No. 24-924

IN THE

Supreme Court of the United States

WINSTON TYLER HENCELY,

Petitioner,

v.

FLUOR CORPORATION; FLUOR ENTERPRISES, INC.; FLUOR INTERCONTINENTAL, INC.; FLUOR GOVERNMENT GROUP INTERNATIONAL, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF *AMICUS CURIAE*[1]

The Veterans of Foreign Wars of the United States ("VFW") is a congressionally chartered veterans organization established in 1899 that, with its Auxiliary, represents over 1.5 million members. Since the VFW's establishment, millions of members have served their country in forward operating bases, combat theaters, war zones, and other locations, including Afghanistan and, specifically, Bagram Airfield, where the tragic events underlying this petition occurred.

The VFW has a significant interest in the issues raised by this case. Due to the surge in the use of private contractors over the past two decades, *see* Heidi M. Peters, Cong. Rsch. Serv., R44116, *Department of Defense: Contractor and Troop Levels in Afghanistan and Iraq: 2007-2020* 1 (2021), VFW members increasingly work with personnel of private companies like Respondents. During their service in theaters like Afghanistan, Iraq and elsewhere, VFW members understand – and have lived – the difference between true "combatant activities" (like dodging roadside bombs) and everyday base-support services (like fixing cars). Mistakes by those private companies and their personnel, including "inside the wire" of a base, can result in injury, or even death, for servicemembers. The VFW's interest, therefore, is institutional and ongoing; it extends beyond a single case.

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[1] Pursuant to this Court's Rule 37.6, *amicus* confirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its counsel or its members made any monetary contributions intended to fund the preparation or submission of this brief.

For this reason, the dimensions of the federal common-law preemption doctrine announced in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), affect the interests of VFW members. Broadly, the very existence of this non-statutory, judicially crafted doctrine naturally influences any government contractor's incentives to exercise care in the discharge of its duties. More specifically, the lower federal court's unguided extension of *Boyle* from its modest "indirect preemption" origins (relying on the FTCA's "discretionary function" exception to bar certain "design defect" claims) to something more akin to "field preemption for combatant activities" carries vast implications for the safety and security of America's servicemembers. This is especially true for injuries sustained "inside the wire," the place where servicemembers ought to be (and feel) most secure.

Before the decision below, no federal appellate court had relied upon this judicially crafted "combatant activities" extension of* Boyle *to preempt in their entirety the state-law tort claims of an injured or deceased American servicemember. Whatever *Boyle*'s proper contours, surely it cannot extend to an American servicemember's injuries sustained "inside the wire" and traceable to companies that, according to the Army's own investigators, were derelict in their duty. That dereliction of duty includes inexplicably allowing an employee to construct a suicide vest with tools and equipment that Fluor never should have allowed him to access. The VFW supports reversal of the lower court's judgment to ensure that its unprecedented extension of *Boyle* does not jeopardize the life or health of another American servicemember or upend the lives of another servicemember's family.

SUMMARY OF ARGUMENT

The lower court's judgment should be reversed. In support of that conclusion, this brief offers two reasons in addition to those advanced by Petitioner.

First, the lower court's rule does not adequately protect the interests of American servicemembers. As a textual matter, *Boyle* rests on shaky ground. While Article VI speaks in terms of "laws" and "treaties," *Boyle* extended its preemptive sweep to include judge-made federal common law. But federal common law, unlike federal statutes and treaties, does not require any inter-branch cooperation. Rather, it represents a value-laden policy decision made exclusively by unelected judges based upon their discernment of "unique federal interests." Seizing upon this authority, the court below stretched *Boyle* from its narrow confines (displacing design defect claims) to broad field-like preemption for undefined combatant activities (displacing all claims). Whatever the original wisdom of *Boyle* and whatever the wisdom of its extension to "combatant activities", the decision below failed to give adequate weight to the interests of service members and their families in having access to state-law tort remedies, at least in cases involving injury (or death) suffered "inside the wire", and, according to the Government's own investigation, fairly traceable to a private company's negligence.

Second, the political question doctrine does not categorically preclude consideration of servicemembers' state-law tort claims for injuries (or death) occurring "inside the wire." That doctrine operates as a narrow constraint on federal courts' generally unflagging obligation to exercise jurisdiction when Congress has authorized it. Here, the political question doctrine does not apply. Entertaining such suits does not require the courts to second-guess military decision-

making, especially where the Government's own investigation traced the harm to the company's negligence. Nor does an inquiry into causation issues that underlie most tort claims trigger the doctrine.

ARGUMENT

This case concerns preemption. Preemption – namely the power of federal law to displace state law – traces to the Supremacy Clause contained in Article VI of the Constitution. So, as a matter of first principles, this case turns upon the proper interpretation of Article VI.

