No. 13-817

In the Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC.,
Petitioner,

v.

CHERYL A. HARRIS, Co-Administratix 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 OF DRI - THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

J. MICHAEL WESTON*
PRESIDENT
DRI - THE VOICE OF THE DEFENSE BAR
55 West Monroe
Chicago, IL 60603
(312) 759-1101
mweston@lwclawyers.com

JERROLD J. GANZFRIED
HOLLAND & KNIGHT LLP
800 17th Sreet, NW
Suite 1100
Washington, DC 20006
(202) 469-5151
jerry.ganzfried@hklaw.com

Counsel for Amicus Curiae
*Counsel of Record

February 2014

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Amicus curiae DRI — The Voice of the Defense Bar ("DRI") is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly files *amicus curiae* briefs in cases that raise issues of concern to its members.

Clear rules that can be readily understood and implemented benefit the civil justice system in multiple ways. In addition to advancing the goals of prompt, orderly, certain and predictable resolution of disputes, clear rules provide normative standards that guide conduct in orderly, certain and predictable ways. This case arises in a context where the demands of orderliness, certainty and predictability are most compelling – a military contractor in a combat zone on foreign soil. But the

---

[1] Letters of consent have been filed with the Court. Counsel of record received notice of DRI's intent to file this *amicus* brief at least 10 days prior to the due date. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part, and no person or entity, other than the *amicus curiae,* its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

decision of the Third Circuit embraces a regime of uncertainty that subjects the defendant to multiple, diverging, conflicting standards of conduct and duties of care that vary depending on the State of domicile of each member of the U.S. military stationed overseas.

The judgment of the Third Circuit in this case, which conflicts with decisions of this Court and decisions of other federal courts of appeals, poses substantial practical problems in an area of law that touches on vital areas of national security, foreign relations and military affairs. Certiorari would be warranted even if these practical problems affected only the litigation of similar tort cases. But, the impact of the decision below also affects vital issues of separation of powers, placing the judiciary in conflict with both the Executive Branch (which conducts foreign and military policy) and the Legislative Branch (which crafted statutory immunities and prescribed specific remedies for members of the Armed Forces injured in the course of their service). This Court's review is warranted to restore the appropriate constitutional balance.

INTRODUCTION

This case arises in a context in which the need for a uniform, federal standard is at its zenith. A military contractor engaged by U.S. forces. On foreign soil. In a combat zone.

And, yet, the Third Circuit concluded that constitutional and federal statutory immunity did not turn on a uniform federal standard, but on the

differing standards for tort liability in each State to which an individual service member might be connected. Thus, the Third Circuit offers a potential remedy for soldiers from Pennsylvania that it would deny to soldiers from Texas and Tennessee. If that fragmentation of standards were not enough, the Third Circuit could not resolve which of three States provided the standard for judging the claims presented by the family of Sgt. Maseth. How is a contractor operating subject to military control in a battlefield situation supposed to discern the applicable standard of care if an appellate court is unable to make that determination five years later? And, as a practical matter that is central to this case, how is a contractor in a combat zone supposed to comply with a judicially-imposed standard of care that requires conduct rejected by the military commanders on the scene?

The correct answer is that the contractor's military-governed actions are not subject to state law tort litigation or liability. Governing precedent dictates that such combat zone conduct is protected by the constitutional principles of federalism, separation of powers and the political question doctrine, and by the statutory immunities prescribed in the Federal Tort Claims Act ("FTCA"). Moreover, service members and their families are protected by the statutory compensation system Congress created that displaces judicially-created remedies.

As the petition for a writ of certiorari explains, courts nationwide have relied on multiple grounds for rejecting battlefield tort claims against military contractors. Grounds for dismissal include, among

others, the political question doctrine, the principle of derivative sovereign immunity, the combatant activity exception to the FTCA, and the exclusive remedy prescribed by the Defense Base Act. Some courts, like the Third Circuit in this case, have allowed such claims to proceed. In an area of law that touches so directly on core federal constitutional issues such as the Supremacy Clause and separation of powers, and that affects on a daily basis United States military operations in combat zones, this Court should not await further percolation of the issues in the lower courts. Percolation has its costs.

REASONS FOR GRANTING THE PETITION

This case arises at the intersection of United States foreign relations and military affairs, a confluence of circumstances that presents the legal issues in a context where the federal interest is at its apex.

Even in circumstances involving incidents within the United States, this Court has held "[t]he complex subtle, and professional decisions as to the composition, training, equipping and control of a military force are essential professional military judgments." *Gilligan v. Morgan,* 413 U.S. 1,5 (1973). It is, as the Court explained "difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches" and "difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.* at 10. When the geographic locus of the military activity is transported to a war zone on foreign soil, the

constitutional imperatives that informed this Court's decision in *Gilligan* are even more compelling.

