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

RESPONDENTS' SECOND SUPPLEMENTAL BRIEF

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RESPONDENTS' SECOND SUPPLEMENTAL BRIEF

The government's invited amicus briefs in this case and *KBR, Inc.* v. *Metzgar*, No. 13-1241, underscore that certiorari should be denied in both cases. On point after point, the government agrees with respondents. It agrees that "[t]here is no substantial conflict among the circuits on either the justiciability question or the preemption question." Br. 18; 13-1241 U.S. Br. 19-20 & n.5. It agrees that the circuits do not diverge about the relevance of state law. *See* Br. 18-19; Resp'ts Supp. Br. 2-3 (addressing *Carmichael* and *McManaway* dissent). It agrees that the courts of appeals "correctly held that respondents' claims are not barred by the political-question doctrine at this stage of the litigation." Br. 7. It agrees that derivative sovereign immunity is not an issue distinct from preemption. That issue, which does not even merit separate analysis in the government's brief, "can be understood as part and parcel of the combatant-activities exception." 13-1241 U.S. Br. 18-19 (quoting Pet. 38); *see also id.* at 23.

The government also agrees that the interlocutory posture of both cases warrants denying review. Br. 20-21; 13-1241 U.S. Br. 22-23. Even with respect to the preemption question—the only one on which the government disagrees with respondents and the courts below on the merits—the government agrees that review is unwarranted and indeed would be unwise at this stage of the litigation. Br. 20-21. The government correctly echoes respondents' points that further proceedings could obviate review, while re-

view now could require the Court to resolve a constitutional or jurisdictional question in order to reach the *non*constitutional preemption question. Br. 21 & n.3; *infra* pp.8-9. The government correctly concludes that certiorari should be denied.

A. The Government's Submission that Certiorari Is Unwarranted Entirely Vitiates KBR's Arguments for Certiorari

The petitions in this case and *Burn Pit* are based entirely on KBR's assertion that it needs immunity from tort law in order to protect *the government's* interests in conducting military activities. No other interest would entitle KBR to immunity from tort law, and KBR suggests none. Because KBR asserts the government's interests as its shield, the government's disavowal of any need for review at this time vitiates KBR's arguments and should be dispositive.

The government has stated that the Constitution does not support, and that it does not agree with or need, KBR's expansive interpretation of the political-question doctrine. Further, the government has informed this Court that it does not need resolution of the preemption issue by this Court at this time. And the government has noted that further review, even if warranted, can occur at "a later stage" of the proceedings, when "the issues will be more sharply presented." Br. 21. Since the government itself is satisfied that its interests are not at this time adversely affected by the decisions below, there is nothing left of KBR's argument that further review is warranted.

B. Even Apart from the Interlocutory Stage of the Proceedings, Review of the Preemption Question Is Unwarranted

The government correctly concludes that "review is not warranted at this time" on either of KBR's questions presented, "given the interlocutory posture of this case" and the absence of a circuit conflict on either of the questions presented. Br. 18-19. That should end the matter.

The government nevertheless adds that the preemption question "warrants this Court's review," Br. 19, presumably at some time in the future, after a final judgment and if a circuit split develops. Neither that suggestion nor the government's arguments on the merits of preemption need be considered to rule on the petitions before the Court. Moreover, the government's position on preemption is incorrect, and it overstates the importance of the issue. It also understates the vehicle problem of resolving the nonconstitutional merits issue of preemption before the constitutional, threshold political-question issue.

1. *Merits of Combatant-Activities Preemption*. As our initial brief explained, Opp. 31, Congress expressly excluded contractors from the scope of the Federal Tort Claims Act (FTCA). 28 U.S.C. § 2671. This Court has nevertheless recognized a judge-made, extra-statutory contractor defense applicable to procurement contracts. Even in that context, the defense shields a contractor from product liability only where "the United States approved reasonably precise specifications" and "the equipment conformed to those specifications." *Boyle* v. *United*

Technologies Corp., 487 U.S. 500, 512 (1988). *Boyle* carefully limited the scope of preemption to that necessary to protect the government's "judgment that a particular feature of military equipment is necessary" against a "precisely contrary" state tort duty, such that a contractor could not possibly comply with both. *Id.* at 512, 509. That preemption extends only far enough to immunize a "design feature [that was] considered by a Government officer, and not merely by the contractor itself." *Id.* at 512.

