NO. _____

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

PETITION FOR WRIT OF CERTIORARI

LAWRENCE S. EBNER
RAYMOND B. BIAGINI
DANIEL L. RUSSELL JR.
McKENNA LONG & ALDRIDGE LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7500

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BARBARA A. SMITH
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

January 8, 2014

QUESTIONS PRESENTED

During the Iraq War, the U.S. Army had no perfect option for housing troops and protecting them from rocket and mortar fire. The Army ultimately concluded that the "least bad" option was to billet thousands of soldiers in pre-existing, Iraqi-constructed "hardstand" buildings. The Army knew that those buildings contained hazardous, ungrounded electrical systems, but determined that the hazards from those substandard systems were outweighed by the overarching need to protect troops from enemy fire. The Army also lacked funds to upgrade the hardstand buildings, and chose not to construct new housing facilities to avoid the appearance of a prolonged occupation.

Respondents' son was a soldier who died in a tragic accident in which he was electrocuted while showering in his assigned living quarters in a hardstand building at a forward operating base near Baghdad. Respondents brought state-law tort claims against Petitioner Kellogg Brown & Root Services, Inc., a battlefield support contractor that provided facilities maintenance and other essential combat support services to the Army in the Iraq war zone. The district court correctly concluded that Respondents' claims were nonjusticiable under the political question doctrine and were preempted by the "combatant-activities exception" to the Federal Tort Claims Act ("FTCA"), but the Third Circuit reversed on both issues. Remarkably, the Third Circuit viewed the political question issue as turning on which state law applied to these events in Iraq. The questions presented are:

(1) Whether the political question doctrine bars state-law tort claims against a battlefield support contractor operating in an active war zone when adjudication of those claims would necessarily require examining sensitive military judgments.

(2) Whether the FTCA's "combatant-activities exception," 28 U.S.C. § 2680(j), preempts state-law tort claims against a battlefield support contractor that arise out of the U.S. military's combatant activities in a theater of combat.

PARTIES TO THE PROCEEDING

Petitioner Kellogg Brown & Root Services, Inc. was the Appellee in the proceedings before the Third Circuit and the Defendant in the proceedings before the district court. Respondents Cheryl A. Harris and Douglas Maseth were Appellants before the Third Circuit and Plaintiffs in the district court.

CORPORATE DISCLOSURE STATEMENT

KBR, Inc. and KBR Holdings, LLC are parent corporations to Petitioner Kellogg Brown & Root Services, Inc. KBR, Inc. and KBR Holdings, LLC each have a 10% or greater ownership interest in Kellogg Brown & Root Services, Inc. KBR, Inc. is a publicly held corporation.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes & Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Kellogg Brown & Root Services, Inc. ("KBR") provided combat support services to the U.S. Army during the Iraq War. Respondents seek to hold KBR liable under state tort law for a tragic accident that occurred at a forward operating base in Iraq. Sensitive military judgments pervade every aspect of this case, and adjudication of Respondents' claims would necessarily require examining the Army's strategic battlefield decisions. Yet the Third Circuit deemed application of the political question doctrine to turn on which state's law is applicable, and refused to find Respondents' claims preempted under the "combatant-activities exception" to the Federal Tort Claims Act. The Third Circuit's decision badly misconstrues those doctrines, adopts an unprecedented justiciability framework that will lead to absurd and inequitable results, and conflicts with a number of other decisions correctly recognizing that state tort law has no place in a foreign war zone.

OPINIONS BELOW

The Third Circuit's opinion is reported at 724 F.3d 458, and reproduced at Pet.App.1-46. The district court's opinion is reported at 878 F. Supp. 2d 543, and reproduced at Pet.App.49-164.

JURISDICTION

The Third Circuit issued its decision on August 1, 2013. KBR filed a timely petition for rehearing en banc, which the court denied on September 10, 2013. On November 8, 2013, Justice Alito extended the time for filing this petition to and including January 8, 2014. *See* No. 13A476. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II section 2 of the U.S. Constitution provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." Article I section 8 of the Constitution provides that "[t]he Congress shall have Power … [t]o raise and support Armies," and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States...."

The FTCA provides in relevant part that the United States' waiver of sovereign immunity for tort claims "shall not apply to … (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680.

STATEMENT OF THE CASE

A. The Army's Reliance on Civilian Contractors To Perform Essential Battlefield Support Functions

This is one of numerous "contractor-on-the-battlefield" tort suits that have arisen out of the U.S. military's heavy reliance upon civilian support contractors in active war zones such as Iraq and Afghanistan.

Before the advent of the modern, all-volunteer military, uniformed soldiers typically performed combat support functions such as maintaining facilities, transporting supplies, and performing countless other logistical tasks essential to the war effort. But with the transition to an all-volunteer

military—and the corresponding reduction in size of the armed forces—it is often impractical or unfeasible for such tasks to be performed by uniformed soldiers. Instead, the military has entered into a symbiotic relationship with in-theater service contractors to perform such essential combat support activities. By using contractors for those tasks, the military has "'freed up'" soldiers to "concentrate on the core functions of warfighting." C.A.App.429 (Vines Decl. ¶ 6); *see* Army Reg. 700-137 (Logistics Civil Augmentation Program).

In December 2001, the Army awarded KBR an umbrella contract that included "combat service support." The Army defines "combat service support" as the provision of "essential capabilities, functions, activities, and tasks necessary to sustain all elements of operating forces in theater at all levels of war."[1] Under that umbrella contract, KBR performed vital functions for the war effort, such as servicing base facilities, delivering fuel, repairing equipment, preparing meals, and maintaining water supplies. In short, KBR personnel handled critical responsibilities, such as "KP duty," traditionally performed by soldiers before the modern, all-volunteer military. General John Vines, the former Commander of the Multi-National Corps–Iraq, described KBR's services as "essential to the success

[1] U.S. Army Field Manual 1-02, Operational Terms and Graphics at 1-36 (2004), http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_02.pdf.

of the military's combat mission." C.A.App.430 (Vines Decl. ¶ 7).[2]

B. Army Housing During the Iraq War at the Radwaniyah Palace Complex

Military commanders deciding where to quarter troops during Operation Iraqi Freedom had no perfect options and faced difficult tradeoffs. Billeting soldiers in pre-existing, Iraqi-constructed buildings would expose them to known risks of poor construction, including electrical shocks resulting from faulty wiring. But building new secure housing would generate the appearance that the United States was a long-term occupying force, thus undermining strategic military and diplomatic goals. And housing soldiers in temporary structures would jeopardize security by leaving soldiers with insufficient protection from the near-constant stream of mortar, missile, and small arms fire that plagued the region. C.A.App.432-33 (Vines Decl. ¶ 15).

