No. 13-817

In the Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., PETITIONER

v.

CHERYL HARRIS, CO-ADMINISTRATRIX OF THE ESTATE OF RYAN D. MASETH, DECEASED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Respondents brought state-law claims against petitioner for injuries arising out of petitioner's allegedly negligent performance under contracts with the U.S. military in Iraq. The questions presented are:

1. Whether the political-question doctrine bars respondents' claims.

2. Whether respondents' claims are preempted because they arise out of the uniquely federal sphere of the military's combat operations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations: Page

Miscellaneous:

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

This case involves state-law claims against petitioner for injuries caused by its allegedly negligent performance under contracts with the U.S. military in Iraq. The court of appeals reversed the dismissal of the claims and remanded for further proceedings.

1. During the Iraq War, the U.S. military established a forward operating base at the Radwaniyah Palace Complex in Baghdad. Pet. App. 2. Petitioner performed electrical maintenance and other work at that facility under contracts with the military. *Id.* at

2-3. In January 2008, Staff Sgt. Ryan Maseth was electrocuted while showering in the Palace Complex. *Id.* at 2.

Staff Sgt. Maseth's parents, respondents here, sued petitioner in Pennsylvania state court under Pennsylvania statutes permitting recovery for wrongful death caused by negligence. See C.A. App. 148-152 (Am. Compl.) (citing 42 Pa. Cons. Stat. Ann. §§ 8301-8302 (West 2007)). They argued that petitioner had negligently performed the electrical maintenance required by its contractual obligations by failing to ground and bond a water pump and by failing to adequately respond to complaints about electrical hazards in Staff Sgt. Maseth's barracks. See Pet. App. 3. Petitioner removed the case to the United States District Court for the Western District of Pennsylvania and moved to dismiss respondents' claims on the grounds that they were barred by the political-question doctrine and that they were preempted because they arose in the context of a U.S. military conflict on a foreign battlefield. C.A. App. 208-226. The district court ultimately held that respondents' claims were barred on both grounds. See Pet. App. 49-164.

2. The court of appeals reversed and remanded. See Pet. App. 1-46.

a. The court of appeals first concluded that the suit was not barred by the political-question doctrine at this stage. It began by explaining that a suit against a military contractor would be foreclosed by that doctrine "if [a] contractor is simply doing what the military ordered it to do," because in that circumstance "review of the contractor's actions necessarily includes review of the military order directing the action." Pet. App. 11. At the same time, the court rec-

ognized that "where the military does not exercise control but merely provides the contractor with general guidelines that can be satisfied at the contractor's discretion, contractor actions taken within that discretion do not necessarily implicate unreviewable military decisions." *Ibid.* The court determined that the contracts under which petitioner performed electrical maintenance at the Palace Complex "provide[d] [petitioner] with significant discretion over how to complete authorized work orders," and therefore did "not introduce an unreviewable military decision into the case." *Id.* at 12.

The court of appeals then further evaluated whether, even though petitioner had considerable discretion under the contracts, proving respondents' specific claims or petitioner's asserted defenses would nevertheless require the review of military judgments. Pet. App. 12-36. It determined that respondents' claims are "based solely on whether [petitioner] satisfied its contract duties"—not whether petitioner was negligent even if it complied with the terms of the contracts—and therefore that they did not "require[] evaluating the wisdom of the military's decisions." *Id.* at 12-16.

As to petitioner's defenses, the court of appeals held that its first defense—Staff Sgt. Maseth's assumption of the risk—would not require evaluation of military judgments. See Pet. App. 16-19. But with respect to the second and third defenses—that the military was a proximate cause of Staff Sgt. Maseth's death and that Staff Sgt. Maseth was contributorily negligent—the court found that, depending on the substantive rule of law to be applied, they might re-

quire an evaluation of the military's blameworthiness. See *id.* at 27, 31-33.

