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When You Are Injured on Active Duty Because of the Negligence of Someone, You Cannot Sue the Federal Government, But You May Be Able to Sue a Federal Contractor, Under Some Conditions.

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

10.2—Other Supreme Court Decisions.
14.0—Tort claims involving service members and military families.

Hencely v. Fluor Corp., 608 U.S. _____, 2026 U.S. LEXIS 1868 (April 22, 2026).[3]

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), and other laws that are especially pertinent to those who serve our country in uniform. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 80% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 44 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. As of 5/1/2026, I have come out of retirement to affiliate with Maher Legal Services in an "of counsel" role. You can reach me by e-mail at samuel@maherlegalservices.com or by telephone at (708) 468-8155.

[3] This is a very recent decision of the United States Supreme Court—the decision was announced on 4/22/2026. United States Supreme Court decisions are officially published in consecutive volumes of *United States Reports,* starting in the 1790s. There is a lag time of some months between the announcement of a decision and its official

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The statutory background for this case.

It is tragic but unavoidable that members of the armed forces will suffer personal injury or death as a result of occurrences that are incident to their military service. In some of those cases, the negligence of someone (like a fellow service member, another Federal Government employee, or an employee of a federal contractor) causes or contributes to the personal injury or death. Under these circumstances, the injured service member or his or her surviving spouse or estate is precluded from suing the Federal Government under the Federal Tort Claims Act (FTCA) and recovering financial compensation for the resulting disability or death. *Hencely,* this very recent decision of the United States Supreme Court, illustrates that, in some limited circumstances, it is possible to sue a federal contractor and prevail, if it can be proved that the negligence of one or more employees of the contractor caused or contributed to the personal injury or death.

For most of our country's history, there was no judicial remedy for a tort[4] committed by a federal employee or service member, in the course of his or her duties. For example, if your child were injured or killed through the negligence of a Post Office driver, the only way that you could obtain compensation was by persuading your United States Senator or Representative to introduce a private relief bill and hope that your Senator or Representative had the interest and clout to push

publication. This case will be published in Volume 608 of *United States Reports,* but we do not yet know the page number where the decision will start. In the meantime, the text of the case is available unofficially.

[4] "A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability." https://www.law.cornell.edu/wez/tort.

through the bill successfully. Consideration of these private relief bills distracted Senators and Representatives from urgent matters requiring congressional attention.

Congress finally provided a comprehensive remedy for torts committed by federal employees and service members on 6/25/1946, when it enacted the Federal Tort Claims Act (FTCA), as part of the Legislative Reorganization Act.[5] Congress set forth the general rule of liability for torts as follows:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.[6]

The FTCA makes 20 exceptions to the general rule that the Federal Government has waived sovereign immunity and is liable under the same circumstances and to the same extent that a private individual is liable under the law of the state where the allegedly wrongful act or omission occurred. The FTCA does not contain an express exception for claims involving personal injury or wrongful death suffered by an active-duty member of the armed forces incident to his or her service. Nonetheless, in the years following the enactment of the FTCA in 1946, the Federal Government asserted that it was immune from such lawsuits.

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[5] Public Law 79-601, 60 Stat. 812 (August 2, 1946).

[6] 28 U.S.C. § 2674. *See generally* Law Review 16070 (July 2016).

Two circuits agreed with the Government's assertion that it was immune from personal injury and wrongful death lawsuits brought by injured service members or by their surviving spouses or estates, and one other circuit held that the Federal Government was not immune from such lawsuits. To resolve this split among the circuits, the Supreme Court granted certiorari in 1950. In a decision that is controversial to this day, 76 years after it was decided, the Supreme Court held that Congress, in enacting the FTCA, did not waive sovereign immunity to permit a lawsuit for personal injury or wrongful death of an active-duty member of the armed forces if the injury or death was incident to the service member's service in the armed forces.[7]

As I explained in detail in Law Review 16070 (July 2016), I believe that *Feres* was wrongly decided in 1950, but I also believe that it is most unlikely that the Supreme Court will grant certiorari to reconsider this precedent that was decided one year before I was born. In the intervening 76 years, Congress has amended the FTCA several times, but none of those amendments have repealed the *Feres* Doctrine. If Congress disagreed with the *Feres* Doctrine, it has had ample opportunity to overrule that doctrine by amending the FTCA.

As a result of a tragic incident in Afghanistan in 2016, Hencely (the plaintiff) suffered permanent disabilities. Hencely was an active-duty U.S. Army soldier at the time of the incident, so the *Feres* Doctrine prevented him from prevailing in a lawsuit against the Federal Government for his injuries.[8]

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[7] *Feres v. United States.* 340 U.S. 135 (1950). *See generally* Law Review 16070 (July 2016) for a detailed discussion of the *Feres* precedent and its implications.

