NOS. 13-817, 13-1241

In the
Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC.,
Petitioner,

v.

CHERYL A. HARRIS, *et al.*,
Respondents.

KBR, INC., *et al.*,
Petitioners,

v.

ALAN METZGAR, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the U.S. Courts of Appeals for the Third Circuit and Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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The United States agrees that Respondents' claims are preempted, and that "this Court's review of the preemption issue is warranted." As the United States explains, it is wholly untenable for mission-critical battlefield support services to be governed by a patchwork of state tort laws, and such litigation imposes unwarranted burdens on the military. Thus, the United States agrees with Petitioners and both district courts that these state-law claims should be dismissed in full as preempted.

The United States nonetheless argues that the Court should deny certiorari because these petitions arise in an "interlocutory posture." That is, the United States is advocating further proceedings on claims it believes are *definitively preempted in their current posture*, just to see whether KBR might prevail on a *different* ground after several more years of litigation. If not, presumably this Court can grant certiorari years from now to conclude that there was a dispositive federal defense all along.

That approach has nothing to recommend it. Further proceedings would produce the very harms the preemption doctrine is designed to avoid—*e.g.*, making liability for mission-critical battlefield support services turn on the vagaries of varying state tort laws, and diverting military officials from their duties to participate in burdensome discovery and court proceedings. Both district courts correctly dismissed these claims as preempted. Thus, these cases are not interlocutory in any *meaningful* sense, as the United States itself has recognized in successfully seeking certiorari review of cases in the identical procedural

posture. There is no sound reason to defer review of the preemption issue.

The United States also correctly recognizes that derivative sovereign immunity is closely related to preemption and merits review alongside that issue if certiorari is granted. Indeed, this Court should have before it all the grounds that the lower courts have considered in evaluating the expanding universe of contractor-on-the-battlefield litigation, including the political question doctrine. The United States attempts to downplay the division of authority on the political question issue, but the dissenting judges in the Fifth Circuit *McManaway* case correctly recognized that the circuits are divided. And if the Third and Fourth Circuits really are correct that the application of the political question doctrine to alleged torts arising on foreign battlefields turns on the details of varying state laws, that only strengthens the case for a uniform federal rule of preemption.

In short, the issues presented in these petitions merit this Court's attention now, and the Court should grant certiorari to consider all three grounds for reaching the common-sense conclusion that state tort law is not the proper remedy for disputes arising out of combatant activities in Iraq and Afghanistan.

I. The United States Correctly Recognizes That The Combatant-Activities Preemption Issue Warrants This Court's Review.

The United States correctly recognizes that the Third and Fourth Circuits "erred in holding that respondents' state-law tort claims are not preempted," and that "this Court's review of the preemption issue is warranted."

A. The United States embraces a "properly tailored preemption test" that would preclude state-law claims against a contractor if: (1) "a similar claim against the United States would be within the FTCA's combatant-activities exception," and (2) "the contractor was acting within the scope of its contractual relationship … at the time of the incident." U.S. *Burn Pit* Br.15-16; U.S. *Harris* Br.15. This test "respects the military's reliance on the expert judgment of contractors, gives effect to the reality of informal interactions between contractors and military personnel … and guards against timidity of contractor personnel in performing critical functions out of fear of tort liability." *Id.*

The United States' preemption standard is not new. It has been advanced in previous cases, *see Burn Pit* Pet.31-32, and KBR encouraged the Third and Fourth Circuits to adopt it. Yet both courts rejected the United States' test as "far too broad" and "overinclusive." *Burn Pit* Pet.App.47-49; *Harris* Pet.App.42-44. Instead, those courts applied a preemption standard that focused on whether the contractor was *integrated* into the military's combatant activities, and whether the contractor exercised *discretion* in performing its delegated duties. *Id.* As the United States explains, that approach is "both imprecise and too narrow," and does not adequately protect the critical federal interests at stake. U.S. *Burn Pit* Br.14-15; U.S. *Harris* Br.14-15.