After exhaustively considering the risks and benefits of each alternative, the Army decided to house many of its Special Forces troops in pre-existing, Iraqi-constructed concrete buildings (also known as "hardstand" structures). C.A.App.283-84. The Army concluded that the overriding need to protect soldiers from incoming enemy fire outweighed the well-documented risk of electrical shocks from

---

[2] KBR's contract required the government to reimburse KBR for virtually all contract-related costs, including most third-party litigation costs and money judgments not covered by liability insurance. *See* 48 C.F.R. § 52.228-7(c).

the substandard electrical systems in many pre-existing hardstand buildings. *Id.*

The Radwaniyah Palace Complex ("Palace Complex") is a massive facility on the outskirts of Baghdad that includes a Hussein-era palace and more than 100 other Iraqi-constructed buildings. Shortly after the invasion in 2003, the Army began using the Palace Complex to house Special Forces troops and as the headquarters for the Combined Joint Special Operations Task Force. The Army exercised, at all times, "overall responsibility for, and authority and control of, the activities and operations that took place at the [Palace Complex]." Pet.App.53; *see* C.A.App.2081 (Army was responsible for "real estate management and infrastructure maintenance").

From the start, it was "generally accepted that the buildings in the [Palace Complex] did not meet Western construction standards and that there were deficiencies in the electrical systems, including a lack of proper grounding and bonding." Pet.App.56. In 2003, the Army hired an Iraqi contractor to renovate and re-wire several buildings at the Palace Complex. It was well-known within the military that Iraqi contractors often failed to perform proper electrical bonding and grounding. The Army chose a local contractor nonetheless to improve relations with the local community. Army officials subsequently accepted the renovation work and moved soldiers into the facilities despite their awareness that the Iraqi contractor's electrical work was "bad news," "everything [was] jerry-rigged together," and "everything [needed] to be fixed." C.A.App.593.

Army commanders were well aware of the risk of shocks from such poorly installed electrical systems. *See* Pet.App.59-64. Between 2004 and 2006, there were numerous reports of injuries, and even deaths, resulting from shocks, including soldiers who were electrocuted while showering. Pet.App.59-60. Briefings to senior Army commanders and Defense Department officials emphasized the "serious threat to the life, health, and safety of our soldiers" posed by faulty wiring, and warned that troops "could be electrocuted in a shower." C.A.App.322-24. Indeed, several senior officers openly criticized their commanders' decision to expose soldiers to the life-threatening risks associated with ungrounded hardstand buildings. After no corrective action was taken in 2006, one Lieutenant Colonel predicted, "I guess nobody is going to care unless somebody dies." C.A.App.412.

Although "shocking incidents of soldiers occurred regularly," Army leadership nonetheless concluded that this risk was "'minor'" when compared to "other more pressing military issues such as power generation and the protection of base residents from indirect enemy fire." Pet.App.62. As with countless other wartime decisions, Army commanders were forced to select the "'least bad' option available to fulfill the mission under the limitations [they] faced." C.A.App.431 (Vines Decl. ¶ 11); *see id.* ¶ 10 (Army adopted and accepted a "good enough" standard for construction and base maintenance services).

C. KBR's Combat Support Services at the Palace Complex

From April 2006 until February 2007, the Army engaged KBR to perform limited maintenance at the Palace Complex. KBR was not retained to bring the electrical system up to United States standards but rather was hired to, among other things, "'support *existing* electrical systems.'" Pet.App.57-58. The contract itself stated that the existing electrical systems at the Palace Complex were in "poor condition." *Id.*

After that contract expired, the Army directed KBR to perform operations and maintenance work at the Palace Complex pursuant to its broader umbrella contract. During the transition to that contract, KBR inspected the Palace Complex facilities and provided the military written technical reports identifying numerous problems with the electrical systems.

Given the poor state of the facilities at the Palace Complex, KBR initially proposed that it comprehensively upgrade the electrical systems and perform preventative maintenance to address known dangers. Pet.App.67. This "Level A" maintenance would have cost between ten and twenty million dollars. Pet.App.67 n.6. But, in light of limited funding and other spending priorities, the Army determined that "the cost associated with Level A maintenance was prohibitive." Pet.App.67. The Army also rejected a "refurbishment" option that would have required KBR to upgrade the Palace Complex facilities "to Western construction standards." Pet.App.71-72 & n.8.

Instead, the Army directed KBR to provide "Level B" maintenance, which included limited upkeep of *existing* systems and "required only that KBR respond to service order requests and fix the problems initially identified by military personnel." Pet.App.122. This lower level of service cost the government considerably less than Level A maintenance, but did not permit "'inspections, preventative maintenance, and upgrades.'" Pet.App.67-68. KBR was allowed to perform "[l]imited maintenance" only after receiving a specific "service request" from the Army. Pet.App.68. The Army "controlled the terms and conditions of the contract," and KBR "was not permitted to engage in any work … outside the scope of the contract without prior approval from the military." Pet.App.69-70.

