No. 23-16041

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERTO ELORREAGA, et al.,

Plaintiffs-Appellees,

v.

VIACOMCBS, INC.,

Defendant-Appellant,

WARREN PUMPS, LLC and AIR & LIQUID SYSTEMS CORP.,

Intervenors.

On Appeal from the United States District Court
for the Northern District of California, Oakland
(No. 4:21-cv-05696) (Hon. Haywood S. Gilliam, Jr.)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND COALITION FOR LITIGATION JUSTICE, INC. AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

Mark A. Behrens
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
1800 K Street NW, Suite 1000
Washington, D.C. 20006
(202) 783-8400
mbehrens@shb.com
csilverman@shb.com

Attorneys for Amici Curiae
Additional counsel listed on inside cover

Jonathan D. Urick
Kevin R. Palmer
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062-2000
(202) 659-6000
jurick@uschamber.com

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

Erica Klenicki
Michael A. Tilghman II
NAM LEGAL CENTER
733 Tenth Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000
eklenicki@nam.org
mtilghman@nam.org

Counsel for Amicus Curiae National Association of Manufacturers

DISCLOSURE STATEMENT PURSUANT TO RULES 26.1 AND 29

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby state that the Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, and National Association of Manufacturers have no parent corporation and have issued no stock.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that (1) no party's counsel authored this brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person — other than *amici curiae*, their members, or their counsel — contributed money that was intended to fund the preparation or submission of the brief.

/s/ Cary Silverman
Cary Silverman

CONSENT STATEMENT PURSUANT TO RULE 29

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that all parties have indicated that they consent, or have no objection, to the filing of this *amici curiae* brief.

/s/ Cary Silverman
Cary Silverman

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the state and federal courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber's members have a strong interest in ensuring that lower courts adhere to *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). Many of the Chamber's members sell products and services to the United States government.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.9 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation.

The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for asbestos and other toxic tort claims.[1] The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

Amici have an interest in this case because the district court's ruling makes the government contractor defense unavailable in cases arising under federal common law. This decision, if upheld, will expose businesses that provide military equipment and other products to the federal government, per the government's own specifications or approval of the design, to unfair liability. When government contractors adhere to their contractual obligations and rely on the government's discretionary policymaking determinations, they should not have to fear liability to third parties merely because those third parties disagree with the government's

[1] The Coalition includes Century Indemnity Company; Great American Insurance Company; Nationwide Indemnity Company; San Francisco Reinsurance Company, Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

safety assessments and a claim arises under federal common law, rather than state product liability law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below exposes businesses that provided products meeting the government's specifications decades ago to expanded liability by depriving them of a long-established defense. The availability of the government contractor defense should not be arbitrarily determined based on whether a claim is rooted in federal common law or state product liability law, as the court below mistakenly ruled. It applies equally, if not more strongly, to federal common law claims.

The government contractor defense is an outgrowth of the federal government's sovereign immunity, which protects the ability of public officials to make public policy decisions (exercising their discretionary functions) without being second-guessed in litigation. When a government contractor carries out the federal government's directives in providing a product or service, it receives derivative immunity, so long as certain conditions are met. *Boyle*, 487 U.S. at 512. The issue in this appeal is not whether the Defendant here has established the elements of the defense, but whether the government contractor defense is available at all in cases arising under admiralty law, a form of federal common law.

The availability of the government contractor defense is especially important in the military context, where the weighing of risks and benefits of equipment used in wartime or national defense is different than for ordinary consumer products. Without the government contractor defense, manufacturers would be subject to liability for providing the government what it asked for, litigation would question military decisions about product design, and the costs of liability and higher insurance would be passed on to the government (and taxpayers) through higher prices.

Courts have sometimes applied the government contractor defense as a form of preemption, understandably, because product liability and other tort claims are typically governed by state common law, making it necessary to consider whether federal law overrides state interests. At its core, however, the government contractor defense is a type of derivative immunity conveyed by federal common law. That defense is thus available irrespective of whether a claim arises under state tort or statutory law, or, as here, federal common law. Principles of sovereign immunity and the public policies underlying the government contractor defense do not fluctuate based on whether a claim arises under state law or federal law, or an injury occurred on land or offshore. In fact, application of a *federal* common law

defense stemming from *federal* sovereign immunity should be most straight forward in application to a *federal* common law claim.

