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 AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. PREEMPTION OF STATE TORT REMEDIES THAT DO NOT CONFLICT WITH ANY FEDERAL STATUTE OR REGULATION IS NOT CONSISTENT WITH THE SUPREMACY CLAUSE. 5

A. The Lower Court Deprived Petitioner of the Remedy and Accountability Afforded by State Tort Law, Despite the Absence of Any Conflict with Federal Law 7

B. Preemption of State Laws That Are Not in Conflict with Federal Law Does Not Fall Within the Supremacy Clause. 9

1. The text, structure, and history of the Supremacy Clause support the settled interpretation that there can be no federal preemption in the absence of positive federal law that conflicts with state law. ... 9

2. Preemption of state law in the absence of a conflict with an act of Congress undermines federalism.....14

II. "COMBATANT-ACTIVITIES" PREEMPTION OF STATE TORT REMEDIES AGAINST PRIVATE ACTORS IS INCONSISTENT WITH THIS COURT'S PREEMPTION JURISPRUDENCE.....16

A. "Combatant-Activities" Preemption Violates This Court's Foundational Principle That the Intent of Congress Is the Touchstone of Preemption.....17

B. "Combatant-Activities" Preemption Ignores This Court's Foundational Presumption Against Preemption.....19

1. The presumption against preemption is essential to protect America's constitutional system of federalism. 20

2. The presumption against preemption is strongest where preemption of state tort remedies would leave injured victims with no remedy at all.....21

C. In the Absence of Clear Manifestation of Congressional Intent, Extending "Combatant-Activities" Preemption Invites Judicial Overreach.....23

III. "COMBATANT ACTIVITIES" PREEMPTION OF CIVILIAN CONTRACTORS' STATE TORT LIABILITY IS UNWISE PUBLIC POLICY.....26

A. Federal Preemption of State Tort Remedies Removes an Important Safety Incentive That Protects Military and Civilian Personnel.....26

B. Tort Liability Will Not Shift Costs to the Federal Government and Taxpayers, But Will Actually Result in Lower Contracting Costs for the Military. 29

C. Implied "Combatant Activities" Preemption Is Not Needed to Protect Other Important Federal Interests. 31

CONCLUSION.....32

TABLE OF AUTHORITIES

Cases

Aiello v. Kellogg, Brown & Root Servs., Inc.,
751 F. Supp. 2d 698 (S.D.N.Y. 2011) 26

Al-Quraishi v. Nakhla,
728 F. Supp. 2d 702 (D. Md. 2010), *appeal dismissed en banc sub nom. Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) 18

Borough of Duryea v. Guarnieri,
564 U.S. 379 (2011) 22

Boyle v. United Techs. Corp.,
487 U.S. 500 (1988) 8, 9, 29

Brandes v. United States,
783 F.2d 895 (9th Cir. 1986) 31

Campbell-Ewald Co. v. Gomez,
577 U.S. 153 (2016) 31

Chamber of Com. of U.S. v. Whiting,
563 U.S. 582 (2011) 16

Christopher v. Harbury,
536 U.S. 403 (2002) 22

CSX Transp. Inc. v. Easterwood,
507 U.S. 658 (1993) 15

Dolan v. U.S. Postal Serv.,
546 U.S. 481 (2006) 18

English v. General Elec. Co.,
496 U.S. 72 (1990) 17, 19

FERC v. Mississippi,
456 U.S. 742 (1982) 13

Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.,
592 U.S. 351 (2021) 20

Gade v. National Solid Wastes Mgmt. Ass'n,
505 U.S. 88 (1992) 10, 16

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 15

Harris v. Kellogg Brown & Root Services, Inc.,
618 F. Supp. 2d 400 (W.D. Pa. 2009) 26

Harris v. Kellogg Brown & Root Servs., Inc.,
724 F.3d 458 (3d Cir. 2013) 8, 32

Haywood v. Drown,
556 U.S. 729 (2009) 13

Health & Hosp. Corp. of Marion Cnty. v. Talevski,
599 U.S. 166 (2023) 12

Hencely v. Fluor Corp.,
120 F.4th 412 (4th Cir. 2024)
..... 6, 7, 8, 17, 24, 25, 26, 29

Hencely v. Fluor Corp.,
554 F. Supp. 3d 770 (D.S.C. 2021) 7

Hencely v. Fluor Corp., Inc.,
No. 6:19-CV-00489, 2020 WL 2838687
(D.S.C. June 1, 2020).....27

Hillsborough Cnty. v.
Automated Med. Laboratories, Inc.,
471 U.S. 707 (1985).....20, 25

Ibrahim v. Titan Corp.,
391 F. Supp. 2d 10 (D.D.C. 2005).....18

In re KBR, Inc., Burn Pit Litig.,
744 F.3d 326 (4th Cir. 2014).....25, 26

James v. Kelly Trucking Co.,
661 S.E.2d 329 (S.C. 2008).....7

Johnson v. United States,
170 F.2d 767 (9th Cir. 1948).....18

Jones v. Halliburton Co.,
625 F. Supp. 2d 339 (S.D. Tex. 2008), *aff'd*, 583
F.3d 228 (5th Cir. 2009), *cert. dismissed sub nom.*
KBR Tech. Servs. Inc. v. Jones, 559 U.S. 998 (2010)
.....20

Jones v. Rath Packing Co.,
430 U.S. 519 (1977).....20

Kansas v. Garcia,
589 U.S. 191 (2020).....16

Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.,
523 U.S. 751 (1998).....24