D. Staff Sergeant Maseth's Death

Among the troops assigned to live in the Palace Complex was Staff Sgt. Ryan Maseth, a Green Beret and Army Ranger deployed with the 5th Special Forces Group (Airborne). Like other soldiers living in the Palace Complex, Staff Sgt. Maseth was aware of the risk of electrical shocks from faulty wiring in his building, and knew that the Army provided alternative showering facilities that did not pose the same risk. Two of Staff Sgt. Maseth's fellow soldiers testified that they "advised Maseth of the shocking risk posed by using the shower in [the building] to which he was assigned." Pet.App.139. One of those soldiers "explained that Maseth should put his hand out to test the water before getting into the shower and even advised him that the problem would not be fixed unless the entire building was rewired." *Id.* As

the district court explained, "it is clear that Maseth was warned of the problems" posed by the electrical system at the Palace Complex. Pet.App.138-39 n.33.[3]

Staff Sgt. Maseth died in a tragic accident on January 2, 2008. While showering in his assigned living quarters at the Palace Complex, an ungrounded water pump failed and energized the pipes connected to it. Pet.App.82-83. Because every component of the electrical system was similarly ungrounded, the electrical current flowed unchecked throughout the building. Staff Sgt. Maseth was electrocuted when he touched the metal showerhead. A senior commanding General subsequently noted that "the tragic and unfortunate electrocution that took SSG Maseth's life could have happened at any other ungrounded pre-existing building in Iraq." C.A.App.432-33 (Vines Decl. ¶ 15).

Staff Sgt. Maseth's death spurred multiple Executive Branch and congressional investigations into the problem of soldier electrocutions in Iraq. In a July 2009 report, the Defense Department's Inspector General concluded that "multiple systems and organizations failed, leaving [Staff Sgt.] Maseth and other US Service members exposed to unacceptable risk." C.A.App.2122. And the Army

---

[3] Soldiers hesitated to complain about shocks because they—like the Army officials who were responsible for housing decisions—"did not consider the shocks as a serious issue when compared to the other risks they faced as they served during in the war in Iraq." Pet.App.80; *see also* Pet.App.80-81 (describing incident in which soldiers plugged a cell-phone-jamming device into an overloaded generator, despite KBR's warnings not to do so, because the need to prevent the remote detonation of car bombs outweighed the risk of electrical system failure).

Criminal Investigation Command concluded in August 2009 that "[t]here was no single person or organization entirely responsible for electrical safety in the [Palace Complex] and whose act or omission caused SSG Maseth's death." C.A.App.2157.

The Inspector General's report explicitly noted that the "chain of command is responsible for the safety and well-being of the soldiers under their control," and that "[s]oldiers are responsible for their own safety as well as the safety of their fellow soldiers and equipment to the greatest extent possible under the given mission parameters." C.A.App.2164-65. The report also concluded that the Special Forces soldiers housed at the Palace Complex were aware of the risk of shocks, but "had become accustomed to more serious threats and had lived in much worse housing" and "didn't want to move" to alternate housing. C.A.App.2155-56. Though not exonerating KBR, both investigations highlighted military decisions that led to Staff Sgt. Maseth's tragic death.

In February 2008, one month after Staff Sgt. Maseth's death, the Army finally directed KBR to "'rewire the building and ensure proper grounding of all electrical units, systems, and components.'" Pet.App.87.

E. Proceedings Before the District Court

On March 24, 2008, Staff Sgt. Maseth's parents filed negligence claims against KBR in state court. Because the United States is immune from suit under both the FTCA's combatant-activities exception and *Feres v. United States*, 340 U.S. 135 (1950), KBR is the only named defendant. The crux

of Respondents' complaint is that KBR should have taken a number of affirmative steps to fix problems with the bonding and grounding of the electrical systems at the Palace Complex. *See* Pet.App.114-15 (summarizing additional bonding and grounding work that KBR allegedly "should have" performed).

KBR removed the case to federal court and then moved to dismiss, arguing that the case presents a nonjusticiable political question and is preempted by the combatant-activities exception to the FTCA. The district court denied KBR's first motion to dismiss, and the Third Circuit dismissed an interlocutory appeal from that decision. On remand, the district court instructed the parties to engage in extensive discovery on Respondents' claims and KBR's defenses. During the discovery period, the parties deposed seventeen current and former members of the military and U.S. government, including senior Army officers, senior enlisted personnel, and contracting officials.

KBR subsequently renewed its motion to dismiss, which the district court granted on July 13, 2012. The court held that Respondents' state-law negligence claims presented nonjusticiable political questions because "the military presence looms large over nearly every aspect of this case," and "further adjudication of this dispute will inextricably lead to consideration of sensitive military judgments for which no judicially manageable standards exist." Pet.App.51, 102.

The district court found that "military personnel were aware of the specific risk of electrocution in shower facilities posed by the deficient electrical

systems in hardstand buildings," but "felt that the shocking incidents were minor when compared to other pressing matters at the base such as power distribution and protection from indirect fire." Pet.App.117-18. The court also noted that, by expressly choosing the less-comprehensive "Level B" maintenance package, the Army acknowledged that the buildings in the Palace Complex would be maintained "as is," and that KBR would not be expected to perform "preventative maintenance or inspections" or "upgrades." Pet.App.122-24.

The district court thus concluded that KBR had presented "sufficient evidence" to show that "the military exposed soldiers to what its commanders determined to be an acceptable level of risk after considering all of the other hazards of war which were faced by soldiers in the Iraq war theatre and its ability to fund the electrical upgrades and safety features which are admittedly standard here in the United States." Pet.App.52. In short, "the military's involvement cannot be divorced from any negligent act or omission of KBR." Pet.App.110.

The district court further held that Respondents' claims are preempted by the combatant-activities exception to the FTCA because KBR was "fully integrated in the combatant activities of the military" and "supported … the military's missions in Iraq." Pet.App.162-63.

F. The Third Circuit's Decision

The Third Circuit reversed. On the political question issue, the court readily acknowledged 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 (emphasis added). As the court explained, "[e]lectrocution was a reasonably foreseeable result of several strategic military decisions," such as the decision to use ungrounded hardstand buildings for troop housing and the decision not to perform comprehensive upgrades of the electrical systems in those buildings. Pet.App.22.