"The first and most important rule of constitutional interpretation is to heed the text – that is the actual words of the Constitution – and to interpret that text according to its ordinary meaning as originally understood." *United States v. Rahimi*, 620 U.S. 680, 715 (2024). The Supremacy Clause declares: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art VI, cl. 2. Textually, then, the "actual words" of the Supremacy Clause only accord preemptive effect to certain federal legal rules, namely those contained in the Constitution itself, along with "Laws" and "Treaties." Those latter two categories ("Laws" and "Treaties") both require a degree of inter-branch cooperation (namely bicameralism in the case of "Laws" and Senate ratification in the case of "Treaties").

As a textual matter, this could be a very easy case. No federal "law" or "treaty," within the meaning of Article VI, displaces the state-law claims here. Rather, any preemption is merely "implied" from an assertion that a case touches upon an area "involving uniquely

federal interests." Under this "implied preemption" theory, those "interests" displace state law – even absent any congressional command or direct conflict. The displaced state-law rules are then replaced by judge-made rules, so-called substantive federal common law. *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988). In short, it is the alleged conflict between federal "policy interests" and "state law" that gives rise to preemption. This theory underpins the holding in *Boyle*: "Policy interests" animating the Federal Tort Claims Act's "discretionary function" exception displace state-law tort claims predicated on a theory of design defect. 487 U.S. at 511. Of course, judicially discovered "policy interests" are neither "Laws of the United States" nor "Treaties." Because such "policy interests" are not the product of bicameralism and presentment (or similar inter-branch processes like ratification), as a strictly textual matter, the *Boyle* rule (whatever its sweep) arguably does not displace the state-law tort doctrine. *See Va. Uranium v. Warren*, 587 U.S. 761, 778 (2019) (plurality opinion) (Gorsuch, J., joined by Thomas & Kavanaugh, JJ.) ("No more than in field preemption can the Supremacy Clause be deployed here to elevate abstract and unenacted legislative desires above state law; only federal laws 'made in pursuance of' the Constitution, through its prescribed process of bicameralism and presentment, are entitled to preemptive effect.").

Despite the text of Article VI, *Boyle* charted a different course. It held that these federal "policy interests" could displace positive state law. Even accepting the legitimacy of that jurisprudential move, *Boyle* represented an especially curious exercise of the Court's post-*Erie* residual power to make substantive federal common law. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The exercise was

curious because "Congress was not silent." *Gulf Offshore Co. v. Mobil Oil Corp*., 453 U.S. 473, 487 (1981). Far from it—Congress spoke clearly: The FTCA, by its plain terms, does not apply to government contractors. 28 U.S.C.§ 2671. While post-*Erie* substantive federal common law might fill gaps where Congress had not acted, *Boyle* purported to do so in an area of law that Congress had affirmatively addressed. Put another way, *Boyle* appeared to give "improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress pursuant to the Constitution." *Wyeth v. Levine*, 555 U.S. 555, 604 (2009) (Thomas, J., concurring). *Boyle* was possible only by wedding an anti-textual reading of Article VI with an anti-textual reading of the FTCA.

Nonetheless, *Boyle* announced a judicially manufactured policy derived from the FTCA's "discretionary function" exception, 28 U.S.C. § 2680(a), to preempt state-law tort claims against private government contractors based upon design defects. 487 U.S. at 511-13. This rule of federal common law, like preemption generally, undermined federalism. Specifically, *Boyle* displaced state-law choices to afford a remedy to parties injured by another private party's conduct. Of course, no act of positive law by the federal political branches mandated that anti-federalist displacement. So *Boyle* inescapably resulted in the sort of value-laden policy choices by the judicial branch that displaces equally value-laden policy decisions made by the several states.

In the wake of *Boyle*, several circuits extended its value-laden judicial policymaking of preempting specific tort claims (design defect) under the FTCA's "discretionary function" exception, 28 U.S.C. § 2680(a),

to derive from another FTCA provision – the "combatant activities" exception, 28 U.S.C. § 2680(j) – another rule of federal common law, one that threatens to displace all tort remedies otherwise available under state law to injured (or deceased) servicemembers and their families. While those circuits adopted different rules and different conceptions of the federal interest, *see* Pet.App.22-30, the decision below represents an extreme outlier. It is the first federal appellate decision to rely on the "combatant activities" extension of *Boyle* to preempt in their entirety claims of an injured or deceased servicemember. Its rule effectively forecloses any relief to servicemembers even when those injuries are (1) sustained "inside the wire", (2) traceable to a private contractor's violation of its own duties under the government contract and (3) the Government's own investigators have laid responsibility for the injuries at the contractor's feet. Over a decade ago, one federal judge feared that "[t]he combatant activities exception, cut loose from its rationale, threatens to metamorphose into a near-absolute immunity for contractors." *McMahon v. General Dynamics Corp.*, 933 F. Supp. 2d 682, 693-94 (D.N.J. 2013). The decision below realizes that ominous prediction.