In characterizing and applying the doctrine as a "preemptive government contractor defense" that applies only to state law claims, the district court issued an outlier decision that improperly narrows the availability of a long-established defense. Unless reversed, this ruling will have adverse implications for both government contractors and the federal government. *See Boyle*, 487 U.S. at 507.

This Court should reverse the district court's denial of the Defendants' motion for summary judgment and granting of partial summary judgment to the Plaintiffs on this issue and confirm that the government contractor defense is available in claims arising under federal common law.

ARGUMENT

I. THE GOVERNMENT CONTRACTOR DEFENSE IS AN EXTENSION OF SOVEREIGN IMMUNITY TO THOSE WHO FOLLOW THE FEDERAL GOVERNMENT'S DIRECTIVES

The Supreme Court's recognition of the government contractor defense, its evolution, and the public policy concerns that underlie it, all indicate that it is an extension of the federal government's sovereign immunity to private parties that follow the government's directives. As such, the defense applies equally to claims based in state or federal law.

This foundation for the government contractor defense has been apparent since the U.S. Supreme Court first applied that defense in *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 19 (1940). In that instance, landowners alleged that a contractor's construction of dikes for the federal government in the Missouri River resulted in erosion that washed away a portion of their land. Since the contractors' work was "authorized and directed" by the government, the Court found "there is no liability on the part of the contractor for executing [the government's] will." *Id*. at 20. As the Court explained, "[w]here an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred." *Id*. at 21. In other words, the Court understood that the federal government's sovereign immunity extended to a contractor, as an agent of the federal government, so long as the contractor was acting within the scope of its authority, i.e., following the government's instructions pursuant to the contract. *Id*. at 22.

Following *Yearsley* and prior to *Boyle*, this Court and other courts, recognized that the government contractor defense derives from sovereign immunity and is a matter of federal common law. For example, in *McKay v. Rockwell Int'l Corp.*, this Court recognized that "[g]iven the immunities of the

United States," a supplier of military equipment could not be required to "shoulder . . . the entire burden of the liability to injured servicemen." 704 F.2d 444, 448 (9th Cir. 1983). In that instance, which arose under admiralty law, the Court ruled that the families of Navy pilots who died in aircraft crashes could not pursue an action against the manufacturer alleging that the fighter's ejection system was defectively designed. *See id.* Likewise, in a case preceding *Boyle* by two years, the Fifth Circuit found that the government contractor defense primarily stems from federal government immunity and applies to claims that attempt to shift that liability onto others. *See Bynum v. FMC Corp*., 770 F.2d 556, 564-65, 567 (5th Cir. 1985).

Boyle was an outgrowth of this case law, providing an opportunity for the U.S. Supreme Court to define the scope and contours of the government contractor defense. The Court ruled that to invoke the defense successfully, the contractor must establish three elements: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id*. at 512. The Court did not, however, alter the underlying foundation of the defense.

As is the situation for most tort claims, *Boyle* arose under state common law. For that reason, the Supreme Court's decision speaks in terms of preemption, as

federal interests had to overcome state interests in compensating its citizens for torts. While the Court observed that there was no federal statutory defense that preempted state law, or a direct conflict with federal law requiring preemption, it held that "uniquely federal interests" precluded contractor liability arising out of federal military contracts in circumstances that present a significant conflict with federal policy – such as when the product's design reflects a balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." 487 U.S. at 511. The *Boyle* Court drew this analysis from the Federal Tort Claims Act (FTCA), which precludes claims against the government based on the exercise of a "discretionary function" by a government agency or employee, which includes such engineering decisions. *See id.* (quoting 28 U.S.C. § 2680(a)).

Subsequent court decisions reaffirm this understanding. For example, the Second Circuit has referred to the government contractor defense as "a type of derivative immunity" for government contractors that flows from the federal government's immunity when carrying out discretionary functions. *In re World Trade Center Disaster Site Litig.*, 521 F.3d 169, 196 (2d Cir. 2008). If a contractor shows that a federal agency is entitled to discretionary function immunity, the contractor may be entitled to share this immunity when the government approved

reasonably precise specifications, the equipment or service provided conformed to those specifications, and the entity warned the agency about any dangers known to it but not to the agency. *See id.* at 196-97. The Second Court recognized that this derivative immunity preempts state tort or statutory law where there is a significant conflict with federal policy or interest. *See id.* Such a step – finding preemption – is simply unnecessary when a claim arises under federal common law.