For example, with respect to petitioner's contention that the military's actions were a cause of Staff Sgt. Maseth's death, the court of appeals explained that if the applicable substantive law required damages to be apportioned based on fault, there would be "no way to determine damages without evaluating military decisions." Pet. App. 27. The court observed that of the three States whose tort law might apply, two (Tennessee and Texas) use a proportional-liability system, while Pennsylvania has a joint-and-several liability system. See *id.* at 28. It accordingly held that, if the law of Tennessee or Texas applies, the district court should permit respondents to proceed only on those "damages claim[s] that do[] not implicate proportional liability (such as nominal damages, if available)." *Id.* at 29. The court reached a similar conclusion for petitioner's contributory-negligence defense. The requirements of that defense under Texas or Tennessee law, it explained, might require a determination whether the military, even though not a party to the case, bore some blame for Staff Sgt. Maseth's death. *Id.* at 33-36. In that event, it held, the claims would be nonjusticiable. *Id.* at 36.

b. The court of appeals rejected petitioner's argument that the claims were preempted by the federal interests inherent in the combatant-activities exception to the Federal Tort Claims Act (FTCA). See Pet. App. 37-45. That exception provides that the FTCA's waiver of the United States' sovereign immunity "shall not apply to * * * [a]ny claim arising out of the combatant activities of the military or naval forc-

es, or the Coast Guard, during time of war." 28 U.S.C. 2680(j).

The court of appeals first noted that the FTCA does not apply to government contractors, because they are excluded from the statute's definition of "Federal agency." See Pet. App. 38 (quoting 28 U.S.C. 2671). But the court recognized that this Court "has held that the Act's exceptions sometimes express federal policies that impliedly preempt state claims against defense contractors providing services to the military." *Ibid.* In *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), it explained, this Court held that the FTCA's discretionary-function exception, 28 U.S.C. 2680(a), reflected a federal policy that preempted certain state-law design-defect claims against federal contractors. See Pet. App. 38-39 (discussing *Boyle*, 487 U.S. at 510-512). The court of appeals similarly determined that the combatant-activities exception "represents a unique federal interest in the management of wars" that displaces state-law causes of action in appropriate circumstances. *Id.* at 39-40.

The court of appeals ultimately adopted the D.C. Circuit's standard for evaluating whether a state-law claim against a contractor for wartime activities is preempted by that federal policy. Pet. App. 42. Under that standard, "[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Ibid.* (quoting *Saleh* v. *Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009), cert. denied, 131 S. Ct. 3055 (2011)). In so holding, the court rejected the approach proposed by the

United States in an amicus brief in *Al Shimari* v. *CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012) (en banc), because it would preempt state tort laws "even if an employee of a contractor allegedly violated the terms of the contract . . . as long as the alleged conduct at issue was within the scope of the contractual relationship." Pet. App. 43 (quoting Gov't Amicus Br. at 20, *Al Shimari*, *supra* (No. 09-1335)).

Under the preemption standard that the court of appeals adopted, it found that respondents' claims were not preempted because "[t]he military did not retain command authority over [petitioner's] installation and maintenance of the [ungrounded] pump." Pet. App. 44. "Instead," the court said, "the contracts and the work orders provided for general requirements or objectives and then gave [petitioner] considerable discretion in deciding how to satisfy them." *Id.* at 44-45.

c. The court of appeals accordingly remanded the case to the district court. Consistent with its analysis of the political-question defense, the court stated that if the district court concludes that Pennsylvania law applies, "then this case lacks any nonjusticiable issues and may proceed," but that if it concludes that "either Tennessee or Texas law applies, then the case contains nonjusticiable issues" that would require either dismissal or a narrowing of the scope of relief available to exclude damages subject to a proportional-liability apportionment. Pet. App. 45.