[8] Three express provisions of the FTCA also precluded Hencely from prevailing against the Federal Government. The FTCA specifically excludes waiver of sovereign immunity for claims arising out of the combatant activities of the armed forces during time of war. 28 U.S.C. § 2680(j). The FTCA also excludes claims arising in a foreign

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Hencely did not try to sue the Federal Government because it was clear that he could not prevail in such a lawsuit. His imaginative and diligent attorneys instead sued Fluor Corporation, contending that negligence of Fluor employees caused the tragic incident in 2016. This Supreme Court precedent lays out a roadmap for other attorneys in other cases involving personal injury or wrongful death suffered by active-duty members of the United States armed forces.

Facts of the *Hencely* case.[9]

On 11/11/2016 (Veterans Day), Winston T. Hencely was on active duty as a Specialist (E-4) in the Army and was serving at Bagram Air Base in Afghanistan. He confronted an individual who, it turned out, was a terrorist but who was also a local-hire employee of a Fluor subcontractor. The terrorist set off his suicide vest after Hencely confronted him. The explosion killed 5 and wounded 17, including Hencely. As a result of his injuries, Hencely is permanently disabled. The Army's investigation of this tragedy concluded that Hencely's intervention "likely prevented a far greater tragedy."

The terrorist who set off the explosion worked as a "local national" contractor at Bagram as part of the military's "Afghan First" program. The program sought to stimulate the local economy and stabilize the

country. 28 U.S.C. § 2680(k). The FTCA also excludes claims arising out of the performance of a discretionary function, even if the discretion has been abused. 28 U.S.C. § 2680(a).

[9] Because the District Court granted the defendant's motion for summary judgment and the 4th Circuit affirmed, the Supreme Court opinion set forth the version of the facts that is most favorable to the plaintiff, Hencely. On remand, Hencely will need to prove this version of the facts in order to prevail in this lawsuit. The Supreme Court decision gives him that opportunity to prevail, but it does not guarantee that he will prevail.

Afghan Government by requiring contractors (including Fluor) to hire Afghans "to the maximum extent possible."

A Fluor subcontractor hired the terrorist to work in the nontactical vehicle repair yard. The Army's contract with Fluor made Fluor "responsible for oversight of its personnel and subcontractors to ensure compliance with all terms of the contract." Of course, this included the security terms and procedures.

The Army's investigation of the tragedy found Fluor primarily responsible for the attack. Interviews of Fluor personnel "revealed a poor understanding by Fluor's supervisors as to who was responsible for supervising" this specific local-hire employee, the terrorist who set off the bomb. The Army investigation also faulted Fluor for "an unreasonable complacency by Fluor to ensure that Local National employees were properly supervised at all times, as required by their contract."

Identifying the parties to this lawsuit.

In November 2016, when this tragic event occurred, Wilson T. Hencely was a 20-year-old Specialist (E-4) on active duty in the United States Army. As a result of his wounds, he is disabled and has been medically retired from the Army.

Fluor Corporation, the defendant, has been described as follows:

> Fluor Corporation is an American engineering and construction firm, headquartered in Irving, Texas. It is a holding company that

> provides services through its subsidiaries in three main areas: oil and gas, industrial and infrastructure, government, and power. It is the largest publicly traded engineering and construction company in the Fortune 500 rankings and is 265th overall.[10]

Hencely's lawsuit against Fluor in the District Court and the Court of Appeals.

Hencely sued Fluor Corporation in the United States District Court for the District of South Carolina.[11] Fluor made a motion for summary judgment, contending that there was no evidence to support Hencely's claim and that no reasonable jury could find for Hencely. The District Court granted that motion. Hencely appealed to the United States Court of Appeals for the 4th Circuit.[12] A three-judge panel of the 4th Circuit affirmed the grant of summary judgment to Fluor Corporation. By a 2-1 majority, the panel held:

> Because the United States military retained command authority over the supervision of local nationals at the airfield in Afghanistan, the service member's tort claims against the military contractor arising out of that combatant activity were preempted. The contractor was properly awarded judgment on the pleadings on the service member's breach of contract claim because the service member did not plead facts sufficient to plausibly establish that he was an intended third-party beneficiary of the

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[10] https://en.wikipedia.org/wiki/Fluor_Corporation.

[11] The District Court had diversity-of-citizenship jurisdiction because Hencely is a resident of South Carolina and Fluor is headquartered in Texas. In cases of this nature, the federal courts apply state law (including state common law) on issues that do not involve federal questions. *See Eric v. Tompkins,* 304 U.S. 641 (1938).

[12] The 4th Circuit is the intermediate federal appellate court that sits in Richmond, Virginia and hears appeals from district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

> contract with the federal government. The United States and the contractor did not evidence intent to benefit the service member, or U.S. soldiers as a class, in the contract or its implementing agreements.[13]

Hencely applies to the Supreme Court for a writ of certiorari.

