No. 13-817

In The Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC.,

Petitioner,

v.

CHERYL A. HARRIS, Co-Administratrix of the Estate of Ryan D. Maseth, deceased; and DOUGLAS MASETH, Co-Administrator of the Estate of Ryan D. Maseth, deceased,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this state-law wrongful death suit against a private contractor, arising from negligent maintenance work that resulted in a soldier's electrocution while showering in his barracks in Iraq, was properly remanded for a choice-of-law analysis before determining if the suit would be barred by the political question doctrine.

2. Whether the Federal Tort Claims Act's "combatant-activities" exception, 28 U.S.C. § 2680(j), preempts state law to bar a wrongful death suit against a private contractor to recover for a soldier's electrocution in his barracks shower in Iraq.

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MISCELLANEOUS:

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STATEMENT

Staff Sergeant Ryan Maseth, an Army Ranger and Green Beret, died in Iraq at the age of twenty-four. He was electrocuted while showering in his barracks due to defective electrical and plumbing equipment, including an ungrounded, unbonded water pump and electrical panel. Sergeant Maseth's parents alleged that the equipment was negligently installed and repaired by petitioner Kellogg Brown & Root Services ("KBR"), a private defense contractor

that provided plumbing, electrical, and other support services to the military in Iraq. In letting this state-law tort action against KBR proceed, the court below neither broke new ground nor deviated from the precedents of other courts of appeals. The Third Circuit correctly held that this straightforward tort action between private parties could not be held nonjusticiable at this stage of the proceedings, and that it is not preempted.

In analyzing whether this suit was barred as raising a political question, the Third Circuit properly considered whether resolution of the underlying claims or defenses required scrutinizing or second-guessing military decisions. It held correctly that the answer depends on which state's law governs the case, as well as factual matters yet to be proven. It therefore remanded for a choice-of-law analysis and, if necessary, certain factfinding. The court also correctly held that the action is not preempted by the combatant-activities exception to the Federal Tort Claims Act ("FTCA"), because KBR's repair work was not performed under the military's control and did not implicate its battlefield conduct and decisions.

This would be a particularly poor case in which to address the questions KBR presents. While KBR frames its first question in terms of adjudicating claims that "would necessarily require examining sensitive military judgments," Pet. ii, the court of appeals *agreed* with KBR that such second-guessing is inappropriate and remanded for a choice-of-law analysis (and possibly findings) that would determine

whether the case could be resolved without evaluating military decisionmaking. Thus, the issue that KBR asks this Court to resolve may not even be presented. *See* Pet. ii. An eventual dismissal on grounds of nonjusticiability, or a victory on the merits or on any other ground for KBR, would moot both of the questions KBR seeks to present.

Although KBR argues that state law should play no role, applying the political question doctrine *always* depends on identifying which legal and factual issues a court will need to resolve. In a suit like this, which is based on state law, identifying the legal issues that might render a case nonjusticiable necessarily depends on identifying the governing state law.

KBR seeks to bar a tort suit by private individuals against a private company – *not* the government – for negligence by the company's plumbers and electricians at a barracks. The decision below is correct, interlocutory, and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

A. Factual Background

1. Sergeant Maseth was stationed at the Radwaniyah Palace Complex ("the Complex"), comprised of Iraqi-constructed buildings that predated the war. Pet. App. 2. The U.S. government contracted with KBR to provide operational support, including plumbing and electrical maintenance and repairs, at the Complex. Pet. App. 2-3. Under the contract in

effect from April 2006 through February 2007, Pet. App. 57, KBR was responsible for maintaining electrical and plumbing systems, respectively, "in a safe manner" and in "good, safe operating condition." Pet. App. 14; C.A. App. 1644. During that time, KBR's work under the contract allegedly included the installation and maintenance of water pumps and the maintenance of an electrical control panel that was not grounded or bonded. C.A. App. 1643-45, 2078.[1]

In February 2007, KBR entered into a new contract with the Army, under which it was to perform varying levels of maintenance on different buildings (designated Levels "A," "B," and "C"). Pet. App. 64; C.A. App. 1710. KBR was obligated to exercise the same standard of care for repairs at both Level "A" and "B" facilities. C.A. App. 1803. Building 1, where Sergeant Maseth was stationed, was designated Level "B," meaning that KBR was required to perform repairs there in response to military work orders, as opposed to performing regular, KBR-initiated inspections and preventive maintenance. C.A. App. 155, 722-23, 1717-18. Upon receiving a work order, KBR was to decide how to address the

[1] Grounding involves connecting potential electrical conductive material to the earth. Bonding involves connecting all exposed metal items that are not designed to carry electricity so that if electrical insulation fails, a person cannot touch two objects that are dangerously different in their electrical potential. Frank Fitzgerald, *Grounding and Bonding*, ENERGY EDUC. COUNCIL (Sept. 20, 2007), http://www.energyedcouncil.org/pdf/Event%20Presentations/Grounding%20and%20Bounding.pdf.

maintenance problem, perform the work, and notify the military when the project was finished. C.A. App. 1767-68, 1770-72. "KBR staff responded to work orders without oversight or inspection by the military." Pet. App. 72.

2. KBR was aware of the significant history of electrical shocks in the bathroom where Sergeant Maseth was electrocuted. It received work orders on several occasions to address soldiers' complaints of shocks in the bathroom shower and sink. C.A. App. 720-21, 727-28, 731 (Hummer Dep.). Despite KBR's multiple opportunities to fix the problem – and KBR's designation of each work order as "Finished" or "completed" – the problem persisted. C.A. App. 2012, 2183-86.

3. On January 2, 2008, Sergeant Maseth was electrocuted while showering in his barracks. A short circuit in an ungrounded water pump sent a fatal electric current through the shower water, causing Sergeant Maseth's death. Pet. App. 82-83; C.A. App. 147-48.

B. District Court Proceedings

Respondents, Sergeant Maseth's parents, filed a wrongful death action against KBR in Pennsylvania state court, alleging that KBR's negligence caused their son's death. C.A. App. 94, 148-52.