The Third Circuit, when finding the government contractor defense applicable beyond the military context, also viewed the defense as arising under "federal common law." *Carley v. Wheeled Coach*, 881 F.2d 1117, 1127 (3d Cir. 1993). Again, while the court spoke in preemption terms given the presence of a Virgin Island law claim,[2] it recognized that the underlying rationale of the government contractor defense is "the extension of the government's sovereign immunity to private actors who perform their obligations to the government." *Id*. at 1123; *cf. Koutsoubos v. Boeing Vertol, Division of Boeing Co*., 755 F.2d 352, 354 (3d Cir. 1985) (in case arising under admiralty law, finding "[i]t is clear that federal common law provides a defense to liabilities incurred in the performance of

[2] There was a dispute over whether federal common law, Virgin Islands law, or Florida law applied. The district court concluded that the government contractor defense was available regardless of whether federal common law or Virgin Islands law applied. *See id.* at 313. The Third Circuit did not resolve this issue, but found that the defense is matter of federal common law and preempts state law, thereby making it available, if its requirements are met, in all cases. *See id.* at 329.

government contracts"). That immunity should not evaporate based on the source of the claim. *See Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 797 (5th Cir. 1993) ("The government contractor defense . . . generally immunizes government contractors for civil liability arising out of the performance of federal procurement contacts.").

The Eleventh Circuit has similarly referred to *Boyle* as establishing a "federal common law government contractor's defense." *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1313 (11th Cir. 1989). That defense, the Eleventh Circuit explained, "derives from the principle that where a contractor acts under the authority and direction of the United States, it shares the sovereign immunity that is enjoyed by the government." *Id.* at 1316. "Without the defense, the government's own tort immunity for its discretionary functions would be undermined." *Id.* at 1315. While the Eleventh Circuit applied the defense to preempt Florida's product liability law, the outcome should be the same if an aviation accident occurred over navigable waters rather than over land. "[T]he proper focus is the protection of discretionary government functions for which the defense is intended." *Id.* at 1317.

This Circuit has likewise referred to the government contractor defense as "an established component of federal common law" that is "intended to implement

and protect the discretionary function exception" of the FTCA. *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 968, 1000 (9th Cir. 2008). The defense "allows a contractor-defendant to receive the benefits of sovereign immunity when a contractor complies with the specifications of a federal government contract." *Id*. That sovereign immunity does not vary based on the source of the claim.

II. THE GOVERNMENT CONTRACTOR DEFENSE SERVES THE INTERESTS OF THE FEDERAL GOVERNMENT, ITS CONTACTORS, AND THE PUBLIC

The government contractor defense advances important interests for the federal government, its contractors, and the public. A ruling that arbitrarily narrows the availability of the defense jeopardizes these interests.

In *McKay,* this Court recognized three key public policy reasons supported extending application of the *Yearsley* government contractor defense, developed in the context of construction projects, to military equipment contracts. First, shifting liability to a contractor when the federal government that was involved in the product's design and specifications is immune would indirectly result in higher costs for the government. *See* 704 F.2d at 449. Faced with such liability, contractors would pass on the expected cost through cost overrun provisions in equipment contracts, incorporating the price of higher liability insurance in the contacts, or through higher prices for later equipment sales. *Id*.

Second, imposing liability on military suppliers for designs that the government specified or approved improperly thrusts the judiciary into military decision making. *See id.* The Court recognized that determining whether military equipment is defective is unlike analyzing the defectiveness of ordinary consumer products. A level of risk may be acceptable or unavoidable for products needed for war or national defense that would be unacceptable for other products. *See id.* at 449-50.

In *Bynum*, the Fifth Circuit agreed with these policy reasons supporting the "federal defense" recognized in *McKay*. *See id.* at 565-66, 569. It also recognized issues of fairness. "Without the government contractor defense," the Fifth Circuit observed, "military contractors would be discouraged from bidding on essential military products" because they often are unable to alter the government's specifications for high-risk products, yet would be subject to liability beyond their control. *Id*. at 566. "[A]n innocent contractor should not be ultimately liable for a dangerous design when the responsibility properly lies elsewhere." *Id*.

The Supreme Court incorporated these public policy concerns into its decision in *Boyle*. *See* 487 U.S. at 507-13 (discussing *McKay* and *Bynum)*. The *Boyle* Court found that whether a lawsuit is against a federal official or a federal contractor, there is the same federal interest "in getting the Government's work

done." *Id*. at 505. "It makes little sense to insulate the Government against financial liability for judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production" as the cost of liability would be passed on to the government in the form of higher prices to cover, or insure against, liability for government-ordered designs. *Id*. at 512.