Under the proper test, the United States agrees that Respondents' claims "should be dismissed." U.S. *Harris* Br.17; U.S. *Burn Pit* Br.18. KBR's electrical maintenance and waste disposal functions were

"essential support services" for the United States' combat operations. *Id.* And Respondents have not identified "any sound reason to believe that [KBR] was acting outside the scope of its contractual relationship with the military." *Id.*

B. The United States also "agrees with [KBR]" that the preemption issue "warrants this Court's review." U.S. *Harris* Br.19-20; U.S. *Burn Pit* Br.21-22. A legal regime in which "contractors that the U.S. military employs during hostilities are subject to the laws of fifty different States for actions taken within the scope of their contractual relationship supporting the military's combat operations *would be detrimental to military effectiveness*." *Id.* (emphasis added).

Moreover, the costs of such litigation would ultimately be borne by the military, even though the military would be immune from direct suit. Many contracts for combat support services, including the one here, "contain indemnification or cost-reimbursement clauses passing liability and allowable expenses of litigation directly on to the United States." *Id.* And contractors would inevitably "demand greater compensation in light of their increased liability risks" if they were subject to *post hoc* state-law tort suits. *Id.*

Contractor-on-the-battlefield litigation also "impose[s] enormous litigation burdens on the armed forces." *Id.* The plaintiffs in such cases are "likely to seek to interview, depose, or subpoena for trial testimony senior policymakers, military commanders, contracting officers, and others, and to demand discovery of military records." *Id.* It is thus "imperative" for courts to apply the correct preemption

test and resolve preemption issues at the earliest possible stage of the case. *Id.*

There is also a well-documented circuit split on the preemption issue. The United States asserts that there is no "square" split, but acknowledges that the Third and Fourth Circuits rejected the "breadth" of the federal interest articulated in *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009). And four judges of the Fifth Circuit recently reviewed the landscape and concluded that "circuit courts have divided over the scope of the [combatant-activities] exception as applied to civilian contractors." *McManaway v. KBR*, 554 Fed. Appx. 347, 353 (5th Cir. 2014) (Jones, J., dissenting), *cert. pending*, No. 14-105. Those judges concluded that "the scope of this exemption *must be determined by the Supreme Court*" to provide much-needed guidance to the lower courts. *Id.* (emphasis added).

II. The United States' Sole Argument For Deferring Review Is Without Merit.

The United States acknowledges that "this Court's review of the preemption issue is warranted," but nonetheless encourages the Court to deny both petitions. The *sole* basis for that recommendation is the concern that these cases arise in an "interlocutory" posture. *See* U.S. *Harris* Br. 20-21; U.S. *Burn Pit* Br. 22-23. That argument is misplaced for several reasons.

A. At the outset, the United States' position is self-contradictory. The United States correctly recognizes that contractor-on-the-battlefield suits impose significant burdens on the military, and that it is critical for such cases to be governed by a uniform

federal standard rather than a patchwork of state laws. It is thus mystifying that the United States encourages this Court to postpone its review in hopes that KBR might ultimately prevail on another ground. Given that both courts of appeals have definitively rejected the preemption standard the United States believes to be correct, a deferral of review would consign KBR and the military to the precise burdens that the correct preemption standard avoids. What awaits if this Court denies review is litigation concerning the details of state tort law, which will inevitably drag in military officers for depositions and impose other burdens on the military.

Indeed, denial of certiorari would place the district courts in a wholly untenable position. In *Burn Pit*, the district court previously concluded that the plaintiffs' claims were preempted (and barred by derivative sovereign immunity and the political question doctrine), *see Burn Pit* Pet.App.65-98, but the Fourth Circuit reversed that ruling. The United States now *agrees* with the district court's original ruling that the claims are preempted. Nonetheless, the United States would force the parties (and the military) to undergo months if not years of burdensome discovery so that the district court could determine whether the claims are preempted based on a standard that neither it nor the United States thinks is correct or workable.