DISCUSSION

The decision below correctly recognized that no bar to justiciability is necessarily present at this stage of the litigation because a factfinder could rule in favor of respondents without questioning the wisdom of the

U.S. military's battlefield judgments. But the court of appeals applied an imprecise and unduly narrow understanding of preemption in this context. Under its approach, contractors performing essential tasks in an active theater of war could be subject to the laws of fifty different States.

No substantial conflict of authority exists among the courts of appeals on either the justiciability question or the preemption question. But because three courts of appeals have now adopted a preemption test that, in the view of the United States, does not sufficiently safeguard the significant national interests at stake, that issue warrants this Court's review in an appropriate case. In the decision below, however, the court of appeals remanded to the district court for further determinations relevant to the applicability of the political-question doctrine. For that reason, we conclude, on balance, that the Court should deny review here.

A. Although This Case Is Justiciable At This Stage Of The Litigation, Respondents' Claims Are Preempted

1. The court of appeals correctly held that respondents' claims are not barred by the political-question doctrine at this stage of the litigation.

a. The political-question doctrine is "primarily a function of separation of powers," *Baker* v. *Carr*, 369 U.S. 186, 210 (1962), and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States* v. *Munoz-Flores*, 495 U.S. 385, 394 (1990). It thus "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the

Executive Branch." *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). In *Baker*, this Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question," including, as relevant here, "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." 369 U.S. at 217. To determine whether "one of these formulations" is applicable, the court must engage in a "discriminating inquiry into the precise facts and posture of the particular case." *Ibid.*

The Constitution confers on the Legislative and Executive Branches broad authority over the military. See U.S. Const. Art. I, § 8, Cls. 11-16; *id.* Art. II, § 2, Cl. 1. Although not "every case or controversy which touches foreign relations lies beyond judicial cognizance," *Baker*, 369 U.S. at 211, military affairs feature prominently among the areas in which the political-question doctrine traditionally has been implicated. In *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), for example, this Court held that the political-question doctrine barred a suit seeking injunctive relief based on allegations that the National Guard used excessive force in responding to Vietnam war protesters at Kent State University, because "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." *Id.* at 5, 10. Indeed, the Court found it "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.

The basic principle, therefore, is that where resolving a legal claim would require an evaluation of quintessentially military judgments, such as operational decisionmaking in foreign theaters of war, the claim is nonjusticiable under the political-question doctrine. Courts of appeals have steadfastly applied that principle in cases seeking review of military judgments. See *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 982, 984 (9th Cir. 2007); *Aktepe* v. *United States*, 105 F.3d 1400, 1403-1404 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998); *Tiffany* v. *United States*, 931 F.2d 271, 275, 277-278 (4th Cir. 1991), cert. denied, 502 U.S. 1030 (1992).

b. In this case, respondents do not assert that petitioner was negligent for engaging in conduct ordered or approved by the military. Rather, they argue that within general parameters set by the military, petitioner acted negligently and that petitioner breached its contracts with the military. See Pet. App. 16 ("[Respondents] argue only that [petitioner] failed to satisfy the contractual standards."). Evaluating that claim would not necessarily require a factfinder to "scrutiniz[e] sensitive military decisions" (Pet. 15). Accordingly, if the claims were not otherwise barred (but see pp. 11-17, *infra*), the district court could treat military standards and orders as a given, such that the trier of fact could not question the wisdom of military judgments. Under such an approach, a jury could conclude that petitioner failed to act reasonably within the parameters established by the military, such as the terms of the pertinent contracts. Or petitioner could prevail by demonstrating that it acted in a rea-

sonably prudent manner given the military's parameters and the circumstances present in the theater of war at the time. Either way, while we believe respondents' claims are preempted, adjudication of those claims would not violate the constitutionally grounded political-question doctrine because it would not require searching judicial inquiry into the soundness of judgments made by the military itself.

