sure.

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

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

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

MR. CHANG: Correct. And a stock helicopter example as well. So that clearly shows that contractors -- or Justice Scalia

envisioned a system where contractors are still subject to state law liability.

JUSTICE BARRETT: Thank you.

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

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

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

Did I read too much into your brief?

MR. CHANG: No. So our position is

that this Court does not have to overrule Boyle because we win even under Boyle's terms. And, certainly, the only reason that this --

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

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

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

(Laughter.)

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

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

Who wrote Boyle?

JUSTICE THOMAS: Justice --

MR. CHANG: Justice Scalia wrote it.

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

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

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

(Laughter.)

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

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

JUSTICE KAVANAUGH: What --

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

MR. CHANG: No, what -- Your Honor. First, we're dealing with something that

occurred on a civilian part of the base --

JUSTICE ALITO: Oh. Well --

MR. CHANG: -- involving a --

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

JUSTICE KAVANAUGH: It's Bagram.

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

JUSTICE KAVANAUGH: Come on.

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

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

JUSTICE ALITO: I mean, suppose a contractor said -- a contract says that the contractor is to provide appropriate suit -- appropriate protection when it is accompanying

a convoy through a dangerous area, all right? Would a claim -- and -- and let's say that a member of the military is injured. Could that member of the military sue the contractor on the theory that the contractor was negligent?

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

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

JUSTICE ALITO: Yeah, well, what if it's just provide appropriate protection?

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

JUSTICE ALITO: Seriously?

JUSTICE KAVANAUGH: But, on --

JUSTICE KAGAN: You know, just -- I -- I was thinking of a similar question to Justice Alito, that you could have the rule that you're suggesting here, and it's -- it's the rule that I do think follows from Boyle, which is that the contract is -- the contractor is liable as

long as the military didn't specifically approve or direct the conduct.

But you could have a more deferential rule which still allows some forms of state liability to come in, which is that the contractor was liable if but only if the plaintiff can show that the contractor violated military policy.

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

What would you think of a rule like that?

MR. CHANG: I -- we -- we would certainly be okay with that rule. Certainly, if the Court is already thinking about creating some sort of a federal common law rule in this area, we think it should be the one that furthers the government's interests by avoiding

contractor negligence and -- and incentivizes contractor adherence in a -- in a war zone.

And this is -- this ended up injuring multiple U.S. soldiers on the base because Fluor didn't do what the Army told it to do. So, if we're thinking about what kind of rule applies, the rule has to be one that saves soldiers.

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

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

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

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

MR. CHANG: I -- you know, it's -- it's certainly possible, Your Honor.

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

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

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

JUSTICE BARRETT: Doesn't that seem like a pretty big problem for your theory if that's the state law if -- or if the default is whatever law would otherwise apply, as Justice Kavanaugh is saying, the enemy's law is going to apply to the -- I mean, that suggests that maybe a federal common law should apply, maybe

not the common law rule that Fluor and the government want, but if the alternative is a default to Afghan law?

MR. CHANG: So -- so two responses to that, Your Honor. The first is that -- so, when it comes to applying foreign law to judge the acts of a military contractor, again, that's an ordinary working of the fact that Congress has not displaced state law, which includes the -- the operation of choice-of-law principles under that state law.

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

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

And I wanted to know, is uniquely

federal interest a branch of constitutional preemption in your view?

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

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

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

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

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

JUSTICE KAVANAUGH: What is the difference?

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

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

MR. CHANG: I mean, yes, Your Honor, because one is saying that states cannot act in a discriminatory manner against -- against a contractor, and the other is that you're displacing the operation of the entire state law from -- from that area.

So -- so, when it comes --

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

And, look, what happened here is

terrible, so I'm completely sympathetic to that. But, in terms of the legal framework that applies for situations like this, my thought based on the precedent was Congress has to speak to provide for it.

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

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

So doesn't it come out differently?

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

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

MR. CHANG: I -- the --

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

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

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

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

JUSTICE JACKSON: So can you just --

JUSTICE ALITO: Would --

JUSTICE JACKSON: -- say a little about the Badilla test? As I read your brief, in the last few pages, you seemed to say that if the Court applies the kind of Boyle analysis here, it's the Badilla test that you would

suggest. Why -- why is that?

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

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

JUSTICE ALITO: If the --

JUSTICE GORSUCH: Please.