Despite these findings, the Third Circuit nonetheless held—in reasoning that was not advanced by either party or the district court—that application of the federal, constitutionally-based political question doctrine "depends on which state law controls," and requires an antecedent choice-of-law analysis. Pet.App.29. Texas and Tennessee apply "proportional liability" systems for calculating damages, and the Third Circuit concluded that if one of those states' law applies, then "damages cannot be estimated without evaluating unreviewable military decisions." Pet.App.28. But the court concluded that the case would be justiciable if Pennsylvania law applies because, under Pennsylvania's joint-and-several liability rule, "the plaintiffs are free to obtain the entirety of their relief from KBR." Pet.App.28-29. The Third Circuit remanded to the district court to determine "which state's law applies." Pet.App.33.[4]

---

[4] For similar reasons, the Third Circuit concluded that "[w]hether KBR's contributory-negligence defense presents a nonjusticiable issue also turns on the applicable state law." Pet.App.30-36. The court held that resolution of this issue would turn on nuances of Texas, Tennessee, and Pennsylvania law about whether fault can be assigned to nonparties for purposes of a contributory-negligence defense. *Id.*

Although such a state-law focused view of the political question doctrine would seem to strengthen the case for preemption, the Third Circuit held that Respondents' claims were not preempted by the combatant-activities exception to the FTCA, 28 U.S.C. § 2680(j). The court expressly rejected the test proposed by the United States, which would ask whether a similar tort claim against the United States would fall within the FTCA's combatant-activities exception and whether the contractor was acting within the scope of its authority at the time of the incident. Pet.App.42-43.

The court purported to endorse the D.C. Circuit's test for preemption of claims against a battlefield support contractor—*i.e.*, when the 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.'" Pet.App.42 (quoting *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009)). But the Third Circuit engaged in a searching inquiry into whether the military retains command authority, which is contrary to the D.C. Circuit's approach and its broader holding that the combatant-activities exception "reveals a policy of 'the elimination of tort from the battlefield.'" Pet.App.41-43.

The court acknowledged that KBR was "integrat[ed] into the military's combatant activities" in an "active war zone." Pet.App.43-44. But it nonetheless concluded that "[t]he considerable discretion KBR had in deciding how to complete the maintenance at issue here … prevents the plaintiffs'

suit from being preempted because the military did not retain command authority over KBR's actions." Pet.App.44-45.

KBR filed a timely petition for rehearing en banc, which the Third Circuit denied on September 10, 2013. The Third Circuit has stayed the mandate pending this Court's review.

REASONS FOR GRANTING CERTIORARI

The Third Circuit refused to affirm the dismissal of Respondents' state-law tort claims for injuries arising out of U.S. military decisions in Iraq. That decision warrants review by this Court for two independent reasons.

First, the Court should grant certiorari to address whether state-law tort claims against a battlefield support contractor operating in an active war zone are barred by the political question doctrine when adjudication of those claims would necessarily require scrutinizing sensitive military decisions. Military judgments pervade every aspect of this case. The Army made a calculated decision to house troops in pre-existing, Iraqi-constructed buildings despite the well-documented risk of electrical shocks from faulty wiring. Due to funding constraints, the Army also chose to maintain those buildings on an "as-is" basis rather than comprehensively upgrading the electrical systems (as KBR had proposed). Respondents' negligence claims against KBR simply cannot be disentangled from the Army's strategic decisions regarding troop housing and resource allocation for the war effort in Iraq.

The Third Circuit's conclusion that application of the political question doctrine turns on the nuances

of state tort law and requires an antecedent choice-of-law analysis is deeply flawed on a number of levels. The political question doctrine is a constitutional principle derived from the separation of powers, and turns on the unique competencies of each branch of the *federal* government. A uniform federal rule is especially important in cases, such as this one, that are based on events that occurred in a war zone halfway around the world. On a foreign battlefield, both the military and the military's contractors are dealing with service members as U.S. service members, not as residents of particular states whose idiosyncratic tort law rules might or might not permit a suit to go forward. The events in question occurred in military housing in Iraq; it is absurd to hold that the political question doctrine bars a suit brought by a soldier from Tennessee but not one from Pennsylvania.

The Third Circuit's reasoning—which was subsequently adopted by the Fifth Circuit as well—is flatly contrary to *Taylor v. KBR*, 658 F.3d 402 (4th Cir. 2011), and *Carmichael v. KBR*, 572 F.3d 1271 (11th Cir. 2009). Both *Taylor* and *Carmichael* involved tort claims against KBR arising out of its combat support functions in Iraq. But, unlike the Third Circuit here, the Fourth and Eleventh Circuits had little difficulty concluding that the claims were nonjusticiable. As the Eleventh Circuit explained in *Carmichael*, "it would be impossible to determine that [KBR] alone was the sole cause of the accident or to possibly apportion blame without ruling out the potential causal role played by pivotal military judgments." *Id.* at 1295. Neither court remotely suggested that application of the political question

doctrine required an antecedent choice-of-law inquiry into the nuances of state tort law.

Second, the Court should grant certiorari to address whether the "combatant-activities exception" to the FTCA preempts state-law claims against a battlefield support contractor that arise out of the military's combatant activities in a war zone. There is no question that the combatant-activities exception bars Respondents from suing the military directly for injuries incurred at a forward operating base in Iraq. It makes no sense to allow identical claims to proceed against a *contractor* based on the same underlying events. Regardless of whether the defendant is the United States or a contractor, critical federal interests will be undermined if tort claims arising out of combatant activities are allowed to proceed. The United States itself has emphasized that subjecting contractors to state-law tort suits may burden the military with intrusive discovery requests and result in unwarranted judicial probing of the military's wartime policies—which is precisely what has happened in this case. The Third Circuit's holding that a state-law tort claim is not preempted if the contractor exercised any "discretion" in performing its contractual duties squarely conflicts with the D.C. Circuit's decision in *Saleh*, 580 F.3d 1, and the position of the United States.

Both of these issues independently merit this Court's review, but together they make the need for this Court's review particularly acute. The notion that the applicability of the distinctly-federal political question doctrine turns on the details of state law is profoundly flawed. But if the applicability of that

doctrine to actions on a foreign battlefield really did turn on the vagaries of a soldier's home-state tort law, the need for a uniform rule of federal preemption would be that much more obvious. One way or the other, it is clear that state law has no place on a foreign battlefield. That has long been obvious in suits against the U.S. military. Given the realities of the modern all-volunteer military, in which contractors perform functions traditionally discharged by soldiers, it makes no sense to have a different rule for contractors.