KBR removed the case to the U.S. District Court for the Western District of Pennsylvania, and then

moved to dismiss under Federal Rule of Civil Procedure 12(b)(1). KBR argued that the suit raised nonjusticiable political questions and was preempted by the "combatant-activities" exception to the FTCA, 28 U.S.C. § 2680(j). C.A. App. 96. The district court initially denied KBR's motion, and the court of appeals dismissed KBR's appeal as interlocutory. *Harris* v. *Kellogg, Brown & Root Servs., Inc*., 618 F. Supp. 2d 400 (W.D. Pa. 2009), *appeal dismissed*, 618 F.3d 398, 399 (3d Cir. 2010).

After extensive discovery, KBR renewed its Rule 12(b)(1) motion to dismiss.[2] This time, the district court granted the motion. Pet. App. 51. The court held that both the political question doctrine and the combatant-activities exception barred respondents' claims. Pet. App. 53.

C. Proceedings on Appeal

The Third Circuit reversed and remanded. Pet. App. 2. It concluded that KBR's political question argument could not be resolved without further proceedings in the district court, and that the combatant-activities exception to the FTCA did not preempt respondents' state-law tort claims. Pet. App. 2.

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[2] While the Third Circuit suggested that KBR's motion should have been brought under Rule 12(b)(6), it ruled that the distinction made no difference in this case. Pet. App. 4 n.1.

1. The court of appeals noted that the political question doctrine does not directly bar suits against military contractors, since they are not "coordinate branches of government to which [the judiciary] owe[s] deference." Pet. App. 8. Nonetheless, the court stated that complaints against military contractors for conduct in a theater of war could present "nonjusticiable issues," if resolution of the parties' claims or defenses would require judicial evaluation of "military decisions that are textually committed to the executive"; if the case presented "issues that lack judicially manageable standards"; or if resolving the claims would evince a lack of the "respect due to coordinate branches of government." Pet. App. 7, 8, 36; *see also* Pet. App. 7 (quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)).

The court therefore conducted a detailed analysis of respondents' claims and KBR's defenses to determine whether "the case actually requires evaluation of military decisions." Pet. App. 9. The court explicitly adopted the analytical "framework" followed by the Fifth and Eleventh Circuits. Pet. App. 9-10 (citing *Lane* v. *Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008), and *McMahon* v. *Presidential Airways, Inc*., 502 F.3d 1331, 1359-60 (11th Cir. 2007)). The court also derived guidance from the Fourth and Ninth Circuits. Pet. App. 10 n.3 (citing *Taylor* v. *Kellogg Brown & Root Servs., Inc.,* 658 F.3d 402 (4th Cir. 2011), and *Koohi* v. *United States*, 976 F.2d 1328 (9th Cir. 1992)). In accord with those courts, the court of appeals stated that a suit against a contractor could sometimes be

nonjusticiable: for example, where "a contractor's apparently wrongful conduct may be a direct result of an order from the military," or where "a plaintiff's contributory negligence may be directly tied to the wisdom of an earlier military decision." Pet. App. 8-9 (citing *Carmichael* v. *Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281-83 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3499 (2010), and *Taylor*, 658 F.3d at 411-12).

a. The court of appeals reasoned that "neither of [respondents'] liability theories require[d] evaluating the wisdom of the military's decisions." Pet. App. 16. Respondents' claims were based on KBR's alleged negligence in installing and/or maintaining an ungrounded pump and other equipment and therefore presented the straightforward issue of whether KBR violated "the standard of care set by [its] contract with the military." Pet. App. 13.[3] "Accordingly, neither [theory] justifie[d] dismissing this case on political question grounds." Pet. App. 16.

b. The court also examined KBR's defenses (implied assumption of risk, proximate cause, and contributory negligence) to determine if any of them would "implicate strategic military decisions." Pet.

[3] Because of the pretrial posture of this case, the factual dispute as to whether KBR installed the pump that caused Sergeant Maseth's death has not yet been resolved. An investigation by the Department of Defense Inspector General nevertheless found that "KBR installed the pump on the roof which contributed to the electrocution of SSG Maseth." C.A. App. 2078.

App. 16. It concluded that the assumption-of-risk defense would not raise any justiciability problems under any potentially applicable state law. Pet. App. 17.[4] Implied assumption of risk is not recognized in Tennessee or Texas, and the only relevant determinations for this defense under Pennsylvania law – whether Sergeant Maseth was aware of the risk of electrocution and voluntarily assumed it – would not require any evaluation of military decisions. Pet. App. 17 n.10, 19.

In contrast, the court ruled that the justiciability of KBR's proximate cause and contributory negligence defenses could potentially turn on which state's tort law governed. *See* Pet. App. 17, 21. Resolving these defenses under Pennsylvania law would not require the evaluation of any military decisions.[5] But resolving them under Texas or Tennessee law might require apportioning liability among multiple actors (possibly including the government), which in turn could require evaluating those actors' decisions. Pet. App. 29, 34-36. Even so, the court of appeals held that the suit should not necessarily be dismissed even if Texas

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[4] The possibilities are Pennsylvania, where respondents are domiciled; Tennessee, where Sergeant Maseth's estate is being administered; and Texas, where KBR is domiciled. Pet. App. 113 n.23.

[5] Pennsylvania law provides for joint-and-several liability and also bars attributing fault to nonparties. A court therefore would not have to question military decisions in order to hold KBR fully liable, even if KBR asserted that the military played a role in Sergeant Maseth's death. Pet. App. 28, 33-34.

or Tennessee law were found applicable and apportionment of liability were necessary to calculate ordinary tort damages. Rather, in that case, respondents would be "foreclose[d]" from "obtaining the types of damages that are assigned using proportional liability," thereby eliminating the need to evaluate military decisions. Pet. App. 29; *see also id.* (noting that "nominal damages, if available," may remain). The court of appeals therefore remanded the case to the district court to make the necessary choice-of-law determination. Pet. App. 37.