Sound analysis will recognize that the military/foreign relations setting of this case mandates the following conclusions:

(1) that federal law – not state law – must provide the governing standard. This is so both because the context in which this case arises is squarely within the realm that the Constitution assigns to the federal government, and because a single, uniform standard is a practical necessity if all U.S. service members are to be treated equally.

(2) that, within the federal constitutional system, decisions for the day-to-day activities of United States troops in a war zone are committed to the other branches of government. The limited judicial role does not embrace second-guessing such real-time military decisions as the housing and equipping of our troops.

(3) that, consistent with the dual constitutional imperatives of the Supremacy Clause and separation of powers that preclude the vagaries of differing state tort laws and judicially-created remedies, Congress has crafted uniform federal remedies available to all who serve in the military. Expressly excluded from some of those statutory remedies are state-law causes of action in tort for injuries arising out of combatant activities.

For the reasons explained in the petition for a writ of certiorari, the Third Circuit's mistaken view of these constitutional and statutory standards

provide ample basis for this Court's review. There are, in addition, compelling practical reasons for certiorari to be granted now. Courts nationwide have relied on multiple grounds for deciding whether to dismiss combatant activity tort claims. Further litigation in the lower courts subjects the government and the contractors upon whom the military depends in sensitive combat zone activities to precisely the second-guessing, uncertainty and conflicting standards that should be barred as a matter of Constitutional and statutory law.

I. By Making Application of the Political Question Doctrine Turn on State Law Tort Standards, the Decision of the Third Circuit Conflicts with Decisions of Other Appellate Courts, with Constitutional Principles of Federalism and Separation of Powers, and with the Reality of Battlefield Operations.

The Constitution confers authority over the military and over foreign relations on the Executive and Legislative Branches of the federal government. U.S. CONST. Art. I, §8, Cls. 11-16; Art. II, §2, Cl. 1; Art. VI, Cl. 2. That structural assignment by the Constitution has several pivotal implications for this case. First, the federal interest predominates over the states. *See, e.g., American Insurance Ass'n v. Garamendi,* 539 U.S. 396 (2003); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000); *Zschernig v. Miller,* 389 U.S. 429, 432 (1968); *Hines v. Davidowitz,* 312 U.S. 52 (1941); *United States v. Belmont,* 301 U.S. 324, 331 (1937); *Chae Chan Ping v. United States,* 130 U.S. 581, 605 (1889). Second, the Judicial Branch is constitutionally bound to

accept the primacy of the Executive and Legislature on these questions. *See, e.g., Department of the Navy v. Egan,* 484 U.S. 518, 530 (1988); *Gilligan,* 413 U.S. at 5, 10; *Williams v. Suffolk Ins. Co.,* 38 U.S. (13 Pet.) 415, 420 (1839).

In holding that state-law tort standards determine the applicability of the political question doctrine to military personnel serving in combat zones overseas, the Third Circuit departs from settled principles. At a doctrinal level, the Third Circuit's approach is at odds not only with the constitutionally-mandated structure of government, but also with the basic underpinnings of tort theory. Contrary to the decision below, the D.C. Circuit has explained that "all of the traditional rationales for *tort* law – deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors – are singularly out of place in combat situations, where risk-taking is the rule." *Saleh v. Titan Corp.* 580 F.3d 1, 7 (D.C. Cir. 2009) (emphasis in original). The guidance of the D.C. Circuit is particularly apt in this case, where the military authorities in place in Iraq rejected petitioner's recommendation for other work to be done on the facility. Pet. App. 67, 71-72; *see* Pet. 7.

Beyond the analytical shortcomings of the Third Circuit's decision are practical ramifications that make its decision especially deleterious. Military authorities need to know that contractors essential to the United States' mission are under their control. When military decision-makers conclude that local exigencies call for Level B electrical maintenance, it is essential that the

contractor provide exactly that. *See* Pet. App. 67, 71-72. If the contractor proposes Level A maintenance and the military command rejects the proposal, the contractor has its instructions that must be followed. If commanders in the field in Iraq conclude that the standard is Level B, there is no room for a court to determine – years after the fact – that the contractor should, nevertheless, have performed work to a standard that would be acceptable in Texas, or Tennessee, or to an altogether different standard that would be acceptable in Pennsylvania. The decision below replaces the single, clearly established, military-selected standard with a pastiche of varying state-law approaches. As a result of this unwarranted dependence on differing state tort schemes, even now — five years after the events — the Third Circuit cannot say which State's law applies.

II. The Application of State Law Tort Standards and Remedies Conflicts with Federal Statutory Provisions that Treat Military Personnel Equally.

