No. 13-817

In the Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC.,
Petitioner

v.

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

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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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KBR concedes that the Fifth Circuit's decision remanding to the district court in *McManaway* v. *KBR*, No. 12-20763, was entirely in accord with the Third Circuit's decision in this case. *See* Supp. Br. 3; *see also* BIO 21-22, 26. The Fifth Circuit's denial of rehearing en banc in *McManaway* simply further confirms the uniformity among the courts of appeals on the questions presented. It also emphasizes the lack of warrant for this Court to reach out unnecessarily to decide significant and barely developed questions of constitutional law at the interlocutory stage of the proceedings in this case.

1. *Political question*.

a. KBR attempts to rely on the statement in Judge Jones's dissent from denial of rehearing in *McManaway* that "[n]ow, among the circuit courts, there is no uniformity" on the application of the political question doctrine to cases against military contractors. Supp. App. 12. What is actually apparent from Judge Jones's dissent is that there is in fact complete uniformity on the issue. We have already explained that the Third Circuit's decision here is entirely consistent with decisions of the Fourth and Fifth Circuits. BIO 18-22. Judge Jones agrees. Supp. App. 11-12. KBR, too, concedes that the Third Circuit's approach "was subsequently adopted by the Fourth Circuit . . . and by the Fifth Circuit" in *McManaway*. Supp. Br. 3.

i. That leaves only the Eleventh Circuit's decision in *Carmichael* v. *KBR*, 572 F.3d 1271 (11th Cir. 2009). The Eleventh Circuit's prior decision in *McMahon* v.

Presidential Airways, Inc., 502 F.3d 1331 (11th Cir. 2007), makes clear that the Eleventh Circuit, like the Third Circuit here, will find a case justiciable if it does not "require reexamination of any decision made *by* the U.S. military." *Id.* at 1361; *see* Pet. App. 11. While *Carmichael* reached a different result, that is to be expected when courts apply the same rule to different facts. Indeed, the Eleventh Circuit recognized as much in *Carmichael*. *See* BIO 14-15, 17.

ii. Although KBR argues that the Court should ask for the government's views in this case, the government has already informed the Court in its amicus brief filed in response to this Court's invitation in *Carmichael* that the Eleventh Circuit there, if anything, "may have ultimately erred" in applying the political question doctrine to dismiss the case. 09-683 U.S. Amicus Br. 16. As the government explained—consistent with the Third Circuit's reasoning here—the suit could go forward if "the jury could conclude that [the contractor] failed to behave in a reasonable manner *within* the parameters established by the military." *Id.* at 17. Thus, if the plaintiff could establish that the contractor "was not paying attention" while driving the vehicle that caused the accident in *Carmichael* or that the contractor "failed to comply with military orders," liability could be found. *Id.* "In short, if the parameters set by the military were not followed, then there would be no cause to second-guess military judgments as such . . . in the manner that lower courts have regarded as barred by the political question doctrine." *Id.* at 17-18. That is essentially the Third Circuit's view here.

iii. Judge Jones and KBR nonetheless maintain

that there is a conflict with *Carmichael* because the Eleventh Circuit there stated in a footnote that its analysis "would remain the same regardless of which state's law applied." 572 F.3d at 1288 n.13. Of course, if the applicable law does not differ from State to State (or if the parties do not argue that it differs), a court has no reason to make a choice-of-law determination. Thus, as the court explained in *Carmichael*, "[t]he district court does not appear to have made any specific determination regarding the substantive law applicable to the dispute." *Id.* As applied to the issues in *Carmichael*, the court found that there was "uniformity of negligence law among the states" and therefore "[the court's] analysis would remain the same regardless of which state's law applied." *Id.*

Even on that premise, the court in *Carmichael* found it necessary to "assume . . . that Georgia law would apply," 572 F.3d at 1288 n.13, thereby indicating that the content of state law *was* important to the analysis. If choice of law had been contested in *Carmichael*, the court obviously would not have merely "assume[d]" that Georgia's law applied, but would instead have had to make a choice of law determination, precisely as the Third, Fourth, and Fifth Circuits have done in cases where choice of law was disputed and potentially determinative. As *McManaway* underscores, the courts of appeals are in complete agreement on that principle.

iv. More fundamentally, determining whether a case requires a forbidden evaluation of military decisions requires a court to examine what will actually be litigated, *i.e.*, the claims and defenses that may be asserted. Where, as here, the laws of varying States

that may apply to a case differ materially in what has to be proven to establish a claim or make out a defense, the court must determine choice of law in order to decide whether the political question doctrine applies. KBR calls this "state-law-centric" but offers no alternative approach. BIO 25-26. The uniform acceptance of this approach by the courts of appeals establishes that there is no other way to proceed.