2. Finally, the court of appeals held that respondents' claims were not preempted by the combatant-activities exception to the FTCA, 28 U.S.C. § 2680(j). Pet. App. 43-44. Since "defense contractors are not part of the government," neither the waiver of sovereign immunity contained in the FTCA nor any of its exceptions "apply *directly*" to KBR. Pet. App. 38 (emphasis in original). Nevertheless, the court extrapolated from this Court's analysis of a different exception to the FTCA in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 511-12 (1988), that the FTCA's "exceptions sometimes express federal policies that impliedly preempt state claims against defense contractors providing services to the military." Pet. App. 38.

In evaluating KBR's preemption argument, the court of appeals followed the two-part test outlined by the D.C. Circuit in *Saleh* v. *Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). Pet App. 42. That test asks "whether [a] contractor is integrated into the military's combatant

activities" and, if so, "whether the contractor's actions were the result of the military's retention of command authority." Pet. App. 43.

The court of appeals first concluded that KBR *was* integrated into the military's combatant activities, rejecting respondents' argument that maintenance of plumbing and electrical systems at a barracks is not a combatant activity at all. Pet. App. 44. However, the court then determined that KBR retained "considerable discretion" in deciding how to complete the maintenance at issue. Pet. App. 44-45. Describing KBR's contract as "performance-based," in that it outlined "required results rather than . . . 'how' the work [wa]s to be accomplished," Pet. App. 45 (quoting *Saleh*, 580 F.3d at 10), the court of appeals concluded that the "military did not retain command authority over KBR's installation and maintenance of the pump." Pet. App. 44. Respondents' claims, therefore, were not preempted. Pet. App. 45. The court remanded for further proceedings.

ARGUMENT

Under fundamental principles of state tort law, a private actor, like KBR in this case, may be held liable for death caused by its negligence. Some courts of appeals have carved out limited exceptions to liability when adjudication would require evaluation of strategic military decisions and directives. The court of appeals undertook a careful review of the

claims and defenses in this case and concluded that the case *might* require evaluation of military decisions, depending on the outcome of further proceedings in the district court. It therefore remanded for that court to decide in the first instance what law governs, which in turn will determine what has to be litigated and, therefore, whether this case can proceed. The court of appeals' decision to remand the case for that purpose is unexceptionable and is in accord with the decisions of every other circuit that has addressed similar issues.

Likewise, the court's decision that the combatant-activities exception does not preempt this state-law negligence suit is also correct and in accord with the decisions of the two other circuits that have addressed the issue.

This case arises in an especially hypothetical interlocutory posture, in which KBR may, in fact, still prevail on the very political question issue it seeks to present. Such a result would obviate any need for this Court to enter uncharted constitutional waters in construing whether and how the political question doctrine applies to bar state-law suits against private parties. Further review is unwarranted.

I. The Decision Below Correctly Applied the Settled Test for Evaluating Whether a Case Presents a Nonjusticiable Political Question, in Accord with Decisions of Other Courts of Appeals

A. The Courts of Appeals Are Consistent in Their Approach to Nonjusticiability

The political question doctrine is a "narrow exception" to the judiciary's "responsibility to decide cases properly before it." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1427 (2012). Each of the few courts of appeals that have addressed whether suits against private contractors are nonjusticiable has applied the same test for ascertaining the presence of a political question. Using factors originally set forth in *Baker* v. *Carr*, that test focuses on whether "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department[ ] or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon* v. *United States*, 506 U.S. 224, 228 (1993) (quoting *Baker,* 369 U.S. at 217); *see also* Pet. App. 7.

KBR acknowledges that the Third and Fifth Circuits use the same test to decide whether there is a political question. But it argues that the Third Circuit's decision conflicts with those of the Fourth and Eleventh Circuits in *Carmichael* and *Taylor*. Pet. 16. In fact, there is no conflict with either decision. Any variation in results turns on whether the respective facts, claims, and defenses in particular cases, analyzed under the applicable state law, require a

forbidden evaluation of military decisions. Moreover, other decisions of the Fourth and Eleventh Circuits that are not cited by KBR further establish those circuits' agreement with the Third Circuit.

1. **Eleventh Circuit**. In *Carmichael*, a soldier's wife sued KBR for severe brain injuries her husband suffered when he was thrown from a KBR truck traveling in a military convoy through an Iraqi war zone. 572 F.3d at 1275-78. Because the convoy route was extremely dangerous, with bad roads and frequent insurgent attacks, navigating it "called for delicately-calibrated decisions based on military judgment, experience, and intelligence-gathering." *Id*. at 1282. The complaint alleged that the accident was caused by the KBR driver's negligence, but KBR argued that litigating the claim would necessarily involve questioning military decisions. *Id.* at 1278-79.

On *Carmichael*'s extreme facts, both the district and appellate courts agreed with KBR. Because of the dangerous circumstances, the military exercised "'plenary control,'" dictating "every imaginable aspect of convoy operations," including how the driver was to carry out the mission. *Id.* at 1276, 1277 n.5 (citation omitted); *see also id.* at 1279, 1281.[6] The

[6] The military exclusively controlled the convoy's date and departure time; the number of vehicles in the convoy; its overall speed; its exact route; how much fuel each vehicle carried; each vehicle's speed; the distance between vehicles; and all security measures, including who should wear seatbelts and when drivers could stop for rest, comfort, or personal relief. *Carmichael*, 572 F.3d at 1277 & n.5, 1281, 1286.

operation was "thoroughly pervaded by military judgments and decisions." *Id*. at 1282-83. The Eleventh Circuit therefore held the suit nonjusticiable because it would "require reexamination of many sensitive judgments and decisions entrusted to the military in a time of war." *Id.* at 1281.

The court further held that the plaintiff's claims could not be resolved according to "'judicially discoverable and manageable standards'" due to the "highly unusual circumstances under which the accident occurred," including the transport of jet fuel on a route "'notorious for lethal insurgent activity.'" *Id.* at 1279 (citations omitted). The "familiar touchstones" of "common sense and everyday experience" that a jury ordinarily uses in determining reasonableness would "have no purchase" in circumstances dramatically different "'from driving on an interstate highway or county road.'" *Id*. at 1289 (citation omitted). Therefore, the Eleventh Circuit held that the plaintiff's claims were barred by the political question doctrine. *Id.* at 1275.