Kosak v. United States,
465 U.S. 848 (1984) 18

Lackey v. Stinnie,
145 S. Ct. 659 (2025) 17

Malley v. Briggs,
475 U.S. 335 (1986) 23

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 22

Martin v. United States,
145 S. Ct. 1689 (2025) 10

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 17, 19, 20

Merck Sharp & Dohme Corp. v. Albrecht,
587 U.S. 299 (2019) 12

Missouri Pac. Ry. Co. v. Humes,
115 U.S. 512 (1885) 21

Murphy v. National Collegiate Athletic Ass'n,
584 U.S. 453 (2018) 11, 12

Mutual Pharm. Co. v. Bartlett,
570 U.S. 472 (2013) 10

Nat'l Ass'n of Mfrs. v. Dep't of Def.,
583 U.S. 109 (2018) 17

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 19

New York v. United States,
505 U.S. 144 (1992) 12

Ohio Adjutant Gen.'s Dep't v. Fed. Lab. Rels. Auth.,
598 U.S. 449 (2023) 17

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 21

Payton v. New York,
445 U.S. 573 (1980) 21

PLIVA, Inc. v. Mensing,
564 U.S. 604 (2011) 11

Puerto Rico Dep't. of Consumer Affs. v. Isla Petroleum Corp., 485 U.S. 495 (1988) 16

Saleh v. Titan Corp.,
580 F.3d 1 (D.C. Cir. 2009) 8, 24, 26, 27, 28, 29

Schick v. United States,
195 U.S. 65 (1904) 22

Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 23

Smith v. United States,
507 U.S. 197 (1993) 18

Smothers v. Gresham Transfer Inc.,
23 P.3d 333 (Or. 2001), *overruled on other grounds, Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168 (Or. 2016) 21

South Carolina v. Baker,
485 U.S. 505 (1988) 12

Sure–Tan, Inc. v. NLRB,
467 U.S. 883 (1984) 22

United Constr. Workers v. Laburnum Constr. Co.,
347 U.S. 656 (1954) 23

United States v. Nordic Village, Inc.,
503 U.S. 30 (1992) 18

United States v. Yazell,
382 U.S. 341 (1966) 13

United States v. Yellow Cab Co.,
340 U.S. 543 (1951) 18

Virginia Uranium, Inc. v. Warren,
587 U.S. 761 (2019) 16, 20, 23

Watts v. SEC,
482 F.3d 501 (D.C. Cir. 2007) 32

Wyeth v. Levine,
555 U.S. 555 (2009) 12, 15, 16, 19, 29

Yearsley v. W.A. Ross Constr. Co.,
309 U.S. 18 (1940) 31

Constitutional Provisions

U.S. Const. Art. VI, cl. 2 ..... 10, 11

Statutes

Atomic Testing Liability Act, 50 U.S.C. § 2783.....19

Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–80..... 7, 8, 17, 19, 24, 25, 31

Rules

Fed. R. Civ. P. 45(d).....32

Regulations

FAR 52.228-7, 73 Fed. Reg. 16764-01 (Mar. 31, 2008) (codified at 48 C.F.R. § 52.228-7).....30

Other Authorities

Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321 (2001).....10, 14

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William Blackstone, Commentaries on the Laws of England (1765) 22

INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 79-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ strongly believes that the decision below, depriving military personnel and civilians of legal redress for wrongful injuries caused by private contractors, is not authorized by the Supremacy Clause, violates settled preemption principles established by this Court, and furthers no desirable public policy objectives.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The lower court's "combatant-activities" preemption of state tort law in the absence of any conflict with

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

a federal statute or regulation having the force of law is not supported by the Supremacy Clause.

Army Specialist Hencely was severely wounded in a terrorist attack on Bagram Airfield in Afghanistan, due to the private contractor Fluor Corporation's negligent supervision of its Afghan employee in violation of its contractual obligations and military policy. However, the lower court held that Hencely's state tort action against Fluor was preempted, not because it conflicted with any federal law, but rather because the "combatant-activities" exception of the FTCA signaled a uniquely federal interest that necessitated preemption to shield private contractors from state tort liability.

The federal government's authority to preempt state law is derived from the Supremacy Clause. The plain text makes clear that the Supremacy Clause does not confer any power to negate state law deemed inimical to some federal purpose or interest. The operation of the Supremacy Clause is far narrower. It provides a clear rule of decision for judges: If, but only if, a state law conflicts with the Constitution or with a valid federal law, judges must apply the federal law. The conflicting federal law must be one directed at individuals, not the states, and fall within the enumerated powers vested in Congress by the Constitution. The fact that the drafters did not place the Supremacy Clause in Article I, which enumerates Congress's powers, confirms this narrow interpretation. To hold otherwise would turn the Supremacy Clause into a roving commission for Congress or the courts to negate state laws deemed contrary to federal interests, even in areas outside of Congress's enumerated powers.

The adoption of the Supremacy Clause also confirms that it vests no raw authority in either Congress or the judiciary to simply declare a state law preempted. The delegates to the Constitutional Convention considered but rejected a proposal that would have authorized Congress to "negate" any state law deemed to be "improper." Granting supremacy only to federal "laws" prevents the federal government from running roughshod over the interests of the states, even inadvertently, by requiring that preemption be based on federal laws enacted with the participation of the states, not on some brooding federal interest discerned by the judiciary.

2a. The lower court's "combatant-activities" preemption also conflicts with the two "cornerstones" of this Court's preemption jurisprudence. The intent of Congress to displace state law with federal law is the "touchstone" of preemption analysis. The court below purported to preempt Petitioner's state-tort remedies with no reliable indicia, from either a federal statute or regulatory scheme, that Congress so intended. Instead, the court stated its own view that state tort laws would clash with the federal interest underlying the FTCA's "combatant-activities" exception.

That provision merely preserves the federal government's sovereign immunity for claims arising from the activities of the armed forces. The plain text gives no indication that Congress intended to shield private contractors from liability as well. In fact, Congress expressly provided that the application of the FTCA does *not* include contractors. When Congress intends for an exception to protect contractors from liability, it does so explicitly.