JUSTICE ALITO: If preemption depends on the interpretation of a contract and whether the contractor violated the terms of the contract, do you want us to adopt something like the -- the rule that used to apply in foreign sovereign immunities cases so that if the government says there was no violation of the contract, that's the end of the matter? Would you say no, the plaintiff still has the opportunity to litigate that issue in state

court, presumably, possibly in front of a jury?

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

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

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

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

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

It would be a really hard case for any plaintiff to disagree with an army coming in. And even if a judge disagrees with that, that would give the contractor a great reason on

appeal. And that is not a reason to displace state law.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

JUSTICE ALITO: I don't know what --

CHIEF JUSTICE ROBERTS: I'm sorry.

Justice Thomas, anything further?

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

MR. CHANG: Correct, Your Honor.

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

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

As I understood it, it was that as the Fourth Circuit said, the combatant activity --

activities exception has a policy of -- of protecting the military's judgment, and that meant that even the imposition per se of state law was -- was a problematic imposition.

CHIEF JUSTICE ROBERTS: Justice Alito?

Justice Sotomayor?

JUSTICE SOTOMAYOR: No.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

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

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

JUSTICE KAVANAUGH: Tell me what the limits are.

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

JUSTICE KAVANAUGH: The general state

regulation of workplace safety, that would be non-discriminatory, right?

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

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

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

JUSTICE KAVANAUGH: It's a contractor.

MR. CHANG: To a contractor?

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

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

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

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

JUSTICE KAVANAUGH: What do you say to

the retired military brief that says that this is going to -- your rule would lead to finger-pointing, which I think this suit would lead to finger-pointing by the defendant against the military, and -- and back-and-forth on that? You know, how does someone who used to be in the Taliban end up running a 5K or whatever it was at the starting line? That -- that's going to be a lot of finger-pointing on that.

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

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

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

MR. CHANG: Oh -- oh, certainly. I mean, so --

JUSTICE KAVANAUGH: Yeah.

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

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

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

JUSTICE KAVANAUGH: Well, do you imagine in state court, like, generals, military officers, coming in for -- for testimony about what our rules were for the -- the people who worked in the vehicle yard, what our rules were for who could run in a 5K, what -- why we had former Taliban working on a U.S. base at Bagram? You know, that would be an interesting discussion, I'm sure.

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

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

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

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

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

JUSTICE KAVANAUGH: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

MR. CHANG: That's correct.

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

MR. CHANG: A hundred percent. And -- and the reason why -- and the fact that there are other mechanisms to protect the government's interests like that undercuts the

need to displace state law with federal common law in this case.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: And is it your view that really the rule that you want us to adopt or the one that you're focused on is applicable in the situation in which the contractor acts contrary to the military's interests because it's doing something negligently, that it is not -- it has not been authorized by the military to behave in this way, the particular way that is being claimed as causing the injury in this case?

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

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

universe, right?

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

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

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

MR. CHANG: Not at all.

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

MR. CHANG: Not at all. And that Congress doubled down in the Westfall Act when

it passed Westfall Act to protect federal officials from lawsuits. It adopted the definition of the FTCA, which is the same excluding contractors.

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

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Mosier.

ORAL ARGUMENT OF MARK W. MOSIER
ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

Petitioner's claims undermine the military's authority to punish and deter misconduct. Congress has given the military the necessary tools to enforce its contracts and to ensure compliance with its orders. The military must decide how to address non-compliance by balancing sensitive national security and foreign policy interests.

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

I welcome the Court's questions.

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

MR. MOSIER: No. We would agree with

the test that the -- that the government has proposed here, and to establish preemption here, you would have to show that the injuries and the claims arose out of combatant activities and that the contractor was acting within the scope of its contracts.

JUSTICE THOMAS: What about, for example, the food service contractor --

MR. MOSIER: On --

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

MR. MOSIER: Yes.

JUSTICE THOMAS: And assume there was food poisoning.

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

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

MR. MOSIER: Yes, absolutely. The --

first of all, the -- the -- the military can terminate a contract. It can seek damages under the contract. Contractors and their employees are subject to criminal prosecutions and court-martials, and Congress has over the years changed the provisions and given additional tools to the military to police its contractors and ensure that they comply with their contractual obligations.

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

What is the uniquely federal interest there?

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

Where we would see the conflict even

within the situation in which there has been a file -- finding of breach is when state law is trying to impose additional or different sanctions than the military.

