No. 24-924

# In the Supreme Court of the United States

WINSTON TYLER HENCELY,

*Petitioner*,

v.

FLUOR CORPORATION, ET AL.

*Respondents*.

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

## BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 19 OTHER STATES IN SUPPORT OF PETITIONER


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## INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

When Respondent Fluor Corporation, a military contractor, hired Ahmad Nayeb, a former Taliban insurgent, to work at Bagram Airfield in Afghanistan, a tragic disaster resulted. Nayeb purportedly built a suicide vest during his largely unsupervised shifts at Fluor's vehicle yard; he paired homemade explosives with materials from the yard to do it. Pet. App. 9, 171-73. Fluor then permitted Nayeb to walk—unsupervised—to a different part of the base, where he detonated the bomb near soldiers gathering for a Veterans Day 5K. The explosion killed five and injured sixteen others. Altogether, "poorly vetted access" and "unreasonable supervision" allowed Nayeb to "operat[e] with impunity" in preparing for and conducting his attack. Pet. App. 160. "Fluor's complacency and its lack of reasonable supervision" was deemed "the primary contributing factor" to the attack. Pet. App. 158.

Petitioner Winston Hencely was one of those wounded. He sued Fluor in federal district court, relying on South Carolina law. And at least on the facts alleged, his case seemed strong. See *Beneficial Fin. I, Inc.* v. *Windham*, 847 S.E.2d 793, 805 (S.C. Ct. App. 2020) (describing negligent hiring, supervision, and training claims). But the district court entered judgment for the contractor, and the Fourth Circuit affirmed. Pet. App. 2. According to the Fourth Circuit, Hencely's state-law tort suit "clash[ed] with the federal interest underlying the combatant activities exception" to the Federal Tort Claims Act. Pet. App. 21. By its express terms, the FTCA and its related exceptions do *not* apply to military contractors like Fluor. See 28 U.S.C. § 2671. But the Fourth Circuit effectively extended the Act's reach anyway, explaining how it

wanted to advance a "policy" of "foreclosing state regulation" of anything related to wartime activities. Pet. App. 20; see also Pet. App. 27 (declaring that "the imposition of *per se* of the state … tort law … conflicts with the federal policy of eliminating regulation of the military" (cleaned up)).

The Fourth Circuit's approach is an affront to both the horizontal and vertical separation of powers, and the Court should not endorse it.

In essentially rewriting several of the FTCA's provisions, the court ignored Congress's careful judgment. Congress expressly decided *not* to extend the FTCA's protections (derived from notions of sovereign immunity) to private contractors. Although the Fourth Circuit emphasized the Act's purpose, this Court has rejected this "purpose first" approach time and again in any number of contexts. It also conceived the Act's purpose too narrowly. And the Fourth Circuit's choice to seize control over what should be congressionally driven policy judgments in turn harms the States. After all, "[t]he allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond* v. *United States*, 564 U.S. 211, 221 (2011). "The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Id.*

What's more, the Court gave insufficient respect to the States' interests in affording relief to victims and imposing punishment on wrongdoers within their borders. In prior cases, even the Fourth Circuit has acknowledged the "general presumption that Congress did not intend to preempt state law," especially when it comes to the "preemption of state remedies like tort recoveries, whe[re] no federal remedy exists." *Columbia Venture,*

*LLC* v. *Dewberry & Davis, LLC*, 604 F.3d 824, 830 (4th Cir. 2010). In the tort realm, "an unambiguous congressional mandate" must thus be present to preempt. *Fla. Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 147 (1963). These clear-statement principles "compel[] Congress to legislate deliberately and explicitly before departing from the Constitution's traditional distribution of authority." *Carter* v. *Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring). Yet the Fourth Circuit forgot them here, trouncing important state interests in tort law in the process.

The Court should reverse.

## SUMMARY OF ARGUMENT

**I.** The FTCA does not apply to private, military contractors. Even so, the Fourth Circuit employed a provision of that statute to bar liability against Fluor, reasoning that this outcome advanced the statute's purpose. Purpose-driven, legislative revisionism is an unwelcome relic of an early time. Courts should stick with the text. Indeed, this case reflects how purpose-focused analysis can go awry, as the Fourth Circuit was mistaken when it came to both the purpose of the FTCA's combatant-activities exception and the Act as a whole. And to the extent that the court below relied on this Court's earlier decision in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 511-513 (1988), that was a serious mistake. That decision already stands on shaky footing, and it's a particularly ill fit for the facts of this case. Ultimately, the lower court inappropriately assumed a legislative function that belongs to Congress alone.