Consistent with the Constitutional provisions that entrust these issues to the Executive and Legislative Branches of the federal government, statutes governing the military provide the roadmap for the correct disposition of this case. Key among these are the "combatant activities exception" to the FTCA, which keeps in place the federal government's sovereign immunity with respect to "claims arising out of the combatant activities of the military … during time of war." 28 U.S.C. §2680(j). This statutory provision has been viewed as equally

applicable to on-site battlefield contractors. *E.g., Saleh,* 580 F.3d at 7 ("the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield"), *id.* at 9 ("During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted"); *see also, Al Shimari v. CACI Int'l, Inc.,* 679 F.3d 205, 236 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting) ("Congress wanted to keep tort law out of the battlefield regardless of a defendant's status as a soldier or a contractor"); Defense Production Act of 1950, 50 U.S.C. app. §2071(a).

The federal government has expressed the view that "state tort law claims against contractors are generally preempted if similar claims brought against the United States would come within the FTCA's combatant activities exception and if the alleged actions of the contractor and its personnel occurred within the scope of their contractual relationship with the government, particularly if the conduct occurred while contractor personnel were integrated with the military in its combat-related activities." Br. of United States as Amicus Curiae, *Al Shimari v. CACI Int'l, Inc.,* No. 09-1335, 2012 WL 123570 (4th Cir. Jan. 14, 2012) at 2-3.

Also consistent with the uniquely federal interest, Congress has taken additional steps to displace the uncertainties and vagaries of state tort law as a potential remedy for military personnel. The Veterans Benefits Act, 38 U.S.C. §§1101, *et seq.,*

provides certain and predictable compensation for injuries suffered in military service. *See United States v. Johnson,* 481 U.S. 681, 690 (1987) (service members injured or killed in service to the United States are entitled to statutory disability and death benefits that "compare extremely favorably with those provided by most workman's compensation statutes") (quoting *Feres v. United States,* 340 U.S. 135, 145 (1950).

Congress has addressed the subject of battlefield injuries in additional ways that preclude the result reached by the Third Circuit. For example, the Defense Base Act ("DBA"), 42 U.S.C. §1651 created an exclusive, federally-administered, contractor-funded, compensation system for contractor personnel injured or killed overseas while performing national defense activities. That statute expressly prohibits state tort liability in favor of the exclusive federal statutory remedy. 42 U.S.C. §1651(c) (incorporating the exclusive remedy provision of the Longshore and Harbor Workers' Compensation Act, and stating further that an employer's liability under the no-fault statutory compensations scheme "shall be exclusive and in place of all other liability … under the workmen's compensation law of any State, Territory, or other jurisdiction"). Even in such circumstances as Sgt. Maseth's tragic accident, there is no latitude for judicial override of the compensation remedies and limits set by Congress. *See Walters v. National Ass'n of Radiation Survivors,* 473 U.S. 305, 319-34 (1985) (upholding statutory maximum fee recovery for attorneys representing veterans in benefits cases).

Among other objectives, these statutes are designed to eliminate tort law, tort liability, and the threat of tort litigation from the battlefield. They do so by creating comprehensive, exclusive remedies without the need for protracted litigation or judicial second-guessing of military battlefield decisions that resulted in injury or death. Unlike the decision of the Third Circuit, which would provide a remedy to military personnel from Pennsylvania that is denied to service members from Texas and Tennessee, Congress created a uniform system that treats all injured veterans equally, regardless of the State from which they hail.

III. Practical Exigencies Warrant this Court's Review.

A grant of certiorari in this case would bring much needed resolution to pressing Constitutional and statutory issues on which the courts of appeals are divided. That alone, should suffice to warrant review.

Additional factors make the case for certiorari even more compelling. One basic concern underlying the issues in this case is that the primacy of the Executive and Legislative Branches will be undermined by the judicial imposition of state-law tort standards on military and foreign relations decisions made on battlefields overseas.

But concern is not simply that different courts have taken different analytical routes to the same result of protecting the overarching federal interest. As this Court has recognized, even the pendency –

indeed, even the mere *threat* – of litigation has a chilling deleterious effect on the conduct of sensitive federal activities. For example, this Court observed in *United States v. Stanley,* 483 U.S. 669, 682 (1987), that the prospect of "compelled depositions and trial testimony by military officers concerning the details of their military commands" threatens government interests. *See, Stencil Aero Enginering Corp. v. United States*, 431 U.S. 666 (1977). *Cf., Chappell v. Wallace,* 462 U.S. 296, 299, 304 (1983) (rejecting *Bivens* remedy against a service member's superior officers and noting the harmful effects on military effectiveness of litigation over injuries sustained in the course of duty). Comparable considerations informed this Court's holdings in *Feres v. United States,* 340 U.S. 135 (1950), and *Boyle v. United Tech. Corp.,* 487 U.S. 500 (1988).