Assuming the district court does not find the claims preempted based on that concededly flawed standard, it must then proceed to sort through the various state tort laws governing hundreds of plaintiffs from 42 states to determine whether they

raise political questions. Assuming some claims survive that process, further litigation involving the vagaries of state laws and the distraction of military officials awaits. And all of this concerning claims that both the United States and the district court believe to be definitively and uniformly preempted on the record as it now stands.

Further proceedings in *Harris* would be equally counter-productive. There, too, the district court actually tasked with overseeing the litigation concluded that the state-law claims were preempted and barred by the political question doctrine. The Third Circuit reversed and definitively held that the claims were "not preempted," *Harris* Pet.App.44, again applying a standard that the United States believes to be mistaken in an outcome-determinative manner. Thus, in *Harris*, the preemption issue is off the table and the district court's task would be to consider the nuances of Pennsylvania, Tennessee, and Texas tort law for purposes of determining the justiciability of claims that the United States and the district court both believe to be uniformly preempted by federal law. With all due respect, this makes no sense. If the United States is correct about the proper test for preemption—and it is—deferral of review has nothing to recommend it.

B. With both district courts definitively dismissing Respondents' claims, only to be reversed by courts of appeals applying an analysis the United States believes to be deeply flawed, the petitions here are not "interlocutory" in any *meaningful* sense. The United States itself has recognized as much when filing its own petitions. And this Court routinely

considers cases in which a district court entered judgment for the defendant but the court of appeals reversed and remanded for further proceedings. Indeed, at least seven merits cases from *this Term alone* arise in the same procedural posture as these cases.[1] Two of those cases involve federal government petitions, which underscores that the Solicitor General routinely seeks—and obtains—certiorari in this same posture.

For example, in *FAA v. Cooper*, 132 S. Ct. 1441 (2012), the district court dismissed the plaintiff's Privacy Act claim, but the Ninth Circuit reversed and remanded. When the Solicitor General subsequently petitioned for certiorari, the respondent argued that the petition should be denied because of its "interlocutory" posture. In reply, the government argued that the procedural posture "poses no impediment to this Court's review" because the case "presents a pure question of law that otherwise would meet the criteria for certiorari and on which the viability of respondent's entire lawsuit turns." U.S. Reply Br. 5-6, *FAA v. Cooper*, No. 10-1024, 2011 WL 2159624 (May 31, 2011). The Solicitor General further emphasized that the question presented "would be unaffected by any additional 'factual findings' … that the district court might make," and that "denying certiorari now would serve only to delay review and

[1] *See San Francisco v. Sheehan*, No. 13-1412; *United States v. June*, No. 13-1075; *United States v. Wong*, No. 13-1074; *Omnicare v. Laborers Pension Fund*, No. 13-435; *Integrity Staffing v. Busk*, No. 13-433; *Oneok v. Learjet*, No. 13-271; *KBR v. Carter*, No. 12-1497.

prolong the negative consequences of the court of appeals' decision." *Id.*

All of those statements apply with full force here. The Third and Fourth Circuits incorrectly decided an important question of law in a manner that will undermine core federal interests. And *the remand proceedings themselves* will "prolong the negative consequences of the court of appeals' decision" by imposing unnecessary costs and burdens on the military and subjecting decisions made on a foreign battlefield to the whims of juries and the vagaries of state law.

The preemption issue is as squarely presented as it will ever be, and further proceedings would produce the precise harms the correct preemption rule is designed to avoid. The proper time for this Court's review is now.

III. The Court Should Also Grant Certiorari On The Political Question And Derivative Sovereign Immunity Issues.

In addition to combatant-activities preemption, the Court should also grant certiorari to consider the derivative sovereign immunity and political question issues. The United States has previously emphasized the importance of "examin[ing] the full array of relevant defenses—in conjunction with one another and in light of the relative benefits and burdens of each." U.S. *Amicus* Br. 22, *Carmichael v. Kellogg Brown & Root Services*, No. 09-683, 2010 WL 2214879 (May 28, 2010). The three issues are closely interrelated, and all reinforce the common-sense point that state tort law is not the proper way to regulate mission-critical support services in a foreign war zone.