The wars in Iraq and Afghanistan have triggered hundreds of "contractor-on-the-battlefield" tort suits brought by soldiers and/or civilians, with no sign of abating. The decision below promises that if plaintiffs' lawyers just pick the right state tort law and theory, they can recover against contractors for battlefield injuries. This Court should make clear that this is a false promise and stem this tide of cases.

I. The Court Should Grant Certiorari To Address The Applicability Of The Political Question Doctrine To State-Law Tort Claims Against A Battlefield Support Contractor Operating In An Active War Zone.

A. Adjudication of Respondents' Claims Would Unquestionably Implicate Strategic Military Decisions.

The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed … 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). That is, a federal court should dismiss a case as nonjusticiable if 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." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

It is "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" than military affairs and foreign policy, and it is "difficult to conceive of an area … in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). The Constitution provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States," U.S. Const. art. II, § 2, and that "[t]he Congress shall have Power… [t]o raise and support Armies," and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States," *id.* art. I, § 8.

As this Court has explained, "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments," and "[t]he ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Gilligan*, 413 U.S. at 10. Indeed, the very nature of warfare "requires military commanders to conduct risk assessments of

numerous risks that would be unacceptable in civilian life which they must weigh on a daily basis." Pet.App.120.

This is a case in point. The risks from the substandard wiring of the pre-existing Iraqi hardstand building "would be unacceptable in civilian life," *id.*, but so too would the risks of mortar fire, while diplomatic concerns about erecting permanent structures would have no analog whatsoever in ordinary civilian life. State tort law, which is all about apportioning duties and liability for the incidents of ordinary civilian life, has no role in balancing these military responsibilities. Indeed, applying ordinary civilian tort law to this situation is the kind of absurdity that the political question doctrine was designed to prevent.

Even beyond the basic trade-offs among the risks of electrical shocks, the risks from mortar fire, and various diplomatic imperatives, strategic military judgments pervade every aspect of this case. The Army controlled where troops would live and decided what levels of risk were acceptable for troop housing. The Army decided that pre-existing, Iraqi-constructed buildings were the "least bad" option because protecting troops from enemy fire was critical, even if it exposed soldiers to other hazards. The Army chose to maintain those hardstand buildings on an "as-is" basis rather than funding costly comprehensive upgrades of the electrical systems. And the Army was responsible for providing alternative housing or showers if existing facilities posed unacceptable risks. Each of those military decisions required a careful balancing of

countless considerations that are inherently military in nature, including troop safety, diplomatic considerations, cost considerations, and how the decision would advance the war effort.

Adjudication of 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 housing and the allocation of scarce resources. The crux of Respondents' negligence claim is that KBR *should have taken* affirmative steps to upgrade the electrical system in the Palace Complex. *See* Pet.App.12-13 & n.5; *see also* Pet.App.114-15 (summarizing additional bonding and grounding work that KBR allegedly "should have" performed).

But the Army operated under a "good enough" standard and *expressly refused* to contract with KBR to perform precisely the type of preventative maintenance work that is central to Respondents' claims. KBR warned the military in 2007 that the Palace Complex buildings lacked proper grounding, and offered to perform "Level A" maintenance, which would have entailed "upgrades to existing facilities and the establishment of a preventative maintenance program, including checks for grounding of electrical systems." Pet.App.67; *see* Pet.App.130 (Level A maintenance "would have explicitly required KBR to conduct periodic checks for grounding of all equipment, including water pumps, every 60 days."). The Army rejected that option as too costly.

Instead, it directed KBR to perform far-more-limited "Level B" maintenance, which involved

making repairs only in response to specific service requests and "expressly excluded upgrades to existing systems and preventive maintenance." Pet.App.67. The Army also rejected a "refurbishment" option that would have required KBR to upgrade the Palace Complex electrical systems to "Western construction standards." Pet.App.71-72 & n.8.

In sum, as the district court correctly concluded, Respondents are effectively challenging "the scope of the duties assigned to KBR *by the military*." Pet.App.112 (emphasis added). KBR offered ample evidence to show that "the risk of electrical shock to which Staff Sergeant Maseth was exposed was the result of high level military cost-benefit and wartime risk management decisions rather than the result of KBR's own negligence." Pet.App.135-36. Those strategic military risk assessments simply "cannot be evaluated under traditional state law tort standards." Pet.App.145. Respondents' negligence claims are thus nonjusticiable under a straightforward application of the political question doctrine because their allegations against KBR cannot be disentangled from core military judgments regarding the war effort.[5]

[5] KBR's contributory negligence and assumption-of-risk defenses similarly raise political questions by implicating issues such as whether military leaders provided sufficient warnings to Staff Sgt. Maseth about the risk of electrical shocks, and whether Staff Sgt. Maseth acted reasonably by failing to use alterative shower facilities.

B. The Third Circuit Badly Misconstrued the Political Question Doctrine.

The Third Circuit readily acknowledged that "KBR has adduced sufficient evidence to present its defenses that the military's housing and maintenance decisions were at least *a* proximate cause of the death" and may have been "*the* proximate cause." Pet.App.25. More specifically, the court recognized that "[e]lectrocution was a reasonably foreseeable result of several strategic military decisions," including the decision to house troops in pre-existing Iraqi buildings and the decision to reject KBR's offer to perform "Level A" maintenance at the Palace Complex. Pet.App.22-23.

Those findings should have been more than sufficient for the Third Circuit to find Respondents' claims nonjusticiable. But the court thought a further inquiry was needed. Even though no party had raised a choice-of-law issue on appeal, the Third Circuit held that the question of whether Pennsylvania, Texas, or Tennessee law applied would be *dispositive* to whether this case raised a nonjusticiable political question. Pet.App.27-30.