In a civil case in the federal court system, the final appellate step is to apply to the Supreme Court for a writ of certiorari (discretionary review). The Supreme Court denies certiorari in about 99% of the cases where it is sought. Certiorari is granted only if four or more of the nine Justices vote for it.

Hencely applied for certiorari and the Supreme Court granted it. During this Supreme Court term (from October 2025 through June 2026), the Supreme Court received briefs and heard oral arguments on this case. The decision was announced on 4/22/2026.

The Supreme Court decision in *Hencely v. Fluor Corporation.*

All nine Justices participated in the decision of this case. Justice Clarence Thomas wrote the majority opinion and was joined by Justice Sonia Sotomayor, Justice Elena Kagan, Justice Neil Gorsuch, Justice Amy Coney Barrett, and Justice Ketanji Brown Jackson. This is a most unusual combination of "conservative" and "liberal" Justices to make a majority. Justice Samuel Alito wrote the dissent and was joined by Chief Justice John Roberts and Justice Brett Kavanaugh. I have placed the entire text of the majority opinion at the end of this article.

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[13] *Hencely v. Fluor Corp.,* 120 F.4th 412 (4th Cir. 2024).

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What does this precedent mean for service members who have been injured in the course of their duties and for the families of those who have died?

This case substantially expands the tort remedies that may be available in cases of this kind. The Supreme Court firmly rejected the 4th Circuit's per se rule that wounds, injuries, and deaths resulting from the negligence of federal contractors supporting combat operations cannot give rise to successful tort claims against those contractors.

Is this case over?

No, this case is not over. Because the District Court granted the defendant's motion for summary judgment and the 4th Circuit affirmed, there has been no trial in this case. On remand, the plaintiff (through his counsel) will need to prove to the jury that his version of the facts, as set forth in his complaint, is correct. This case may drag on for several more years.

Of course, it is also possible that Fluor Corporation will come to its senses and make a reasonable settlement offer that the plaintiff can accept. I urge the company to do right by Hencely and all the other members of the United States armed forces who have been injured or killed by the company's negligence.

This tragedy occurred in November 2016, almost a decade ago. Why does it take so long to resolve a civil lawsuit?

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I invite the reader's attention to Act 3, Scene 1 of *Hamlet,* by William Shakespeare. This is the famous "to be or not to be" soliloquy by Prince Hamlet. While contemplating suicide, Prince Hamlet detailed all that is wrong with human life, and "the law's delay" was one item in a very long list. Shakespeare wrote that play sometime between 1599 and 1601, or more than 425 years ago. "The law's delay" has only gotten worse in the last four centuries.

Bravo Zulu to the attorneys who represent in this most important case.

In the District Court and the Court of Appeals, Wilson T. Hencely was represented by attorneys Beattie B. Ashmore of Greenville, South Carolina; Robert Henry Snyder, Jr. of Decatur, Georgia; Jim Butler of Atlanta, Georgia; Paul Painter and Andrew Bowen of Savannah, Georgia; and Joe Brewer of Greenville, South Carolina. Attorney Frank H. Chang of Arlington, Virginia argued for Hencely in the Supreme Court. I congratulate all of them for their imaginative, diligent, and successful representation of this most deserving client. They have created a great precedent that will help many future service members and the estates of deceased service members to achieve some measure of justice.

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If you are not eligible for membership but believe in this mission, your financial contribution directly funds this resource and the advocacy work that protects those who serve. Donations may be mailed to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002

Here is the entire text of the majority decision of the Supreme Court:

In 2016, a Taliban operative working for respondent Fluor Corporation, a military contractor, carried out a suicide-bomb attack at Bagram Airfield in Afghanistan. After then-Army Specialist Winston T. Hencely confronted him, the bomber detonated his suicide vest. As a result of the injuries he received, Hencely is now permanently disabled. In an effort to recover damages for his injuries, Hencely sued Fluor, bringing state-law tort claims for negligently retaining and supervising the attacker. According to Hencely and the United States military, Fluor's conduct was not authorized by the military and even violated

instructions the military had given it as a condition of operating on the base.

Fluor argues that federal law preempts Hencely's suit. But, no statute or constitutional provision expressly does so. And, our precedent suggests that state law is generally not preempted when the "contractor could comply with both its contractual obligations" to the military and state law—unlike when the state-imposed duty "is precisely contrary to the duty imposed by the Government contract." *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 509, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988). However, the United States Court of Appeals for the Fourth Circuit held that federal law preempts Hencely's suit based on a different rule: During wartime, all state-law claims against military contractors under military command arising out of combatant activities are preempted regardless of whether any conflict exists between the military's instructions and state law. 120 F. 4th 412, 426 (2024). We disagree. The preemption rule on which the Fourth Circuit relied lacks any foundation in the Constitution, federal statutes, or our precedents.