III. THE INTERESTS UNDERLYING THE GOVERNMENT CONTRACTOR DEFENSE DO NOT VARY DEPENDING ON WHETHER STATE OR FEDERAL LAW APPLIES

The federal interests underlying *Boyle* do not vary depending on whether a plaintiff's injury occurred on land or at sea or if state or federal law apply. Rather, the government contractor defense should apply with the greatest ease in cases arising under federal common law as it is a federal common law defense. No determination of preemption of state law is necessary.

As discussed earlier, *Boyle's* application of the government contractor defense in preemption terms stemmed from the state product liability claims at issue in that particular case. The Supreme Court understood, however, that the defense is rooted in "federal common law," *id*. at 504, and sovereign immunity that is not waived by the FTCA, *see id.* at 511. It was the financial burden of lawsuits' second-guessing of judgments about the design of military equipment—made or

approved by government and carried out by contractors—that the Court found supports the defense. *See id.* at 511-12.

Likewise, while this Court has applied the government contractor defense to preempt state law claims, it has also recognized that the doctrine serves as a "shield to tort liability" that protects the ability of the military "to obtain necessary equipment" without "pay[ing] higher prices to offset the contractor's increased risk of liability." *Getz v. Boeing Co.*, 654 F.3d 852, 860, 863 (9th Cir. 2011). Those concerns for both the government and private contractors are implicated regardless of whether the liability stems from a claim arising under state or federal law.

The government contractor defense applies in asbestos litigation in appropriate circumstances. *See, e.g., Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 251, 259 (4th Cir. 2017) (finding "colorable federal defense of government-contractor immunity" provided a basis for asbestos defendant to remove action to federal court). Courts have applied the defense irrespective of whether a claim arises under state product liability or admiralty law, and at least one court has already found the district court in this case "mistaken about the law." *Gorton v. Warren Pumps, LLC*, No. 1:17-1110, 2023 WL 3848412, at *17 n.13 (M.D. Pa. June 6, 2023); *see also* William C. Buckhold & Lisa D. Goekjian, *The Government Contractor's Defense to Product Liability Claims*, 99 Com. L.J. 64, 85 (1994)

("The government contractor defense is as much a part of federal law as the common law of admiralty or the statutory liability provisions of the Death on the High Seas Act or Suits in Admiralty Act. Moreover, the basis for the defense, the exercise of discretion by federal officials, is a bar to tort liability under state or federal law.").

When a case, as here, does not involve state tort claims, but arises under federal common law, no preemption is needed. The federal defense directly applies. This should make application of the defense simpler, not more challenging. A federal common law defense should apply to a federal common law action. There is no need for a court to find that federal law conflicts with state law or a uniquely federal policy or interest must prevail over state interests.

In sum, the sovereign immunity that underlies the government contractor defense does not vary based on the nature of the claim. The public policy rationales underlying the defense do not shift depending on where an injury occurred. The district court's ruling is an outlier, the only decision to *amici's* knowledge that distinguishes between state tort law and federal common law claims. If upheld, government contractors would arbitrarily lose the ability to assert a federal defense, ironically, where a claim is governed by federal law.

CONCLUSION

For these reasons, the Court should reverse the district court's denial of the Defendants' motion for summary judgment and granting of partial summary judgment to the Plaintiffs on this issue and confirm that the government contractor defense is available in claims arising under federal common law.

Respectfully submitted,

/s/ Cary Silverman

Mark A. Behrens
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
1800 K Street, NW, Suite 1000
Washington, D.C. 20006
(202) 783-8400
mbehrens@shb.com
csilverman@shb.com

Attorneys for Amici Curiae

Jonathan D. Urick
Kevin R. Palmer
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062-2000
(202) 659-6000
jurick@uschamber.com

Counsel for Amicus Curiae
Chamber of Commerce of the
United States of America

Erica Klenicki
Michael A. Tilghman II
NAM Legal Center
733 Tenth Street, NW, Suite 700
Washington, DC 20001
(202) 637-3000
eklenicki@nam.org
mtilghman@nam.org

Counsel for Amicus Curiae
National Association of Manufacturers

Dated: November 20, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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