**II.** The Fourth Circuit's decision failed to account for important state interests. States have an interest in seeing innocent parties compensated. On the flip side,

they have an interest in seeing wrongful conduct punished and deterred. And tort law is a tool to advance state social policy. But the Fourth Circuit improperly slammed the door on any of these interests without any real consideration of the consequences.

## ARGUMENT

It's understandable and appropriate to defer to our country's military decisionmakers. But "[d]efense contractors do not have independent constitutional authority and are not coordinate branches of government to which [courts] owe deference." *Harris* v. *Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 465 (3d Cir. 2013). The Fourth Circuit thus went too far in functionally extending that deference to a private military contractor, especially considering the contractor allegedly did *not* comply with military contracts and orders. In doing so, it wrongly rewrote the FTCA and squelched important state interests.

### I. The decision below warps the FTCA using a mistaken, purpose-driven approach.

#### A. The court effectively rewrote the statute.

**1.** The FTCA does not say that federal contractors like Fluor should be shielded from liability for "combatant activities." In fact, it says the opposite.

The Act addresses "claims against the United States" for certain "negligent or wrongful act[s] or omissions[s] of any employee of the Government." 28 U.S.C. § 1346(b). An "employee of the Government" includes "officers or employees of any federal agency" and military personnel. *Id.* § 2671. But "federal agency" "does not include any contractor with the United States." *Id.* As even the

Fourth Circuit saw, "these provisions do not apply to government contractors" "[b]y their terms." Pet. App. 20. So contractors like Fluor are expressly taken out of the Act's scope, including the Act's exceptions to liability.

Were that not enough, the relevant exception to liability here—the combatant-activities exception—precludes a claim against the government "arising out of the combatant activities *of the military or naval forces, or the Coast Guard*, during time of war." *Id.* § 2680(j) (emphasis added). Yet a "private military contractor is neither a member of the military nor naval forces contemplated by Congress or the courts." Roger Doyle, *Contract Torture: Will* Boyle *Allow Private Military Contractors To Profit From The Abuse of Prisoners?*, 19 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 467, 486 (2007). Claims arising out of a *contractor*'s activities—particularly those not on the battlefield, but back at the base and inside the wire—do not rightfully "arise out" of the military branches' work. See *Combatant*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("'Legitimate' combatants are members of the armed forces or uniformed members of a militia or volunteer corps, under military command and subject to the laws of war."). And under the statute, it's not enough for work to happen alongside or even in service of combatant activities. In that sense, contractors are doubly excluded.

These principles apply even when military contractors operate under strict task orders or contracts. Federal regulations that "fix specific and precise conditions to implement federal objectives … do not convert the acts of entrepreneurs … into federal governmental acts." *United States* v. *Orleans*, 425 U.S. 807, 816 (1976). "[A] contractor [does not] lose[] its independence and become[] an 'employee' of the government in every case in which the

government writes into the contract sufficient procedural safeguards to ensure compliance with the terms of the agreement." *Berkman* v. *United States*, 957 F.2d 108, 114 (4th Cir. 1992).

These text-mandated limits should have been the end of the inquiry. An "elementary" principle of statutory interpretation appears at the start of most every case implicating a statute: "[T]he meaning of a statute must, in the first instance, be sought in the language." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). And judges should "always … begin with the text of the statute." *Limtiaco* v. *Camacho*, 549 U.S. 483, 488 (2007). So in cases where the statute is clear, "the sole function of the courts is to enforce [the law] according to its terms." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (cleaned up). Fluor was a contractor. The FTCA, and thus its combatant-activities exception, does not apply.