KBR notes that the Eleventh Circuit took into account the possibility that military judgments would be implicated even though the plaintiff alleged only that KBR, not the military, had been negligent. Pet. 29. KBR argues that this case is identical, because KBR claims that the military's actions were a proximate cause of Sergeant Maseth's death. Pet. 29. But KBR ignores the crucial underpinning of the Eleventh Circuit's ruling: under Georgia law, "there may be

more than one proximate cause of an injury," which might require assessing the military's negligence to allocate fault. *Carmichael*, 572 F.3d at 1288.[7]

The Eleventh Circuit's conclusion is no different from the Third Circuit's acknowledgement that this case might turn out to be nonjusticiable if the district court determines on remand that Texas or Tennessee law applies and that the facts require fault to be apportioned between the military and KBR. *See* Pet. App. 25-28, 28 n.11. But since Pennsylvania law does not permit such apportionment, *see* Pet. App. 33, the same principles dictate that if Pennsylvania law applies, this case can proceed.

KBR's error on this point also illustrates its misunderstanding of the relevance of the choice-of-law determination. State law does not control the political question inquiry. But, as in any state-law tort suit, state law dictates which claims and defenses

[7] The Eleventh Circuit said that its analysis "would remain the same regardless of which state's law applied," on the supposition that state law is "uniform[ ]" regarding proof of negligence. *Carmichael*, 572 F.3d at 1288 n.13. Whether or not this supposition was correct, the Eleventh Circuit acknowledged the relevance of state law.

Moreover, as this case demonstrates, the law governing *defenses* can vary among states. *See* Pet. App. 16-36. Indeed, KBR does not challenge *any* of the court of appeals' conclusions about the laws of the three states involved here or how these laws vary. There is no indication that the Eleventh Circuit, if faced with a dispute about which of varying laws would govern a given action, would decide the political question issue without considering choice of law.

will be adjudicated, which in turn informs the federal court's determination of whether it would have to second-guess military judgments.

The Eleventh Circuit itself viewed its decision in *Carmichael* as consistent with its previous decision *rejecting* a political question defense in *McMahon* v. *Presidential Airways, Inc.*, 502 F.3d at 1365. *See Carmichael*, 572 F.3d at 1281, 1290-91. While KBR's petition ignores *McMahon* (and the Eleventh Circuit's reconciliation of *Carmichael* and *McMahon*), the Third Circuit explicitly followed *McMahon*. Pet. App. 10-11, 26-27. The differing outcomes of *McMahon* and *Carmichael* resulted from different facts – not a different test.

McMahon involved a suit against a defense contractor following the crash of one of its planes, which provided transportation for the military in Afghanistan. 502 F.3d at 1336. The contract gave the contractor control over and responsibility for "making the decisions regarding the flights" it provided, including supplying all aircraft, personnel, and necessary supervision. *Id.* at 1360. Moreover, the contractor, "and not DOD, was ultimately responsible for ensuring that the flights it provided were operated in a reasonably safe manner." *Id*. at 1361. The court concluded that the contractor had "not shown that resolution of [the plaintiff's] negligence claims w[ould] require reexamination of any decision made *by* the U.S. military." *Id.*; *see also* Pet. App. 11.

That the Third Circuit viewed the instant case as more analogous to *McMahon* than to *Carmichael* does not demonstrate a conflict any more than does the Eleventh Circuit's own holding that *McMahon* was justiciable and *Carmichael* was not. Indeed, *Carmichael* recognized that its decision was compelled by the facts of the case, citing *McMahon* to illustrate that "not . . . all cases involving the military are automatically foreclosed by the political question doctrine." 572 F.3d at 1281.

2. **Fourth Circuit.** The Fourth Circuit's decision in *Taylor*, cited by KBR, Pet. 26-27, and its recent decision in *In re KBR, Inc., Burn Pit Litigation*, No. 13-1430, 2014 WL 868667 (4th Cir. Mar. 6, 2014) ("*Burn Pit*"), are also in accord with the Third Circuit's decision below. Indeed, *Burn Pit* cites and explicitly follows the decision here.

a. In *Taylor*, a Marine sued KBR for injuries allegedly caused by the negligence of KBR technicians. 658 F.3d at 403. He was electrocuted when the technicians turned on a main generator at a base, knowing that Taylor and other Marines were in the midst of installing a second generator to power a "Tank Ramp." *Id.* at 404. Under Virginia law, which the parties agreed applied, contributory negligence was a complete defense to liability. *Id*. at 405 n.6. Thus, assessing KBR's fault might not require review of military decisions, but "an analysis of KBR's contributory negligence defense would 'invariably require the Court to decide whether . . . the Marines made a reasonable decision' in seeking . . . to add

another electric generator at the Tank Ramp." *Id*. at 411-12 (first omission in original) (citation omitted). *Taylor*'s analysis and holding, including its assessment of how rules on apportionment of liability necessarily inform the political question analysis, mirror that of the Third Circuit below. *See supra* pp. 9-10.

b. More recently, the Fourth Circuit explicitly aligned itself with the Third Circuit on these points. In *Burn Pit*, servicemembers alleged that they were injured by KBR's negligent waste disposal and water treatment practices in Iraq and Afghanistan. KBR filed a motion to dismiss on political question grounds, which the district court granted. *Burn Pit*, 2014 WL 868667, at *1-3.

The Fourth Circuit vacated, relying largely on *Taylor* and the instant case and distinguishing *Carmichael* on its facts. It reiterated *Taylor*'s admonition that "'acting under orders of the military does not, in and of itself, insulate [a] claim from judicial review.'" *Id.* at *4 (quoting *Taylor*, 658 F.3d at 411). The court could not "categorize such a case as nonjusticiable without delving into the circumstances at issue," including "'how [the Servicemembers] might prove [their] claim[s] *and* how KBR would defend.'" *Id.* (alterations in original) (quoting *Taylor*, 658 F.3d at 409).