Hencely, a former Army specialist, was seriously injured in a Taliban suicide attack on Veteran's Day 2016 at Bagram Airfield, then the largest U.S. base in Afghanistan. Hencely saw the perpetrator, Taliban operative Ahmad Nayeb, as Nayeb was walking toward a Veteran's Day 5K race. When Hencely attempted to question him, Nayeb detonated his suicide vest. The explosion killed 5 and wounded 17. Hencely, then just 20 years old, suffered a fractured skull and brain injuries. The Army concluded that Hencely's intervention "likely prevent[ed] a far greater tragedy." App. to Pet. for Cert. 156.

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Nayeb worked as a "Local National" contractor at Bagram as part of the military's "Afghan First" program. 120 F. 4th, at 418. That program sought to stimulate the local economy and stabilize the Afghan Government by requiring contractors to hire Afghans "'to the maximum extent possible.'" *Ibid.* The military interviewed and screened potential employees. During this process, it learned that Nayeb had been involved with the Taliban in the past. Nonetheless, it approved him for employment.

After this approval, Fluor's subcontractor hired Nayeb to work in the base's nontactical vehicle yard. The Army's contract with Fluor made it "'responsible for oversight of [its] personnel or Subcontractors to ensure compliance with all terms of the'" contract. *Id.*, at 419. Fluor was also required to comply with base-security policies. Under the "Bagram Airfield Badge, Screening, and Access Policy," all nonuniformed personnel, including Nayeb, were assigned a color-coded badge. *Ibid.* The policy required that Fluor escort red-badge holders like Nayeb in all areas of the base except at their work sites and maintain "'constant view' of them." *Id*., at 419-420.

The Army's investigation found Fluor primarily responsible for the attack. Interviews of Fluor personnel "reveal[ed] a poor understanding by Fluor supervisors as to who was responsible for Nayeb's supervision" and "an unreasonable complacency by Fluor to ensure Local National employees were properly supervised at all times, as required by their contract." App. to Pet. for Cert. 171. The Army also concluded that Fluor failed to impose adequate disciplinary measures on Nayeb, who slept on the job and was absent from his work area without

justification, even though these were grounds for firing him. Fluor's lax supervision, the Army's report continued, allowed Nayeb to check out tools that he did not need for his job and that he used to make the bomb inside Bagram. And, Fluor "was …deficient in [its] performance of executing and supervising escort duties" when employees like Nayeb left their workstations to leave the base. *Id*., at 174. Instead of escorting Nayeb to the base exit at the end of his shift, Fluor relied on a sign-out system administered by another Afghan employee, in violation of the base's badge policies. The report found that this lax supervision "enabled Nayeb to go undetected" for nearly an hour on the day of the attack and to walk at liberty throughout the base until Hencely confronted him. *Id*., at 176. In sum, the report concluded that "the primary contributing factor" to the attack was "Fluor's complacency and its lack of reasonable supervision of its personnel." *Id.*, at 158.

Hencely sued Fluor and its subsidiaries in the United States District Court for the District of South Carolina, where two Fluor subsidiaries are located. Hencely brought claims under South Carolina law for negligent supervision, negligent entrustment of tools, and negligent retention of an employee. Following Circuit precedent, the District Court entered summary judgment for Fluor. 554 F. Supp. 3d 770, 774 (2021). Under that precedent, suits against military contractors arising out of combatant activities are generally preempted. See *In re KBR, Inc., Burn Pit Litigation*, 744 F. 3d 326, 349, 351 (CA4 2014).

The Fourth Circuit affirmed under this "battlefield preemption" doctrine. 120 F. 4th, at 418, 430. According to the Fourth Circuit, "'[d]uring 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.'" *In re KBR*, 744 F. 3d, at 349 (quoting *Saleh* v. *Titan Corp.*, 580 F. 3d 1, 9, 388 U.S. App. D.C. 114 (CADC 2009)). The court reasoned that the Federal Tort Claims Act's combatant-activities exception, which preserves the Federal Government's immunity against claims "arising out of the combatant activities of the military" during wartime, 28 U. S. C. §2680(j), also reflects a congressional intent to bar all tort suits against contractors connected with those combatant activities. On the Fourth Circuit's view, state-law tort suits cannot proceed even when the contractor is alleged to have violated its instructions from the military.

We granted Hencely's petition for a writ of certiorari to decide whether a state-law suit premised on a military contractor's activities in a war zone is preempted even when the contractor was not required or authorized to take the action at issue. 605 U. S. 968 145 S. Ct. 2748, 222 L. Ed. 2d 1042 (2025).

Neither the Constitution nor any federal statute supports the Fourth Circuit's broad rule. Nor does the Court's opinion in *Boyle* support preemption in this case.

