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 Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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Respondents characterize this case as a "straightforward tort action between private parties." It is anything but. "Straightforward" tort actions can be adjudicated based on state-law standards that are designed to apportion duties and liability in ordinary civilian life. This case, by contrast, involves events that occurred in a war zone halfway around the world that are inexorably intertwined with sensitive military judgments. State tort law is categorically unsuited to the resolution of such claims, which is why Respondents' claims are both non-justiciable and preempted.

Respondents' defense of the Third Circuit's approach to the political question doctrine highlights its shortcomings and the split among the circuits, but also underscores the importance of a uniform rule of combatant-activities preemption. Respondents claim that nuances of state law—*i.e.*, whether damages are calculated based on proportional or joint-and-several liability—are *dispositive* in determining whether claims against a contractor are justiciable. And they contend that there is nothing anomalous about cases arising out of the same events on a foreign battlefield being decided in a radically different manner based on the happenstance of a soldier's residence when not serving abroad.

Respondents are wrong on the law. The political question doctrine is a federal constitutional principle that should not turn on the state-law formula for apportioning damages. As the Eleventh Circuit has correctly held—but the Third and Fourth Circuits have failed to recognize—if a battlefield contractor

offers sufficient evidence that resolution of the case requires judicial review of sensitive military decisions, then the case must be dismissed regardless of any lingering choice-of-law issues.

But if Respondents were correct that the political question doctrine turns on state law, then the need for a clear and consistent rule of combatant-activities preemption would be that much more imperative. The uniform that counts in a foreign war zone is that of the United States military. Contractors cannot look beyond that uniform to divine the domicile of the soldiers with whom they interact, and their liability should not turn on that happenstance. There is no practical way a battlefield contractor could comply with 51 different standards based on each soldier's home-state tort law, and it would be highly damaging to their mission-critical activities to even try.

Respondents' contention that there is no split on the preemption issue cannot be squared with the Third Circuit's statement that "we do not go as far as the D.C. Circuit's holding that [the combatant-activities exception] reveals a policy of 'the elimination of tort from the battlefield.'" Pet.App.41. Although the Third Circuit tried to downplay the split, the Fourth Circuit candidly acknowledged a three-way split between the D.C., Third, and Ninth Circuits, and aligned itself with the Third Circuit. *See In re KBR Burn Pit Litig.*, 744 F.3d 326, 347-48 (4th Cir. 2014). And even Respondents concede that the Third Circuit squarely rejected the government's proposed test on an issue of paramount importance to the United States.

Respondents are also wrong to suggest that this Court should await further proceedings in the district court. The Third Circuit conclusively held that Respondents' state-law claims are *not* preempted. That critical issue cannot get any riper. The circuits are also split on what renders a contractor-on-the-battlefield case non-justiciable, and whether a remand for a detailed choice-of-law inquiry is necessary or appropriate. Thus, pointing out that the Third Circuit ordered a remand hardly renders the question whether such a remand is appropriate unripe. Respondents have already deposed seventeen military officials, and a remand promises more of the same scrutiny of military decision-making, which is the very harm the political question doctrine seeks to avoid.

* * *

Since KBR filed its petition, the Fourth Circuit has further heightened the need for this Court's review by adopting the same deeply flawed legal framework as the Third Circuit. The *Burn Pit* decision eliminates any doubt that the issues presented in this case are important and recurring, and that courts are continuing to struggle with the proper legal framework for adjudicating "contractor-on-the-battlefield" cases.

KBR has already filed a petition for certiorari in *Burn Pit*. *See KBR v. Metzgar*, No. 13-1241 (Apr. 11, 2014) ("*Burn Pit* Pet."). The best way to proceed is to consolidate this petition with the *Burn Pit* petition and grant certiorari in both cases, as both courts have rejected the United States' test for preemption. But in light of the paramount federal interests

implicated by these cases, the Court should, at a minimum, call for the views of the Solicitor General.

I. The Court Should Grant Certiorari To Address How The Political Question Doctrine Applies To Contractor-On-The-Battlefield Suits.