Based on the facts before it, the Fourth Circuit viewed "the military's control over KBR's burn pit and water treatment tasks" as not rising "to the level of

the military's control over the convoy in *Carmichael*," but as "more closely resembl[ing] the situation in *Harris*" (i.e., this case). *Id.* at *8. The Fourth Circuit explained that the Third Circuit "applied a test very similar to the *Taylor* test," and it considered the "military guidance document[s]" in the cases to be "[s]imilar[ ]" in that "the military told KBR what goals to achieve but not how to achieve them." *Id*. The Fourth Circuit therefore saw insufficient evidence of military control to dismiss the plaintiffs' claims on political question grounds. *Id*.

With respect to KBR's defenses, the Fourth Circuit distinguished *Taylor* and followed the Third Circuit's decision below. "[U]nlike the contributory negligence defense at issue in *Taylor*," KBR's proximate cause defense in *Burn Pit* would not necessarily require judicial evaluation of the reasonableness of military decisions. *Id.* at *9. Finding the Third Circuit's reasoning in the instant case "persuasive and applicable," the Fourth Circuit held that "the political question doctrine does not render this case non-justiciable at this time," and vacated the district court's order dismissing the suit "on that basis." *Id.* at *10.[8]

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[8] The Fourth Circuit noted that it was "unclear which state's (or states') law w[ould] ultimately apply" to the multidistrict action involving complaints originally filed in forty-two states, but that KBR's causation defense would not lead to a political question problem "unless (1) the military caused the Servicemembers' injuries, at least in part, and (2) the Servicemembers

(Continued on following page)

3. **Fifth Circuit.** As KBR acknowledges, the Fifth Circuit also agrees with the Third Circuit here. Pet. 29-30 (citing *McManaway* v. *KBR, Inc.*, No. 12-20763, slip op. at 2 (5th Cir. Nov. 7, 2013)). In fact, the Fifth Circuit adopted its position before either its decision in *McManaway* or the Third Circuit's decision in this case.

a. In *Lane* v. *Halliburton*, 529 F.3d at 554 (not cited by KBR), the Fifth Circuit held that a state-law tort action by civilian truck drivers, who were hired by KBR to work in Iraq, was not necessarily barred by the political question doctrine. Because the litigation involved only private parties, the court considered it an "ordinary tort suit," in which "[*Baker*'s] textual commitment factor actually weigh[ed] in favor of resolution by the judiciary." *Id.* at 560. The Fifth Circuit conducted a detailed analysis of all the claims and defenses that would be relevant under Texas law. Based on the record before it, the court concluded that resolution of the action would not necessarily involve "a constitutionally impermissible review of wartime decision-making." *Id.* at 561-68.

b. In *McManaway*, the district court denied KBR's motion to dismiss based on the political question doctrine. No. 12-20763, slip op. at 1. The Fifth Circuit refused to entertain an interlocutory appeal in the absence of a choice-of-law determination by the

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invoke a proportional-liability system that allocates liability based on fault." *Burn Pit*, 2014 WL 868667, at *10 & n.4.

district court (for which it remanded), citing its earlier decision in *Lane* and the Third Circuit's decision in the instant case. *Id.* at 2-3.[9]

B. The Court Below Correctly Rejected KBR's Nonjusticiability Argument at This Stage of the Proceedings

KBR challenges the Third Circuit's holding that adjudicating respondents' tort claims would not require "evaluating the wisdom of the military's decisions." Pet. App. 16. There is no reason for this Court to review the Third Circuit's evaluation of the specific facts that led to that conclusion, which in any event was correct. KBR also challenges the court's holding that whether this case turns out to be nonjusticiable depends on which state's law governs,

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[9] In *Koohi* v. *United States*, which KBR does not mention, the heirs of decedents sued the United States for negligence – and private defense contractors for alleged design defects – after a U.S. naval cruiser shot down a private airliner identified by the cruiser's computerized air defense system. 976 F.2d at 1329-30. The Ninth Circuit rejected the United States' political question arguments and held that "it follows *a fortiori* that the action against the private defendants is [justiciable] as well." *Id*. at 1332 n.3. Indeed, as of the time of its decision, the court had found "no Supreme Court or Court of Appeals decisions which ha[d] dismissed a suit brought against a private party on the basis of the political question doctrine." *Id.* The Ninth Circuit's rejection of the political question argument is consistent with the Third Circuit's rejection here. Nothing in *Koohi* suggests that the Ninth Circuit would have reached a contrary holding in the instant case, and KBR does not argue otherwise.

which must be determined through further proceedings in the district court. Both challenges lack merit.

1. The court of appeals correctly recognized that adjudicating respondents' claims would not require an assessment of military judgments. The court noted that the military did not control KBR's technicians, that work orders lacked detailed instructions, that the military was not involved in responding to work orders, and that KBR employees retained "significant discretion over how to complete authorized work orders." Pet. App. 12; *accord* Pet. App. 72 (finding that "KBR staff responded to work orders without oversight or inspection by the military"). Distinguishing this situation from "the degree of control the military had over the convoy" in *Carmichael*, the Third Circuit rightly found a closer analogy in *McMahon*, where the aviation contractor "retained authority over the type of plane, flight path, and safety of the flight." Pet. App. 11.

More specifically, the court found that respondents' claims "center on KBR's failure to ground or bond the water pump when KBR allegedly installed or maintained the pump." Pet. App. 12. Under either theory (negligent installation or maintenance), KBR's conduct would be judged against "the standard of care set by [its] contract with the military." Pet. App. 13. The claim is not that the military should not have hired KBR, or should not have hired KBR to carry out plumbing and electrical maintenance, or should have hired KBR to perform extensive rewiring, or should have designated Sergeant Maseth's barracks Level

"A" versus Level "B," or any objection related to the military's decisions. Respondents simply claim that KBR negligently performed the work it was hired to do.[10] All of KBR's arguments, *see* Pet. 20-22, about "strategic military judgments" – such as where troops should live, maintaining buildings without comprehensive upgrades, Level "A" versus Level "B" maintenance, and the like – are irrelevant to the negligence issue that would actually be tried in this case.