The Supremacy Clause provides that the Constitution, federal statutes, and treaties are "the supreme Law of the Land; …any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. "[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*, 605 U. S. 395, 409, 145 S. Ct. 1689, 222 L. Ed. 2d 54 (2025). But, "[t]here is no federal pre-emption *in vacuo*,

without a constitutional text or a federal statute to assert it." *Puerto Rico Dept. of Consumer Affairs* v. *ISLA Petroleum Corp.*, 485 U.S. 495, 503, 108 S. Ct. 1350, 99 L. Ed. 2d 582 (1988). Instead, "the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress." *Kansas* v. *Garcia*, 589 U. S. 191, 202, 140 S. Ct. 791, 206 L. Ed. 2d 146 (2020).

Fluor has not identified any provision of law expressly preempting Hencely's suit. No constitutional provision says it is preempted, and neither the Fourth Circuit nor Fluor suggests otherwise. Nor does any federal statute preempt this suit. Fluor cites only the FTCA's combatant-activities exception, §2680(j), which, this Court has explained, does *not* apply to suits against federal contractors, see *United State* v. *Orleans*, 425 U. S. 807, 813-814, 96 S. Ct. 1971, 48 L. Ed. 2d 390 (1976) (citing §2671); accord, *post*, at 15 (Alito, J., dissenting).

Without any constitutional or statutory text expressly supporting preemption, the Fourth Circuit, like the D.C. Circuit before it, resorted to our precedent in *Boyle*. 120 F. 4th, at 425-426; see also *Saleh*, 580 F. 3d, at 5. According to the Fourth Circuit, *Boyle* requires preemption of all claims against contractors engaged in combatant activities under the military's command authority. 120 F. 4th, at 425-426. For its part, the Government asserts that an action is preempted if it "arises from both combatant activities and a contractor's actions within the scope of its contract." Brief for United States as *Amicus Curiae* 28. Our precedents do not support either rule.

To start, *Boyle* does not squarely govern. It concerned the performance of a procurement contract, not a performance contract, and the combatant-activities exception was not at issue. Accord, *post*, at 16-17 (opinion of Alito, J.). But, regardless, its reasoning does not support the Fourth Circuit's preemption rule.

Under our precedents, *Boyle* explained, "a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law," fashioned by federal courts in the absence of congressional action. 487 U. S., at 504, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (quoting *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 640, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981); citation omitted); see, *e.g.*, *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366-367, 63 S. Ct. 573, 87 L. Ed. 838 (1943); *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 726-729, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979). In those rare areas of "uniquely federal interest," the Court has held state law preempted when there is a "significant conflict" between "an identifiable federal policy or interest and the [operation] of state law," or when "specific objectives" of federal legislation would be frustrated. *Boyle*, 487 U. S., at 505, 507, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (internal quotation marks omitted). This Court has emphasized the narrowness of this doctrine, which will rarely apply when "litigation is purely between private parties and does not touch the rights and duties of the United States." *Bank of America Nat. Trust & Sav. Assn.* v. *Parnell*, 352 U.S. 29, 33, 77 S. Ct. 119, 1 L. Ed. 2d 93 (1956); see *Boyle*, 487 U. S., at 506, 108 S. Ct. 2510, 101 L. Ed. 2d 442.

In *Boyle*, the conflict between federal interests and state law was particularly sharp. There, a Marine helicopter pilot drowned after a crash during a training exercise. *Id*., at 502, 108 S. Ct. 2510, 101 L. Ed. 2d 442. The pilot's father sued the manufacturer of the helicopter, alleging that, under state tort principles, the escape hatch for the helicopter should have opened *inward* even though the federal procurement contract for the helicopter required that it open *outward*. *Id.*, at 503, 108 S. Ct. 2510, 101 L. Ed. 2d 442.

To assess preemption of that suit, the Court first identified a "'uniquely federal' interest" in the "the civil liabilities arising out of the performance of federal procurement contracts." *Id.*, at 505-506, 108 S. Ct. 2510, 101 L. Ed. 2d 442. After all, the Court reasoned, in *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U. S. 18, 60 S. Ct. 413, 84 L. Ed. 554 (1940), the Court had rejected "an attempt by a landowner to hold a construction contractor liable under state law" for eroding land in the course of constructing dikes for the Government. *Boyle*, 487 U. S., at 506, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (citing *Yearsley*, 309 U. S., at 20-21). There was "no basis for a distinction," *Boyle* explained, between a contractor's fulfillment of a performance contract like the one in *Yearsley* and a contractor's faithful execution of a procurement contract for helicopters. 487 U. S., at 506, 108 S. Ct. 2510, 101 L. Ed. 2d 442.

Boyle was clear that the identification of a uniquely federal interest "does not, however, end the inquiry." *Id*., at 507, 108 S. Ct. 2510, 101 L. Ed. 2d 442. Instead, this Court's precedents require "a significant conflict … between an identifiable federal policy or interest and the operation of state law." *Ibid.* (internal quotation marks and alterations omitted).