A. Respondents assert (at 23-24) that this case is about "private plumbers and electricians," and that military decisions are "*irrelevant* to the negligence issue." But military judgments cannot be excised from this case. The duties of private plumbers and electricians are normally set by the local code, but in a foreign war zone military exigencies will dictate how the work is to be performed. Respondents' suggestion that this case should proceed as a "straightforward" tort action blinks reality.

Respondents focus exclusively on *their own* allegations—which, unsurprisingly, omit any reference to military judgments—while ignoring KBR's liability defenses. If this case proceeded to trial, KBR's core defense would be that strategic military decisions were the cause of Staff Sgt. Maseth's tragic death. Pet.20-22. For example, military commanders chose to house soldiers in Iraqi-constructed buildings *despite the known risk of electrical shocks* because they concluded that this was the best way to protect soldiers from incoming fire. *Id.* And military officials chose not to expend limited wartime resources to remedy those known hazards. Adjudication of KBR's causation defenses would unquestionably "implicate[] sensitive judgments of the military which are shielded from judicial review." Pet.App.116.

Respondents further assert (at 25-26) that it is appropriate for the justiciability inquiry to turn on state-law details such as whether a state uses "joint-and-several versus proportional liability." But they have no response to the key finding that should have made this an easy case: the Third Circuit's conclusion that "KBR has presented sufficient evidence to support its argument that the military, rather than KBR, was the exclusive proximate cause of Staff Sergeant Maseth's death." Pet.App.20. *Regardless* of how each state calculates damages, this case should have been dismissed because adjudication of KBR's causation defense would inevitably implicate non-justiciable military judgments. Pet.23-26.

Even if Respondents were correct that state-law details are dispositive, this would only reinforce the need for a clear rule of combatant-activities preemption. The federal government's interest in "preventing military policy from being subjected to fifty-one separate sovereigns" is "not only broad—it is also obvious." *Saleh v. Titan Corp.*, 580 F.3d 1, 11 (D.C. Cir. 2009). Respondents concede (at 26) that under the Third Circuit's approach "a court might have to apply different rules to different plaintiffs—even in the same case." Whether this case is ultimately reversed on political-question grounds or preemption grounds, it is wholly unacceptable for events on a military base in a foreign war zone to be subject to "different rules" based on the happenstance of each soldier's domicile.

B. Respondents' claims would have been dismissed as non-justiciable under *Carmichael v.*

KBR, 572 F.3d 1271 (11th Cir. 2009). Respondents contend (at 14-17) that *Carmichael* turned on that case's "extreme facts" rather than a difference in legal framework, but that argument does not withstand scrutiny.

The Eleventh Circuit found the plaintiff's claims to be non-justiciable because KBR had offered "plausible" evidence showing that military judgments "contributed" to the plaintiff's injuries. *Id.* at 1286. It would thus be "impossible" to determine the cause of the accident "without ruling out the potential causal role played by pivotal military judgments." *Id.* at 1295. Here, in contrast, the Third Circuit allowed Respondents' claims to proceed even though it made the *exact* same finding—namely, that there was "sufficient evidence" to show that the military may have been "*the* proximate cause" of the injury. Pet.App.25. The Eleventh Circuit held that the very *process* of adjudicating a causation defense rendered the case non-justiciable, but the Third Circuit held that political questions would arise—if at all—only if the military could be found directly at fault under a particular state's tort regime.

Respondents also assert (at 15-16) that *Carmichael* "acknowledged the relevance of state law" and turned on a nuance of Georgia law under which an injury can have more than one proximate cause. But the Eleventh Circuit expressly stated that its decision would have been the same "*regardless of which state's law applied*," and thus it was "unnecessary" to perform a choice-of-law analysis. 572 F.3d at 1288 n.13 (emphasis added).

In denying the split, Respondents also rely on *McMahon v. Presidential Airways*, 502 F.3d 1331 (11th Cir. 2007). But *McMahon* turned largely on an evidentiary ruling unrelated to the merits of the political question issue. The court refused to consider the defendant's declarations showing that the military was responsible for the key decisions that led to the accident. *Id.* at 1360 n.28. Because of the defendant's procedural foot fault, the court only had before it "the complaint, the contract, and the Statement of Work." *Id.* In both this case and *Burn Pit*, in contrast, KBR has properly offered declarations from top military officials explaining precisely how the plaintiffs' claims would implicate strategic military judgments.