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

That conflict looks a lot like the conflict that the Court found sufficient to find preemption in Arizona versus United States, where there was a different method of enforcement, in Buckman, where the state was trying to impose additional restrict -- or liability for fraud to the FDA, and even in Garamendi, and what the Court said in Garamendi is that if the federal government decides as a matter of foreign policy to use kid gloves in addressing an issue of foreign policy and a state wants to address the same issue, but they want to do it through an iron fist, that is a conflict that warrants preemption because it's

left to the executive branch to calibrate the appropriate remedy.

And we think the same analysis applies here. It -- it is, you know, the military could have -- it could have terminated the contract. I don't --

JUSTICE GORSUCH: Mr. Mosier, if that -- if that's the case --

MR. MOSIER: Yeah.

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

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

JUSTICE GORSUCH: Yeah.

MR. MOSIER: -- and we recognize that.

JUSTICE GORSUCH: Yeah.

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

JUSTICE GORSUCH: And it says, unless -- unless you're exercising specific

control over the actions and decisions, you're not going to get Boyle. That's what the -- that's what the government told contractors like Fluor. Why -- why isn't it fair to hold you to that?

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

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

MR. MOSIER: It's a different rule

that is based on the different uniquely federal interest. The uniquely federal interest that the Court fashioned the test on in Boyle was a uniquely federal interest in --

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

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

JUSTICE GORSUCH: If I might just finish.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Thank you.

You know, you're going to have your shot, my friend.

JUSTICE KAVANAUGH: I'm -- I'm ready.

JUSTICE GORSUCH: Boyle was about contracts, and -- and it was about, you know, if it's specifically directed, well, then you're out of luck. I -- I -- I totally get that contractors in -- in -- in wartime play an increasingly significant role. I mean, we've got briefs before us from the Veterans of Foreign Wars pointing out that in the Gulf War in the '90s, it was like one in a hundred --

I'm making that up -- and now it's over 50 percent more recently.

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

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

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

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

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

JUSTICE GORSUCH: But answer that question. We have to decide how important is it for the military to have contractors not fearful of liability versus how is it -- important is it for the military have contractors who don't injure military members? Right? That -- that's a -- that is a -- that is what you're asking us to -- to weigh, and you're asking us to come down on one side rather than the other.

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

JUSTICE BARRETT: Well, and, counsel --

MR. MOSIER: And --

JUSTICE BARRETT: Oh, sorry.

JUSTICE GORSUCH: Okay.

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

MR. MOSIER: Yeah.

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

(Laughter.)

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

JUSTICE BARRETT: But, counsel, so I guess one problem I'm having is just the analytical one. I mean, let's -- let's assume that we think you're right and that there's preemption. You still have to decide -- if -- if you're saying that state law can't control,

then some federal common law does. And in Boyle, the conflict, you're right, it was different, but there was actually -- they were contractual terms, and so the Court was very focused on the specific conflict between the contract that the helicopter design fulfilled and the state tort law.

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

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

MR. MOSIER: So that is -- that is part of what -- the argument that the combatant activities exception can use -- be used as evidence of Congress's intent on the types of claims that would interfere with the military, just like the Court used it in Boyle. It was

the other -- the discretionary functions exception, but it was the same way that it used it.

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

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

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

JUSTICE BARRETT: Well, it --

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

JUSTICE BARRETT: Well -- well, right. But, I mean, it seems to me you're saying state

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

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

JUSTICE KAVANAUGH: Can I -- can I --

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

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

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

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

But why do we have Boyle at all? You say this is based on some exclusive Article I power. The power to raise and support an army includes training an army. It's exclusive to the federal government. States can have militias but not army. So why do we bother with Boyle at all?

MR. MOSIER: Because --

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

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

JUSTICE SOTOMAYOR: But -- but then why did the military issue its regulation? There, a military contractor asked for indemnification, and the military said no

because, under Boyle, you -- if you're making a -- a -- a judgment contrary to our directives, you're liable and we don't see why you should be indemnified.

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

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

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

JUSTICE SOTOMAYOR: -- Congress and the military. The military could write its

contracts more specifically to indemnify or direct.

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

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

Chief Justice Marshall acknowledged and rejected that -- that argument in Osborn. Justice Kavanaugh quoted the language from Crosby that says, you know, that Congress, the fact that they didn't expressly preempt something just maybe show that they understand

implied preemption.

I think the default rule --

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

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

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

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

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

JUSTICE KAVANAUGH: Justice Gorsuch's good questions earlier about Boyle and the

interaction of Boyle with other branches of preemption, I think this is very important analytically that we have this straight, so I want to --

MR. MOSIER: Yes.