2b. The lower court's application of "combatant-activities" preemption also ignores this Court's foundational presumption that the historic police powers of the states are not to be preempted unless that was the clear and manifest intent of Congress. Employer liability for harm resulting from negligent supervision of employees, as in this case, is an area traditionally subject to state law.

Preemption of state tort remedies represents a serious intrusion into the interests of the sovereign states in providing legal recourse for wrongful injury. Indeed, providing a legal remedy for injury is a basic due process requirement under both federal and state constitutions. The presumption against preemption of state tort remedies is especially compelling where, as here, preemption leaves a plaintiff with no legal recourse at all.

Preemption that is unmoored from any express or implied congressional intent invites overreach and impermissible judicial lawmaking. Courts that have applied "combatant-activities" preemption of the kind embraced by the lower court have extended it to shield the carelessness of contractors in circumstances far removed from the exigencies of combat.

3. Rejection of "combatant-activities" preemption will not undermine important governmental policies. While the notion of deterring risk-taking may be out of place in the context of hostilities by actual combatants against an adversary, reasonable care is wholly appropriate for contractors providing essential support services. Due to the large number of civilian contractors, and the fact that they are not under direct military command, the government depends upon the

contracting companies themselves to supervise their workers and ensure they perform their contractual obligations safely. By broadly erasing potential state tort liability, the lower court deprives the government and its military of an important tool to incentivize compliance with its own safety and security policies. That incentive fairly places the cost of injuries on contractors, who are best positioned to prevent them.

Imposing tort liability will not result in contractors passing the costs of judgments along to the taxpayers. Federal contracting regulations prohibit indemnification of private contractors for liability costs attributable to their own contract violations. Potential tort liability for contractors will actually result in lower costs to the taxpayer as contractors who invest in safety face lower potential liability and are able to bid lower on service contracts.

Finally, this Court's rejection of "combatant-activities" preemption would not undermine other legitimate governmental concerns. Corporations that actually act as instrumentalities of the government and that faithfully comply with their contractual obligations will retain their derivative immunity. Liability claims that second-guess military decision-making will continue to be dismissed as nonjusticiable political questions. The federal rules will continue to protect against discovery that would disclose privileged information or impose undue burdens on the government.

ARGUMENT

I. PREEMPTION OF STATE TORT REMEDIES THAT DO NOT CONFLICT WITH ANY FEDERAL STATUTE OR REGULATION IS NOT

CONSISTENT WITH THE SUPREMACY CLAUSE.

Former U.S. Army Specialist Winston Tyler Hencely is undeniably a hero. On November 12, 2016, at the Bagram Airfield base in Afghanistan, he spotted Ahmad Nayeb, an Afghan employed by contractor Fluor Corporation, looking out of place and nervous. Nayeb was conspicuously unescorted as he approached a crowd of military and civilian personnel gathered for a Veterans Day event. Hencely confronted Nayeb, who detonated a suicide vest hidden beneath his robe. Five persons were killed and 17 were injured in the blast, but Hencely's actions prevented an untold number of additional casualties. He himself, then 20 years old, was severely wounded. *Hencely v. Fluor Corp.*, 120 F.4th 412, 420 (4th Cir. 2024).

There is no serious question that the primary responsibility for the attack falls on Fluor. Following an extensive investigation, the Army's AR-15-6 report concluded that Fluor failed to supervise Nayeb at his workplace. Flour allowed him to roam at will, gathering the shrapnel and other items he would use for his bomb. Fluor lent him the tools he used to build it. And Fluor allowed Nayeb to wander away from his workstation unescorted, with the explosive vest hidden under his clothing for about an hour until he encountered Specialist Hencely. *Id.* at 420–21. All of these actions violated Fluor's contract with the government and military policies regarding Local Nationals with which,"[f]or obvious reasons, the military required Fluor's strict compliance." *Id.* at 420. This failure was "the primary contributing factor" in the attack. *Id.* at 421.

Hencely filed suit under South Carolina's employer liability law, seeking compensation for his severe injuries and accountability for those responsible. *See James v. Kelly Trucking Co.*, 661 S.E.2d 329, 330 (S.C. 2008) ("[A] plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public.").

But the district court granted summary judgment in Fluor's favor, ruling that Hencely's claim would "conflict with the uniquely federal interests underlying the FTCA's combatant activities exception." *Hencely v. Fluor Corp.*, 554 F. Supp. 3d 770, 774 (D.S.C. 2021). The Fourth Circuit affirmed. 120 F.4th 412 (4th Cir. 2024). In so doing, the court fashioned an extraordinarily broad implied preemption defense for the benefit of Fluor and other civilian contractors working with the military.

A. The Lower Court Deprived Petitioner of the Remedy and Accountability Afforded by State Tort Law, Despite the Absence of Any Conflict with Federal Law.

The Federal Tort Claims Act (FTCA) broadly waives the United States' sovereign immunity from liability from tort suits. 28 U.S.C. §§ 1346(b), 2671–80. But that waiver is subject to exceptions, including for any "claim arising out of the combatant activities of the military or naval forces . . . during time of war." *Id.* at § 2680(j).

Because Fluor is not an employee of the United States, the FTCA is not the basis for Hencely's claim;

nor is § 2680(j) available to Fluor as a defense. Nevertheless, the court below adopted an ill-defined implied field preemption, first formulated by the D.C. Circuit which posited that emanations from § 2680(j) signal a federal interest so compelling as to displace all state tort liability:

> During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted.

120 F.4th at 426 (quoting *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009)). The Third Circuit has adopted this same standard. *See Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 480–81 (3d Cir. 2013).