To craft a rule of decision for suits against federal procurement contractors, *Boyle* turned to the FTCA, which preserves the Federal Government's sovereign immunity against a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty," §2680(a). See *id.*, at 511, 108 S. Ct. 2510, 101 L. Ed. 2d 442. Because the Federal Government cannot be sued for exercising its discretion to select helicopter designs, the Court concluded that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances" require displacement. *Id.*, at 512, 108 S. Ct. 2510, 101 L. Ed. 2d 442. But even then, not all tort suits arising out of design defects in federally procured equipment are preempted. The Court instead adopted a three-part test requiring preemption if (1) the United States approved precise specifications; (2) the equipment conformed to them; and (3) the supplier warned the United States about the dangers the specifications entailed. *Ibid.*

Under this approach, many suits are not preempted. For example, there would generally be no preemption when the procured equipment was a stock model, or when the Government's specifications were silent as to the complained-of defect in the product. *Id.*, at 509, 108 S. Ct. 2510, 101 L. Ed. 2d 442. And, the Court explained that preemption of all suits by military personnel against procurement contractors would be "too broad" a preemption rule because it would bar suits even when the Government did not instruct the contractor to produce equipment with the challenged feature. *Id.*, at 510, 108 S. Ct. 2510, 101 L. Ed. 2d 442.

Boyle's reasoning contradicts the Fourth Circuit's analysis. *Boyle* addressed "a special circumstance" in which the contractor has a defense because "the government has directed a contractor to do the very thing that is the subject of the claim." *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 74, n. 6, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001). Hencely sued Fluor for conduct that, we assume (as the Fourth Circuit did), was not authorized by, but was even contrary to, federal instructions. See 120 F. 4th, at 430. Fluor does not dispute that military officials found it to have failed in its contractual obligations. It also does not dispute that the Army found this failure to be a cause of Hencely's injuries. Even granting that there is a "uniquely federal interest" in the regulation of military bases overseas, there would be no "significant conflict" between that interest and state-law negligence liability premised on a contractor's departure from military instructions. *Boyle*, 487 U. S., at 507, 108 S. Ct. 2510, 101 L. Ed. 2d 442.

An example *Boyle* gave confirms that *Boyle* does not justify the Fourth Circuit's rule. The Court thought it clear that in a case in which the Government asks a contractor for a certain result, and the contractor is sued for how it achieved that result, the suit is not preempted if the Government was silent about the conduct that allegedly violated state law:

"If, for example, the United States contracts for the purchase and installation of an air-conditioning unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. The contractor could

comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be pre-empted in this context." *Id.*, at 509, 108 S. Ct. 2510, 101 L. Ed. 2d 442. The contract at issue in this case is "like the one for the hypothetical air conditioner, not the helicopter." *Saleh*, 580 F. 3d, at 22 (Garland, J., dissenting). The Fourth Circuit did not conclude "that the government required or authorized the contractor personnel at [Bagram Airfield] to do what state law forbids," and *Boyle* cannot be read to "protect a contractor from liability resulting from the contractor's violation of federal … policy." 580 F. 3d, at 22-23. The Government required Fluor to hire Afghan employees and to provide logistics for Bagram Airfield. But, it did not, Hencely contends, require Fluor to leave Nayeb unsupervised, allow him to walk alone for an hour after his shift, or permit him to obtain unauthorized tools with which he could build a bomb. Instead, on each score, the Army concluded that Fluor *failed* express duties to the Government. Given this, Hencely's suit premised on Fluor's negligence in carrying out those duties is, under *Boyle*'s reasoning, not preempted just as the hypothetical claims about the air-conditioner would not be preempted.

None of this should come as a surprise to Fluor under existing statutes and regulations. "Congress knows full well how to make its intention to preclude private liability known." *Saleh*, 580 F. 3d, at 26 (Garland, J., dissenting). Congress gave some contractors express protection from suits related to their activities. 42 U. S. C. §§233(a), (g) (channeling suits against employees at certain federally funded health centers); 50 U.S.C. §2783(b) (providing the same for contractors carrying out an atomic weapons testing program). And, in the Defense Base Act, Congress channeled claims by contractors' employees to an administrative

process, see 42 U. S. C. §§1651(a), (c), but did not do the same for suits by *soldiers* on military bases. Moreover, the Government advised Fluor that it would not have a blanket defense based on its status as a military contractor. See *Saleh*, 580 F. 3d, at 27 (Garland, J., dissenting). Before the suicide attack that injured Hencely, the Department of Defense responded to concerns that its regulations "may lead courts to deny contractors certain defenses in tort litigation." 73 Fed. Reg. 16767 (2008). The Department observed that courts generally "absolv[e] contractors of liability to third parties where the Government carried ultimate responsibility for the operation." *Ibid.* But, beyond that context, the Department warned, contractors must "research host nation laws and proposed operating environments" because existing law held "contractors accountable for the negligent or willful actions of their employees, officers, and subcontractors." *Id*., at 16768. The Department explained that *Boyle* did not protect nonprocurement contractors and that contractors should not expect "to avoid accountability to third parties for their own actions by raising defenses based on the sovereignty of the United States." 73 Fed. Reg. 16768.

