NO. 13-1241

In the
Supreme Court of the United States

KBR, INCORPORATED, ET AL.,

Petitioners,

v.

ALAN METZGAR, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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This petition and *KBR v. Harris*, No. 13-817 (U.S. filed Jan. 8, 2014), well illustrate the many problems that arise when plaintiffs attempt to use state tort law to recover for injuries that occurred in an active war zone halfway around the world. State law—which is well-designed to apportion duties and liability in ordinary *civilian* life—is categorically unsuited to the resolution of such claims, which is why Respondents' claims are non-justiciable, preempted, and barred by the doctrine of derivative sovereign immunity.

There is no question that these issues are important and recurring, and that the lower courts are divided over the proper framework for adjudicating "contractor-on-the-battlefield" claims. Four judges of the U.S. Court of Appeals for the Fifth Circuit recently emphasized that "there is no uniformity" among the courts of appeals on the questions presented here, and that it is critical for this Court to provide "a uniform decision-making apparatus and a way to hasten resolution of these cases." *McManaway v. KBR, Inc.*, No. 12-20763, 2014 WL 1686952, *5 (5th Cir. Apr. 28, 2014) (Jones, J., dissenting from denial of rehearing *en banc*) ("*McManaway* Dissent").

Respondents' principal answer to all this is not to deny the widespread confusion in the circuits, but to suggest that review in this case, unlike others (including *Harris*), would be premature because additional discovery and factfinding is needed to determine whether Respondents' claims are non-justiciable or preempted. But that contention misses

the point altogether. KBR's petition challenges the Fourth's Circuit's *legal standards* for adjudicating contractor-on-the-battlefield claims, and KBR contends that under the proper legal standards—which prevail in the Eleventh and D.C. Circuits, but not in the Third, Fourth, or Fifth—Respondents' claims should be dismissed *on this record*. Indeed, one of the key issues in this case is whether a remand for a detailed choice-of-law analysis is a necessary component of the justiciability inquiry, or a mistake. It is thus a *non sequitur* to point to the remand—the propriety of which is squarely at issue in the first question presented—as a reason for deferring consideration.

The Fourth Circuit also acknowledged a three-way split of authority over the legal standard for combatant-activities preemption, and unequivocally rejected the test proposed by the United States. Those issues, and the related derivative sovereign immunity question, are ripe for immediate resolution by this Court. Further proceedings would only invite the very harms these doctrines are designed to prevent—namely, forcing military officials to be haled into depositions and court proceedings to explain and justify their wartime decisions. "Planning and winning military conflicts is hard enough without asking the military to bear the cost and associated inflexibilities imposed by anticipating *post hoc* lawsuits." *McManaway* Dissent, 2014 WL 1686952 at *7.

* * *

For the reasons stated in the petition, the *Harris* briefing, and the *McManaway* Dissent, the best

course is for this Court to grant certiorari outright both here and in *Harris*. At a bare minimum, in light of the paramount federal interests implicated by these cases, the Court should call for the views of the Solicitor General.

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

A. Respondents' state-law tort claims challenge waste disposal practices in the Iraq and Afghanistan war zones. If this case proceeded to trial, one of KBR's core liability defenses would be that Respondents cannot establish causation because the key decisions regarding the use of burn pits in Iraq and Afghanistan were made by the military, not KBR. That is not something that KBR merely argued or alleged. The district court closely examined the substantial record in this case and concluded that KBR has pointed to "clear evidence" showing that "the most important waste disposal decision affecting Plaintiffs, *i.e.*, the decision to use open burn pits, was made by the military, not the Defendants." Pet.App.69-70.

Respondents complain (at 13-15) that the persuasiveness of that evidence has not yet been tested and the factfinder has not yet "resolve[d] the factual conflicts." Respondents suggest that a remand will permit that factual development, and that review at this juncture is premature. But that only serves to highlight one of the Fourth Circuit's fundamental legal errors: it converted the threshold *justiciability* inquiry into a full-blown *merits*

adjudication. Pet. 23-25. The Fourth Circuit candidly acknowledged that KBR's evidence "indicates that the military allowed the use of burn pits and decided whether, when, and how to utilize them." Pet.App.17. The existence of that evidence—wholly apart from whether the factfinder credited it—should have been sufficient to render Respondents' claims non-justiciable. But, despite recognizing the existence of such evidence, the Fourth Circuit nonetheless remanded for factfinding to *conclusively* resolve these issues. Pet.App.21-22.