Not surprisingly, KBR fails to cite a single case in which a defense contractor's alleged negligence has been held nonjusticiable on similar facts. It relies instead on general pronouncements about "military affairs and foreign policy" and this Court's statement that "decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." Pet. 19 (quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)). But those kinds of decisions are not at issue here. This case is about private plumbers and electricians, not soldiers or military police. And unlike the plaintiffs in *Gilligan*, who sought "judicial oversight of training

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[10] Respondents allege:

> (1) KBR had a contractual duty to respond to work orders with safe work, (2) soldiers in Staff Sergeant Maseth's barracks complained of shocks that were reported to KBR in authorized work orders, (3) KBR could have eliminated the risk of electrocution under these work orders, but (4) it was negligent in failing to eliminate or recognize that risk.

Pet. App. 13.

procedures employed by the National Guard," *Lane*, 529 F.3d at 560, respondents simply want to maintain an "ordinary tort suit." *Id.* The Third Circuit's decision to let them do that is correct.

2. KBR improperly faults the Third Circuit for remanding this case to the district court to determine which state's law will govern KBR's defenses, claiming that the decision "[b]adly [m]isconstrue[s] the [p]olitical [q]uestion [d]octrine." Pet. 23. Citing "first principles" but no cases (other than general propositions from *Baker*), KBR argues that the decision below impermissibly makes the "political question doctrine turn[ ] on the nuances of *state* tort law." Pet. 23.

KBR's argument cannot be taken seriously. There is no suggestion in the decision below that the political question doctrine turns on state law. Rather, the Third Circuit applied the federal doctrine – specifically, the criteria outlined in *Baker* – to the case before it, which happens to be a state-law tort action. How state law treats defenses like contributory negligence and related questions of joint-and-several versus proportional liability (including whether liability can be apportioned to nonparties, such as the government here) determines what issues will be tried. Those issues in turn determine whether adjudicating KBR's defenses will require evaluating military decisions. Depending on which state's law applies, some defenses may require such evaluation, whereas others will not. KBR suggests no alternative way to determine

whether the court will have to second-guess military decisions, and there is none.

Accordingly, courts in state-law tort suits against military contractors inevitably take into account which state's law governs. In some cases, the parties agree or the court assumes that a particular law governs. *See*, *e.g.*, *Taylor*, 658 F.3d at 405 n.6; *Carmichael*, 572 F.3d at 1288 & n.13, 1289. Where the applicable law is in doubt or disputed and would be material, the district court must make that determination before the political question issue can be resolved. *See, e.g.*, *Burn Pit,* 2014 WL 868667, at *10 & n.4; *McManaway*, No. 12-20763, slip op. at 2. KBR cites no authority to the contrary.

Nor does KBR cite any authority for its strongly expressed but entirely unsupported opinion that the Third Circuit's approach (and presumably, that of the other courts of appeals) is "illogical," "inequitable," or indeed "absurd[ ]." Pet. 25 & n.6. True, a court might have to apply different rules to different plaintiffs – even in the same case – if, for example, the district court determined that the law of a plaintiff's domicile governed. But that would be true as to any issue in any case in which state law varied, and such variation is familiar in our federal system. *See, e.g.*, *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Indeed, Congress has expressly embraced the use of state tort law, with all its variations, in tort suits against the federal government itself. *See* 28 U.S.C. § 1346(b) (providing for federal tort liability "in accordance with the law of the place where the act or

omission occurred"); *Molzof* v. *United States*, 502 U.S. 301, 305 (1992).

To the extent that the interest of the domicile state is *de minimis* "when the events in question occurred in a war zone halfway around the world," Pet. 25, KBR is free to argue on remand that the law of its state of domicile or any other jurisdiction should govern. But KBR's demand for a "uniform federal rule" for tort suits filed against it, Pet. 25, which supposedly would disregard the elements of actions and defenses under state law, finds no support in decisions of this Court or of the courts of appeals. It should be rejected.

II. The Court of Appeals Correctly Held, in Accord with Other Circuits, That the Combatant-Activities Exception Does Not Preempt This Negligence Suit

The court of appeals correctly held that respondents' suit against a private contractor is not preempted by Congress's decision to preserve sovereign immunity with respect to claims against the United States "arising out of the combatant activities of the military or naval forces . . . during time of war." Federal Tort Claims Act, 28 U.S.C. § 2680(j). The court of appeals expressly applied and followed the D.C. Circuit's decision in *Saleh*, and the Fourth Circuit subsequently agreed with the decision below. *Burn Pit*, 2014 WL 868667, at *18.

Even assuming that military contractors are protected by the combatant-activities exception – notwithstanding Congress's express *exclusion* of contractors from the scope of the FTCA, 28 U.S.C. § 2671 – KBR's negligent installation and maintenance are much further removed from the battlefield and military control than *Saleh*'s interrogation of enemy combatants in a military prison. Indeed, the result in this case follows directly from *Saleh*'s recognition that "tort suits against contractors" operating under "performance-based" contracts "would *not* be preempted under [*Saleh*'s] holding." 580 F.3d at 10 (emphasis added).

A. The Decision Below Does Not Conflict with *Saleh* or Any Other Decision

1.a. *Saleh* involved a suit on behalf of foreign nationals against contractors who had assisted the military with prisoner interrogation at the infamous Abu Ghraib military prison. The D.C. Circuit held that "[d]uring wartime, where a private services 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." *Id.* at 9. Far from disagreeing, the court below "*agree*[*d*]" with *Saleh* "that the statute represents a federal policy to prevent state regulation of the military's battlefield conduct and decisions," and expressly "*adopt*[*ed*] the D.C. Circuit's combatant-activities, command-authority test." Pet. App. 41-42 (emphases added).

b. KBR errs in asserting that the court below nonetheless *applied* the test in a way that is "irreconcilable with the D.C. Circuit's test." Pet. 34. In a passage ignored by KBR, *Saleh* discussed a situation strikingly similar to the one in this case and squarely concluded, as did the Third Circuit, that such a suit would *not* be preempted. Specifically, the D.C. Circuit noted that the military commonly uses a "performance-based statement of work" to be completed by a contractor, under which "the Government does not, in fact, exercise specific control over the actions and decisions of the contractor." 580 F.3d at 10. In cases involving such contracts, the *Saleh* court would not find preemption under its own test:

> Because performance-based statements of work "describe the work in terms of the required results rather than either 'how' the work is to be accomplished or the number of hours to be provided," by definition, the military could not retain command authority nor operational control over contractors working on that basis and thus *tort suits against such contractors would not be preempted under our holding*.