The analysis of the decision below is consistent with that general approach. The court of appeals recognized that a claim that a contractor that adhered to military standards or orders should nevertheless be held liable under state law would pose a nonjusticiable political question because "review of the contractor's actions [would] necessarily include[] review of the military order directing the action[s]." Pet. App. 11. At the same time, the court correctly held that petitioner's assertion of a particular defense—such as contributory negligence—could render a claim nonjusticiable because, depending on the requirements for proving the defense or calculating damages, it might require an assessment of whether and to what extent the military should be regarded as having been at fault. See *id.* at 29, 35-36. The court correctly held, however, that determining whether such an assessment will be necessary for respondents to succeed on their claims must await further developments in the litigation, including identification of the applicable rules of liability.

c. Petitioner contends (Pet. 21) that adjudicating respondents' claims "would unquestionably require courts to review the Army's strategic judgments about placing soldiers in harm's way, such as its decisions concerning the acceptable level of risk in troop hous-

ing and the allocation of scarce resources." That is incorrect. Rather, the lawfulness and wisdom of the military's judgments must be taken as given, and the actions of petitioner must be evaluated in light of those judgments, such as the military's decision to house troops in Iraqi buildings.

The United States shares petitioner's concern with the application of state tort law to regulate important contractor functions in an active war zone. That concern, however, is more appropriately addressed through preemption, not the political-question doctrine. Still, the deference owed to the political Branches on military matters, as reflected in the political-question doctrine, does reinforce the conclusion that respondents' claims here are preempted in the absence of affirmative authorization by Congress for state tort law to enter that field.

2. The court of appeals erred in holding that respondents' state-law tort claims are not preempted.

a. This Court has long recognized that even absent a federal statute, a federal-law rule of decision must govern certain questions involving "uniquely federal interests," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964), such as where "the authority and duties of the United States as sovereign are intimately involved" or where "the interstate or international nature of the controversy makes it inappropriate for state law to control," *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). For example, this Court has held that a federal rule of decision displaces state law with respect to "[t]he rights and duties of the United States on commercial paper which it issues," *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943), "the priority of liens stem-

ming from federal lending programs," *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), and "the scope of the act of state doctrine," *Sabbatino*, 376 U.S. at 427. Those fields "are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504 (1988).

This Court applied those preemption principles in *Boyle* to hold that in certain circumstances state-law claims against federal procurement contractors are preempted. 487 U.S. at 512. *Boyle* held generally that "displacement of state law" is appropriate if "a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law," or if "the application of state law would frustrate specific objectives of federal legislation." *Id.* at 507 (internal quotation marks and citations omitted; brackets in original). The Court further held that "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary preemption." *Ibid.*

Applying that framework, the Court concluded that application of state tort law to particular design features of military equipment would conflict with the federal policy embodied in the discretionary-function exception of the FTCA, which exempts from the FTCA's waiver of sovereign immunity "[a]ny claim * * * based upon the exercise or performance * * * [of] a discretionary function," 28 U.S.C. 2680(a). The "selection of the appropriate design for military equipment," the Court explained, "is assured-

ly a discretionary function within the meaning of this provision," because it involves "judgment as to the balancing of many technical, military, and even social considerations." *Boyle*, 487 U.S. at 511. Although the FTCA does not apply to actions of contractors, 28 U.S.C. 2671, the Court concluded that it would "make[] little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Boyle*, 487 U.S. at 512. Such liability "would produce the same effect sought to be avoided by the FTCA exemption" in that the "financial burden of judgments against the contractors would be passed through, substantially if not totally, to the United States itself." *Id.* at 511-512.

b. The decision below correctly recognized that the general preemption framework set forth in *Boyle* and its antecedents governs this case. See Pet. App. 37-45. It also correctly held, consistent with the holdings of three other circuits, that the FTCA's combatant-activities exception codifies federal interests that would be frustrated if state-law tort liability applied without limitation to battlefield contractors under the military's auspices. See *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 348 (4th Cir. 2014), petition for cert. pending, No. 13-1241 (filed Apr. 11, 2014) (*Burn Pit*); *Saleh* v. *Titan Corp.*, 580 F.3d 1, 5-7 (D.C. Cir. 2009), cert. denied, 131 S. Ct. 3055 (2011); *Koohi* v. *United States*, 976 F.2d 1328, 1336-1337 (9th Cir. 1992), cert. denied, 508 U.S. 960 (1993). The military's effectiveness would be degraded if its contractors were subject to the tort law of multiple States for

actions occurring in the course of performing their contractual duties arising out of combat operations.