The approach embraced by the Fourth Circuit and Respondents is wrong as a matter of both law and fact. The political question doctrine is rooted in the separation of powers, and its core purpose is to prevent judicial intrusion into inherently executive decisions. As the district court correctly recognized, the very *process* of adjudication in this case would result in "precisely the kind of unnecessary intrusion and entanglement with the military that the political question doctrine was designed to avoid." Pet.App.65. Respondents served at more than 100 military bases throughout two theaters of war over a decade. The "factfinding" that Respondents and the Fourth Circuit contemplate would involve massive document discovery from the military and hundreds of depositions in which military officials are forced to explain and justify their wartime decisions. Such an "intrusion of the judiciary into military decision-making would not only violate separation of powers principles, but would also be extremely unwise and imprudent." Pet.App.96.

Relatedly, Respondents are wrong to suggest (at 5-11, 14-15, 32-34) that so-called "formal" discovery is needed to determine whether this case implicates non-justiciable political questions.[1] In support of its motion to dismiss, KBR offered seven sworn declarations from high-level military and government officials (which were vetted and approved by the Department of Defense); more than 1,000 pages of contract documents; government reports regarding the use of burn pits prepared by DOD and the Government Accountability Office; Army regulations regarding waste management and water operations; and military bulletins and articles regarding burn pits. And Respondents countered with 18 declarations and more than 30 other exhibits of their own.

As the district court correctly concluded, this substantial record is "more than sufficient" to enable a court to rule on the relevant issues. Pet.App.63-64. The district court did not need to permit further discovery to find the political question doctrine applicable. To the contrary, the district court recognized that further discovery would be "unnecessary" and "extremely burdensome," and would "intrude upon sensitive military judgments." *Id.* KBR believes that the Fourth Circuit's decision to remand for further discovery was wrong and in conflict with the approach of other circuits. Certainly, the fact that the Fourth Circuit's

[1] Respondents (at 34) attempt to distinguish this case from the "developed factual record" in the *Harris* case, effectively conceding that *Harris* is an appropriate vehicle to address the legal questions raised by contractor-on-the-battlefield suits.

erroneous ruling took the form of a remand order hardly prevents this Court from determining whether the remand was appropriate or necessary.

B. Respondents fare no better in defending the Fourth Circuit's holding that the justiciability inquiry turns on the details of state law, specifically whether a state uses a "proportional-liability system" or "pure joint-and-several liability system." Pet.App.24-25 & n.4. Respondents claim (at 15) that it is "unremarkable and uncontroversial" to consider the details of state law in the political question analysis. But, to the contrary, the political question doctrine "serves unique *federal* and constitutional concerns," and "[d]ifferences among the tort regimes of the United States should not affect [that] analysis." *McManaway* Dissent, 2014 WL 1686952 at *4 (emphasis added). A negligence claim in *any* jurisdiction "requires proof of the same elements: duty, breach, causation, and damages," and "[n]o matter the choice of law, the contractor defendant could present the same evidence that the United States military was responsible for plaintiffs' injuries." *Id.*

Indeed, this case is a paradigmatic example of the flaws of a state-law-centric approach to the political question doctrine. The effect of the Fourth Circuit's ruling is that "a trial court presiding over suits filed in 42 states … may have to conduct a virtual nationwide analysis of tort law before determining which plaintiffs' claims are justiciable." *Id.* As a result, "some claims may be justiciable, while others are not, depending solely on differing states' laws." *Id.* Respondents do not even attempt

to explain why it would be reasonable for conduct on a foreign battlefield to be subject to 42 different standards based on the happenstance of each soldier's home-state tort laws.