JUSTICE KAVANAUGH: -- make sure we have it straight, which is I think you're saying put aside Boyle.

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

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

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

MR. MOSIER: Yes.

JUSTICE KAVANAUGH: -- that's your point. Put aside Boyle. Sweep -- it's gone. You still win under this other branch of

preemption law, is your argument?

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

JUSTICE KAVANAUGH: And when --

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

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

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

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

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

MR. MOSIER: Correct.

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

MR. MOSIER: Correct. There could be the scope of the rule, the common law rule the court would adopt is like it did in Boyle, is a

rule for determining where there would be preemption and what areas would be left to federal common law and what would -- what would fall outside of there when state law claims would be allowed to proceed.

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

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

MR. MOSIER: So the FTCA itself carved out contractors because that was a decision by Congress that the United States would -- would

defend and -- and -- claims and accept liability for actions by its employees but not for its contractors.

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

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

MR. MOSIER: What the Court said in

Boyle and we think is right is those issues that the Constitution and the laws of the United States commit to the control of the federal government, so, here, I think --

JUSTICE THOMAS: What does that mean?

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

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

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

JUSTICE THOMAS: Give me a couple of examples.

MR. MOSIER: Obviously, war-making

treaties, coining money, the things in Article I, Section 10 --

JUSTICE THOMAS: Thank you.

MR. MOSIER: -- provide a list of the things the states cannot do.

CHIEF JUSTICE ROBERTS: Justice Alito?

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

MR. MOSIER: He brought both claims. The remaining claims are tort claims. For his breach-of-contract claim, that was dismissed because he's not a third-party beneficiary to the contract, and so that obviously, you know, one -- is one of the oddities of the rule he proposes, is that he's going to litigate a breach of contract without a contract claim.

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

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

JUSTICE ALITO: Suppose that a -- a

contractor is building a building and hires a subcontractor and specifies exactly what the subcontractor is to do, and then someone is injured by falling debris and that person sues the subcontractor.

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

MR. MOSIER: Not under general tort law principles.

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

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

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

MR. MOSIER: There's no -- there's really no legislative history about that. The

fact that it was adopted shortly after World War II to address combatant activities in time of war would suggest that they had the -- had that in mind.

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

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

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

So wouldn't the rule that we adopt

have to deal with all three of those situations?

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

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

If the contractor knows we could be blamed for this, they're going to want to do their own investigation. They're going to want

to collect their own evidence. There will already start to be considerations of, was it the military's fault? What is -- was it our fault?

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

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

You know, the plaintiffs say --

JUSTICE ALITO: All right.

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

JUSTICE ALITO: Thanks -- thank you. Thank you.

MR. MOSIER: Yeah. Okay.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

(Laughter.)

JUSTICE SOTOMAYOR: A very odd argument. Okay.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

Justice Gorsuch?

Justice Kavanaugh?

JUSTICE KAVANAUGH: Can you just continue with that?

(Laughter.)

MR. MOSIER: Yeah. I mean, where I -- where I was ending with that is, you know, the

plaintiffs said that they wouldn't put the military's judgments on trial and, therefore, we would.

JUSTICE KAVANAUGH: You're going to be.

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

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

MR. MOSIER: Yes, of course.

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

MR. MOSIER: And --

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

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

JUSTICE KAVANAUGH: And then the military runs a 5K, right, and -- and anyone

who's run a 5K, there are lots of people stacked together at the starting line, right?

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

JUSTICE KAVANAUGH: Right. But --

MR. MOSIER: The military --

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Just a few clarifying questions.

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

MR. MOSIER: It's different --

JUSTICE BARRETT: Okay.

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

JUSTICE BARRETT: Second, can you just say a little bit what the scope of the combat exception is? I mean, you know, you said that Bagram was under siege constantly from rockets, et cetera. That's certainly not true of every base abroad.

MR. MOSIER: Mm-hmm.

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

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

In the first decision after the adoption of the FTCA, the Ninth Circuit in Johnson interpreted combatant activities and said it includes not only physical violence but also actions necessary to and taken in connection with. And every court of appeals

has kind of relied on that test, which seems consistent with the plain language.

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

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

MR. MOSIER: So I would -- the -- the hypothetical I got was E. coli on Bagram, and I would say yes, you may -- it may be a different conclusion, E. coli in San Diego order a base to troops that aren't ready to deploy. It's not -- every base is not looked at the same.

The actual injury is examined to determine its connection to combat activities, which is not viewed as everything the military does.