b. Judge Jones stated that requiring a choice-of-law determination "stands federal procedure on its head by implying that [a] case must nearly be tried before we can assess federal court jurisdiction and competence to hear it." Supp. App. 3. No court has held that a case must "nearly be tried" before the political question issue can be resolved. In this case, for example, had the district court understood the nature of the analysis and realized that it turned on which of conflicting state laws is applicable, the court could have resolved the choice of law issue much earlier in the litigation. Even if the political question doctrine is one of "jurisdiction," *but cf. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1427 (2012), there are many cases in which a district court's erroneous jurisdictional analysis leads to extensive proceedings before the lack of jurisdiction is ultimately revealed. *See, e.g., Elgin* v. *Department of Treasury*, 132 S. Ct. 2126 (2012); *Raines* v. *Byrd*, 521 U.S. 811 (1997). Application of the political question doctrine is no different.

c. Relatedly, KBR (but not Judge Jones) asserts that the Third Circuit held "that district courts must conclusively resolve all factual issues to determine whether the threshold political question doctrine applies." Reply Br. 7-8. It is true that a district court

may have to resolve some factual disputes in order to determine what issues will be litigated, and hence whether resolution of the case would require a forbidden judicial evaluation of military decisions. But it is simply hyperbole to state that the Third Circuit held that a court must "conclusively resolve all factual issues" before determining the application of the political question doctrine. There are many issues that clearly do not have to be resolved before determining whether the political question doctrine requires dismissal here. *See* Pet. App. 26. They include, for example, whether KBR installed the pump that caused the electrocution of Sergeant Maseth when he took a shower in his barracks, *see* Pet. App. 14; whether KBR maintained or should have maintained the pump, *see* Pet. App. 15-16 n.8; whether Sergeant Maseth knew of and voluntarily exposed himself to a risk, *see* Pet. App. 18; and so on.

2. *Combatant activities preemption*

a. KBR renews its argument that the Third Circuit's decision conflicts with *Saleh* v. *Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). *See* Supp. Br. 6. As explained in the Brief in Opposition (at 34), however, *Saleh*'s statement that a policy of the FTCA was "the elimination of tort from the battlefield," 580 F.3d at 7, did not suggest that Congress pursued that policy to the exclusion of all others. To the contrary, *Saleh* itself recognized "that a service contractor might be supplying services in such a discrete manner—perhaps even in a battlefield context—that those services could be judged separate and apart from combat activities of the U.S. military." *Id*. at 9. *Saleh* also explained that a company like KBR operating under "performance-

based statements of work" such as those involved here, *id*. at 10, would *not* be entitled to immunity. *See* BIO 29-30, 34. There is no conflict with *Saleh*.

b. KBR argues that the military should not be asked "to bear the cost and associated inflexibilities imposed by anticipating *post hoc* lawsuits." Supp. Br. 7 (quoting Supp. App. 17).[1] The Third Circuit remanded here to determine whether the political question doctrine permits this case to proceed. It is therefore possible that the case *will* ultimately be found to be nonjusticiable, and KBR (and certainly the military) will not be asked to bear any cost. If this case instead proceeds to judgment and respondents do prevail, it is KBR, not the military, that will bear the costs. Even if that occurs, tort liability generally is designed not merely to compensate victims but also to encourage adequate care. Insofar as KBR, or any other contractor, is thereby spurred to exercise adequate care in the future, costs—and the lives of soldiers like Sergeant Maseth—will be saved, not imposed.

KBR argues that "it makes no sense to . . . preserve civilian contractor tort liability in ways that would be

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[1] While KBR states that "[r]espondents have already deposed seventeen military officials," Reply Br. 3, the majority of those depositions were noticed by KBR, not respondents. KBR also neglects to mention that those depositions were all taken in person or by phone from individuals stationed in this country, *and with no objection by the United States*. *See* Pet. App. 100 n.18 ("The military has cooperated with the parties throughout the discovery process, and this Court has not been called upon to resolve any disputes between the parties and the military.").

inconceivable had the same battlefield-related activities been conducted by the military itself." Supp. Br. 6 (quoting Supp. App. 14). Insofar as "battlefield-related" liability means "state regulation of the military's battlefield conduct and decisions," the Third Circuit agreed that claims against contractors would be preempted. Pet. App. 42. But beyond that, Congress conspicuously *excluded* contractors from the FTCA's scheme, including from the combatant-activities and other exceptions. *See* 28 U.S.C. § 2671; BIO 31-32.

Indeed, *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), held that, even where the FTCA does preempt some claims against contractors, such preemption gives narrower protection to contractors than the FTCA does to the government itself. *Id.* at 512; see BIO 33 & n.15. Thus, *Boyle* too establishes that Congress was willing to accept some contractor liability (and costs to the government, if any, that result). *See* Pet. App. 39 (noting that, under *Boyle*, a court should not "simply apply[] the statute as if the contractor were the federal government"). Contrary to KBR's arguments, Congress likely would have been particularly concerned that plumbing and electrical contractors, like KBR in this case, exercise due care to protect soldiers from entirely avoidable, non-combat deaths such as the one that occurred here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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