But the decision below articulated a preemption standard that is both imprecise and too narrow. Adopting a test first articulated by the D.C. Circuit in *Saleh*, the court held that a battlefield contractor is shielded from state-law tort liability if the contractor was "integrated into combatant activities over which the military retains command authority." Pet. App. 42 (quoting *Saleh*, 580 F.3d at 9).

That standard appears to rest on a misunderstanding about the role of private contractors in active war zones and to reflect an unduly narrow conception of the federal interests embodied in the FTCA's combatant-activities exception. Under domestic and international law, civilian contractors engaged in authorized activity are not "combatants." Rather, they are civilians accompanying the force. They cannot lawfully engage in combat functions or combat operations, which are uniquely sovereign functions. See *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, DoD Instruction 3020.4.1, para. 6.1.1 (Oct. 3, 2005); *id.* para. 6.1.5; *Policy & Procedures for Determining Workforce Mix*, DoD Instruction 1100.22, Encl. 4, para. 1.c(1)(b) (Apr. 12, 2010); 73 Fed. Reg. 16,764-16,765 (Mar. 31, 2008); Army Reg. 715-9, para. 3-3(d) (1999).

At the same time, however, the FTCA's combatant-activities exception does not apply only when the challenged act was itself a "combatant activity" or the alleged tortfeasor was itself engaged in a "combatant activity." The statute instead bars claims "*arising out of* the combatant activities of the military * * * during time of war," 28 U.S.C. 2680(j) (emphasis add-

ed), and therefore applies not only to claims challenging the lawfulness of combatant activities, but also to claims seeking redress for injuries caused by combat support activities. Such claims are naturally understood to "arise out of" the military's combat operations. The scope of preemption of claims against military contractors should be equivalent.

Accordingly, under a properly tailored preemption test, claims against a contractor are generally preempted if (i) a similar claim against the United States would be within the FTCA's combatant-activities exception because it arises out of the military's combatant activities, and (ii) the contractor was acting within the scope of its contractual relationship with the federal government at the time of the incident out of which the claim arose. That test is particularly appropriate in situations where, as here, the contractor was integrated with military personnel on the same military base in the performance of the military's combat-related activities.[1] This rule respects the military's reliance on the expert judgment of contractors, gives effect to the reality of informal interactions between contractors and military personnel in combat and support operations, and guards against timidity of contractor personnel in performing critical functions out of fear of tort liability.

Under that approach, federal preemption would generally apply even if an employee of a contractor allegedly violated the terms of the contract or took

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[1] Even if all these factors exist, however, in narrow circumstances countervailing federal interests may make preemption inappropriate. For example, preemption should not apply to shield a contractor from liability for acts of torture as defined by federal law. See 18 U.S.C. 2340A.

steps not specifically called for in the contract, as long as the alleged conduct at issue was within the general scope of the contractual relationship between the contractor and the federal government. Determination of the appropriate recourse for the contractor's failure to adhere to contract terms and related directives under its exclusively federal relationship with the United States would be the responsibility of the United States, through contractual, criminal, or other remedies—not private state-law suits by individual service members or contractor employees. Compare *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); see also *Arizona* v. *United States*, 132 S. Ct. 2492, 2502 (2012). But preemption would not apply to conduct of a contractor employee that is unrelated to the contractor's duties under the government contract; a claim challenging such conduct would not ordinarily be said to "arise out of" the military's combatant activities. That standard assures that preemption is properly tailored to the federal interest inherent in the combatant-activities exception: that actions arising out of the Nation's conduct of military operations should not be regulated by tort law.