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

JUSTICE BARRETT: Would be.

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

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

MR. MOSIER: It could.

JUSTICE BARRETT: Okay.

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

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

MR. MOSIER: Okay.

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

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

MR. MOSIER: So, certainly, with respect to claims on a foreign battlefield, I think you would view it as field preemption.

And that's largely because applying conflict preemptions, we just think there's an inherent conflict between duties of reasonable care under state tort law and what the military demands and needs on a battlefield in combat operations.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Gannon.

ORAL ARGUMENT OF CURTIS E. GANNON

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENTS

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

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

Petitioner indisputably cannot sue the U.S. Army directly, and he should not be permitted to sue its combat support contractors

instead. Applying that principle requires no extension of Boyle, which correctly looked to a closely related FTCA exception as a model.

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

I welcome the Court's questions.

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

MR. GANNON: Well, I agree with much of the answer that my friend just gave you to that, Justice Thomas, that we start with the Constitution's structure here. And we have a list at the top of page 12 of our brief of other areas where the Court has found there to be uniquely federal interests. They include things like foreign affairs, rules implementing federal loan programs, civil immunity of federal officials. They're areas where the

Constitution and the statutes and the laws of the United States have made it clear that this is an area of exclusive federal interest. And I think that that's clearest in this context because federal powers are at their zenith --

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

MR. GANNON: Well --

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

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

We think that when Boyle talked about uniquely federal interests, that's a concept that this Court used in Sabbatino to say the

active state doctrine is an area of uniquely federal interest.

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

JUSTICE THOMAS: But -- but Boyle didn't say all of that.

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

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

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

Court acknowledged that this is there.

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

CHIEF JUSTICE ROBERTS: Counsel, how -- I'm interested in the -- limitation to a foreign battlefield. Does that that mean, for example, there are bases in -- or where we're operating from in Afghanistan at the same time that would not be in a foreign battlefield because it's not as directly engaged as Bagram was in this case?

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

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

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

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

MR. GANNON: I -- I think that if -- if -- that that's going to be a question about what's -- what -- what it means to arise from the military's combatant's activities. And we -- we also have the second prong, which is about -- and just to finish the answer to the first prong, that can certainly extend to

people who are supplying the troops, who are on the very front lines.

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

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

CHIEF JUSTICE ROBERTS: Well, okay.

MR. GANNON: -- it was --

CHIEF JUSTICE ROBERTS: So ferrying the troops. What about preparing the rations of food that is going to eventually be used at Bagram and there's some, you know, infection at the food plant in, you know, I don't know, someplace in the United States?

MR. GANNON: Yeah. I -- I think that -- I'm not sure how the combatant activities exception in the FTCA has been construed in a context like that. I think that for preemption purposes here, this goes to a

question that Justice Barrett just asked whether this really needs to be overseas.

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

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

MR. GANNON: Yeah.

JUSTICE KAGAN: In Bagram, take the -- the contractor that doesn't properly cook the chicken, take the contractor that doesn't properly maintain the trucks, take the contractor that does a whole series of things that are going to injure or kill soldiers, in violation of what the government has said is its policies, you know, the government has a

policy manual, here is how to maintain the trucks, here is how to cook the chicken, and the contractor has operated in violation of that.

MR. GANNON: Yeah.

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

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

But, even when the state thinks it is trying to help the federal government enforce

its own standards, this Court has recognized that the imposition of state law can be a threat. My friend --

JUSTICE KAGAN: But tell me why.

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

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

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

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

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

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

JUSTICE KAGAN: Right. I was just --

MR. GANNON: -- during the Vietnam War.

JUSTICE KAGAN: -- suggesting in all the arguments you were saying to me about how the government needs to be in control of its relationship with its contractors, applies just

as well to manufacturers of helicopters.

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice --

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

JUSTICE ALITO: In response to the

argument that a suit like Mr. Hencely's can easily get into, is very likely to get into discovery that would be very intrusive and disadvantageous to the government, the argument is that -- is made, well, the government can always invoke the state secrets privilege.