Fortunately, reversing that extreme decision does not require this Court to reexamine the very shaky foundations upon which the *Boyle* rule rests. Nor does it require this Court to confine *Boyle* to the discretionary function exception. Rather, at a minimum, *Boyle's* anti-textualist roots, its anti-federalist impact, and its invitation for judicial policymaking counsel against any sweeping, value-laden federal common law rules that displace state prerogatives to afford tort remedies to injured citizens. As long as courts continue to embark on this inescapably value-laden enterprise, the essential error committed by the lower court was

to undervalue the importance of those remedies for servicemembers (and their families), at least in cases when the servicemembers' injuries (or death) occur inside the wire and, according to the Government's own investigators, are fairly traceable to the tortious conduct of a private party.

A. The decision below gives inadequate weight to the importance of state-law tort remedies for military servicemembers and their families.

"[T]ort law has a role to play in ensuring redress for injuries, spreading the cost of accidents, and – most of all – enforcing the highest standards of care . . . upon which our servicemen and servicewomen rely." *McMahon*, 933 F. Supp. 2d at 684. *Boyle* recognized that these countervailing considerations counseled limits on the value-laden federal common law; it affirmatively rejected a plea to adopt the *Feres* doctrine to demarcate the boundaries of federal common-law preemption. 487 U.S. at 510 (discussing *Feres* . *United States*, 340 U.S. 135 (1950)). In the Court's view, drawing such a line would "prohibit all service-related tort claims" against the relevant contractors. *Id.* By rejecting "too broad" a rule, *Boyle* at least tried to balance the "unique federal interest" with federalism values and the goals of state-law tort doctrine. *Id.*

The decision fails to balance these competing interests and, thereby, strips tort law of its essential role. Civil tort remedies help to hold private contractors accountable.[2] Such accountability is even more important today than it was in *Boyle.* The prolifera-

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[2] *See* Rodney M. Perry, *Fixing the Faults: An Argument Against the Saleh v. Titan Corp. Rule for Private Military Contractor Immunity*, 42 Pub. Cont. L.J. 607, 619–20 (2013).

tion of private contractors in the intervening decades demands an approach to contractor liability that adequately accommodates the interests of service-members who work alongside contractor personnel.

Since *Boyle*, a defining feature of the modern military landscape has been the proliferation of private contractors. During the first Gulf War, the ratio of contractors to troops was 1:100 – a dramatic change from previous wars.[3] By 2003, the ratio of private contractors to U.S. military personnel in the Gulf had shrunk to roughly 1:10. [4] During the post-occupation periods in Iraq and Afghanistan, "contractors frequently accounted for 50% or more of the total DOD presence in country."[5] Similarly striking is the increasing number of America tax dollars allocated to private government contractors. From 1994 to 2002, the DoD allocated an estimated $300 billion to private federal contracts.[6] In 2022 alone, that number grew to $415 billion – more than all other government agencies combined spent on private contracts.[7]

As the United States' reliance on the use of private military contractors has grown, so too has its recogni-

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[3] Joelle D. Keypour, *The Political Question Doctrine in Private Military Company Liability Cases: Defining Claims to Ensure Accountability*, 21 Cardozo J. Int'l & Comp. L. 729, 734–35 (2013); Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 Pub. Cont. L.J. 369, 373 (2004).

[4] Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 Colum. J. Transnat'l L. 521, 522–23 (2004) (hereinafter "Singer, *War*").

[5] Alexandra G. Neenan, Cong. Rsch. Serv., IF10600, *Defense Primer: DOD Contractors* 2 (2024).

[6] Keypour, at 737; Singer, *War* at 522.

[7] Neenan, at 2.

tion of the need for accountability mechanisms.[8] Guidance from the Legislative and Executive Branches evidences this recognition. For example, established Army regulations make clear (1) that contractor personnel are not part of the military chain of command; (2) that the management of private contractors shall be governed by the terms and conditions of their government contract; and (3) that private contractors – not the Government – are responsible for "providing day-to-day supervision of their employees."[9]

The United States has also professed a commitment "to ensuring that its contractors are subject to proper oversight and held accountable for their actions." Press Release, U.S. Dep't of State, *Department of State Legal Adviser Promotes Accountability for Private Military and Security Companies* (Sept. 17, 2008). In 2008, the DoD promulgated regulations regarding contractor personnel authorized to accompany U.S. Armed Forces. *See* Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized To Accompany U.S. Armed Forces, 73 Fed. Reg. 16764-01 (codified at 48 C.F.R. pts. 212, 225, 252).

One of those regulations mandates contractual terms that put private contractors on notice of their duties. Private government contracts must include a clause providing, *inter alia*, that "[c]ontract performance in support of U.S. Armed Forces deployed outside the United States may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance

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[8] Keypour, at 737; Dan B. Dobbs et al., The Law of Torts § 352 (rev. ed. 2024).