The D.C. Circuit explained in *Saleh,* 580 F.3d at 8, that "such suits will surely hamper military flexibility and cost effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations." Similarly, Judge Wilkinson's dissent from the Fourth Circuit's en banc decision in *Al Shimari* (679 F.3d at 229, 243) catalogued an extensive list of adverse consequences flowing from the mere pendency of contractor-in-the-battlefield litigation: contractors will have to "pause[] to consider their potential liability … before agreeing to supply the military needed personnel under the government contract;" the "facilitation of tort remedies chills the willingness of both military contractors and the government to contract;" prospective tort suits increase the costs of employing contractors on the battlefield and to the "Defense

Department in an era of cost consciousness, the threat of tort liability can chill both the government's ability and willingness to contract by raising the price of partnering with private industry…;" "[s]o long as the executive branch could control contractual performances through contract law, it had little reason to eschew valuable partnerships with private enterprise," but if "third parties can pull contractors and their military supervisors into protracted legal battles, we can expect a distortion of contractor and military decisionmaking to account for that contingency."

In a series of *amicus* briefs in this Court and several circuit courts, the United States has expressed related concerns. *E.g.,* Br. of the United States as Amicus Curiae, *Carmichael v. Kellogg, Brown & Root Service, Inc.,* No. 09-683 (S. Ct. May 2010) at 18 ("the need for certain evidence in a suit against a private contractor may itself give rise to serious concerns (*e.g.,* classified information in certain circumstances, burdens on the military"), 20 ("suit by or on behalf of an injured service member against a contractor may also effectively implicate the service member's relationship with his commander or other military officials, especially when the contractor's operations are integrally related with military operations"); Br. of the United States as Amicus Curiae, *Fisher v. Halliburton,* Nos. 10-20371, 10-20202, 2010 WL4619492 (5th Cir. Sept. 16, 2010) at 3 ("To support ongoing military operations in Iraq and Afghanistan, the United States relies heavily on civilian contractors, and the potential tort liability of contractors arising from the performance of functions in this context is thus a

matter of considerable importance to the United States, particularly because increased tort litigation risk would, at a minimum, cause prospective contractors to increase the prices they charge the government and could dissuade them from offering their services altogether"); Br. for the United States as Amicus Curiae, *Al Shimari, supra,* at 2 (among the "significant federal interests at stake" are "ensuring that state-law tort litigation does not lead to second-guessing military judgments, protecting the primacy of existing tools for the government to regulate the conduct of contractors working on behalf of the United States (especially where civilian contractors work alongside service members in the military's conduct of combat-related activities)" and the "federal interest in protecting the conduct of the military's combat operations from interference by litigation based on state tort law").

In short, the adverse impact of tort claims against battlefield contractors is well documented. Contractors and the United States government have alerted the courts to the adverse consequences that flow from the mere potential for state law tort claims. Many courts have taken heed. Some, like the Third Circuit, have not.

As the petition explains, the Third Circuit decision in this case conflicts with the rulings of other courts that correctly perceived the constitutional, statutory and practical reasons for rejecting state-law tort claims against military contractors in these circumstances. In rejecting such claims against contractors, courts have articulated multiple rationales, invoking concepts that range

from Constitution-based federalism under the Supremacy Clause, separation of powers and the political question doctrine, to statutory-based exclusive administrative remedies, preemption of state-law remedies, and legislative exceptions to the waiver of sovereign immunity, to common law and judicial-based defenses, such as shared or derivative sovereign immunity, and the government contractor defense. As these various rationales sometimes converge, the lines that separate one from another may seem difficult to discern. But, they all gravitate toward recognizing the deleterious impact of imposing state-law tort standards on military contractors serving the United States in overseas battlefields.

In contrast to the decisions of other courts, the Third Circuit concluded that core issues of Constitutional law – on which nationwide uniformity is essential to the foreign relations and military affairs of the United States – should nonetheless be governed by the differing tort law regimes of each State. There is no warrant for state law to trump federal law on these sensitive subjects. Nor is there any convincing reason to wait for additional line-drawing by the circuit courts. Since even the mere possibility for judicial second-guessing of military battlefield decisions creates adverse consequences, further percolation of the issues comes at a steep cost.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

J. MICHAEL WESTON*
PRESIDENT
DRI - THE VOICE OF
THE DEFENSE BAR
55 West Monroe
Chicago, IL 60603
(312) 759-1101
mweston@lwclawyers.com

JERROLD J. GANZFRIED
HOLLAND & KNIGHT LLP
800 17th Sreet, NW
Washington, DC 20006
(202) 469-5151
jerry.ganzfried@hklaw.com

Counsel for *Amicus Curiae*

February 2014

*Counsel of Record