Id. (emphasis added) (quoting 48 C.F.R. § 37.602(b)(1)).

This case involves precisely the kind of "performance-based" work order that the D.C. Circuit held "would not be preempted" under *Saleh*. Respondents allege that KBR negligently installed and maintained the pump that malfunctioned, causing Sergeant Maseth's death. If KBR installed the pump – a factual

question not yet resolved, *see* Pet. App. 6 n.2 – it did so pursuant to a contract under which "any completed electrical work was required to 'operate as originally intended and designed, and in a safe manner.'" Pet. App. 14 (quoting C.A. App. 1644). In *Saleh*'s terms, the "required result[ ]" was a safely functioning pump, and the contract thus provided for a "performance-based" standard of work.

The same result follows with respect to the claim of negligent maintenance. Respondents allege that KBR "should have properly grounded and bonded the pump" in response to several work orders that "complain[ed] of shocks in the same building," Pet. App. 12 n.4 (citing C.A. App. 2013), 15, and that KBR marked as "Finished" or "completed." C.A. App. 2012, 2183-86. As the court of appeals noted, "the relevant contracts and work orders did not prescribe how KBR was to perform the work required of it." Pet. App. 44. Rather, maintenance work orders provided for a "performance-based statement of work," with "quite minimal" further direction from the military. Pet. App. 12 n.4, 15. In sum, *Saleh* held that negligence suits arising out of performance-based contracts like the ones at issue here are not preempted. The Third Circuit's rejection of preemption here follows directly from *Saleh*.

2. KBR does not contend that the preemption holding in this case conflicts with any decision of any other court of appeals. Indeed, the Fourth Circuit recently "agree[d] with the Third Circuit's determination" in the instant case and "adopt[ed] the *Saleh*

test." *Burn Pit*, 2014 WL 868667, at *18. Applying that test, the Fourth Circuit explained, would require a determination "whether the military retained command authority over KBR's waste management and water treatment activities" at issue in *Burn Pit*. *Id*. at *19. But because "the extent to which KBR was integrated into the military chain of command [was] unclear" for those activities, the court remanded for further proceedings to resolve that crucial issue. *Id*. Like the decision in this case, *Burn Pit* follows *Saleh*. There is no conflict.[11]

B. The Court of Appeals Correctly Held That the FTCA Does Not Preempt This Suit

1. As an initial matter, Congress excluded contractors from the scope of the FTCA by expressly providing that the statute's key term – "Federal agency" – "does not include any contractor with the United States." 28 U.S.C. § 2671. Congress could, of course, have chosen to provide special immunities for some or all military contractors, KBR included, or for

[11] In *Koohi*, the Ninth Circuit held preempted a claim against a contractor based on its role in the U.S. military's fatal interception of an Iranian airliner. 976 F.2d at 1336. *Koohi* explained that preemption extends to claims by "those against whom force is directed as a result of military action" in "wartime encounters." *Id*. at 1337. The decision below noted that *Koohi* did not address other types of claims, such as those at issue here. Pet. App. 41 n.16. KBR does not mention *Koohi* or argue that the decision here conflicts with *Koohi*.

government contractors more generally. It did not. In light of that congressional decision, courts should tread cautiously before extending exceptions of the FTCA – which, after all, define the scope of sovereign immunity of the *government*, not of a private contractor – to exempt private contractors from suit.[12]

2. The *Saleh* test, as applied below, grants military contractors limited immunity from state tort actions while recognizing that significant opposing policy interests disfavor immunity. The first factor – "whether the contractor is integrated into the military's combatant activities – ensures that preemption occurs only when battlefield decisions are at issue." Pet. App. 43. A contractor performing duties unrelated to combat operations has no claim to protection from a provision that limits even the government's exemption to only those claims "arising out of the combatant activities of the military . . . forces . . . during time of war." 28 U.S.C. § 2680(j). Indeed, respondents argued below that their negligence claims, based on KBR's routine plumbing and electrical work in military barracks, did not arise from a "combatant activity" of the "military." Pet. App. 44.

[12] KBR argues that this suit should be preempted because otherwise, liability costs "will ultimately be 'passed through to the American taxpayer.'" Pet. 32 (quoting *Saleh*, 580 F.3d at 8). Of course, potential liability for negligence also provides an incentive for contractors to avoid liability costs by exercising adequate care in the first place. In any event, this rationale would dictate total immunity for all government contractors, a policy Congress rejected.

The Third Circuit's rejection of respondents' argument is, if anything, overly protective of KBR and reads "combatant activities" too broadly, to the detriment of soldiers and civilians and the government's interest in their protection.

The second *Saleh* factor – "whether the contractor's actions were the result of the military's retention of command authority – properly differentiates between the need to insulate the military's battlefield decisions from state regulation and the permissible regulation of harm resulting solely from contractors' actions." Pet. App. 43. In this case, the military did not control KBR's specific actions, but simply contracted for routine plumbing and electrical work. Preempting this wrongful death action would disserve not only the military's interest in getting the job done properly, but also state and private interests in life, health, and safety. Moreover, given the military's lack of involvement in the details of how maintenance was performed, preemption would provide no corresponding benefit in terms of protecting military decisionmaking.[13]

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[13] In *Boyle* v. *United Technologies Corp.*, which involved an alleged design defect, this Court accepted a so-called contractor defense only where, *inter alia*, "the United States approved reasonably precise specifications" and "the equipment conformed to those specifications." 487 U.S. at 512. That rule ensured that the defense, based on the federal policy underlying the "discretionary function" exception to the FTCA, would extend only as far as necessary to protect the military, but not so far as to cover cases where "the design feature in question" was "merely

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3. Quoting one phrase from *Saleh* out of context, KBR argues that the policy underlying the combatant-activities exception "is simply the elimination of tort from the battlefield." Pet. 31 (quoting 580 F.3d at 7). But "[n]o legislation pursues its purposes at all costs," regardless of the other interests that may be implicated. *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-26 (1987) (per curiam)). *Saleh* itself elsewhere recognized that tort suits against contractors involving "performance-based statements of work" like the one here, are *not* preempted. 580 F.3d at 10. More broadly, *Saleh* acknowledged "that a service contractor might be supplying services in such a discrete manner – perhaps even in a battlefield context – that those services could be judged separate and apart from combat activities of the U.S. military." *Id.* at 9.