[9] Perry, at 620.

in such operations." 48 C.F.R. § 252.225-7040(b)(2). The contract must also specify that "[u]nless immune from host nation jurisdiction by virtue of an international agreement or international law, inappropriate use of force by contractor personnel supporting the U.S. Armed Forces can subject such personnel to United States or host nation prosecution and civil liability," 48 C.F.R. § 252.225-7040(b)(4) (codifying DoD Instruction 3020.41); *see* U.S. Dep't of Defense, Instruction 3020.41, *Operational Contract Support Outside the United States* (2024), *available at* https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302041p.pdf.

These federally mandated provisions all reflect DoD's assessment that private contractors can appropriately manage risk:

> Contractors are in the best position to plan and perform their duties in ways that avoid injuring third parties. Contractors are equally or more responsible to research host nation laws and proposed operating environments and to negotiate and price the terms of each contract effectively. Accordingly, the clause retains the current rule of law, holding contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors.

73 Fed. Reg. 16764-01 at cmt. 6 (discussing 48 C.F.R. § 252.225-740(b)(2)).

The DoD further clarified that *Boyle* has no bearing on the new rule. Whereas *Boyle* narrowly "extends to manufacturers immunity when the Government prepares or approves relatively precise design or production specifications after making sovereign decisions balancing known risks against Government

budgets and other factors in control of the Government," the rule "covers service contracts, not manufacturing, and [ ] makes no changes to existing rules regarding liability." *Id.* The DoD then distinguished the public policy rationales underlying *Boyle* and the federally mandated clauses as follows:

> The public policy rationale behind *Boyle* does not apply when a performance-based statement of work is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor or its employees or subcontractors. Asking a contractor to ensure its employees comply with host nation law and other authorities does not amount to the precise control that would be requisite to shift away from a contractor's accountability for its own actions. Contractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government. However, to the extent that contractors are currently seeking to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States, *this rule should not send a signal that would invite courts to shift the risk of loss to innocent third parties*. The language in the clause is intended to encourage contractors to properly assess the risks involved and take proper precautions.

Id. (emphasis added).

In light of the Government's approach, some experts conclude that "when faced with such an explicit contractual and regulatory *ex ante* allocation of risk,"

as required by the DoD's regulations, "the law should presume" that the contractor "has logically built the cost of potential tort liability into its rates."[10] This commonsense conclusion emanates from the different incentives motivating the conduct of private contractors and government employees. Contractors "are private, profit-motivated actors,"[11] placed "in a position to earn profits from [their] association with the government," who are therefore incentivized "to maximize personal welfare, or profits, rather than public welfare, and to be staffed by self-interested individuals."[12] Public servicemembers, on the other hand, receive less than private contractors – typically a salary – and presumably are motivated by a sense of duty to "act in the public interest and [ ] to maximize social welfare[.]"[13] Logically, then, extending immunity to "the contractor [that] 'stands to enjoy the benefits' of the contract" would not only be "improper" but also "redundant" because "'one would expect the contractor to [have already] engage[d] in cost-benefit optimizing behavior without the benefit of immunity.'"[14]

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[10] Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 Brook. J. Int'l L. 395, 443 (2009).

[11] Singer, *War* at 524

[12] Finkelman, at 442.

[13] *Id.*

[14] *Id.* (quoting Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from* Boyle's *Government Contractor Defense*, 63 S. Cal. L. Rev. 637, 652-53 (1990)); *see also* Keypour, at 756–57 (asserting private contractor's "decision-making processes . . . contrast[s] deeply with the military's motivations to protect the nation's interests, particularly those related to security.").

Viewed against this framework, the lower court's rule sweeps too broadly. The lower court's test asks only if the contract is "integrated into combatant activities over which the military retains command authority." Pet.App.21-22. This test fails to undertake the essential inquiry commanded by *Boyle*, namely to identify a "significant conflict" between the federal interest and the underlying state-law tort theories. As *Boyle* made clear "conflict there must be." 487 U.S. at 508. Yet there can hardly be conflict where the contractor's adherence to the Government's requirements is entirely compatible with adherence to state-law tort duties, especially where the Government, in its own instructions to contractors, has made clear that they remain accountable "to innocent third parties" for their mistakes. 73 Fed. Reg. 16764-01 at cmt. 6. A more measured test must "strike[ ] the proper balance between protecting military decision-making and opening the federal courthouse doors to a plaintiff's legitimate state-law claims." *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 129 (2d Cir. 2021).

B. Reversal of the decision below is consistent with *Boyle*.

Reversing the lower court's decision does not require this Court to reexamine the shaky foundations upon which the *Boyle* rule rests. In fact, a proper reading of *Boyle* counsels against the lower court's wholesale displacement of state tort-law remedies.