**2.** The Fourth Circuit marched ahead anyway, discerning a "federal policy of foreclosing state regulation of the military's battlefield conduct and decisions" from the FTCA's terms and then using that policy to effectively rewrite them. Pet. App. 20 (cleaned up); see also Pet. App. 27. It also passingly commented on the "rationales for [state] tort law" against this federal "policy" and found them wanting. Pet. App. 27 n.7. In this way, the Fourth Circuit's thinking mirrored (and heavily relied on) the D.C. Circuit's opinion in *Saleh* v. *Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009), which likewise focused on "the policy embodied by the combatant activities exception"—but not the text. The Third Circuit, too, has mistakenly used "purpose" and "policy" to shape its conception of a combatant-activities exception. See *Harris*, 724 F.3d at 480 ("The purpose underlying § 2680(j) therefore is to

foreclose state regulation of the military's battlefield conduct and decisions.").

To be sure, the Fourth Circuit and its sister circuits were ostensibly using the FTCA only as evidence of "interests" that might in turn give rise to a federal defense. See *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 347-49 (4th Cir. 2014). But an earnest look at these decisions suggests that the courts were using old-fashioned, purpose-driven analysis to revise the terms of a statute, albeit through the roundabout way of evaluating "interests." Too often, "courts have very creatively interpreted the statute to extend it to contractors, a result that is in direct contravention of the statutory bar on the FTCA applying to contractors." Major Jeffrey B. Garber, *The (Too) Long Arm of Tort Law: Expanding the Federal Tort Claims Act's Combatant Activities Immunity Exception to Fit the New Reality of Contractors on the Battlefield*, ARMY LAW., Sept. 2016, at 12, 13.

Such legislative revisionism is a serious mistake. Nearly a century-and-a-half ago, this Court admonished that "[c]ourts cannot supply omissions in legislation, nor afford relief because they are supposed to exist." *United States* v. *Union Pac. R.R. Co.*, 91 U.S. 72, 85 (1875). Nothing has changed since. See *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) ("It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." (cleaned up)). It remains true that "it is [the courts'] duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Va. Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1900 (2019) (Gorsuch, J.). So when a statute "says nothing about [certain types of] claims," it is generally "improper to conclude that what Congress omitted from the statute is

nevertheless within its scope." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 353 (2013). "[T]he choice" to expand or contract a statute "is not [a court's] to make." *CSX Transp., Inc.* v. *Ala. Dep't of Revenue*, 562 U.S. 277, 296 (2011). "Congress wrote the statute it wrote," and that is all courts can deal with. *Id.*; see also *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 784, 794 (2014) ("[Courts do not have a] roving license … to disregard clear language simply on the view that … Congress must have intended something broader." (cleaned up)).

By fixating on purpose (rather than text), courts below have violated the separation of powers by assuming a legislative function. It's a dangerous game to rule based on what "Congress would have wanted" instead of "what Congress enacted." *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992) (cleaned up). Remember that the "very essence" of the legislative process is "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987). Courts cannot identify a gap and then assume that the legislature would have chosen to fill it in the way the court believes. Such an approach would produce "little more than wild guesses." Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983).

This effort to push text aside for the sake of purpose forgets that "[l]egislation is … the art of compromise." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). So by the time a law is adopted, "all that is really agreed upon is the words." Josef Kohler, *Judicial Interpretation of Enacted Law*, *in* SCIENCE OF LEGAL METHOD: SELECT ESSAYS BY VARIOUS AUTHORS 187, 196 (Bos. Book Co. 1917). Omitting something from the text

may have been "the price of passage." *Henson*, 137 S. Ct. 1725.

The Fourth Circuit unfortunately indulged in straight-up policy- and interest-balancing here—the kind of work that belongs to Congress. See, *e.g.*, Pet. App. 27 n.7. "It is for Congress, not [the] [c]ourt[s], to amend the statute if it believes that the" state tort-law will "unduly restrict[]" contractors from performing their work effectively. *Dodd* v. *United States*, 545 U.S. 353, 359-60 (2005). "The judiciary is not the proper branch to balance these competing policy choices, especially in the areas of military policy and foreign affairs, which are constitutionally consigned to Congress and the Executive Branch. Congress, not the courts, should decide whether to adopt a combatant-activities defense for federal contractors." Margaret Z. Johns, *Should Blackwater and Halliburton Pay for the People They've Killed? Or Are Government Contractors Entitled to A Common-Law, Combatant-Activities Defense?*, 80 TENN. L. REV. 347, 352 (2013).

**3.** And as it turns out, even if purpose were the guiding light, the Fourth Circuit misjudged the purposes that would be relevant here.