C. Respondents claim (at 19) that the Fourth Circuit applied the "same framework" as the Eleventh Circuit in *Carmichael v. KBR*, 572 F.3d 1271, 1286 (11th Cir. 2009), but that contention does not withstand scrutiny. Under the Fourth Circuit's approach, the only way to determine whether the political question doctrine applies is to examine the details of state law and then fully develop the facts relevant to the merits of any defense that might implicate a political question. In stark contrast, the Eleventh Circuit found the plaintiff's claims to be non-justiciable in *Carmichael* because KBR had offered "plausible" evidence showing that military judgments "contributed" to the plaintiff's injuries. *Id.* at 1286. Under those circumstances, it would be "impossible" to determine the cause of the accident "without ruling out the potential causal role played by pivotal military judgments." *Id.* at 1295. That is, the Eleventh Circuit correctly held that pointing to evidence of military involvement, as KBR did here, is sufficient because the very *process* of developing the facts concerning the degree of that involvement implicates the concerns of the political question doctrine.

Respondents assert (at 20) that *Carmichael* "looked to state law to determine whether the plaintiff's claims would implicate military decisions." But the court did no such thing. To the contrary, the Eleventh Circuit expressly stated that its decision

"would remain the same *regardless of which state's law applied*," and thus it was "unnecessary" to perform a choice-of-law analysis. 572 F.3d at 1288 n.13 (emphasis added).

Respondents (at 16-23) also cite a number of other decisions for the proposition that "[t]o the extent there have been different outcomes" among the courts of appeals in applying the political question doctrine, this "is a reflection of differences in the facts, not in the court's view of the law." But those arguments are mistaken and miss the forest for the trees. Four judges of the Fifth Circuit recently reviewed the same cases cited by Respondents and reached the opposite conclusion—namely, that "[n]ow, among the circuit courts, *there is no uniformity*." *McManaway* Dissent, 2014 WL 1686952 at *5 (emphasis added). The Third Circuit's *Harris* decision was a sea-change in what had been a relatively settled area of the law, and that approach has now spread to the Fourth and Fifth Circuits as well. *Id.* at *4-*5. Certiorari is warranted to provide "a uniform decision-making apparatus and a way to hasten resolution of these cases." *Id.* at *5.

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

Respondents' claims are also preempted by the combatant-activities exception to the FTCA, 28 U.S.C. § 2680(j), because allowing those claims to proceed would undermine the critical federal interests the exception was designed to protect. Pet.29-35. State-law tort claims challenging conduct that occurred in a foreign war zone will have

"constitutionally suspect, intrusive, and ultimately destructive consequences … *even if the liability superficially falls on civilian contractors*." *McManaway* Dissent, 2014 WL 1686952 at *6 (emphasis added).

Respondents (at 25-26) boldly deny the existence of a split on the scope of combatant-activities preemption, but they ignore the fact that the Fourth Circuit itself recognized a three-way split of authority on this issue. Pet.32-35. Although it applied a test purportedly drawn from *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009), the Fourth Circuit candidly acknowledged the divergent approaches taken by different circuits, finding the D.C. Circuit's approach "too broad," the Ninth Circuit's approach "too narrow," and the Third Circuit's approach just right. Pet.App.41-42.

The recent *McManaway* dissent similarly emphasized that "circuit courts have divided over the scope of the [combatant-activities] exception as applied to civilian contractors." 2014 WL 1686952 at *5. Given that "hundreds, perhaps thousands, of lawsuits have been filed in the wake of the wars in Iraq and Afghanistan," the "inconsistencies" among the lower courts over the scope of the preemption doctrine are "troubling in their own right," and "complicate the litigation of military contractor suits in all jurisdictions." *Id.* at *5-*6.

Respondents also do not dispute that the Fourth Circuit squarely rejected the United States' proposed preemption standard or that their claims would fail under that test, which asks whether: (1) a similar claim against the United States would be barred by

the combatant-activities exception; and (2) the contractor was acting within the scope of its authority. Pet.34-35. The Fourth Circuit rejected that test as a matter of law, *see* Pet.App.44-47, and that holding will not be affected in any way by further proceedings on remand. Given that the purpose of extending preemption to contractors is to protect important federal interests, it is no small matter that both the Third and Fourth Circuits have squarely rejected the United States' proposed test in favor of a test substantially less protective of those federal interests.