First, *Boyle* expressly acknowledged that federal common law does not govern where, as here, "litigation is purely between private parties and does not touch the rights and duties of the United States[.]" *Boyle*, 487 U.S. at 506 (quoting *Bank of America Nat. Trust & Sav. Assn. v. Parnell*, 352 U.S. 29, 33 (1956)). In so doing,

Boyle contrasted the facts of that case with those presented in *Miree v. DeKalb County,* 433 U.S. 25, 30 (1977). *Boyle* observed that because the plaintiffs in *Miree* (third-party beneficiaries to an agreement between a municipality and the FAA) merely "sought to enforce" the contractual duties required by the underlying government contract rather than impose a "contrary" duty, "any federal interest in the outcome of the [dispute] . . . '[was] far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.'" *Boyle*, 487 U.S. at 508 (quoting *Miree*, 433 U.S. at 32–33).

Conversely, the liability sought to be imposed in *Boyle* "directly affect[ed]" the "interests of the United States" because it purported to constrain the Government's discretionary design decisions under military procurement contracts. *Boyle*, 487 U.S. at 506–07. As such, "the state-imposed duty of care . . . [was] precisely contrary to the duty imposed by the Government contract[.]" *Id.* at 509. *Boyle* then took the analysis one step further, hypothesizing of "an intermediate situation, in which "the duty sought to be imposed on the contractor is not identical to one assumed under the contract, but is also not contrary to any assumed." *Id*. "If, for example," *Boyle* theorized, "the United States contracts for the purchase and installation of an air conditioning-unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary." *Id. Boyle* went so far as to declare that "[n]o one [could] suggest[ ] that state law would generally be pre-empted in this context," because "[t]he contractor could comply with both its contrac-

tual obligations and the state-prescribed duty of care." *Id.*

Here, even assuming that the duty of care sought to be imposed under state law is not identical to the duty of care assessed under military standards, the standards certainly do not clash because the Army's report already concluded that Fluor failed to uphold its contractual obligations to supervise its employees. Accordingly, a decision in this case poses no threat to the military's ability to control and regulate on-base safety and security protocols because Fluor could have theoretically "compl[ied] with both its contractual obligations and the state-prescribed duty of care." *Id.*; *see Badilla*, 8 F.4th at 128 ("No significant conflict exists between [a uniquely federal] interest and state law unless the challenged action can reasonably be considered the military's own conduct or decision and the operation of state law would conflict with that decision.") (emphasis in original).

Second, unlike the precise design specifications required for the helicopter in *Boyle*, the Army in this case generally delegated employee supervision responsibilities to the private employers themselves, impliedly disclaiming a direct "federal interest" in the manner and method that such supervisory practices occur so long as such practices complied with on-base security protocols. "[C]ontractors should not be protected where they act as functionally autonomous actors." Finkelman, at 447. "A core principle of modern tort law is that liability for negligence should be borne by the party that is the cheapest cost avoider." *Id.* As compared to U.S. troops or local civilians, an autonomous contractor is the cheapest cost avoider because it can discharge its "contractual responsibilities in conformity with the applicable duty of care" and

can also insure against the risk of any resulting harm. *Id.* "[T]he effect of providing a federal common law affirmative defense for service contractors in this situation would [unfairly] shift the loss to the innocent victim" *Id.* at 448.

Moreover, where contractor discretion is involved, "the national security interest in incentivizing risk taking is not present." *Id.* Congress has only authorized indemnification where contractors are required "to undertake activities for the government that would expose them to greater risks than would ordinary commercial or industrial activities, which could be protected by private insurance." *Id.* Absent a demonstrated intent to directly legislate and control contractor discretion, any potentially adverse federal interest is "far too speculative . . . to justify the application of federal [common] law" to preempt state tort law. *Miree,* 433 U.S. at 32–33. At a minimum, "it would be unreasonable to say that there is always a 'significant conflict' between the state law and a federal policy or interest[.]" *Boyle*, 487 U.S. at 509. According to the Second Circuit, "[p]reemption arises when the Government specifically authorizes or directs the contractor action, not when the Government generally permits the contractor to undertake a range of actions"; otherwise "any tort claim against a military contractor would involve an indirect challenge to the military's decision not to prevent the action that gave rise to the claim[.]" *Badilla*, 8 F.4th at 129-130 (emphasis in original). Preemption in this case would therefore be inappropriate even under some lower courts' reading of *Boyle*.