That holding is deeply flawed on a number of levels. The notion that the *federal*, constitutionally based political question doctrine turns on the nuances of *state* tort law ignores first principles. The "nonjusticiability of a political question is primarily a function of the separation of powers," and application of the doctrine involves "a delicate exercise in constitutional interpretation." *Baker*, 369 U.S. at 210. The key considerations in determining whether the political question doctrine applies—such as

whether the issue has been textually committed to the political branches and whether there are judicially manageable standards for resolving the issue—involve the powers and competencies of each branch of the federal government. The vagaries of state tort law do not affect whether a decision has been committed by the Constitution to the Executive Branch or whether an Article III court has workable standards for evaluating events that occurred in a foreign war zone. And when a case arises in a context like this, which is manifestly unsuited for the application of state tort law designed for apportioning responsibility among civilians, focusing on the subtleties of Pennsylvania and Tennessee tort law is to miss the forest for the trees.

The fundamental problem with Respondents' claims is not some pleading deficiency that turns on a nuance of state law. It is that, *regardless* of which state's law applies, Respondents are seeking to hold KBR liable for strategic decisions about the Iraq War that were at all times the responsibility of military officials alone. On a foreign battlefield, both the military and the military's contractors are dealing with service members as U.S. service members, not as residents of particular states whose idiosyncratic tort law rules might or might not permit a suit to go forward. State tort law simply has no place in the regulation of mission-critical functions in an active war zone—which is why tort claims premised on events that occurred on a foreign battlefield are both nonjusticiable under the political question doctrine and, as explained below, preempted by the combatant-activities exception to the FTCA.

The Third Circuit's approach to the political question doctrine would also lead to illogical and inequitable results. Most obviously, tort claims against the *same* defendant arising out of the *same* series of events might give rise to radically different outcomes depending on the happenstance of where a particular soldier happened to live when not stationed abroad. Indeed, the Third Circuit noted that, under its approach, if "Pennsylvania law applies, then the defense does not introduce any nonjusticiable issues," but if "either Tennessee or Texas law applies, then the defense will introduce such an issue." Pet.App.29.[6]

This disparity would be troubling under any circumstances. But when the events in question occurred in a war zone halfway around the world, any ostensible state regulatory interests are *de minimis*, and the need for a uniform federal rule of

---

[6] This absurdity would be particularly manifest in multi-plaintiff suits currently pending against Petitioner. *See*, *e.g.*, *In re KBR Burn Pit Litig.*, 925 F. Supp. 2d 752, 755 (D. Md. 2013), *appeal filed* No. 13-1430 (4th Cir.) (multi-district litigation against KBR involving 58 separate complaints, including 44 purported class actions, alleging injuries from "burn pit" military waste disposal operations in Iraq); *McManaway v. KBR*, 906 F. Supp. 2d 654 (S.D. Tex. 2012), *appeal filed* No. 12-20763 (5th Cir.) (case involving dozens of plaintiffs suing KBR for alleged exposure to harmful chemicals in Iraq); *Bixby v. KBR*, No. 3:09-cv-632, 2012 WL 3776473 (D. Or. Aug. 29, 2012), *appeal filed* Nos. 13-35513, 13-35518 (9th Cir.) (same). The notion that a handful of plaintiffs exposed to the same alleged hazard on a foreign battlefield could proceed based on the peculiarities of their home-state tort law ignores that the political question problems with these cases arise from the foreign battlefield context.

nonjusticiability is imperative. The application of a fundamental constitutional principle to events that occurred on a foreign battlefield cannot possibly vary depending on whether the plaintiff was domiciled in Houston, Memphis, or Pittsburgh.

C. The Third Circuit's Approach Squarely Conflicts with Decisions of the Fourth and Eleventh Circuits, and Has Been Adopted by the Fifth Circuit.

The Third Circuit's approach to the political question doctrine—which was recently endorsed by the Fifth Circuit as well—squarely conflicts with the Fourth Circuit's decision in *Taylor* and the Eleventh Circuit's decision in *Carmichael*.

1. In *Taylor*, the plaintiff was a U.S. Navy Hospital Corpsman who was injured by an electrical shock while helping Marines install an unauthorized backup generator at a tank ramp maintenance area on a military base in Iraq. 658 F.3d at 404. He brought common-law negligence claims against KBR, alleging that KBR employees negligently switched on the area's main generator even though they knew that Marines were working on a backup generator at the time. *Id.*

The Fourth Circuit held that the plaintiff's claims were barred by the political question doctrine. The court acknowledged that "KBR was nearly insulated from direct military control and was itself solely responsible for the safety of all 'camp residents during all contractor operations.'" *Id.* at 411. It nonetheless held that the case was nonjusticiable because "a decision on the merits of [the plaintiff's] negligence claim would require the judiciary to

question 'actual, sensitive judgments made by the military.'" *Id.* For example, adjudication of KBR's contributory negligence defense would have required the court to re-examine military decisions about how to supply power to the tank maintenance facility. *Id.* at 412. The Fourth Circuit concluded that such issues are "beyond the scope of judicial review," and that there are "no discoverable and manageable standards for evaluating how electric power is supplied to a military base in a combat theatre or who should be authorized to work on the generators supplying that power." *Id.* at 412 & n.13.

Taylor arose in a nearly identical posture to this case: the plaintiff brought state-law negligence claims against KBR based on injuries resulting from an electrical shock in Iraq, and KBR's principal defenses included contributory negligence and lack of proximate causation. The Fourth Circuit did not remotely suggest that it needed a full-blown choice-of-law analysis to determine whether the political question doctrine applied, nor did it suggest that its holding might turn on the intricacies of state tort law. Instead, the court concluded, correctly, that tort claims against a battlefield support contractor are nonjusticiable as long as they would inevitably require the court to assess the reasonableness of strategic military decisions in order to adjudicate the plaintiff's claims.

2. In *Carmichael*, an Army sergeant was severely injured in an accident involving a fuel convoy in Iraq. The plaintiff had been serving as the "military escort" on a fuel truck driven by a KBR employee, and was injured when the vehicle rolled

over while taking a narrow turn. 572 F.3d at 1275-78. He subsequently brought state-law negligence claims against KBR.