This preemption, the court stated, is not based on any conflict between state tort law and a federal statute or regulation. It is based instead on conflict with a "uniquely federal interest." 120 F.4th at 426 (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988)). "In other words, when it comes to warfare, 'the federal government occupies the field' and 'its interest in combat is always precisely contrary to the imposition of a non-federal tort duty." *Id.* (quoting *Saleh*, 580 F.3d at 7). The Fourth Circuit also borrowed the D.C Circuit's the term for this newly fashioned ouster of state law: "battle-field preemption." *Id.* at 429 (quoting *Saleh*, 580 F.3d at 7).

To be clear, preemption of state law in the absence of conflict with positive federal law is not compelled by

Boyle, where this Court explained that field preemption may require "a uniform rule" such that the "entire body of state law applicable to the area conflicts *and is replaced by federal rules*." *Boyle*, 487 U.S. at 507–08 (emphasis added); *see also id.* at 504 (holding that certain areas "are so committed . . . to federal control that state law is pre-empted *and replaced*, where necessary, by federal law") (emphasis added). In this instance, the lower court preempted Petitioner's state tort remedy and replaced it with nothing. [2]

B. Preemption of State Laws That Are Not in Conflict with Federal Law Does Not Fall Within the Supremacy Clause.

1. The text, structure, and history of the Supremacy Clause support the settled interpretation that there can be no federal preemption in the absence of positive federal law that conflicts with state law.

"As the Supreme Court and virtually all commentators have acknowledged, the Supremacy Clause is the reason that valid federal statutes trump state law." Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1330

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[2] *Boyle* provides government contractors a narrow and carefully defined defense based on compliance with contract specifications. 487 U.S. at 512. It does not support the vague, freewheeling defense fashioned by the court below to shield contractors who engage in tortious activities in violation of their contracts with the military.

(2001) (quoting Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 234 (2000)).[3]

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2.

Preemption is the Founders' solution to the potential conflicts in our federalist system "resulting from concurrent state and federal powers" over individuals. Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 774 (1994). "[W]hen a regulated party cannot comply with both federal and state directives, the Supremacy Clause tells us the state law must yield." *Martin v. United States*, 145 S. Ct. 1689, 1700 (2025).

This Court has emphasized that the Supremacy Clause is no broader than that. "[It] is not an independent grant of legislative power to Congress. Instead, it simply provides 'a rule of decision.' It specifies

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[3] *See, e.g.*, *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013) ("[O]ur pre-emption doctrine is derived" from the Supremacy Clause) (quoting *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992); *Philadelphia v. New Jersey*, 430 U.S. 141, 142 (1977) ("[F]ederal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause . . . .").

that federal law is supreme in case of a conflict with state law." *Murphy v. National Collegiate Athletic Ass'n*, 584 U.S. 453, 477 (2018) (citation omitted). If Congress does not already possess the authority to legislate in an area governed by state law, the Supremacy Clause does not itself confer that authority. It does not authorize either Congress or the federal judiciary to simply disregard state laws that they deem inconvenient or unwise. To so hold would allow Congress to bootstrap its own authority to legislate in areas outside of its enumerated powers. *See* Gardbaum, *supra*, at 776–77.

This constitutional limitation is clear from the Supremacy Clause's text. Justice Thomas, drawing on the scholarship of Professor Nelson in the plurality portion of his opinion in *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011), calls attention to the phrase "the Constitution or Laws of any State to the Contrary notwithstanding." *Id.* at 617 (quoting U.S. Const. Art. VI, cl. 2). Eighteenth-century legislatures often used this sort of "*non obstante* provision" to signify that a statute "was meant to repeal older, potentially conflicting statutes in the same field." *Id.* at 621–22 (citing Nelson, *supra*, at 234–53). The plain meaning of the Supremacy Clause directs judges to find preemption "if and only if state law contradicts a valid rule established by federal law." Nelson, *supra*, at 231. "The Supremacy Clause grants 'supreme' status only to 'the

Laws of the United States." *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 315 (2019).[4]

This Court has also made it clear that the federal law supposedly in conflict with state law "must represent the exercise of a power conferred on Congress by the Constitution . . . to regulate individuals, not States." *Murphy*, 584 U.S. at 477. Merely "pointing to the Supremacy Clause will not do." *Id.* Nor will an act of Congress or a judicial decree that prohibits or limits the states' application of their own tort laws.

The "Constitution's division of authority between federal and state governments" does not allow Congress to "commandeer state governments into the service of federal regulatory purposes." *New York v. United States*, 505 U.S. 144, 175 (1992) (internal quote omitted). "Conspicuously absent" from the federal government's enumerated powers is "the power to issue direct orders to the governments of the States." *Murphy*, 584 U.S. at 471. *See also Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 202–03 (2023) (Thomas, J., dissenting). Indeed, "the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests." *South Carolina v. Baker*, 485 U.S. 505, 513 (1988).

Consequently, "in the absence of specific congressional action," courts may not simply decree "that implementation of federal interests requires overriding" state law. *United States v. Yazell*, 382 U.S. 341, 352

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[4] "[A]n agency regulation *with the force of law* can pre-empt conflicting state requirements" as well. *Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (emphasis added).

(1966). As Professor Gardbaum points out, such a decree "begs the question it poses," which is whether Congress or the federal courts possess the constitutional authority to declare "there shall be no state regulation of field X" in the first place. Gardbaum, *supra*, at 776. If Congress does not already have the power to rewrite or negate state tort law, the Supremacy Clause cannot bestow that power. *Id.* at 776–77. To hold otherwise would turn the Supremacy Clause into a roving commission for Congress or the courts to negate state laws deemed contrary to federal "interests," even in areas where the federal government itself has no authority to make federal law.