Beyond that, the distinctions between this case and *Saleh* illustrate the soundness of the decision below. *Saleh* involved claims that private contractors, who provided "interrogation and interpretation services" to the military and whose employees "were combined with military personnel for the purpose of performing the interrogations . . . at the Abu Ghraib

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[considered] by the contractor itself" rather than by the government. *Id*. Analogously, the instant suit is based on the claim that KBR's negligence caused Sergeant Maseth's death, completely apart from any supervision or approval – much less specification or direction – by the government.

prison complex," had tortiously mistreated enemy prisoners. *Id.* at 2. It thus implicated how this nation's foes should be treated, an issue at the heart of sensitive wartime decisionmaking. This case, by contrast, involves the alleged negligence of only KBR's own employees, who were solely responsible for maintaining a water pump and fixing all electrical and plumbing defects brought to their attention in the barracks.

Moreover, the contract in *Saleh* gave the contractor only "*some* limited influence over [the] operation" of dealing with enemy combatants at the prison. *Id.* at 8 (emphasis in original). Here, in contrast, KBR's contract assigned the company sole responsibility for responding to work orders and ensuring that plumbing and wiring operated safely and effectively. The military played no role in the actual performance of the tasks at issue.[14]

4. Finally, KBR suggests that the court of appeals should have adopted the government's "even broader" proposal, articulated in a prior case, that all suits against private contractors should be preempted as long as the contractor acted within the scope of its

[14] Even if the military sometimes, and in some places, "'plugged its war-time defensive instruments used to ward off enemy attacks into the electrical facilities that KBR was paid to maintain,'" Pet. 34 (quoting Pet. App. 159-60), there is no evidence or suggestion that the showers in the barracks in this case were connected, physically or otherwise, to any such defensive instruments.

contract – even if it violated the contract's precise terms. Pet. 32-33. No court has adopted that rule, which is facially inconsistent with Congress's decision to exclude contractors from the FTCA and with *Boyle*'s express refusal to adopt such a broad contractor defense. *See supra* p. 33 n.13.

III. This Case Is Interlocutory and Does Not Squarely Implicate Any Disagreement Among the Circuits

The interlocutory posture of this case makes it a poor vehicle, and would do so even if the circuits actually disagreed on either of the questions presented. First, the key political question issue on which KBR seeks certiorari is presented only contingently, since that question might be mooted if Tennessee or Texas law applies. Second, neither alleged conflict is squarely at issue on the facts of this case. A far better vehicle would involve not ordinary plumbing and electrical maintenance, but decisions truly related to military combat.

1. In keeping with the final-judgment rule, this Court strongly disfavors review of piecemeal or interlocutory appeals such as the Third Circuit ruling at issue here. Instead, it "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (citing *Am. Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384

(1893)). The interlocutory posture is "a fact that of itself alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Interlocutory review in this case is particularly ill-advised, because the key *legal* question KBR attempts to present was not itself finally resolved against KBR.

Here, KBR seeks review of the question "[w]hether the political question doctrine bars state-law tort claims . . . when adjudication of those claims would necessarily require examining sensitive military judgments." Pet. ii. If Tennessee or Texas law applies, that question may not be presented at all, because the court of appeals *agreed* with KBR that, depending on the facts, adjudication may well require examining sensitive military judgments and claims for damages (other than perhaps nominal damages) would thus be barred. *See supra* pp. 2-3, 9-10. Only if Pennsylvania law applies would KBR's question necessarily remain in the case.

This Court should not undertake review in that hypothetical posture when the very question on which KBR seeks review may be resolved on remand in KBR's favor. This is especially true because review here would require the Court to address constitutional questions of first impression concerning whether and how the political question doctrine applies in private suits against military contractors or other private entities working with the government.

Moreover, key factual disputes have not been resolved, including who installed certain plumbing and electrical equipment, whether and how KBR responded to work orders, and what standard of care the contracts actually prescribed. KBR could thus prevail on remand on any number of legal or factual grounds, mooting its arguments here. If KBR is ultimately found liable, it will be able to argue its points – together with any others that may arise during the proceedings – in a single petition following the entry of final judgment. *See Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

2. This case is also a poor vehicle because its facts are very different from those in the rare cases in which courts of appeals have shielded private contractors from tort liability based on the political question doctrine or the combatant-activities exception. KBR's arguments hinge on equating a private military contractor with the federal government. But the political question doctrine is designed to protect *governmental* policymaking, and the combatant-activities exception protects combat decisions made by *the government's* "military or naval forces, or the Coast Guard." 28 U.S.C. § 2680(j). Indeed, the FTCA, by its terms "does not include any contractor with the United States." 28 U.S.C. § 2671.

In other words, both questions presented presuppose that a private contractor stands in the shoes of the government, notwithstanding section 2671's express exclusion of contractors. That presupposition

might be plausible in a case like *Carmichael*, where military commanders specified how and when the driver of a vehicle in a military convoy could proceed through a notoriously dangerous war zone frequently attacked by insurgents. It might also be plausible in *Saleh*, where the contractors' employees, together with military and CIA personnel, interrogated enemy combatants at Abu Ghraib.

But here, respondents seek to hold KBR liable for the negligent acts of its maintenance workers, just as they would any civilian plumbing or electrical contractor. The military submitted work orders asking KBR to remedy a problem but did nothing further to address complaints. *See* Pet. App. 72 (finding that "KBR staff responded to work orders without oversight or inspection by the military"). Only a breathtakingly broad ruling, treating all government contractors as if they themselves were sovereigns, could give KBR the result it seeks here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 11, 2014