"Congress has never declared that tort liability should be completely removed from the battlefield or that private military contractors should not be accountable in the United States." Spencer R. Nelson, *Establishing A Practical Solution for Tort Claims Against Private Military Contractors: Analyzing the Federal Tort Claims Act's "Combatant Activities Exception" Via A Circuit Split*, 23 GEO. MASON U. CIV. RTS. L.J. 109, 132 (2012). Perhaps a more reasonable understanding is that Congress "recognize[d] that during wartime … no duty of reasonable care is owed against whom force is directed."

*Koohi* v. *United States*, 976 F.2d 1328, 1337 (9th Cir. 1992). That understanding (though still textually unmoored) is at least consistent with Congress's more general goal throughout the FTCA exceptions to "protect certain important *governmental* functions and prerogatives from disruption." *Molzof* v. *United States*, 502 U.S. 301, 311 (1992) (emphasis added). Wartime enemies shouldn't be able to run to court. But even if it's right that "the FTCA's policy is to eliminate *the U.S. government's* liability for battlefield torts. … it is not plain that the FTCA's policy is to eliminate liability when the alleged tortfeasor is a contractor rather than a soldier." *Saleh*, 580 F.3d at 26 (Garland, J., dissenting). And a governmental shield is a far cry from immunizing all private federal contractors in circumstances like this case.

What Congress *has* said is that the FTCA is meant to engender more liability, not less. "[T]he central purpose of the statute" is to "waive[]" immunity that might otherwise apply in "sweeping language." *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 492 (2006). That objective explains why "[e]xceptions to the FTCA are to be narrowly construed." *Miller* v. *United States*, 710 F.2d 656, 662 (10th Cir. 1983). That goes for the combatant-activities exception, too. Likewise, another "purpose of [the] FTCA was to make the tort liability of the United States 'the same as that of a private person under like circumstance.'" *United States* v. *Olson*, 546 U.S. 43, 46-47 (2005) (quoting S. Rep. No. 1400, 79th Cong., 2d Sess., 32 (1946)). But nothing suggests Congress wanted to do the converse—that is, to imbue private persons with the tort immunities of the United States.

In the roughly 80 years since the FTCA was passed, Congress could have amended it to extend protections to contractors if it wished. But it hasn't, even as contractors

have taken a greater role in military operations. This area—private military contracting operations—also isn't one in which federal courts have long recognized a pervasive federal interest that muscles state interests out of the way. Rather, courts have extended the combatant activities exception only within the last 20 years or so. Congress thus couldn't have assumed that courts had fully and satisfactorily addressed the issue on their own. So there was every reason for Congress to act if it "thought state-law suits posed an obstacle to its objectives." *Wyeth* v. *Levine*, 555 U.S. 555, 574 (2009). But it hasn't, and that choice matters. *Id.* If anything, Congress has shown an interest in making federal contractors *more* amenable to domestic tort actions, not less. See, *e.g.*, S. 526, 111th Cong. (2009) (proposing to require contractors to submit to domestic jurisdiction as to any case involving serious bodily injury).

Altogether, the Fourth Circuit took the FTCA and used it to refashion the rules into something closer to what it felt the law *should* be. That was error—and the Court should reverse.

### B. The court placed too much weight on *Boyle*.

In crafting these new de facto immunities for military contractors, the Fourth Circuit has leaned heavily on *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 511-513 (1988). Pet. App. 20. That case held that the interests embodied in the FTCA's "discretionary function" exemption extended to "bar[] a plaintiff's state-law design-defect claim against the manufacturer of a military helicopter built for the United States." Pet. App. 20 (characterizing *Boyle*). The Fourth Circuit "extended *Boyle*'s logic to the FTCA's combatant activities exemption." Pet. App. 21.

*Boyle* brings with it a questionable pedigree. The Fourth Circuit was unwise to "extend" it.