a. As the government acknowledges, "respondents do not assert" (and KBR does not claim) that KBR's negligent conduct was "ordered or approved by the military." Br. 9. The government did not require, order, or even authorize KBR to leave a water pump ungrounded or unbonded. To the contrary, respondents claim that KBR "acted negligently and that [KBR] *breached* its contracts with the military." Br. 9 (emphasis added). The applicable contract required KBR to comply with industry standards that have long mandated grounding and bonding. 5 C.A. App. 1644-45, 1653; DEP'TS OF THE ARMY, THE NAVY, & THE AIR FORCE, FACILITIES ENGINEERING: ELECTRICAL INTERIOR FACILITIES 1-1, ¶ 1-3.a (Nov. 1995) (Army TM 5-683, Navy NAVFAC MO-116, Air Force AFJMAN 32-1083), *available at* http://tinyurl.com/tm5-683; NAT'L ELEC. CODE arts. 250.4(A), 250.112(A), (L), 250.114 (NFPA 70, 2014), *available at* http://tinyurl.com/nec2014ed. The military has no interest in letting contractors violate contract terms and industry standards with impunity, at least not without a military determination that a particular situation calls for such conduct.

Even without a violation of express contract terms, tort liability for a contractor's negligent performance of a service contract would be consistent with *Boyle*. As the Department of Defense has stated: "The public policy rationale behind *Boyle* does not apply when a *performance-based statement of work* is used in a services contract, because the Government does not, in fact, exercise specific control over the actions and decisions of the contractor . . . ." Contractor Personnel Authorized to Accompany U.S. Armed Forces, 73 Fed. Reg. 16,764, 16,768 (Mar. 31, 2008) (emphasis added when quoted by *Saleh v. Titan Corp*., 580 F.3d 1, 9-10 (D.C. Cir. 2009)). Judge Silberman's opinion for the D.C. Circuit quoted and endorsed the Defense Department's view, agreeing that when a contract specifies only *what* to accomplish rather than *how* to do it, a contractor cannot hide its negligent choices behind the military's coattails. *Saleh*, 580 F.3d at 9-10.[1]

b. The government itself cannot accept the logic of its own position; it asks for an ill-defined exception to preemption for claims alleging torture. Br. 15

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[1] The irony of the government's position (inconsistent with *Boyle* and accepted by no court of appeals) is that contractors would have exceptionally broad immunity from tort liability so long as they acted within the scope of their contract. Br. 15. The scope-of-employment test was meant to *broaden* tort liability by holding an employer liable for its agents' misconduct. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 219 & cmt. a, 229 cmt. a (1958); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 13 cmt. b (2000). Here, the government and KBR stand the doctrine on its head: they seek to immunize agents for their own negligence, recklessness, or even intentional wrongdoing that leads to soldiers' injuries or deaths.

n.1. No such exception would be necessary under the standard uniformly adopted by the courts of appeals (including the court below), which would hold contractors liable for torture unless the government commanded or authorized it. The perceived need to carve out an exception to the government's proposed standard illustrates its overbreadth and lack of grounding in the FTCA itself.

2. *Importance.* The government says the preemption issue warrants review (at some time in the future) to avoid the application of varying state laws, increased contractor costs, and discovery directed towards the military. None of these asserted reasons withstands scrutiny.

a. The government's fear of variations among the States' tort laws, Br. 19, is best directed to the legislature. Congress has expressly authorized the application of varying state tort laws in suits against the federal government itself under the FTCA. *See* 28 U.S.C. § 1346(b)(1); Opp. 26-27. Additionally, the core elements of a tort claim that affect a contractor's conduct ex ante—in particular, the crucial elements of duty and breach—are largely consistent across States. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965) (listing cases from most U.S. jurisdictions). Common practice and nationwide industry standards have long required plumbers and electricians to ground wiring and bond water pumps, pipes, and other metal equipment. Nat'l Elec. Code arts. 250.4(A), 250.112(A), (L), 250.114; Nat'l Elec. Mfrs. Ass'n, *Implementation of the National Electrical Code* (Dec. 11, 2014), *available at* http://www.nema.org/Technical/FieldReps/Documents/Combined-NE

C-Adoption-Report-No-IRC.pdf. If state variations became an issue, the government could require contracts to be carried out under specified standards, or contractors could argue for applying their home State's laws (as KBR argues in this case).

b. The government worries that tort suits will drive up the costs of government contracts. Br. 19-20. But again, Congress rejected this argument, expressly excluding contractors from the FTCA's scope. 28 U.S.C. § 2671. Moreover, cost concerns are offset by tort law's historic policies of compensating injured parties, holding wrongdoers accountable, and creating incentives to exercise due care. Creating a nonstatutory immunity would reward lowball bidders who cut corners and penalize responsible bidders whose higher contract price includes exercising due care.