C. The Fourth Circuit has now squarely aligned itself with the Third Circuit's approach.[1] As a result, two competing positions have emerged among the lower courts. *See Burn Pit* Pet.25-29. The Eleventh Circuit has correctly recognized that a case should be dismissed if the defendant offers sufficient evidence showing that resolution of the case will require judicial review of sensitive military decisions. In stark contrast, the Third and Fourth Circuits hold that state choice-of-law issues will often be dispositive, and that district courts must conclusively resolve all factual issues to determine whether the

[1] The Fourth Circuit had previously taken the correct approach in *Taylor v. KBR*, 658 F.3d 402, 411-12 (4th Cir. 2011), which found that adjudication of KBR's contributory negligence defense would invariably require review of military decisions. The Third Circuit, in contrast, held that KBR must *prove* that Staff Sgt. Maseth was contributorily negligent in order to have the case dismissed as non-justiciable. Pet.App.35.

threshold political question doctrine applies. This conflict is entrenched and well-defined, and is squarely presented in both this case and *Burn Pit*.

II. The Court Should Grant Certiorari To Address The Scope Of Combatant-Activities Preemption.

Certiorari is also warranted to address the scope of the combatant-activities preemption doctrine. Pet.30-37; *Burn Pit* Pet.29-35. Allowing Respondents' state-law claims to proceed would severely undermine federal interests by requiring "extensive judicial probing of the government's wartime policies" and "hamper[ing] military flexibility and cost-effectiveness." *Saleh*, 580 F.3d at 8.

Respondents rely heavily (at 28, 31-32) on the fact that contractors are not expressly covered by the FTCA and its exceptions. But that argument proves far too much. There is a well-developed circuit split on the extent to which claims against battlefield contractors are preempted. But no circuit takes the position that such claims are never preempted, no matter how integrated the operations of the contractor and the military, simply because the FTCA expressly addresses only the latter.

Respondents contend (at 28-29) that the Third Circuit's decision is consistent with the D.C. Circuit's decision in *Saleh*. But although the Third Circuit did its best to minimize the split, the court acknowledged—in a statement Respondents ignore—that "*we do not go as far as the D.C. Circuit's holding* that [the combatant-activities exception] reveals a policy of 'the elimination of tort from the battlefield.'"

Pet.App.41 (emphasis added). In all events, the Fourth Circuit's recent *Burn Pit* decision was far more candid in acknowledging a three-way split over the scope of combatant-activities preemption worthy of Goldilocks, describing the D.C. Circuit's formulation as "too broad," the Ninth Circuit's formulation as "too narrow," and the Third Circuit's as just right. *Burn Pit*, 744 F.3d at 348. The Fourth Circuit further emphasized that even though the Third Circuit "cited *Saleh* favorably" in this case, it "ultimately determined that the D.C. Circuit's formulation of the interest underlying the combatant activities exception was too broad." *Id.*

In attempting to distinguish *Saleh*, Respondents rely heavily on the D.C. Circuit's brief discussion of "performance-based contracts." 580 F.3d at 10. Although the court was not entirely clear about the meaning of a "performance-based contract," it was apparently referring to an arm's-length contract to perform discrete tasks, in which the contractor was not integrated into the military's combatant activities. In other words, a contract is *not* "performance-based" in the sense relevant to the D.C. Circuit if the contractor was "working within the military chain of command." *Id.* Here, KBR was "fully integrated in the combatant activities of the military at the base," and the military "controlled the terms and conditions of the contract and initiated all work that was performed by KBR." Pet.App.162-63.