*Boyle* embraced a defense for military contractors that originally derived from the *Feres* doctrine, "under which the [FTCA] does not cover injuries to Armed Services personnel in the course of military service." *Boyle*, 487 U.S. at 510 (describing *Feres* v. *United States*, 340 U.S. 135 (1950)). *Feres*'s involvement should already raise a red flag to the careful reader, as that doctrine has been said to lack any "basis in the text of the FTCA," rest on "policy-based justifications [that] make little sense," and spur "almost universal[] condemn[ation] [from] judges and scholars." *Carter* v. *United States*, 145 S. Ct. 519, 521 (2025) (Thomas, J., dissenting from the denial of certiorari). Thankfully, this Court declined to rely on *Feres* in *Boyle* in part because "a contractor defense that rests upon it should prohibit all service-related tort claims against the [contractor-]manufacturer." *Boyle*, 487 U.S. at 510. A *Feres*-based contractor defense would therefore be "too broad." *Id.*

But having stepped back from the ledge of *Feres*, *Boyle* nevertheless proceeded to leap off in a different direction—the FTCA. *See* John L. Watts, *Differences Without Distinctions:* Boyle*'s Government Contractor Defense Fails to Recognize the Critical Differences Between Civilian and Military Plaintiffs and Between Military and Non-Military Procurement*, 60 Okla. L. Rev. 647, 665 (2007) (noting how *Boyle* sought "a more solid foundation" than "the often criticized and misunderstood *Feres* doctrine" but instead "radically altered the defense"). Looking to the FTCA's discretionary-function exemption, the Court perceived that designing military equipment was the sort of work that would not be subject to suit under that Act. *Boyle*,

487 U.S. at 511. And it thought that holding contractors liable for such discretionary judgments would be akin to holding the United States itself liable—as "[t]he financial burden of judgments against the contractors would ultimately be passed through … to the United States itself." *Id.* at 511-12.

*Boyle* never acknowledged how Congress had expressly excluded "any contractor with the United States" from the FTCA's reach. See 28 U.S.C. § 2671. Nor did it take note of the many (then-recent) instances in which "Congress had notably failed to act … on proposals for a statutory federal contractors' defense." Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 849 & n.245 (1989). Nor did it reconcile its choice with "legislation making contractors guarantee their contract performance" while refusing reimbursement for insurance. Larry J. Gusman, *Rethinking* Boyle v. United Technologies Corp. *Government Contractor Defense: Judicial Preemption of the Doctrine of Separation of Powers?*, 39 AM. U. L. REV. 391, 432 (1990). Instead, the only mentions of our country's *actual* legislative body came in the dissent, which would have left *Boyle*'s "exercise of legislative power to Congress." *Boyle*, 487 U.S. at 516 (Brennan, J., dissenting).

So it's perhaps unsurprising that, like its progenitor *Feres*, *Boyle* has drawn heavy—and justified—criticism. Most obviously, "the result in *Boyle* seems flatly inconsistent with the textualist approach," looking instead to the kind of policy concerns that are usually "relegate[d] … to the legislative process." Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward A Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1367-68 (1990). "No text or history supports a military contractor's defense,

and no argument from constitutional structure can justify the … creation of federal tort law in this case." William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1231 (2002); see also Victoria Eatherton, *Is Derivative Sovereign Immunity Jurisdictional? An Analysis and Resolution of the Circuit Split*, 47 PUB. CONT. L.J. 605, 620 (2018) ("Without any textual origin, derivative sovereign immunity is simply a creation of the judiciary.").

Worse still for the States, *Boyle* "eschews the sort of formal separation-of-power analysis the Court often has employed to separate responsibilities among government actors within the *federal* sphere." Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257, 269 (1991) (emphasis added). Rather, "for the sake of the United States Treasury, the *Boyle* Court inappropriately adopted the role of the legislature in extending sovereign immunity to government contractors." Terrie Hanna, *The Government Contract Defense and the Impact of* Boyle v. United Technologies Corporation, 70 B.U. L. REV. 691, 694 (1990); see also, *e.g.*, Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1400 (1996) ("*Boyle* usurped Congress' role."); Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who Is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597, 1646-47 (1989) ("[T]he soundness of a policy that may increase the government's cost for weapons is a matter best for Congress to decide."). And "[i]n one fell swoop, the Court transgressed federalism concerns, ignored separation of powers, and upset key precedent." Marshall, *supra*, at 1231. *Boyle*'s "freewheeling, policy-based analysis" has thus been labelled an "aberration." Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 463 & n.64 (2010);

see also Weinberg, *supra*, at 849 (describing how *Boyle* "obviously intrudes upon state-created rights").