The government observes that some government contracts agree to indemnify contractors against tort liability. Br. 20. The contract at issue here, however, did not, and KBR has never alleged otherwise regarding this contract. Moreover, some contracts with indemnification provisions contain exceptions for malfeasance. *See, e.g.*, 48 C.F.R. § 52.228-7(e)(2) (1996). And the government can omit or amend indemnity provisions to limit its liability or require contractors to self-insure. In any event, nowhere else in tort law does a party's decision to provide indemnity by contract to a potential tortfeasor affect the tortfeasor's liability. It should not do so here.

c. The government raises the specter of burdensome discovery, Br. 20, but cites no evidence that discovery poses an actual problem in practice, in this case or any other. Here, the government never ob-

jected to any discovery requests, and all depositions were taken in person or by telephone from persons stationed in the United States. *See* Resp'ts Supp. Br. 6 n.1; Pet. App. 100 n.18.

Moreover, motions to quash, protective orders, and other procedural safeguards are available to protect third parties, especially governmental actors, against burdensome or oppressive discovery. *See, e.g.*, FED. R. CIV. P. 26(c)(1); 45(d)(3)(A); 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2036 (3d ed.); 32-11P JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 11.447 (3d ed. 2014). In applying these safeguards, judges can be expected to be particularly solicitous of government claims that discovery would in any way hinder, obstruct, or jeopardize military or other operations.

d. Nor is there any merit to KBR's (though not the government's) repeated suggestion that any litigation whatsoever will chill military judgment and impede combat effectiveness. Pet. 31. Major Chad C. Carter, Judge Advocate for the U.S. Air Force, has explained that these fears are "vastly overstate[d]" and "grossly exaggerate[d]." Major Chad C. Carter, *Halliburton Hears a Who? Political Question Doctrine Developments in the Global War on Terror and Their Impact on Government Contingency Contracting*, 201 MIL. L. REV. 86, 128, 130 (2009). Existing political-question case law suffices to "protect[] military decisionmaking and policy from judicial intrusion." *Id.* at 129.

3. *Vehicle.* The government rightly stresses the interlocutory posture of this case and *Burn Pit* as an independent ground for denying certiorari. Br. 20-

21; 13-1241 U.S. Br. 22-23. It also notes a second vehicle problem that should equally counsel against review. Br. 21 n.3. The preemption question is a nonconstitutional, nonjurisdictional merits issue. *See id.* To reach that question, however, this Court would first likely have to address any threshold jurisdictional question. *See Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) (rejecting "hypothetical jurisdiction," that is, reaching merits before resolving issue). That would involve deciding two constitutional questions: First, this Court would have to decide whether the political-question doctrine is indeed jurisdictional. *See* Resp'ts Supp. Br. 4. If so, the Court would then have to determine whether and how the "narrow" political-question doctrine, *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1427 (2012), applies to bar state-law tort suits against private parties.

The canon of constitutional avoidance counsels against wading into these undeveloped constitutional waters in order to decide a nonconstitutional merits issue. That is doubly true here, where there is no circuit split, and triply true where the case is interlocutory as well. As the government notes, the district court may conclude on remand that all or part of this case "raise[s] a nonjusticiable political question even under the standard challenged by [KBR]," Br. 21, resulting in "dismissal or substantial narrowing of the case." Br. 20. That could obviate any need to decide the preemption question. At the very least, further ripening would present the issues "more sharply . . . for this Court's review." Br. 21. The lower court proceedings therefore should be allowed to run their course.

Alternatively, the government suggests narrowing *Steel Co.* by exempting combatant-activities preemption from *Steel Co.*'s rule as a "closely related merits ground." Br. 21 n.3. Such an exemption, if warranted, would permit the Court to address the preemption issue without first making a series of new constitutional rulings. But determining whether *Steel Co.* should be narrowed in that way would itself require unnecessarily reaching out to make new law on the contours of hypothetical jurisdiction. As the government recognizes, the better course at this interlocutory stage is to deny review.

The political question doctrine, as the courts of appeals (and now the government) have uniformly understood it, gives the military substantial protection from any threat posed by tort suits against private contractors. Indeed, the political question doctrine may be held on remand to preclude these very suits.

KBR advocates granting review now, for this Court to consider an expansive preemption theory that the courts of appeals have uniformly rejected. That theory is unnecessary to protect a contractor that follows military orders; the scope of FTCA preemption as uniformly recognized by the courts of appeals already does that. The exceptionally broad preemption that KBR advocates would serve solely to immunize private contractors in cases where the preemption recognized by the courts of appeals does *not* apply—*i.e.* in cases like this one, where a soldier died because KBR violated the basic, century-old requirement of bonding and grounding electrical

equipment. The preemption sought is so broad that it presumably would immunize a pizza-delivery contractor who ran a red light on a military base and killed a soldier. It is unsurprising that no court of appeals has accepted it.

The government has agreed that these cases can proceed at this time without damaging any governmental interest. Especially in light of the unanimity of the courts of appeals, as well as the novel constitutional and/or jurisdictional issues the Court would face before reaching the preemption question at all, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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