Since *Boyle* did not reach this case, the Fourth Circuit expanded it. "'In the context of the combatant activities exception,'" it observed, "'the relevant question is *not* so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the state.'" 120 F. 4th, at 429 (quoting *Saleh*, 580 F. 3d, at 7; emphasis added). Instead, the court reasoned, "it is the imposition *per se* of the state . . . tort law that conflicts with the federal policy of eliminating" state regulation of the military during wartime. 120 F. 4th, at 429 (internal quotation marks omitted).

That test sweeps too broadly. The FTCA's combatant activities exception forecloses suits "arising out of the combatant activities *of the military or naval forces, or the Coast Guard*." 28 U. S. C. §2680(j) (emphasis added). Like the discretionary-function exception on which *Boyle* relied, the combatant-activities exception protects the Government's decisionmaking. Accordingly, the Fourth Circuit seems to have recognized that the relevant federal interest is "foreclosing state regulation of the *military's* battlefield conduct and decisions." *In re KBR*, 744 F. 3d, at 350 (emphasis added). But, even assuming such an interest can preempt state law, "[n]o significant conflict exists between *that* interest and state law unless the challenged action can reasonably be considered the military's *own* conduct or decision and the operation of state law would conflict with that decision." *Badilla* v. *Midwest Air Traffic Control Serv., Inc.*, 8 F. 4th 105, 128 (CA2 2021).

The Fourth Circuit's decision not only extended, but contradicted, *Boyle*. *Boyle* created a defense for contractors only insofar as the suit challenged a decision of the Government that the contractor merely carried out. A conflict even with the new "uniquely federal interest" the lower courts have identified in military operations, then, would have to emerge from a state-law suit challenging the *military*'s decisions on the battlefield. The Fourth Circuit did not ask that question. To the contrary, it expressly concluded that resolving Hencely's claims under South Carolina law would not require "evaluat[ing] the reasonableness of military judgments." 120 F. 4th, at 424; contra, *post*, at 12 (opinion of Alito, J.). But, it went on to find preemption in any case because it thought that the Government's "'interest in combat is *always* precisely contrary to the imposition of a non-federal tort duty.'" 120 F. 4th, at

426 (quoting *KBR*, 744 F. 3d, at 349; emphasis added). *Boyle*'s rationale justifies no such blanket preemption.

Perhaps sensing this, Fluor and the Government argue that, even without *Boyle*, the Constitution's structure implicitly preempts any suit against a military contractor operating in a combat zone. See Brief for Respondents 30-33; Brief for United States as *Amicus Curiae* 30. This argument has no basis in the text of the Constitution or our precedent. All acknowledge that the Federal Government has "'broad and sweeping'" war powers. *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 58-59, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (quoting *United States* v. *O'Brien*, 391 U. S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)). The Constitution assigns Congress the power to "declare War," "raise and support Armies," "provide and maintain a Navy," and "make Rules for the Government and Regulation of the land and naval Forces." Art. I, §8, cls. 11-13. The President is the "Commander in Chief of the Army and Navy of the United States" and militias in federal service. Art. II, §2, cl. 1. States, for their part, may not "engage in War, unless actually invaded." Art. I, §10, cl. 3.

But, the Constitution's grant of war powers does not imply that courts must reject any tort claim connected to a war zone, as the Fourth Circuit's rule requires. See 120 F. 4th, at 429. The assignment of those powers to Congress and the Executive has never been understood to bar all war related tort suits. To the contrary, barring other statutory or constitutional considerations, plaintiffs have been able to enforce their legal rights even when they are violated during war. Only a few years after the adoption of the Constitution, the Court addressed the case of Captain Little, commander of a United States frigate. *Little* v. *Barreme*,

6 U.S. 170, 2 Cranch 170, 2 L. Ed. 243 (1804) (Marshall, C. J.). Captain Little acted on the Secretary of the Navy's orders and seized a Danish vessel for violating American neutrality laws during the Quasi-War with France. *Id.*, at 176-178, 2 Cranch 170, 2 L. Ed. 243. The Court found that the orders exceeded the President's statutory authority and held that "Captain *Little* then must be answerable in damages to the owner of this neutral vessel" despite a seizure "with pure intention" to carry out U. S. military policy. *Id*., at 179, 2 Cranch 170, 2 L. Ed. 243. In *Mitchel* v. *Harmony*, 54 U.S. 115, 13 How. 115, 14 L. Ed. 75 (1852), Colonel Mitchell seized property in Mexico during the Mexican-American war that belonged to an American merchant traveling with the military in the war zone. *Id*., at 129-130, 13 How. 115, 14 L. Ed. 75. The merchant sued, and the Court affirmed the tort judgment against Colonel Mitchell. *Id*., at 137, 13 How. 115, 14 L. Ed. 75. As this history shows, the mere fact that the conduct here occurred overseas in a warzone perhaps makes this a good case for Congress to intervene, but it does not give courts a license to bar all such suits on their own authority.