Importantly, other legal avenues for obtaining compensation are available to service members and others injured by contractor negligence. For example, the Department of Veterans Affairs provides compensation to veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty." 38 U.S.C. 1110; see also 38 U.S.C. 1131. In addition, a variety of benefits, including payment of a death gratuity, see 10 U.S.C. 1475, are provided to

the survivors of service members who die while on active duty.[2]

c. The claims against petitioner should be dismissed under the preemption standard proposed here. Respondents claim that petitioner acted negligently in performing contractual duties arising out of the military activities of the United States on a foreign battlefield. The maintenance of buildings on forward bases is an essential support service when the United States military conducts combat operations. Furthermore, when petitioner raised the United States' proposed preemption standard in the courts of appeals, respondents did not identify any sound reason to believe that petitioner was acting outside the scope of its contractual relationship with the military. See Resp. C.A. Reply Br. 14-17. As explained, respondents' claims that petitioner violated the terms of its contracts are insufficient to demonstrate that petitioner was acting outside the scope of the contractual relationship. Accordingly, the court of appeals erred in holding that the claims could proceed.

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[2] The electrocution of Staff Sgt. Maseth was the subject of an investigation by the military under Army Regulation 15-6. It was also the subject of a criminal investigation conducted by the Army's Criminal Investigation Command and an investigation by the Department of Defense's Inspector General. See Inspector General, Dep't of Def., *Report No. IE-2009-006, Review of Electrocution Deaths in Iraq: Part I- Electrocution of Staff Sergeant Ryan D. Maseth, U.S. Army*, July 24, 2009, http://www.dodig.mil/Inspections/IE/Reports/Electrocution%20report%20Part%20I%20Final%20(7-24-09)_full.pdf; see also *Deficient Electrical Systems at U.S. Facilities in Iraq: Hearing Before the House Comm. on Oversight and Gov't Reform*, 110th Cong., 2d Sess. (2008).

B. Given The Interlocutory Posture Of This Case, Review Is Not Warranted At This Time

Despite the importance of the preemption issue and the incorrect standard adopted by the court of appeals, the United States believes, on balance, that review is not warranted at this time given the interlocutory posture of this case.

1. There is no substantial conflict among the circuits on either the justiciability question or the preemption question.

a. Each of the circuits to consider the applicability of the political-question doctrine in the context of battlefield contractors has held that suits that require a factfinder to assess judgments of the U.S. military are nonjusticiable. See Pet. App. 12; see also *Burn Pit*, 744 F.3d at 334-341; *Carmichael* v. *Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1282-1283 (11th Cir. 2009), cert. denied, 561 U.S. 1025 (2010).

The decision below concluded that whether a factfinder would be required to evaluate military judgments may turn on the substantive state-law rule to be applied in the proceeding—for example, the requirements for proving a particular defense or assessing damages. See Pet. App. 12; see also *Burn Pit*, 744 F.3d at 339-341 & n.4; *Lane* v. *Halliburton*, 529 F.3d 548, 568 (5th Cir. 2008). Contrary to petitioner's contention (Pet. 27-29), the Eleventh Circuit's decision in *Carmichael* did not reject the proposition that the substantive legal requirements for proving a claim or defense can be relevant to whether a factfinder will be required to review military judgments. Rather, the Eleventh Circuit concluded only that the substantive principles of negligence relevant in that case did not vary among States. See 572 F.3d at 1288 n.13; cf.

McMahon v. *Presidential Airways, Inc.*, 502 F.3d 1331, 1359, 1365 (11th Cir. 2007) (holding that for a military contractor to successfully invoke the first *Baker* factor, it "must demonstrate that the claims against it will require reexamination of a decision *by the military*" and remanding for further factual development).

b. Likewise, no square conflict exists among the courts of appeals over the proper preemption test applicable to state-law tort claims against military contractors. As discussed, the decision below expressly adopted the standard articulated by the D.C. Circuit in *Saleh*, *supra*. See p. 5, *supra*.