The United States acknowledges that derivative sovereign immunity is closely related to the preemption analysis. The same principles underlying the derivative sovereign immunity doctrine "inform[] the preemption analysis," and reinforce "the inappropriateness of applying state law in this context." U.S. *Burn Pit* Br.18-19. The Court should thus include derivative sovereign immunity among the questions it reviews.[2]

On the political question issue, the United States argues that the lower courts correctly found Respondents' claims to be justiciable. The United States wishfully contends that a court faced with a state-law negligence claim can simply "treat military standards and orders as a given," and ask whether the contractor "failed to act reasonably within the parameters established by the military." U.S. *Harris* Br.9-11; U.S. *Burn Pit* Br.9-11.

But military decisions cannot be so easily excised from these cases. Taking a military order "as a given" may sound plausible in the abstract, but is entirely unworkable in practice—especially in cases arising in forward operating bases in foreign war zones, in which battlefield support contractors work side-by-side with uniformed personnel. Unsurprisingly, the United States offers no guidance or direction about how district courts could actually implement that

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[2] Petitioners agree with the United States that if the Court grants only one petition, it should grant *Burn Pit*, while holding *Harris* and *KBR v. McManaway*, No. 14-105. *See* U.S. *Burn Pit* Br.23-24. Although the derivative sovereign immunity issue is fairly included within the preemption question in *Harris*, it was separately briefed and decided in *Burn Pit*.

approach, or what would stop a jury told to take military orders "as a given" from imposing liability on a contractor for following a military order the jury believes to be imprudent.

Moreover, the United States' blithe assurance ignores KBR's causation defenses. For example, if *Burn Pit* were to proceed to trial, KBR's core liability defense would be that Respondents' alleged injuries were caused by military decisions, such as the decision to use burn pits rather than incinerators. *See Burn Pit* Pet.18-20. Even if the jury would not be asked to independently consider the military's fault, the very nature of a causation defense is that jurors must determine *who was responsible* for causing the plaintiff's alleged injury. That inquiry inevitability will involve juries evaluating military decisions made on a foreign battlefield.

The United States also appears to agree with the Third and Fourth Circuits that the political question inquiry should turn on nuances of state tort law. But that position has a surreal quality in light of the United States' ultimate position that all these claims are preempted because it would be "detrimental to military effectiveness" if battlefield support contractors were "subject to the laws of fifty different States." U.S. *Harris* Br.19-20; U.S. *Burn Pit* Br.21-22. In the end, the Janus-like quality of the United States' position on state law simply underscores the importance of evaluating the political question and preemption issues together, and the artificiality of allowing further lower court exploration of whether claims the United States correctly believes to be

uniformly preempted by federal law are also barred by a political question doctrine that turns on state law.

Finally, the United States denies the existence of a circuit split on the political-question issue, but four judges of the Fifth Circuit recently concluded that "among the circuit courts, there is no uniformity" on this issue. *McManaway*, 554 Fed. Appx. at 352 (Jones, J., dissenting). At a minimum, the decisions below conflict with *Carmichael v. KBR*, 572 F.3d 1271, 1288 n.13 (11th Cir. 2009), which "readily applied the political question doctrine to contractor-on-the-battlefield tort cases without express focus on choice of law issues," *McManaway*, 554 Fed. Appx. at 351. Certiorari is plainly warranted to provide "a uniform decision-making apparatus and a way to hasten resolution of these cases." *Id*. at 352.

CONCLUSION

The United States recognizes that it makes no sense for mission-critical battlefield support services to be regulated by a patchwork of state law and lay juries in proceedings that will inevitably burden the military. The United States also recognizes that the proper path to avoid that patchwork and those burdens is a uniform federal defense of preemption rejected by the courts of appeals. In these circumstances, to defer review and guarantee further proceedings that turn on state law in hopes of a producing a non-interlocutory ruling that will eventually allow this Court to confirm that there was a dispositive federal defense all along has nothing to recommend it. Any further proceedings would be unnecessary at best and burdensome to the military

and chilling to necessary contractors at worst. The petitions should be granted.

Respectfully submitted,

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