Moreover, *Saleh* does not hold that a contract becomes "performance-based" merely because a contractor exercises discretion. *Saleh* focuses on whether a contractor was integrated into "combatant

activities over which the military retain[ed] command authority." 580 F.3d at 9. The fact that a contractor "has exerted *some* limited influence over an operation does not undermine the federal interest in immunizing the operation from suit." *Id.* at 8-9. Indeed, Respondents' emphasis on discretion does not reflect the D.C. Circuit's analysis, but the analysis of the district court decision the D.C. Circuit *reversed* in *Saleh*. *See* Pet.35-36.

Finally, Respondents do not dispute that the Third Circuit rejected the United States' formulation of the test or that their claims would fail under that test, which asks whether: (1) a similar claim against the United States would be barred by the combatant-activities exception; and (2) the contractor was acting within the scope of its authority. Pet.32-33. Respondents argue (at 35-36) that the United States' test is "facially inconsistent with Congress' decision to exclude contractors from the FTCA." But, as noted above, that argument proves too much. The conflict in the circuits is over which contractors enjoy preemption under what circumstances, with no circuit accepting Respondents' extreme position. And given that the purpose of extending preemption to contractors in at least some circumstances is to protect important federal interests, it is no small matter that two circuits have squarely rejected the United States' proposed test in favor of a test substantially less protective of those federal interests.

III. The Questions Presented Are Vitally Important And Ripe For Immediate Review.

The questions presented here are both important and recurring. Contractors provide significant operational benefits and flexibility to military commanders, and routinely perform "functions that the military previously reserved to itself." NDIA Br. 5-9; *see* Chamber Br. 6-15. Indeed, the number of contractors has often "*exceeded* the number of U.S. military forces in Iraq and Afghanistan." NDIA Br. 7. It is critical for those contractors to be subject to clear and nationally uniform rules that minimize any intrusion into the military's operational goals. *See* DRI Br. 11-15; Chamber Br. 15-26.

Respondents are wrong to suggest (at 36-37) that review by this Court would be premature because the legal issues have not been "finally resolved against KBR." At the outset, Respondents do not contend that the preemption question may still be resolved in KBR's favor. The Third Circuit held that "[t]his case is … not preempted," Pet.App.44, and that holding cannot get any riper.

Respondents also miss the point when they suggest that the Court should deny certiorari because KBR might eventually prevail on the political-question issue after remand. The circuits are split on whether a remand for such a detailed choice-of-law analysis is even necessary. It is thus a non sequitur to point to the remand—the propriety of which is squarely at issue in the first question presented—as a reason for deferring consideration.

Moreover, a remand would all but guarantee the very harms the political question doctrine is designed to prevent—*i.e.*, judicial entanglement in inherently executive decisions. This case has already involved extensive discovery, *including seventeen depositions of military officials*. That Respondents believe *still more* proceedings are needed to determine whether the political question doctrine applies only underscores the profound flaws of the Third Circuit's decision.

It also bears emphasis that both here and in *Burn Pit*, the trial court actually responsible for trying the cases viewed embroilment in unmanageable political questions as inevitable. This is not the first time the Court has confronted cases that circuit courts wanted tried by district courts who viewed them as untriable. *See*, *e.g.*, *American Electric Power v. Connecticut*, 131 S. Ct. 2527 (2011). This Court intervened there and obviated the need for those trials, and should do the same here.

Finally, Respondents are wrong to suggest (at 38-39) that this case is a "poor vehicle" because KBR's role was similar to "any civilian plumbing or electrical contractor." KBR's combat support services were no different from services routinely performed by *uniformed soldiers*. Indeed, even the Third Circuit agreed that KBR's "maintenance of electrical systems at a barracks in an active war zone" constitutes a "combatant activity." Pet.App.44. This case is an ideal vehicle in which to address the important and recurring issues that arise in contractor-on-the-battlefield litigation.

Of course, if the Court has concerns about the factual context of this case, the answer would be to consolidate this case with *Burn Pit*—which involves contractors performing a different classic military function—and grant certiorari in both cases. Either way, the Court should not leave the lower courts in disarray or allow the legal regime on foreign battlefields to turn on the vagaries of state law in circumstances where the United States believes federal interests call for preemption.

CONCLUSION

The Court should consolidate this petition with *KBR v. Metzgar*, No. 13-1241, and grant certiorari.

Respectfully submitted,

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