The Eleventh Circuit held that those claims were barred by the political question doctrine. The court emphasized that "military judgments governed the planning and execution of virtually every aspect of the convoy," including the date and time of departure, the number of trucks, the route, and the security measures to be taken. *Id.* at 1281. Like the military housing decisions at issue here, the key decisions were made by the military based on a careful weighing of the costs and benefits of each alternative. For example, "[a] balance had to be struck so that the vehicles would be traveling swiftly enough to frustrate potential insurgent attacks, but not so fast that drivers would be unable to control their vehicles on the narrow, wandering, poorly-maintained road." *Id.* at 1282. The Eleventh Circuit concluded that it was "impossible to make any determination regarding … KBR's negligence without bringing those essential military judgments and decisions under searching judicial scrutiny." *Id.* at 1283.

Unlike the Third Circuit's decision here, choice of law played no role in the Eleventh Circuit's political question analysis. Even though the district court had not made "any specific determination concerning the substantive law applicable to the dispute," the Eleventh Circuit found it "unnecessary to address the issue here." *Id.* at 1288 n.13. As the court explained, "given the uniformity of negligence law among the states, *our analysis would remain the same*

regardless of which state's law applied." *Id.* (emphasis added).

The plaintiff in *Carmichael* also sought to avoid application of the political question doctrine by arguing that the court need not second-guess military judgments because his claims merely alleged that KBR—not the military—had acted negligently. But the Eleventh Circuit rejected that attempted distinction, emphasizing that even if KBR's driver "bore some blame for the accident," it was "perfectly plausible" that military judgments "contributed to the rollover." *Id.* at 1286. That is, "it would be impossible to determine that [KBR] alone was the sole cause of the accident or to possibly apportion blame without ruling out the potential causal role played by pivotal military judgments." *Id.* at 1295.[7]

Here, the Third Circuit refused to dismiss Respondents' claims even though it made the exact same finding as the Eleventh Circuit in *Carmichael*—namely, that there was "sufficient evidence" to show that the military was at least "*a* proximate cause" of the injury and may have been "*the* proximate cause." Pet.App.25. There is no question that Respondents' claims would have been dismissed as nonjusticiable if this case had arisen in the Eleventh Circuit.

3. In addition to conflicting with *Taylor* and *Carmichael*, the Third Circuit's deeply flawed

---

[7] The Eleventh Circuit further held that there were no "manageable standards" for adjudicating the plaintiff's negligence claims because "the dangerousness of the circumstances … renders problematic any attempt to answer basic questions about duty and breach." 572 F.3d at 1289.

approach to the political question doctrine has now spread to the Fifth Circuit. In *McManaway v. KBR*, No. 4:10-cv-1044 (S.D. Tex.), the plaintiffs allege that KBR negligently exposed them to hazardous chemicals while restoring water-treatment operations at an Iraqi oil facility, at the instruction of the military. The district court denied KBR's motion to dismiss and certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b). But, after granting permission to appeal and accepting full merits briefing and argument, the Fifth Circuit dismissed the appeal. Citing the Third Circuit's decision in this case, which also figured prominently in the oral argument, the Fifth Circuit concluded that it was "premature" to consider KBR's political question arguments because "the district court has not performed, and we have not received the briefing necessary for us to perform, a choice-of-law analysis." Order at 2, *McManaway v. KBR*, No. 12-20763 (5th Cir. Nov. 7, 2013).

II. The Court Should Grant Certiorari To Address Whether The "Combatant-Activities" Exception Preempts State-Law Claims Against A Battlefield Support Contractor That Arise Out Of The Military's Combatant Activities In A War Zone.

A. Tort Claims Against a Battlefield Support Contractor Arising out of the Military's Combatant Activities in a War Zone Are Preempted by the FTCA.

The FTCA generally waives the United States' sovereign immunity in tort suits against the government for the wrongful acts of employees of the

United States. But recognizing the absurdity of importing ordinary state tort principles onto the battlefield, the statute expressly preserves the government's sovereign immunity for any "claim arising out of the combatant activities of the military or naval forces … during time of war." 28 U.S.C. § 2680(j).

The rationale for the combatant-activities exception is straightforward. As the D.C. Circuit explained in an opinion by Judge Silberman, "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*, 580 F.3d at 7. The policy underlying the combatant-activities exception "is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Id.*[8]

Those critical federal interests "are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control." *Id.* Indeed, tort claims against a battlefield

---

[8] Judge Wilkinson has similarly emphasized that "consideration of the costs and consequences of protracted tort litigation introduces a wholly novel element into military decisionmaking" and may lead to "excessive risk-aversiveness on the part of potential defendants." *Al Shimari v. CACI Int'l*, 679 F.3d 205, 226 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting).

support contractor are often "really indirect challenges to the actions of the U.S. military." *Id.* Litigation of such claims "will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government's wartime policies." *Id.* at 8. Allowing such suits to proceed "will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations." *Id.* And, based on standard contractual terms, "the costs of imposing tort liability on government contractors" will ultimately be "passed through to the American taxpayer." *Id.* In short, it makes little sense to insulate the government from liability when it performs a task itself, but to allow tort claims to proceed when the government chooses to hire a contractor for that work.

Courts have thus concluded that state-law tort claims against a battlefield support contractor are preempted by the combatant-activities exception if such claims would undermine the uniquely federal interests that the exception was designed to protect. In *Saleh*, the D.C. Circuit held that, "[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." 580 F.3d at 9.

The United States has endorsed an even broader test, arguing that a claim against a contractor should be found preempted if: (1) a similar claim against the United States would be within the combatant-

activities exception of the FTCA; and (2) the contractor was acting within the scope of its contractual relationship with the government at the time of the incident. *See* Br. of United States as Amicus Curiae at 17-20, *Al Shimari v. CACI Intl*, No. 09-1335, 2012 WL 123570 (4th Cir. Jan. 14, 2012). Under that approach, "federal preemption would generally apply even if an employee of a contractor allegedly violated the terms of the contract or took steps not specifically called for in the contract, as long as the alleged conduct at issue was within the scope of the contractual relationship." *Id.* at 20.