Third, *Boyle* solely analyzed the congressional intent with respect to the "discretionary function" clause of the FTCA to conclude that Congress intended

to legislate the idea that the federal government has discretion to determine what is or is not sufficient to satisfy military objectives during a time of war. 487 U.S. at 512-13. As such, it was the military's prerogative to determine that helicopters with hatches opening inwards were sufficient to accomplish military objectives, even though Virginia law would have considered the same feature a design defect. *Id.*

This case has no bearing on the military's exercise of discretionary functions. Instead, the only "federal interest" identified for purposes of the lower court's preemption analysis was that Flour "was 'integrated into combatant activities' at Bagram Airfield." Pet.App.22. Although Petitioner did not contest this finding based on prior circuit precedent in *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 351 (4th Cir. 2014) (hereinafter, "*Burn Pit I*"), that case represents yet another improper exercise of federal common law. Despite acknowledging that the terms "combat" "connotes physical violence" and "combatant" "connotes pertaining to actual hostilities," the *Burn Pit I* court nevertheless held that "viewing 'combatant activities' through a broader lens furthers the purpose of the combatant activities exception." 744 F.3d at 351. This reasoning does not withstand scrutiny. To justify its own value-laden policy judgment regarding the intended purpose of the combatant activities exception, the court derived a meaning from terms connoting "physical violence" and "actual hostilities" to conclude that the phrase "combatant activities" was actually intended to "encompass conduct and decisions that do not involve actual combat" or "physical force." *Id.* (emphasis added) (concluding performance of "waste management and water treatment functions to aid military personnel in a combat area was "undoubtedly 'necessary to and in direct connection with actual hostilities'" and therefore

constituted "combatant activities"). But these are not the words used by Congress in the FTCA, and neither the court below nor the Fourth Circuit precedent upon which it depended undertook the sort of careful discernment of legislative intent that *Boyle* demands. Congress – not the court – is best positioned "to strike a balance between the states' interest in enforcing their tort laws and the federal interest in protecting military service contractors." Finkelman, at 449.

C. The political question doctrine does not categorically preclude consideration of servicemembers' state-law tort claims for injuries incurred "inside the wire."

At the *certiorari* stage, Respondents (unsuccessfully) invoked the political question doctrine as a possible reason counseling against review in this case. Resps. Br. in Opp., *Hencely v. Fluor Corp.*, No. 24-924, 2025 WL 1270436 at *29-31. At the merits stage, Respondents can be expected to revive some form of that argument either in support of reversal or in support of their proposed expansion of *Boyle*. Consequently, *amicus* briefly explains why the political question doctrine does not bar servicemembers claims like those at issue here.

"In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (plurality) (quoting *Cohens v. Virginia,* 6 Wheat. 264, 404, 5 L.Ed. 257 (1821)). The political question doctrine represents a narrow exception to that rule by "exclud[ing] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan*

Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221, 230 (1986) ("The Judiciary is particularly ill suited to make such decisions, as courts are fundamentally under-equipped to formulate national policies or develop standards for matters not legal in nature.") (internal quotations omitted).

Rooted in separation of powers principles, the doctrine traces to *Marbury v. Madison*, wherein then-Chief Justice Marshall observed that "[q]uestions, in their nature political, of which are, by the constitution and laws, submitted to the executive, can never be made in this court." 5 U.S. 137 (1803). Justice Marshall aptly theorized that absent this "division of power" among the branches of Government, "the other departments would be swallowed up by the judiciary." 4 Papers of John Marshall 95 (C. Cullen ed. 1984).

The modern articulation of the political question doctrine emerged in *Baker v. Carr.* 369 U.S. 186 (1962). *Baker* articulated a six-factor test to decide whether a case presents a nonjusticiable political question: namely, courts should ask whether there exists (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 211.

Baker explained that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Id.* The Court must therefore engage in a "discriminating inquiry into the precise facts and posture of the particular case." *Id.* Because the *Baker* factors are ranked "in descending order" both in terms of "importance and certainty," *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004), the test is often distilled to an analysis of the first two factors, i.e., a controversy involves a political question "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Clinton*, 566 U.S. at 195.

While the United States has "significant interests in ensuring that sensitive military judgments are not subject to judicial second-guessing, in protecting soldiers and civilians from wartime injuries, and in making sure contractors are available and willing to provide the military with vital combat-related services," the United States "also has significant interests in ensuring that its contractors exercise proper care, minimize risks to servicemembers and do not avoid appropriate sanctions for misconduct." Br. for U.S. as Amicus Curiae, *Carmichael v. Kellogg, Brown & Root Service, Inc.*, 561 U.S. 1025 (2010) (No. 09683) 2010 WL 2214879, at *9. Accordingly, not "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 217.

Although lower courts have uniformly adopted the *Baker* factors in these cases, any inquiry is inherently fact-sensitive. *Id.* at 744–46. Under that fact-sensitive

test, the political question doctrine does not operate (1) as a general bar to claims against private contractors or (2) as a specific impediment to causation inquiries in tort claims.

1. General Bar: The political question doctrine does not operate as a general bar to claims against military contractors, as the court below correctly concluded. In suits against military contractors, the Fourth Circuit has said a case raises a nonjusticiable political question if either (1) the military exercised "plenary" or "direct" control over the contractor, or (2) "national defense interests were closely intertwined with military decisions governing the contractor's conduct, such that a decision on the merits of the claim would require the judiciary to question actual, sensitive judgments made by the military." *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 155 (4th Cir. 2016). To answer these questions, a court must "examine the evidence regarding the specific conduct to which the plaintiffs were subjected and the source of any direction under which the acts took place." *Id.* at 160.