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

MR. GANNON: You -- you -- you -- you're correct that it's used infrequently. And the national security concerns that are at interest, that -- that are served by the -- by the state secrets privilege, are limited to only certain types of information. We think that the threat of having civiliate -- civil discovery with, you know, people on the battlefield is a problem even if it doesn't involve classified information. It's going to mean that there are going to be depositions of active servicemembers, that -- that -- that -- that we're distracting the military and

civilians from their important duties. We are, again, leading to the finger-pointing situation, the sowing of distrust, the -- the damaging of the relationship between the government and its contractors, and the government still has all of its other remedies, so in further response to the question from Justice Kagan, that we -- when people don't follow their contracts, we can take certain steps to enforce that. And -- and, in this instance, we didn't cancel the contract, but we -- we could have terminated the contract, stopped work, asked for liquidated damages, required personnel to be replaced. We could have done any of those things. We didn't do those things.

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

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

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

JUSTICE ALITO: Yeah. One -- one last

question. If we compare the likelihood that a breach of contract by a military contractor will cause either death or serious injury in this country with the risk that a breach will cause death or serious injury at a place like Bagram Air Base, which is greater?

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

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

MR. GANNON: Well --

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

MR. GANNON: Yes. And -- and this is a point that the D.C. Circuit made in the Saleh opinion, where it talked about the -- the idea of tort laws requiring non-risky behavior all the time isn't compatible with -- with a war

zone. That doesn't mean that we want contractors to engage in extra-risky contract with respect to complying with our contracts, but it does mean that we're worried about the overhanging -- the overhang of having this extra liability out there.

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

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: No.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Kavanaugh?

JUSTICE KAVANAUGH: A couple things just to clarify.

Uniquely federal interest branch of preemption is a separate doctrine from Boyle, right, or a -- a preexisting doctrine, a preexisting doctrine?

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

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

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

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

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

And that's consistent with the way the combatant activities exception in the FTCA

itself is phrased. It's just everything is out. No suits arising out of combatant activities. There's not -- not a bunch of nickel-and-diming about exactly what's in and what's out.

That's different from the discretionary function exception --

JUSTICE KAVANAUGH: We've --

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

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

Is there any difference there? I mean, how do -- how do we think about a hostile state? "Hostile" might be too strong a word, but a state that, you know, has laws that it's

trying to impose different obligations on the United States' conduct of war than the United States itself is trying to impose?

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

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

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

JUSTICE KAVANAUGH: You're not concerned about that?

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

JUSTICE KAVANAUGH: Right. No.

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

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

MR. GANNON: Yes, we are concerned

that -- that -- I mean, as I said, we're worried either way. We think that the imposition of the threat, the specter of tort liability is affecting the relationship between the government and its contractors in a war zone, and we don't want that interference to begin with.

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

MR. GANNON: That -- that is a concern. And I -- I think that -- I -- I'm not exactly sure what -- what the parties' answers to that -- answer to that question really is because there wasn't that much focus. The -- the Fourth Circuit has just a footnote on the assumption that South Carolina law was applicable here. And I understand my friend on the other side to be saying that they're -- they're standing on the background idea that the common law applies, and I guess they mean -- they mean state common law instead of,

you know, the brooding omnipresence in Afghanistan.

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

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

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

JUSTICE KAVANAUGH: Thank -- thank you.

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

CHIEF JUSTICE ROBERTS: Justice

Barrett?

Justice Jackson?

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

Am I wrong about that?

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

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

MR. GANNON: No, they were preempted.

JUSTICE JACKSON: They were preempted.

MR. GANNON: They were -- well, in most of the suits, they've been preempted, I think, whether -- whether or not it -- it required there to be a violation of the contract or not. I mean, Badilla may be an --

may be an -- an exception from that. I'm not sure what else has happened in the Badilla case. We don't have --

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

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

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

MR. GANNON: Well, I -- I -- I -- I don't know about the -- the -- we don't have

data on increased prices because I -- I -- I just don't think that -- that -- that we have enough of an effect there. These -- these are very large contracts that we've had in Afghanistan and Iraq. There are a handful of companies that -- that successfully competed for them.

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

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

MR. GANNON: -- that notwithstanding Boyle --

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

MR. GANNON: And I think right now, I'm not sure what's priced in because I think that there's uncertainty about where this is going to end up. But the government has been

taking the contractor's side in these cases for -- for 14 years -- more than 14 years now.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Chang?

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

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

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

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

And also, in the '40s, Congress passed the Defense Base Act. Congress knew that defense contractors overseas working on U.S.

bases might face liability, so in exchange for the employees giving up of their common law claims, there -- Congress instituted a -- a single compensation regime.

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

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

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

And third, Boyle. Boyle is our case, not theirs. Fluor's expansive reading of Boyle

and converting provisions of statutes that expressly say it is inapplicable contradicts Boyle and what this Court said in Garcia.

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

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