The adoption of the Supremacy Clause clearly shows that such an expansion of federal power to rewrite or negate state law is quite the opposite of the original intent. As detailed by Justice O'Connor, the Founding Fathers who gathered in Philadelphia recognized that the authority of Congress under the Articles of Confederation over the states, but not the individuals residing in the states, needed to be replaced. But the system of federalism that vested both the state and federal sovereigns with authority over individuals obviously posed a problem of conflicting directives and enforcement. *See FERC v. Mississippi*, 456 U.S. 742, 791–93 (1982) (O'Connor, J., dissenting). *See also Haywood v. Drown*, 556 U.S. 729, 751–52 (2009) (Thomas, J., dissenting).

James Madison, advocating for the Virginia Plan saw "the negative on the laws of the States as essential to the efficacy & security of the Genl. Govt." 2 The Records of the Federal Constitutional Convention of

1787, at 27 (Max Farrand ed., 1911) [hereinafter Farrand's Records]. After two proposals failed, Charles Pinckney put forth a provision giving Congress power "to negative all Laws which they shd. judge to be improper." 1 Farrand's Records at 164. This proposal was strongly criticized by delegates who feared that the new government would overwhelm and even "enslave the States." *Id.* at 165. The convention soundly rejected the power to negate state law and unanimously adopted a provision from the New Jersey plan that closely resembled the current Supremacy Clause. 2 Farrand's Records at 28–29. *See also FERC*, 456 U.S. at 794–95 (O'Connor, J., dissenting); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2089–90 (2000); Clark, *supra*, at 1348–55.

The Founders' placement of the Supremacy Clause confirms its textual meaning. If the [Supremacy] Clause were meant to be an affirmative grant of Congressional power, it would likely reside in the metropolis of Congressional power, Article I, Section 8, rather than in the suburbs of Article VI." Dinh, *supra*, at 2088.

It is clear from both the text of the Supremacy Clause and the context of its adoption that it does not grant the federal government the raw power to negate state law in the absence of an actual conflict with a federal law.

2. Preemption of state law in the absence of a conflict with an act of Congress undermines federalism.

The constitutional requirement that state law be preempted only by positive "Laws of the United

States" made pursuant to the Constitution, and not mere "federal interests" discerned by judges, furthers the preservation of our system of federalism.

"The Supremacy Clause . . . requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures." *Wyeth*, 555 U.S. at 586 (Thomas, J., concurring). This Court established in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), that the autonomy of the states is "properly protected by the procedural safeguards inherent in the structure of the federal system," which gives the states representation in Congress. *Id.* at 552. By limiting preemption of state law to conflicts with enactments of Congress, the Supremacy Clause makes the states participants in fashioning the preemptive scope of federal law, and thus serves to guard against "unintended encroachments on the authority of the States." *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). *See also* 1 Farrand's Records at 355 (documenting Madison's notes of James Wilson's remarks at the Constitutional Convention that state governments, "by [their] participation in the Genl. Govt. would have an opportunity of defending their rights"); Nelson, *supra*, at 305 n.228.

Seeking preemption in the absence of a substantive conflict between federal and state laws leaves judges in the position of engaging in a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" or interests, which, of

course, "would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade*, 505 U.S. at 111 (Kennedy, J., concurring). Preemption of state law must not be based on "[i]nvoking some brooding federal interest or appealing to a judicial policy preference." *Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (quoting *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (opinion of Gorsuch, J.)).

In sum, "[t]here is 'no federal preemption *in vacuo*,' without a constitutional text, federal statute, or treaty made under the authority of the United States." *Garcia*, 589 U.S. at 202 (quoting *Puerto Rico Dep't. of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)). This Court should therefore reverse.

II. "COMBATANT-ACTIVITIES" PREEMPTION OF STATE TORT REMEDIES AGAINST PRIVATE ACTORS IS INCONSISTENT WITH THIS COURT'S PREEMPTION JURISPRUDENCE.

In addition to the absence of a sound constitutional basis, the "combatant-activities" theory of preemption espoused by the court below violates the two fundamental "cornerstones" of this Court's preemption jurisprudence: The primacy of the intent of Congress and the presumption against preemption of state tort remedies. *Wyeth*, 555 U.S. at 565. Failure to abide by these settled principles invites courts to improperly assume the role of lawmaker.

A. "Combatant-Activities" Preemption Violates This Court's Foundational Principle That the Intent of Congress Is the Touchstone of Preemption.

This Court has instructed that "[p]re-emption fundamentally is a question of congressional intent." *English v. General Elec. Co.*, 496 U.S. 72, 78–79 (1990). Indeed, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation omitted).

Here, the lower court pointed to no reliable indicia of congressional intent to displace state tort liability of employers who are civilian contractors for the military. There is no Act of Congress or scheme of federal regulation in which such intent was expressed or from which it might be inferred. Instead, the court below stated its own view that "state tort laws would clash with the federal interest underlying the combatant activities exception." 120 F.4th at 426.

The FTCA cannot supply the missing congressional intent. Section 2680(j) provides that Congress's broad waiver of sovereign immunity "shall not apply to . . . [a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during time of war."

The interpretation of statutes "begin[s] with the text." *Lackey v. Stinnie*, 145 S. Ct. 659, 666 (2025). If the text is unambiguous, statutory interpretation "ends there as well." *Ohio Adjutant Gen.'s Dep't v. Fed. Lab. Rels. Auth.*, 598 U.S. 449, 463 (2023) (quoting *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 127 (2018)). In this instance, § 2680(j) applies only to

claims arising out of the activities of the armed forces, "which by their very nature should be free from the hindrance of a possible damage suit." *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 19 (D.D.C. 2005) (quoting *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948)). There is absolutely no basis for supposing that Congress intended this language to protect private contractors from possible tort lawsuits for damages. Instead, the plain text of § 2680(j) demonstrates that Congress intended "to allow most tort suits against government contractors to proceed." *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 739–40 (D. Md. 2010), *appeal dismissed en banc sub nom. Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012).