The court below correctly answered both those questions in the negative, i.e., (1) Fluor was not under the Army's plenary or actual control and (2) Petitioner's state tort claims did not require the court to second-guess sensitive military judgments.

First, "[e]ven though the military dictated the security measures for Bagram Airfield [and] required Fluor to comply with military protocols concerning the supervision and escort of Local Nationals on base," the Army contractually delegated authority to Fluor to hire and supervise employees, as well as control the level of access they had to tools. Pet.App.15, 26. In other words, the Army did not dictate the "how, where, and when" of Fluor's supervision or access to tools.

See Reply Br. of Appellant-Petitioner, *Hencely v. Fluor Corp.*, 120 F.4th 412 (4th Cir. 2024) (No. 21-1994), 2022 WL 198476, at *22. In fact, the Army's investigative report criticized Fluor for lending Nayeb tools his job did not require, not adequately supervising Nayeb while he worked in the hazardous materials work center, and retaining Nayeb despite reported instances of sleeping on the job and absences without authority. Pet.App.10, 26. Based on the foregoing evidence, the Fourth Circuit concluded that "the decision to lend Nayeb a multimeter from Fluor's tool room was not 'made exclusively by the military' or a 'de facto military decision.'" Pet.App.15. As a result, the record below did not satisfy the Fourth Circuit's "rigorous standard for plenary control." *Id.*

Nor do these claims require the judiciary to scrutinize or second-guess sensitive military judgments. Petitioner does not assert that Flour was negligent for engaging in conduct ordered or approved by the military. Rather, he argues that within general parameters set by the military, Fluor acted negligently and should be liable under state tort law. Under these circumstances, the military's standards and orders must be treated "as a given, and the actions of [Fluor] must be evaluated in light of those judgments," such that the trier of fact "[can]not question the wisdom of military judgments." Br. for U.S. as Amicus Curiae, *KBR, Inc. v. Metzgar*, 574 U.S. 1120 (2015) (No. 13-1241), 2014 WL 7185601, at *10-11. In other words, the Court can consider the military's policies without drawing the reasonableness of those policies into question.

It is also worth noting that Fluor's contract required the performance of commercial services rather than

inherently governmental functions.[15] Commercial contracts solicit labor from the private workforce to facilitate the construction of infrastructure, implement development projects, and provide food, custodial, and maintenance services.[16] At the other end of the spectrum, defense-related contracts are intricately linked to military responsibilities and combat activities.[17] "These contracts call upon private contractors to supply military skill and engage in combat operations, strategic planning, intelligence, interrogations, risk assessment, operational support and training, and even offensive missions against militants."[18] The military is much more likely to exercise "plenary" or "direct" control over a contractor's performance of governmental functions that directly implicate mili-

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[15] *See* Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 Wash. U. L.Q., 1001, 1016-19 (2004). (noting a distinction between commercial "'garden-variety' contracting-out initiatives" and "defense-oriented ... combat-related tasks and responsibilities in zones of conflict."); *see also* Deborah Avant & Lee Sigelman, *What Does Private Security in Iraq Mean for U.S. Democracy at Home?* 6 (Jan. 2008), https://bc.sas.upenn.edu/system/files/Avant_08.pdf (noting that "[m]ost analysts have grouped military services into three broad categories: operational support, military advice and training, and logistical support" with the first two categories describing combat-related activities and the third category describing commercial services).

[16] *See* Tony Capaccio, *Fluor Drops Protest of $500 Million KBR Iraq Support Contract*, Bloomberg News, Sept. 30, 2011, http://www.bloomberg.com/news/2011-09-30/fluor-drops-protest-of-500-million-kbr-iraq-support-contract.html; Vernon, at 376 (characterizing military contractor services related to "base operations" as a type of "commercial support").

[17] Keypour, at 752.

[18] Michaels, at 1032-34; Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* 49 (2003).

tary decision-making as opposed to purely commercial services performed at the contractor's discretion.

At bottom, this case concerns the negligence of a private commercial contractor in the supervision of its own employees. Fluor was engaged to perform commercial "base life support services" at Bagram Airfield, "includ[ing], among other things, construction, facilities management, laundry, food, recreation, and, relevant here, vehicle maintenance and hazardous materials management." Pet.App.3. Not only are these services "commonly available in the marketplace for use in traditional commercial settings" – they were performed inside the wire.[19] Moreover, Fluor was not under the plenary or actual control of the military because the Army contractually delegated to Fluor the responsibility and discretion to implement the military's policies and protocols regarding the hiring, supervision, and escort of its employees on base. Petitioner's liability claims therefore arise out of the ordinary course of Fluor's business and, as a result, should be assessed, "wholly independent from the environment in which contractual duties are carried out."[20]

U.S. employers are regularly held accountable for such conduct, and Fluor should not be allowed to act with impunity simply because its business operations were carried out on a U.S. military base.[21] South Carolina tort law therefore offers a "clear roadmap" for resolving Petitioner's claims. Where "clearly definable

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[19] Keypour, at 750–51 ("Commercial contracts solicit labor from the private workforce to facilitate the construction of infrastructure, implement development projects, and provide food, custodial, and maintenance services.").