Respondents argue (at 24 n.1, 26) that the United States' test is "facially inconsistent with Congress' decision to exclude contractors from the FTCA." That argument proves far too much. There is a well-developed circuit split over the *extent* to which claims against battlefield contractors are preempted. Pet.32-35. But no circuit embraces Respondents' extreme position that such claims are never preempted, no matter how integrated the operations of the contractor and the military, simply because the FTCA expressly addresses only the latter.

Respondents are also wrong to suggest (at 26) that KBR is seeking a "*per se* rule protecting government contractors from liability." Under the United States' proposed test, claims against a contractor are preempted only if the contractor is acting within the scope of its authority and a similar claim against the United States would be barred by the combatant-activities exception. That may be a relatively robust preemption doctrine (appropriately

so since the relevant universe is battlefield torts), but it is self-evidently *not* a rule of "*per se*" immunity. And KBR does not need a *per se* rule to prevail in this case on this record. Even a "pinched reading of the combatant activities exception" should "shield KBR and, indirectly, the United States, from jurors' state-law-based second-guessing." *McManaway* Dissent, 2014 WL 1686952 at *7; *see also Saleh*, 580 F.3d at 7.

III. The Court Should Grant Certiorari To Address The Scope Of The Derivative Sovereign Immunity Doctrine.

Finally, this case is an ideal complement to the pending *Harris* petition because it presents the additional issue of derivative sovereign immunity, which is yet another ground on which Respondents' claims should have been dismissed. Pet.35-39. Indeed, Respondents acknowledge (at 28 n.1) that this Court has "not yet reconciled" the derivative sovereign immunity doctrine articulated in *Yearsley v. W.A. Ross Construction*, 309 U.S. 18 (1940), with the FTCA. Because both the district court and the Fourth Circuit addressed the derivative sovereign immunity question—and because this issue is closely related to the combatant-activities preemption issue, *see* Pet.38—there is value in granting on all three questions to maximize the Court's flexibility in evaluating the critically important issues presented here and in *Harris*.

Respondents do not dispute that military personnel often perform battlefield waste management functions, or that state-law tort claims arising out of those mission-critical functions would be barred by sovereign immunity if they had been

filed directly against the United States. But Respondents nonetheless argue (at 28-30) that *full compliance* with a contract is a prerequisite to derivative sovereign immunity.

That is far too narrow a conception of the derivative sovereign immunity doctrine. A contractor can be acting within the *scope* of its delegated authority even where it is alleged to have acted negligently or violated the terms of the contract. *Cf.* 28 U.S.C. § 2679(b)(1) (granting immunity to federal employees for torts committed "within the scope of [their] office or employment," even if that conduct was negligent). And the immunity must be broad enough to avoid "unwarranted timidity" by those doing the public's business, and to ensure that "talented individuals" with "specialized knowledge or expertise" are willing to accept public engagements. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). Respondents are simply seeking to leave KBR "holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Id.* at 1666.

Respondents are flatly wrong to suggest (at 30-31) that the military views private tort suits as an appropriate tool for regulating battlefield support contractors. Respondents are correct (at 30) that the LOGCAP III contract required KBR to maintain liability insurance. But KBR performed numerous functions under that contract outside of a battlefield setting, including functions within the United States. The fact that KBR insured itself for liability arising out of those activities hardly suggests that state-law

tort suits arising out of combatant activities in foreign war zones should be allowed to proceed. Respondents also cite (at 30-31) military regulations that purportedly view private tort suits against contractors as an appropriate way to "allocate risks." But elsewhere in that same document, DOD stated unequivocally that its regulations "make[] no changes to existing rules regarding liability," and that "[c]ontractors will still be able to defend themselves *when injuries to third parties are caused by the actions or decisions of the Government*." 73 Fed. Reg. 16,764, 16,768 (2008) (emphasis added).

CONCLUSION

The Court should grant certiorari in this case and *Harris*.

Respectfully submitted,

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