Nor should "combatant activities of the military" be stretched beyond reason to include the support activities of civilian contractors not actually engaged in hostilities. The FTCA "waives the Government's immunity from suit in sweeping language," *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (quoting *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951)), and this Court has cautioned against "unduly generous interpretations of the exceptions [that] run the risk of defeating the central purpose of the statute." *Id.*; *see also Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984). As a "canon of construction" applicable to the FTCA, Chief Justice Rehnquist stated, the Court should not "assume the authority to narrow the waiver that Congress intended." *Smith v. United States*, 507 U.S. 197, 203 (1993); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (explaining that this Court has "narrowly construed exceptions to

waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the 'sweeping language' of the [FTCA]").

Lest there be any doubt as to its intent on this point, Congress expressly provided that the federal agencies covered by the FTCA include "the military departments . . . and corporations primarily acting as instrumentalities or agencies of the United States, but *does not include any contractor* with the United States." 28 U.S.C. § 2671 (emphasis added). In fact, when Congress has intended to shield contractors from liability it has done so explicitly. *See, e.g.*, the Atomic Testing Liability Act, 50 U.S.C. § 2783 (applying FTCA protections to contractors in suits arising out of "exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States").

B. "Combatant-Activities" Preemption Ignores This Court's Foundational Presumption Against Preemption.

The second cornerstone of this Court's preemption jurisprudence is "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485; *English*, 496 U.S. at 79. This presumption against preemption applies to claims of implied conflict preemption. *See, e.g.*, *Wyeth*, 555 U.S. at 565; *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). And it applies with particular force where it would oust state law in a field

that, like employer liability for negligent supervision of employees, "has been traditionally occupied by the States." *Hillsborough Cnty. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

1. The presumption against preemption is essential to protect America's constitutional system of federalism.

This Court has emphasized that the presumption against federal preemption of state law is not a mere rule of construction. It is based on "important and sensitive federalism concerns," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), and is deeply woven into the fabric of government where "the States are independent sovereigns in our federal system." *Medtronic*, 518 U.S. at 485. "The preemption of state laws represents 'a serious intrusion into state sovereignty.'" *Virginia Uranium*, 587 U.S. at 773 (quoting *Medtronic*, 518 U.S. at 488) (plurality opinion)). It is particularly harmful to federalism, Justice Gorsuch added, when preemption is based "not on the strength of a clear congressional command." *Id.*

States have a strong interest in providing a remedy for wrongful harms to their citizens "as well as enforcing their own safety regulations." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 368 (2021). *See, e.g.*, *Jones v. Halliburton Co.*, 625 F. Supp. 2d 339 (S.D. Tex. 2008), *aff'd*, 583 F.3d 228 (5th Cir. 2009), *cert. dismissed sub nom. KBR Tech. Servs. Inc. v. Jones*, 559 U.S. 998 (2010) (tort suit by a Texas woman alleging rape by fellow contractor employees in Iraq). This Court has pronounced it "the duty of every State to provide, in the administration of justice,

for the redress of private wrongs" under the Due Process Clause of the Fourteenth Amendment. *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). Thirty-eight states expressly guarantee the right to a remedy for wrongful injury in their state constitutions. *See* David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1201 n.25 (1992) (listing state constitutional provisions).

2. The presumption against preemption is strongest where preemption of state tort remedies would leave injured victims with no remedy at all.

The Founders were well acquainted with Sir Edward Coke's exposition of Chapter 29 of the Magna Carta: "Every Subject may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without denial, and speedily without delay." Edward Coke, Second Part of the Institutes of the Laws of England 55–56 (4th ed. 1671).[5] They were equally familiar with the Blackstone's bedrock common-law principle: "Every right, when withheld, must have a remedy, and

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[5] Coke was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" *Payton v. New York*, 445 U.S. 573, 594 (1980) (footnote omitted). The remedy clauses that appear in the state constitutions "traces to Edward Coke's commentary." *Smothers v. Gresham Transfer Inc.*, 23 P.3d 333, 340 (Or. 2001), *overruled on other grounds, Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168 (Or. 2016). The U.S. Constitution's Fifth Amendment guarantee of due process is itself an "affirmation of Magna Charta according to Coke." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring).

every injury its proper redress" by access to "a legal remedy by suit or action at law." 3 William Blackstone, Commentaries on the Laws of England *23, *109 (1765).[6]

Chief Justice John Marshall, echoing Blackstone, restated this principle:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

Consequently, this Court has declared, "the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Sure–Tan, Inc. v. NLRB*, 467 U.S. 883, 896–97 (1984). *See also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) (collecting cases). In fact, this Court has located the fundamental right of access to the courts to seek legal redress in multiple provisions of the Constitution. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

The fundamental importance of this right makes the presumption against preemption even stronger where, as here, "Congress has neither provided nor

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[6] *Schick v. United States*, 195 U.S. 65, 69 (1904) (Blackstone's *Commentaries* were widely accepted as "the most satisfactory exposition of the common law of England. . . . [U]ndoubtedly, the framers of the Constitution were familiar with it.").

suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." *United Constr. Workers v. Laburnum Constr. Co.*, 347 U.S. 656, 663–64 (1954). As the Court explained in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.* at 251. Justice Blackmun in his dissent was equally emphatic on this point: "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter to be left to the States." *Id.* at 264 n.7.

C. In the Absence of Clear Manifestation of Congressional Intent, Extending "Combatant-Activities" Preemption Invites Judicial Overreach.