So courts should not rush to extend *Boyle* to new realms—but they have anyway. *Boyle* now extends to farther reaches while simultaneously dispensing with even the relatively minimal limits that it imposed. Lower courts have "protect[ed] military contractors from state-law claims premised on conduct not mandated, authorized, or even considered by the federal Government." *Badilla* v. *Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 122 (2d Cir. 2021); contrast with *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 n.6 (2001) (saying that *Boyle* applies "[w]here the government has directed a contractor to do the very thing that is the subject of the claim"). But that outcome breaks down even under *Boyle*'s atextual logic, which assumed the protected action would at least "reflect a significant policy judgment by Government officials." *Boyle*, 487 U.S. at 513. The legal fiction of the contractor standing in the shoes of the Government in some sense has thus become even more attenuated. And for much the same reason, "*Boyle*'s cost-passing rationale breaks down in the combatant activities-service contractor context," especially considering the gloss the Fourth Circuit put on it. Ben Davidson, *Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors*, 37 PUB. CONT. L.J. 803, 832 (2008). In other words, the combatant-activities exception has come to offer the sort of unjustified, blanket immunity for contractors that even *Boyle* sought to avoid.

*Boyle* should thus not be read as a license for courts to take up the legislative drafting pen. The decision is troubling enough on its own, and the Fourth Circuit was mistaken in applying it even beyond its original context. Again: doing so seizes too much legislative power. See

*McMahon* v. *Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1330 (M.D. Fla. 2006) (refusing to allow "private contractors" to "bootstrap the Government's sovereign immunity" by creating this new defense "[u]ntil Congress directs otherwise"). "It may well be that, all things being equal, state law ought to play very little role in creating liability for the actions of private military contractors overseas. But the notion that the federal courts (and not the political branches) [can] say so is radically at odds with many of the justifications for the other limits on judicial review." Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035, 1073 (2016).

* * *

Altogether, "[t]here is no express authority for judicially intermixing the government contractor defense and the combatant activities exception; nor is there authority for bestowing a private actor with the shield of sovereign immunity." *McMahon*, 460 F. Supp. 2d at 1330. The Court should do no more than acknowledge as much and reverse.

## II. The decision below defeats the States' interests in affording relief and punishing wrongdoers.

Aside from a lack of concern for Congress, a contractor defense of this kind also reflects a lack of concern for the States. Courts embracing it have focused almost exclusively on the federal interests at stake. Yet the question implicates important state interests, too—interests that the Fourth Circuit literally, and disappointingly, relegated to a footnote. See Pet. App. 27 n.7. At the very least, courts engaging with these various interests should have employed a process "of accommodation" that accounts for the "divergent

interests" of "two sovereignties" in an issue "as to which both have some concern." *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 739 (1961); see also Ian S. Speir, *Pulling Back the Covers: Saleh v. Titan Corporation and (Near-) Blanket Immunity for Military Contractors in War Zones*, 1 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 100, 129 (2011) (arguing that courts have inappropriately overlooked state interests when balancing interests). And for the most part, the FTCA is written in a way to *avoid* any displacement of state law. See *Martin* v. *United States*, 145 S. Ct. 1689, 1700-01 (2025). Had lower courts properly accounted for the States' interests, then, they would not have adopted the sweeping revision of the FTCA that we see here.

The lower courts' minimal regard for state interests is particularly mistaken given that Congress has often sought to respect "traditional principles of state tort law." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); see also *Ruff* v. *Reliant Transp., Inc.*, 674 F. Supp. 3d 631, 635 (D. Neb. 2023) ("[C]ommon law tort constitutes a traditional bedrock state regulatory authority."). And "any sweeping displacement of state tort law … raises serious federalism concerns." Richard C. Ausness, *The Case for A "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1237 (1996). In fact, the Court has said that a "State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez* v. *California*, 444 U.S. 277, 282 (1980).