[20] *Id*.

[21] *See id.* at 737.

criteria for [a] decision [is] available[,] . . . the political question barrier falls away: '(A) Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared.'" *Baker*, 369 U.S. at 214 (citing *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924)).

2. Causation: The political question doctrine also does not preclude inquiry into the causation issues presented by cases like Petitioner's. Below, Fluor argued that it was unreasonable for the military to permit a known Taliban associate onto a secure Military base in the first instance and that the supervision and escorting policies in effect were inadequate. Br. of Appellees-Respondents, *Hencely v. Fluor Corp.*, 120 F.4th 412 (4th Cir. 2024) (No. 21-1994), 2021 WL 5999775, at *48.

First, this is a strawman. The military's protocols have no bearing on the degree of Fluor's negligence because there is no dispute that Fluor failed to follow and uphold those protocols. Specifically, the Army concluded that "the primary contributing factor" to the attack was "Fluor's complacency and its lack of reasonable supervision of its personnel." Pet.App.10, 172. A judicial determination that agrees with or takes as valid an Executive Branch position does not create interbranch friction. *See Boyle*, 487 U.S. at 508; *Miree*, 433 U.S. at 32–33.

Second, a "military contractor's causation defense 'does not require evaluation of the military's decision making **unless** (1) the military caused the [plaintiff's] injuries, at least in part, **and** (2) the [plaintiff] invoke[s] a proportional liability system that allocates liability based on fault.'" *Burn Pit I*, 744 F.3d at 340–41 (emphasis added). It is doubtful that such a causation defense is available here. South Carolina

law prohibits a jury from assigning fault to the military as an immune nonparty. *See Machin v. Carus Corp.*, 799 S.E.2d 468, 478 (S.C. 2017) ("[A] nonparty may be included in the allocation of fault only where such person or entity is a 'potential tortfeasor,' which, under our law, excludes [a third party] who is immune from suit[.]"). Because Fluor cannot allocate fault to the military as a matter of law, its causation defense cannot implicate a political question.

Even if the defense were valid, it still would not present a political question. The Fifth Circuit's decision in *Lane v. Halliburton,* 529 F.3d 548 (5th Cir. 2008), offers useful guidance. In *Lane*, Iraqi insurgents ambushed and attacked employees of KBR (commercial contractor) who were transporting fuel convoys on assignment from the company. *Id.* at 555. The former employees sued claiming that KBR misrepresented the nature of the work assigned and the level of safety that the plaintiffs could expect as employees of the company. *Id.* KBR asserted a causation defense, arguing that no determination as to causation could be made "without examining whether the Army fulfilled its contractual duty to provide force protection for the KBR convoys." *Id.* at 566. The *Lane* court declined to hold that this defense presented a political question. *Id.* Instead, although the type and timing of information KBR received from the Army may have been relevant to determining whether KBR made assurances to the plaintiffs about conditions which it knew or should have known to be untrue, the relevant inquiry was determining what KBR did with that information, "not how ably the military gathered or interpreted it." *Id.* at 567. Accordingly, the plaintiffs' fraud and negligence claims could be resolved "without second-guessing the acts and decisions of the Army." *Id.*

Like the contractor in *Lane*, Fluor represents a prototypical commercial defense contractor that was engaged by the military to provide basic "life support services" such as "construction, facilities management, laundry, food, recreation, and, relevant here, vehicle maintenance and hazardous materials management." Pet.App.3. Fluor's on-base conduct does not require review of sensitive military decisions any more than if such services were performed in the United States on behalf of a local municipality.

Thus, the Fourth Circuit correctly concluded that the political question doctrine did not bar consideration of Petitioner's claims. Pet.App.19.

CONCLUSION

As then-Justice Rehnquist explained nearly a half-century ago, "the enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981). True to this guidance, the doors of America's courthouses should not be closed to American servicemembers and their families under tragic circumstances like those presented in this case. If that must occur, the nation's elected representatives, not unelected judges, should make that hard call. Had Congress intended to legislate "field preemption" for any tort claims asserted against private military contractors, it would have said so. At a minimum, it would have extended the FTCA to private contractors. It did neither. That should tell the Court everything it

needs to conclude that the value-laden *Boyle* doctrine does not displace state-law tort remedies in this case.

For the foregoing reasons, the lower court's judgment should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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