This Court's role "is to interpret the intent of Congress in enacting [the statute], not to make a free-wheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). This means, as Justice Gorsuch has stated, respecting "not only what Congress wrote but, as importantly, what it didn't write." *Virginia Uranium,* 587 U.S. at 765. Without a clear expression of congressional purpose to serve as a polestar, courts may feel "free to extend a federal statute to a sphere Congress was well aware of but chose to leave alone." *Id.* As Justice Stevens, joined by Justices Thomas and Ginsberg, warned in another context,

> In the absence of any congressional statute, . . . creation of a federal common-law "default" rule of [tribal immunity] might

> in theory be justified by federal interests. By setting such a rule, however, the Court is not deferring to Congress or exercising "caution" – rather, it is creating law.

Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 764–65 (1998) (Stevens, J., dissenting). This warning echoes the admonition of other appellate jurists: "When judges preempt state laws in the absence of explicit congressional guidance, they in effect assume a legislative role without accepting legislative responsibility." Judge Kenneth Starr & Judge Patrick E. Higginbotham, et al., The Law of Preemption: A Report of the Appellate Judges Conference 48 (1991).

In this case, for example, the court below sought to divine a preemptive purpose out of an asserted "conflict between federal and state interests." 120 F.4th at 426. Taking its cue from the D.C. Circuit's explanation that traditional tort rationales such as deterrence of risky behavior and compensation of victims "are singularly out of place in combat situations," *id.* at 429 n.7 (quoting *Saleh*, 580 F.3d at 7), the court below strayed far beyond the plain meaning of the text of § 2680(j), which is that Congress intended to eliminate tort liability *only* for the activities of the U.S. Armed Forces.

The lower court itself made clear that "the purpose of the combatant activities exception is . . . to foreclose state regulation of the military's battlefield conduct and decisions." *Id.* at 430 (citation omitted). But the court offered no practical explanation of how imposing liability on a civilian contractor for wrongful and preventable harms conflicts with that purpose. Indeed,

the court was "not convinced that deciding Hencely's case would cause the court to "inevitably be drawn into a reconsideration of military decisions" or "require the district court to evaluate the propriety of [those] judgments." *Id.* at 425 (internal citations omitted). Nevertheless, the court *ipse dixit* declared a federal interest in shielding civilian contractors from state tort liability.

This Court has previously encountered and rejected such judicial overreach. In *Hillsborough County*, this Court was "unpersuaded" by the argument "that an intent to pre-empt [local blood donor safety regulations] can be inferred from the dominant federal interest in this field." 471 U.S. at 719. Not every "subject of national concern . . . ousts all related state law." *Id.*

The practical impact of the lower court's vague and open-ended rationale is to provide no limiting principle to the erasure of state remedies otherwise available to wrongfully injured victims. In place of Congress's narrowly crafted exception in § 2680(j), the court-fashioned "combatant-activities" preemption rule has been applied to shield civilian contractors from accountability for their own carelessness and incompetence in circumstances far removed from actual combat. Examples include: careless hazardous waste disposal and water treatment at bases in Iraq and Afghanistan that contaminated the air and water, sickening soldiers and civilians alike (*In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014)); failure to ground an electric water pump at a base in Iraq that resulted in the fatal electrocution of an Army staff sergeant as he was showering (*Harris v. Kellogg Brown*

& Root Services, Inc., 618 F. Supp. 2d 400 (W.D. Pa. 2009)); and negligent maintenance of a latrine at a base in Iraq, resulting in severe injuries to civilian contractor who slipped and fell on the wet floor (*Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698 (S.D.N.Y. 2011)).

III. "COMBATANT ACTIVITIES" PREEMPTION OF CIVILIAN CONTRACTORS' STATE TORT LIABILITY IS UNWISE PUBLIC POLICY.

A. Federal Preemption of State Tort Remedies Removes an Important Safety Incentive That Protects Military and Civilian Personnel.

The rationale offered by the Fourth Circuit for broad preemption is that "all of the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, where risk-taking is the rule." *Hencely*, 120 F.4th at 429 n.7 (quoting *Saleh*, 580 F.3d at 7). But it is a forceful blow aimed at a straw man. Civilian contractors are *not* combatants and are prohibited from engaging in combat activities. Nor is "risk-taking" a desirable mode when providing meals, constructing housing, maintaining equipment, and carrying out the many other services that civilian contractors *do* perform.

The military has come to depend upon civilian contractors to provide these services. During operations in Iraq and Afghanistan, the number of civilian contractors has at times exceeded the number of uniformed personnel. *In re KBR, Inc.*, 744 F.3d at 331.

This presents problems of accountability. Due to the sheer number of contractors, and because they are not under the military's direct control, military policy sensibly relies on the contracting companies themselves to take reasonable steps to ensure that their employees' activities do not present an unreasonable danger to the military and civilians around them. Department of Defense regulations and the U.S. Army Field Manual state emphatically that the management and supervision of contractor employees is the responsibility of the contractors themselves and not the military. *See Saleh*, 580 F.3d at 33 (Garland, J., dissenting).

In this case, and unlike the procurement contractor in *Boyle*,

> Fluor operated with wide latitude and considerable discretion in the ways it supervised NTV Yard employees, entrusted NTV Yard employees with tools, evaluated [Local National] employee performance and chose to retain Nayeb, implemented the LN escort process to and from the NTV Yard, and exercised control over LN employees during said escort process.

Hencely v. Fluor Corp., Inc., No. 6:19-CV-00489, 2020 WL 2838687, at *12 (D.S.C. June 1, 2020).

Preemption of state tort remedies deprives the military of the most potent means of influencing private contractors to invest in safety and security: the profit motive. It "remove[s] an important tool from the Executive's foreign policy toolbox." *Saleh*, 580 F.3d at 29 (Garland, J., dissenting). It is not state tort liability

of contractors that risks interfering with military judgments. Rather it is depriving the Executive Branch of the option of relying on the financial incentive of potential liability, "[e]ven if the Executive believes that U.S. interests would be advanced by subjecting private contractors to tort liability." *Id.* In fact, "the Department of Defense has repeatedly stated that employees of private contractors accompanying the Armed Forces in the field . . . *are* subject to civil liability." *Id.* at 17 (Garland, J., dissenting).