To start, States have a substantial interest in seeing that persons within their borders receive compensation for injury. The Court has recognized that interest in all

kinds of spheres—"physical injury," emotional "abuse," or "damage to reputation" included. *Farmer* v. *United Bhd. of Carpenters & Joiners of Am., Loc. 25*, 430 U.S. 290, 302 (1977); cf. *Thomas* v. *Wash. Gas Light Co.*, 448 U.S. 261, 277 (1980) (noting a state's "valid interest in the welfare of [an] injured employee"). At bottom, "[t]he American law of torts aims to protect all citizens from the risk of physical harm to their persons or to their property." *Univ. of Denver* v. *Doe*, 547 P.3d 1129, 1145-46 (Colo. 2024) (cleaned up); accord *Bowling Green Mun. Utils.* v. *Thomasson Lumber Co.*, 902 F. Supp. 134, 136 (W.D. Ky. 1995) ("Tort law has as its purpose the protection of society's members from harm."). It is a particular aim to "protect people from misfortunes which are unexpected and overwhelming." *Linden* v. *Cascade Stone Co.*, 699 N.W.2d 189, 193 (Wis. 2005). And States are especially concerned with ensuring that "innocent," *Lynch* v. *State*, 308 A.3d 1, 22 (Conn. 2024), "deserving," *In re Oncor Elec. Delivery Co. LLC*, 630 S.W.3d 40, 43 (Tex. 2021), and other people "powerless to protect themselves," *Blanks* v. *Fluor Corp.*, 450 S.W.3d 308, 373 (Mo. Ct. App. 2014), receive compensation.

Extending the FTCA's combatant-activities exception to federal contractors undeniably undermines these interests. When it comes to the federal government, the States' interest in securing compensation might be lessened because governments are historically shielded from liability by sovereign immunity. Settled expectations, then, are not upset by declaring that certain governmental activities remain off limits from suit. But the same can't be said for private parties; they generally understand that "if you create a dangerous condition and injury ensues you are liable for the injury." *In re Chicago, Rock Island & Pac. R.R. Co.*, 756 F.2d 517, 520 (7th Cir. 1985). Here, all those typical facts came together: Fluor

created a dangerous condition (a former insurgent suicide bomber left unsupervised with bomb-making ingredients on base). It resulted in an undeniable and unexpected injury. And Specialist Hencely was "innocent," "deserving," and "powerless," in that he was in no position to avoid the injuries that resulted from the bombing (seeing as how they came from a surprise attack from a friendly). Fluor, on the other hand, *was* able to do something (and allegedly didn't), so it would be right to "shift[] the loss to [that] responsible part[y]." *Lynch*, 308 A.3d at 22. That's true even in a theater of war, considering that Fluor is said to have failed in its express responsibilities under its contract.

Fluor's conduct flags another interest that States have in allowing tort recovery: punishment and deterrence. "[T]ort law … has a deterrent as well as a compensatory function." *Jones v. Reagan*, 696 F.2d 551, 554 (7th Cir. 1983). South Carolina might have an interest in that effect because of Fluor's operation there. So too might Georgia, seeing as how Specialist Hencely hailed from that State. But neither of those interests can be vindicated after the Fourth Circuit's decision. Here again, that result *might* be palatable if Specialist Hencely had pursued the federal government; States don't ordinarily have the power to "punish" or "deter" the federal government. What's more, military personnel face obvious internal accountability measures. But in taking the exception further afield, the Fourth Circuit has erased "the main function" of tort law. *Id.* at 554; accord *Rivera* v. *Cherry Hill Towers, LLC*, 287 A.3d 772, 777 (N.J. Super. App. Div. 2022) ("A principal purpose of tort law is deterrence." (cleaned up)). Fluor might theoretically face the loss of a contract, debarment, or a poor performance assessment score, see, *e.g.*, Pet. App. 183-87—but it won't otherwise face accountability for

its failings as to Specialist Hencely (or be much deterred from repeating the same).

Lastly, tort law does more than just vindicate the victim and punish the wrongdoer—it also "vindicate[s] social policy." *Steigman* v. *Outrigger Enters., Inc.*, 267 P.3d 1238, 1246 (Haw. 2011); see also *Applied Equip. Corp.* v. *Litton Saudi Arabia Ltd.*, 869 P.2d 454, 460 (Cal. 1994) (same). Put another way, "[r]egulation is the government's prospective ordering of marketplace conduct; tort lawsuits are retroactive case-by-case correctives." *Oncor Elec.*, 630 S.W.3d at 43. Both seek to produce equitable, just, and economically efficient outcomes for all—but States might choose to do so in varying ways. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995) ("The point of *Erie* is that Article III of the Constitution does not empower the federal courts to create" a uniform negligence regime "for diversity cases."). The litigation process itself might even spur beneficial outcomes by bringing problematic or destructive behavior on the part of defendants to light. Cf. *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 273 (2011) ("[C]ourt actions are essential because they provide injured persons with significant procedural tools—including, most importantly, civil discovery.").