Nor is Fluor protected from the consequences of its conduct simply because it was working for the Federal Government and state law is at issue. "[T]here is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions." *Penn Dairies, Inc.* v. *Milk Control Comm'n of Pa.*, 318 U. S. 261, 269, 63 S. Ct. 617, 87 L. Ed. 748 (1943). For example, States ordinarily cannot "directly regulate or discriminate against" federal officers and agencies. *United States* v. *Washington*, 596 U. S. 832, 835, 142 S. Ct. 1976, 213 L. Ed. 2d 336 (2022); see also *McCulloch* v. *Maryland*, 17 U.S. 316, 4 Wheat. 316, 436-437, 4 L. Ed. 579 (1819). "But

those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions." *Penn Dairies*, 318 U. S., at 269, 63 S. Ct. 617, 87 L. Ed. 748. Accordingly, absent a statute to the contrary, States can regulate or tax federal contractors on the same terms as any private company, even where the party asserts an indirect burden on federal activities. See, *e.g.*, *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 104, 60 S. Ct. 431, 84 L. Ed. 596 (1940) (allowing state labor-law liability against a contractor constructing a federal building); *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 159-161, 58 S. Ct. 208, 82 L. Ed. 155 (1937) (upholding a tax imposed on a federal contractor despite a constitutional objection that doing so would burden the Federal Government by increasing its costs).

The Court has not hesitated to apply this principle in the military context. In *Penn Dairies*, the Court allowed a state milk-price regulation to apply to a military contractor providing milk to soldiers on a military base during the Second World War. 318 U. S., at 266-267, 278-279, 63 S. Ct. 617, 87 L. Ed. 748. The contractor argued that applying the regulations to its military contracting operations was unconstitutional, because Congress alone has the power to raise and support armies, and the regulation interfered with the exercise of that power. *Id*., at 268-269, 63 S. Ct. 617, 87 L. Ed. 748; see Art. I, §8, cl. 12. The Court rejected that argument. It explained that while Congress's enumerated powers enable it to "declare state regulations like" the one at issue "inapplicable to sales to the government," the state law was not preempted because the Court could not "find in Congressional legislation … any disclosure of a purpose to immunize government

contractors from local price-fixing regulations which would otherwise be applicable." 318 U. S., at 269, 278, 63 S. Ct. 617, 87 L. Ed. 748. Instead, without a federal statute, contractors ordinarily have a constitutional defense only when the contractor is being sued precisely for accomplishing what the Federal Government requested. In *Yearsley*, a contractor, acting under military orders, built dikes on the Missouri River and "washed away a part of petitioners' land" as a result. 309 U. S., at 19, 60 S. Ct. 413, 84 L. Ed. 554. The landowners sued and secured a judgment against the contractor. *Id*., at 20, 60 S. Ct. 413, 84 L. Ed. 554. This Court reversed. The Court explained that "if th[e] authority to carry out the project was validly conferred … there is no liability on the part of the contractor for executing its will." *Id*., at 20-21, 60 S. Ct. 413, 84 L. Ed. 554.

But, by its own terms, *Yearsley* was limited: "The Court contrasted with *Yearsley* cases in which a Government agent had 'exceeded his authority' or the authority 'was not validly conferred;' in those circumstances, the Court said, the agent could be held liable for conduct causing injury to another." *Campbell-Ewald Co.* v. *Gomez*, 577 U. S. 153, 167, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016) (quoting *Yearsley*, 309 U. S., at 21, 60 S. Ct. 413, 84 L. Ed. 554). Because Fluor is alleged to have acted outside the authority the military granted it, it does not attempt to invoke a *Yearsley* defense. And, we decline to extend *Yearsley* to bar allegations such as Hencely's.

The Fourth Circuit's decision held Hencely's claims preempted even though the conduct complained of was neither ordered nor authorized by the Federal Government. No provision of the Constitution and no

federal statute justifies that preemption of the State's ordinary authority over tort suits. Nor does any precedent of this Court command such a result. Therefore, we vacate the judgment of the Fourth Circuit and remand the case for further proceedings consistent with this opinion.
It is so ordered.

Hencely v. Fluor Corp., 2026 U.S. LEXIS 1868, *5-22