No. 18-317

In The
Supreme Court of the United States

ALAN METZGAR, *et al.*,

Petitioners,

v.

KBR, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

RAYMOND B. BIAGINI
ROBERT A. MATTHEWS
DANIEL L. RUSSELL JR.
MARIANNE F. KIES
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

WARREN W. HARRIS
Counsel of Record
YVONNE Y. HO
BRACEWELL LLP
711 Louisiana St., Suite 2300
Houston, Texas 77002
(713) 223-2300
warren.harris@bracewell.com

Counsel for Respondents

QUESTION PRESENTED

This case involves the attempted use of state-law tort claims to challenge the military's professional judgments across two theaters of war. Under *Baker v. Carr*, 369 U.S. 186 (1962), courts of appeals have uniformly recognized that battlefield judgments are constitutionally reserved to the political branches and cannot be second-guessed by courts of law. When such sensitive military judgments underlie a state-law suit against the military's battlefield contractor, courts have similarly agreed that the political question doctrine bars the claims.

Petitioners alleged that they were injured by smoke from open-air burn pits at military bases in Iraq and Afghanistan. But as the uncontroverted evidence showed, Petitioners' allegations that burn pits were placed in unsafe locations and used to burn improper substances, among others, directly challenge sensitive battlefield decisions that were made by the military alone. Consistent with other courts, the Fourth Circuit held that the military's decisions rendered these suits non-justiciable. In doing so, the Fourth Circuit applied the fact-based analysis required by *Baker* that Petitioners had pressed for all along.

The question presented is:

Whether the political question doctrine bars state-law claims against a battlefield support contractor, when the evidence confirms that the military itself made the decisions at issue and exercised plenary control over the contractor, such that resolving the claims would require questioning the battlefield judgments of military commanders during wartime.

CORPORATE DISCLOSURE STATEMENT

KBR, Inc., is a publicly traded corporation and has no parent company. No publicly held corporation owns 10% or more of KBR, Inc.'s stock. KBR, Inc. does not have any non-wholly-owned subsidiaries or any affiliates that are publicly traded.

Kellogg Brown & Root LLC is not publicly traded. Kellogg Brown & Root LLC is wholly owned by KBR Holdings, LLC, which in turn is wholly owned by KBR, Inc., a publicly traded corporation. Kellogg Brown & Root LLC has no non-wholly owned subsidiaries that are publicly traded. Other than Kellogg Brown & Root LLC's ultimate parent (KBR, Inc.), Kellogg Brown & Root LLC does not have any publicly traded affiliates.

Kellogg Brown & Root Services, Inc. is not publicly traded. Kellogg Brown & Root Services, Inc. is wholly owned by KBR Holdings, LLC, which in turn is wholly owned by KBR, Inc., a publicly traded corporation. Kellogg Brown & Root Services, Inc., does not have any non-wholly-owned subsidiaries. Other than Kellogg Brown & Root Services, Inc.'s ultimate parent (KBR, Inc.), Kellogg Brown & Root Services, Inc., does not have any publicly traded affiliates.

KBR Holdings, LLC is not publicly traded. KBR Holdings, LLC is wholly owned by KBR, Inc., a publicly traded corporation. KBR Holdings, LLC has no non-wholly owned subsidiaries that are publicly traded. Other than its parent, KBR, Inc., KBR Holdings, LLC does not have any publicly traded affiliates.

Kellogg Brown & Root International, Inc. is not publicly traded. Kellogg Brown & Root International, Inc. is wholly owned by Kellogg Brown & Root LLC, which in turn is wholly owned by KBR Holdings, LLC, which in turn is wholly owned by KBR, Inc., a publicly traded corporation. Kellogg Brown & Root International, Inc. has no non-wholly-owned subsidiaries that are publicly traded. Other than its ultimate parent, KBR, Inc., Kellogg Brown & Root International, Inc. does not have any publicly traded affiliates.

KBR Group Holdings, LLC is not publicly traded. KBR Group Holdings, LLC is wholly owned by KBR Holdings, LLC, which in turn is wholly owned by KBR, Inc., a publicly traded corporation.

KBR Technical Services, Inc. is not publicly traded. KBR Technical Services, Inc. is wholly owned by KBR Group Holdings, LLC, which in turn is wholly owned by KBR Holdings, LLC, which in turn is wholly owned by KBR., Inc., a publicly traded corporation.