Every time a court cuts off tort liability, then, it deprives a State of an important policy tool. See 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, 674 (1990) (explaining how extending the FTCA to afford "a careless, ill-suited federal defense" for government contractors deprived the States of flexibility to protect federal interests while concurrently serving their own objectives). The Supremacy Clause means States must

swallow that result when it comes to the federal government. But nothing says that the interests of private contractors should trump the States' policy interests in the same way.

Some courts have said that these "very purposes of tort law are in conflict with the pursuit of warfare." *Saleh*, 580 F.3d at 7; see also Pet. App. 27 n.7 (suggesting deterrence is "out of place" in a situation where "risk-taking is the rule"). But this framing ignores how "tort law typically sanction[s] only "wrongful conduct," bad acts, and misfeasance." *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471, 489 (2023). Conduct always must be evaluated in the context in which it occurs. So when States are measuring whether conduct warrants punishment (or conversely, compensation) under their own tort law, they'll necessarily account for the reality that the conduct occurred during wartime. See *Getz*, 2009 WL 636039, at *5. And yes, some of the ugly realities of war might justify conduct that might otherwise be punishable during peacetime—so "modified [tort] standards" might be necessary in this context. Aaron J. Fickes, *Private Warriors and Political Questions: A Critical Analysis of the Political Question Doctrine's Application to Suits Against Private Military Contractors*, 82 TEMP. L. REV. 525, 556 (2009). Yet it needn't be the case, as a matter of federal law, that all conduct during wartime gets a free pass. Not all bets are off. Contractors can and should still be held to account when they violate their most basic obligations. The Fourth Circuit foreclosed even that.

Further, the federal interest in not turning war into another front for litigation can be vindicated through less destructive means than blanket preemption. See 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, 446 (2009) ("[I]t is unclear that combatant-activities preemption is necessary to [protect the federal government's] interests."). Contractors could still invoke longstanding concepts like the political question doctrine (as Fluor tried to do here), the law-of-war defense, and intra-military immunity might be invoked if a tort action steers too far into military matters. See also generally, *e.g.*, *Mangold* v. *Analytic Servs., Inc.*, 77 F.3d 1442 (4th Cir. 1996) (affording immunity to government contractor performing certain delegated governmental functions). Because these doctrines and defenses contemplate more fact-specific inquiries, they at least allow room for the state interests reflected in tort law to be better considered. See *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 155 (1944) (explaining that a federal interest in uniformity and predictability cannot be advanced at the cost of state law's separate operation).

And truth is, the federal interest in keeping courts away from the battlefield is likely overstated. "[C]ivilian courts" are "frequently" called on to "examine military decisionmaking and thus influence military discipline" even under the present regime. *United States* v. *Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting). The military has continued to function effectively. Indeed, taking a completely hands-off approach to injuries like those seen here might be counterproductive to military operations, as morale might only suffer if servicemembers come to believe that contractors can effectively act with impunity during wartime. *Id.* More directly, less oversight and accountability for contractors can result in direct harm to U.S. military interests by radicalizing enemies. See, *e.g.*, Moshe Schwartz & Jennifer Church, Cong. Res. Serv., Department of Defense's Use of Contractors to Support Military Operations: Background,

Analysis, and Issues for Congress 7 (May 17, 2023) ("Abuses committed by contractors … can also strengthen anti-American insurgents[,] … [and] [i]nsufficient contractor oversight can also undermine military operations."); Finkelman, *supra*, at 452 ("Observers agree that the culture of impunity among contractors has *severely* damaged the U.S. war effort, particularly in Iraq.").

In short, "[t]ort liability serves to compensate injured victims, encourage safe practices, determine financial and moral responsibility, and achieve justice." Johns, *supra*, at 352. If the Fourth Circuit was determined to engage in a policy judgment of the sort that it did below, it should have at least accounted for those interests in its work. It did not, leading it to a mistaken result.

## CONCLUSION

The Court should reverse.

Respectfully submitted.

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