No. 24-924

In the Supreme Court of the United States

WINSTON TYLER HENCELY,

Petitioner,

v.

FLUOR CORPORATION, ET AL.

Respondents.

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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 11 OTHER STATES IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

In 2016, Ahmad Nayeb used a bomb to kill five U.S. soldiers and injure sixteen others in Afghanistan. The attack might sound like another unfortunate incident of war, but it was not—Nayeb was supposed to be on our side. A former Taliban insurgent, Nayeb was employed by a subcontractor to Respondent Fluor Corporation at Bagram Airfield. A military investigation found that Nayeb was able to build a suicide vest during his largely unsupervised shift at Fluor's vehicle yard; he also paired homemade explosives with materials from the yard to do it. App. 9, 171-73. On the day of the attack, Nayeb was then permitted to walk—unsupervised—to a different part of the base, where he detonated his bomb near soldiers gathering for a Veterans Day 5K. Altogether, "poorly vetted access" and "unreasonable supervision" allowed Nayeb to "operat[e] with impunity" in preparing for and conducting his attack. App. 160. "Fluor's complacency and its lack of reasonable supervision" was deemed "the primary contributing factor" to the attack. App. 158.

Petitioner Winston Hencely was one of those wounded. With no recourse against the military for his injuries, Hencely sued Fluor under South Carolina law. But the district court entered judgment for the contractor, and the Fourth Circuit affirmed. 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. App. 21. By its express terms, the FTCA and its related exceptions do

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[*] Under Supreme Court Rule 37.2, *amici* timely notified counsel of record of their intent to file this brief.

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. App. 20; see also 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.

In essentially rewriting several of the FTCA's provisions, the court ignored Congress's careful judgment 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. 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 grant the petition and restore the balance when it comes to state tort law.

SUMMARY OF ARGUMENT

I. The FTCA does not apply to private, military contractors. Even so, the Fourth Circuit essentially 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. 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 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 inappropriately slammed

the door on any of these interests without any real consideration of the consequences.

ARGUMENT

Deference to our country's military decisionmakers is understandable and appropriate. But in extending that deference to private military contractors who allegedly did not comply with military contracts and orders, the Fourth Circuit went too far.

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

A. The court effectively rewrote the statute.

The FTCA does not say that federal contractors 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.* So contractors like Fluor are expressly taken out of the Act's scope. 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). In that sense, they're doubly excluded.

Thus, "[b]y their terms, these provisions do not apply to government contractors," as even the Fourth Circuit recognized. App. 20. That's true even for military contractors who often operate under strict task orders or contracts. See *United States* v. *Orleans*, 425 U.S. 807, 816 (1976) (explaining that even federal regulations that "fix specific and precise conditions to implement federal objectives … do not convert the acts of entrepreneurs … into federal governmental acts"); accord *Berkman* v. *United States*, 957 F.2d 108, 114 (4th Cir. 1992) ("[W]e cannot accept the suggestion that a contractor loses its independence and becomes 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.").

That 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). Indeed, 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 exception does not apply.

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. App. 20 (cleaned up); see also App. 27. It also passingly commented on the "rationales for [state] tort law" against this federal "policy" and found them wanting. 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 used "purpose" and "policy" to shape its conception of a combatant-activities exception, though it viewed that purpose slightly differently. See *Harris* v. *Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 480 (3d Cir. 2013) ("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." See 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 (describing how "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").

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). And it 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.*, 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).

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). 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." App. 20 (characterizing *Boyle*). The Fourth Circuit "extended *Boyle*'s logic to the FTCA's combatant activities exemption." 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 why then should courts rush to extend *Boyle* to new realms? The answer: they shouldn't. Yet as Petitioners have well explained, see Pet. 16-22, courts have indeed stretched *Boyle* to farther reaches while simultaneously dispensing with even the relatively minimal limits that it imposed. In doing so, they 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). 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).

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) have the ability to 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).

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

Aside from a lack of concern for Congress, federal courts adopting a contractor defense of this kind have also shown a lack of concern for the States. Those courts have focused almost exclusively on the federal interests at stake. But see, *e.g.*, *Getz* v. *Boeing Co.*, No. C 07-06396 CW, 2009 WL 636039, at *5 (N.D. Cal. Mar. 10, 2009) (considering the interests that would be advanced by tort law and finding no combatant activities exception applied

to claim brought by servicemember). Yet the question implicates important state interests, too—interests that the Fourth Circuit literally, and disappointingly, relegated to a footnote. See App. 27 n.7. That was a mistake, as 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).

To start, States have a substantial interest in seeing that persons within their borders receive compensation for injury. 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. 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.*, 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 Enterprises, 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.").

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 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. 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. And although some of the ugly realities of war might justify conduct that might otherwise be punishable during peacetime, contractors can and should still be held to account when they violate their most basic obligations. The Fourth Circuit foreclosed even that.

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.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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