Respondents' claims are squarely preempted under either formulation of the test. As the district court explained, "[t]he military engaged KBR to provide discrete operations and maintenance services to the facilities used by [] Special Forces soldiers … and the military controlled the terms and conditions of the contract and initiated all work that was performed by KBR on the base." Pet.App.162. The services provided by KBR supported the military's mission in Iraq, including "the attacks led by Special Forces soldiers off the base, their gathering of intelligence in furtherance of the military's missions, and the defensive mechanisms used by the military to protect base inhabitants from enemy attacks." Pet.App.162-63; *see also Aiello v. KBR*, 751 F. Supp. 2d 698, 714 (S.D.N.Y. 2011) (KBR was fully integrated into combatant activities where it "provide[d] operation and maintenance services at various designated Army base camps across Iraq … at the direction of and in coordination with military personnel").

Moreover, KBR's electrical maintenance work was "directly connected to force protection, as the military actually plugged its war-time defensive instruments used to ward off enemy attacks into the electrical facilities that KBR was paid to maintain." Pet.App.159-60. There is thus no question that KBR was "fully integrated in the combatant activities of the military at the base," Pet.App.163, and that claims against the United States alleging similar conduct would have been barred by the combatant-activities exception.[9]

B. The Third Circuit's Erroneous Refusal To Find Respondents' Claims Preempted Conflicts With the D.C. Circuit's *Saleh* Decision and the United States' Proposed Test for Preemption.

The Third Circuit nonetheless refused to find Respondents' claims preempted, in reasoning that expressly rejects the United States' proposed test and is irreconcilable with the D.C. Circuit test it purports to adopt. The court held that Respondents' claims were not preempted because "the relevant contracts and work orders did not prescribe how KBR was to perform the work required of it." Pet.App.44. Instead, those contracts supposedly "provided for

---

[9] Because the combatant-activities exception applies to all conduct "arising out of" combatant activities, it encompasses "not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948); *see also Aiello*, 751 F. Supp. 2d at 714 (maintenance of latrines was directly related to the health of soldiers on the base and was thus "integral to sustaining combat operations").

general requirements or objectives and then gave KBR considerable discretion in deciding how to satisfy them." Pet.App.44-45. The modest degree of discretion perceived by the Third Circuit does not remotely take KBR beyond the scope of the contract or outside the military's command authority. Nonetheless, the Third Circuit rejected preemption where the D.C Circuit and United States would clearly find the state tort suit preempted.

Although the Third Circuit claimed to be following *Saleh*, its reasoning is fundamentally incompatible with the D.C. Circuit's decision in that case. Indeed, the Third Circuit's holding—that claims against a contractor operating in an active war zone are not preempted if the contractor exercised "discretion" in performing its functions—is nearly identical to the district court decision that the D.C. Circuit *reversed* in *Saleh*. In *Saleh*, the district court had held that combatant-activities preemption "attaches only where contract employees are 'under the direct command and *exclusive* operational control of the military chain of command.'" 580 F.3d at 4. The district court rejected the contractor's preemption defense because there was a "dual chain of command" in which the contractor "retained the power to give 'advice and feedback' to its employees," and had authority to prohibit practices that were "inconsistent with the company ethics policy." *Id.*

The D.C. Circuit unequivocally rejected that approach to combatant-activities preemption, emphasizing that an "exclusive operational control" requirement "does not protect the full measure of the federal interest embodied in the combatant activities

exception." *Id.* at 8. As the court explained, 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, the alternative rule would create a "perverse incentive" by discouraging contractors from exercising their expert judgment to help advance the military's mission. *Id.*; *see also Boyle v. United Tech. Corp.*, 487 U.S. 500, 513 (1988) (emphasizing that "it does not seem to us sound policy to penalize" a defense contractor for exercising discretion).[10]

The Third Circuit also expressly rejected the United States' proposed test, which the court described as "overinclusive" because it would purportedly "insulate contractors from liability" even if they were alleged to have violated the contract in question. Pet.App.42-43. But that reasoning defeats the whole purpose of the combatant-activities exception. The exception is designed to ensure adequate leeway for the government—and, in turn, its contractors—to engage in combatant activities without fear of subsequent judicial scrutiny through tort suits. Congress and the courts have repeatedly recognized the importance of immunities that sweep broadly, in order to avoid chilling critical government functions. *See*, *e.g.*, 28 U.S.C. § 2679 (Westfall Act granting immunity to federal employees for torts committing "within the scope of [their] office or

[10] Moreover, two of the three judges on the Fourth Circuit panel in *Taylor* would have held that the plaintiff's claims were preempted by the combatant-activities exception, as construed in *Saleh*. *See* 658 F.3d at 413 (Niemeyer, J., concurring); *id.* at 413 (Shedd, J., concurring in the judgment).

employment," even if that conduct was wrongful or negligent); *Filarsky v. Delia*, 132 S. Ct. 1657, 1666 (2012).

* * *

Both issues presented here are independently worthy of this Court's plenary review. However, the Third Circuit's erroneous focus on the details of state law in addressing the political question doctrine highlights the importance of a federal preemption defense. Both the military and battlefield contractors must be able to interact with soldiers as soldiers, not as residents of 50 states with varying tort laws. If the applicability of the political question doctrine really did turn on state-law details, then the need for a uniform federal rule of preemption would be that much more obvious. One way or the other, the liability of a battlefield support contractor operating pursuant to military control and a military contract cannot turn on the details of a soldier's home-state tort law.

The suit at issue here is one of numerous actions brought against battlefield support contractors for injuries incurred in the Iraq and Afghan conflicts. The decision below sends exactly the wrong signal to litigants and lower courts about such cases, which will inevitably arise out of future conflicts. It promises that if creative attorneys can only identify the right state-law liability theory, they can recover for injuries suffered on battlefields half the world away. This Court should grant review and send a different message—namely, that war remains as tragic as ever, and civilian tort law continues to have no place on the battlefield.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BARBARA A. SMITH
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

LAWRENCE S. EBNER
RAYMOND B. BIAGINI
DANIEL L. RUSSELL JR.
McKENNA LONG & ALDRIDGE LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7500

Counsel for Petitioner

January 8, 2014