Petitioner contends (Pet. 34-36) that the decision below rejected *Saleh*'s approach. But the court of appeals rejected only the breadth of the D.C. Circuit's articulation of the federal interest at stake, while ultimately adopting the same preemption standard. See Pet. App. 41-42. And the Ninth Circuit's earlier decision in *Koohi* comports with that standard. See 976 F.2d at 1336-1337 (holding that claims against manufacturers of air-defense system for downing of civilian aircraft were preempted).

Although no circuit conflict exists on the preemption question, the United States agrees with petitioner that the issue warrants this Court's review. The scope of state-law tort liability for battlefield contractors has significant importance for the Nation's military operations. A legal regime in which contractors that the U.S. military employs during hostilities are subject to the laws of fifty different States for actions taken within the scope of their contractual relationship supporting the military's combat operations would be detrimental to military effectiveness. And as

this Court recognized in *Boyle*, 487 U.S. at 511-512, expanded liability would ultimately be passed on to the United States, as contractors would demand greater compensation in light of their increased liability risks. Indeed, many military contracts performed on the battlefield contain indemnification or cost-reimbursement clauses passing liability and allowable expenses of litigation directly on to the United States in certain circumstances. See, *e.g.*, 48 C.F.R. 52.228-7(c).

Moreover, allowing state-law claims against battlefield contractors can impose enormous litigation burdens on the armed forces. Plaintiffs who bring claims against military contractors (as well as contractors defending against such lawsuits) are likely to seek to interview, depose, or subpoena for trial testimony senior policymakers, military commanders, contracting officers, and others, and to demand discovery of military records. It is therefore imperative that courts apply a preemption standard that is consonant with the significant federal interests at stake, and that "district courts * * * take care to develop and resolve [preemption] defenses at an early stage while avoiding, to the extent possible, any interference with military prerogatives." *Martin* v. *Halliburton*, 618 F.3d 476, 488 (5th Cir. 2010).

2. Although this Court's review of the preemption issue is warranted, this case is not an appropriate vehicle to address that question at this time. The decision below is interlocutory, and it did not definitively resolve the political-question issue. Instead, it remanded the case for further proceedings that may result in dismissal or substantial narrowing of the case. See pp. 2-4, 6, *supra*.

This case thus may ultimately be deemed to raise a nonjusticiable political question even under the standard challenged by petitioner. If that does not occur, this Court could consider granting review at a later stage in this case. At that point, the issues will be more sharply presented for this Court's review.[3]

3. If this Court were inclined to grant review of the questions presented, it should grant review in *KBR, Inc.* v. *Metzgar*, No. 13-1241, which arises out of the Fourth Circuit's *Burn Pit* decision and raises the same questions as the petition here, and hold this case. Because *Metzgar* includes an additional question about derivative sovereign immunity, granting review in that case would ensure that this Court can consider the full range of arguments against permitting state law to govern contractors' actions on foreign battlefields.

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[3] This Court has not decided whether the rule of *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998)—that a court may not dismiss a case on the merits before satisfying itself that it has jurisdiction, *id.* at 93-102—always requires a court to determine whether a case presents a nonjusticiable political question before dismissing on a merits ground, such as preemption. There are substantial reasons to conclude that the Court should not so hold. The political-question doctrine can involve a factbound inquiry that precludes dismissal at an early stage in some cases. It would not be appropriate to compel a court to undertake such an inquiry—which could itself be burdensome for the court, the parties, and the military—if a court could readily dismiss an action on certain closely related merits grounds, such as combatant-activities preemption. Cf. *Tenet* v. *Doe*, 544 U.S. 1, 7 n.4 (2005) (holding that certain nonjurisdictional threshold questions "may be resolved before addressing jurisdiction").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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