When an injured plaintiff's tort remedy is denied, their injuries and their costs do not disappear. They fall instead on the health care system, other government programs, charities, and, most importantly, on victims themselves and their families. Shifting the costs of the harms caused by contractors to others is neither just nor effective. The costs of avoidable injuries should be imposed on the party most able to avoid them. Tort liability is fair, effective, and efficient in preventing future tragedies. *See generally* Guido Calabresi, The Costs of Accidents 68–129 (1970). In this way, lawsuits "promot[e] optimal deterrence—the taking of precautions and selection of activities that minimize the sum of accident costs and accident avoidance costs." Kenneth S. Abraham, *The Insurance Effects of Regulation by Litigation*, *in* Regulation Through Litigation 212, 232 (W. Kip Viscusi ed. 2002). *See also* Stephen G. Breyer, Regulation and Its Reform 175 (1982) (favoring the rule that is "likely to place costs on the party best able to avoid them").

The lower court suggested that combatant-activities preemption "avoid[s] potential interference 'with

the federal government's authority to punish and deter misconduct by its own contractors.'" *Hencely*, 120 F.4th at 430 (quoting *Saleh*, 580 F.3d at 8). But of course, federal and state tort remedies often coexist and reinforce each other. *See, e.g.*, *Wyeth*, 555 U.S. at 579 (noting the FDA's reliance on state tort lawsuits to provide "an additional, and important, layer of consumer protection that complements FDA regulation").

B. Tort Liability Will Not Shift Costs to the Federal Government and Taxpayers, But Will Actually Result in Lower Contracting Costs for the Military.

A primary rationale advanced by the Court in *Boyle* was that the "financial burdens of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or insure against, contingent liability." *Boyle*, 487 U.S. at 512. The D.C. Circuit adopted that rationale to justify "combatant activities" preemption. *See Saleh*, 580 F.3d at 8 ("[T]he costs of imposing tort liability [are] passed through to the American taxpayer."). The court below, as well, "extended *Boyle's* logic to the FTCA's combatant activities exception." 120 F.4th at 426.

The burden on taxpayers may have been at least a hypothetical concern in *Boyle*, which held that a helicopter manufacturer could not be liable for harm due to the defective design of a military helicopter where the contractor conformed to the government's own precise design specifications. 487 U.S. at 512. That is not

the case where, as here, a plaintiff seeks to hold a contractor liable for harms caused by its own negligence not compelled by the government. In that circumstance, the contractor is prohibited from trying to recover those liability costs from the government. The Defense Federal Acquisition Regulation (FAR) 52.228-7, regarding indemnification, provides: "The Contractor shall not be reimbursed for liabilities . . . [f]or which the Contractor is otherwise responsible under the express terms of . . . the contract." 73 Fed. Reg. 16764-01 (final rule adopted March 31, 2008); *see* 48 C.F.R. § 52.228-7. In short, a contractor held liable in tort for injuries caused by its own negligent contract violations cannot pass those costs through to the American taxpayer.

It may be objected that contractors might anticipate their exposure to potential tort liability and build those costs into the price for their services to the government. If so, the impact would be to *lower* the costs paid by the government to contractors. Contractors who take reasonable steps to assure their employees carry out their responsibilities with due regard for safety will have lower exposure to tort liability. Their cost to "cover or insure against" liability will be lower and allow for lower bids on government contracts. Preemption of state tort liability bestows an unfair and unintended advantage on contractors who cut corners and ignore obvious safety and security concerns, ultimately resulting in more harm to military and civilian personnel.

C. Implied "Combatant Activities" Preemption Is Not Needed to Protect Other Important Federal Interests.

Finally, the legitimate governmental interests in insulating contractors who are actually carrying out the military's decisions and in insulating military personnel from disruptive discovery and litigation requirements of state tort actions do not justify wholesale preemption of all state tort remedies.

Existing law currently provides sufficient protection against second-guessing military judgments and decision-making by way of a tort action against a private contractor carrying out those decisions. The FTCA specifies that "the term 'Federal agency' includes … corporations primarily acting as instrumentalities or agencies of the United States," as distinct from independent contractors. 28 U.S.C. § 2671. *See, e.g.*, *Brandes v. United States*, 783 F.2d 895, 897 (9th Cir. 1986). As well, under *Yearsley*, a government contractor is not subject to liability for actions that were "authorized and directed by the Government" and the contractor was merely "executing [the government's] will." *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940); *cf. Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 168 (2016) (finding *Yearsley* derivative sovereign immunity unavailable where the contractor's actions violated the Navy's contractual instructions).

Further, military judgments and decisions remain shielded from state tort liability, regardless of whether this Court rejects "combatant-activities" preemption. Each of the circuits to consider the applicability of the political-question doctrine in the context of battlefield contractors has held that suits that

require a factfinder to assess judgments of the U.S. military are nonjusticiable. *See, e.g.*, *Harris*, 724 F.3d at 466–67; *In re KBR, Inc.*, 893 F.3d at 264; *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1282–83 (11th Cir. 2009).

Where discovery would hamper the military's mission, district courts have the tools to "properly accommodate the government's serious and legitimate concern that its employee resources not be commandeered into service by private litigants to the detriment of the smooth functioning of government operations." *Watts v. SEC*, 482 F.3d 501, 509 (D.C. Cir. 2007). In addition, the Federal Rules require a court to quash or modify a subpoena that "requires disclosure of privileged or other protected matter" or "subjects a person to undue burden." Fed. R. Civ. P. 45(d).

CONCLUSION

For the foregoing reasons, the American Association for Justice asks this Court to reverse the judgment of the court below.

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