Halliburton Company is a publicly traded corporation and has no parent company. No publicly held corporation owns 10% or more of Halliburton Company's stock. Halliburton Company does not have any non-wholly-owned direct subsidiaries or any publicly traded affiliates.

Halliburton Energy Services, Inc. is not publicly traded. Halliburton Energy Services, Inc. is wholly owned by Halliburton Company, a publicly traded corporation. Halliburton Energy Services, Inc. has no non-wholly-owned subsidiaries that are publicly traded. Other than its parent, Halliburton

Company, Halliburton Energy Services, Inc. does not have any publicly traded affiliates.

DII Industries LLC is not publicly traded. DII Industries LLC is wholly owned by Halliburton Energy Services, Inc., which in turn is wholly owned by Halliburton Company, a publicly traded corporation. DII Industries LLC has no non-wholly-owned subsidiaries that are publicly traded. Other than its ultimate parent, Halliburton Company, DII Industries LLC does not have any publicly traded affiliates.

Brown & Root Services and **Kellogg, Brown & Root, Inc.** are no longer active entities.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES
(continued)

PAGE(S)

TABLE OF AUTHORITIES
(continued)

PAGE(S)

TABLE OF AUTHORITIES
(continued)

PAGE(S)

STATUTES

REGULATIONS

TABLE OF AUTHORITIES
(continued)

PAGE(S)

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Based on a fact-intensive, straightforward analysis of an expansive evidentiary record, the Fourth Circuit unanimously affirmed the district court's holding that Petitioners' state-law claims are nonjusticiable. Pet.App.40a-46a. The evidence confirmed that the military made the very decisions that Petitioners claimed were negligent, including that battlefield exigencies required the use of burn pits to dispose of solid waste, and that alternatives to surface burning were infeasible. These decisions were quintessential military judgments constitutionally committed to the political branches, which federal courts are not equipped to second-guess.

In holding that Petitioners' claims are nonjusticiable, the Fourth Circuit applied the same legal standard that Petitioners themselves advocated throughout multiple appeals, ultimately failed to satisfy, and now claim was wrong. Petitioners' strategic about-face cannot disguise the lack of any issue warranting review.

Every appellate court to consider the issue agrees that the political question doctrine can bar judicial review of tort suits that challenge professional military judgments, whether the claims are asserted against a military contractor or the military itself. No authority supports Petitioners' proposed bright-line rule that would make *all* such suits justiciable.

Under this Court's precedent, courts of appeals have applied the factors in *Baker*, 369 U.S. at 217, which ask if there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department," or "a lack of judicially discov-

erable and manageable standards for resolving it." Professional military judgments exemplify the types of issues that are constitutionally committed to the political branches. Traditional norms for negligence claims are also out-of-place in this context because no judicially-manageable standards exist for re-evaluating the propriety of decisions that reflect the military's balancing of battlefield strategic, logistical, and safety concerns. Thus, state-law suits that challenge quintessential military judgments are non-justiciable, whether the claims are asserted against the military or against a contractor whose actions the military controlled.

By advocating for an unprecedented, categorical rule that would make all state-law suits challenging military judgments justiciable, Petitioners disregard *Baker*'s requirement that courts conduct a "discriminating inquiry into the precise facts and posture of the particular case" and refrain from "semantic cataloguing." *Ibid.* Although Petitioners now dispute the necessity of a fact-bound inquiry, that is exactly the analysis they advocated through multiple appeals.

At best, Petitioners cite inconsequential differences of approach that do not affect the outcome of this case. For instance, the relevance of choice-of-law to the justiciability of a battlefield contractor's causation defense is immaterial to the Fourth Circuit's holding that, *regardless* of KBR's defenses, Petitioners' claims are non-justiciable. As the Fourth Circuit explained, Petitioners' allegations amount to *de facto* challenges to professional and strategic military judgments that the Constitution reserves to the political branches and should not be second-guessed by federal courts. Under *Baker*,

these suits are non-justiciable. There is no issue meriting this Court's review.

ADDITIONAL STATUTES INVOLVED

The Federal Tort Claims Act exempts from the waiver of the government's sovereign immunity "[a]ny 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(j).

STATEMENT OF THE CASE

In 2001, the Army awarded KBR a contract that included "combat service support," which can encompass "the full range of Army operations, to include offense, defense, stability, and support within all types of military actions from small-scale contingencies to major theater of wars." C.A.App.471. Under the contract, the Army directed KBR to perform several critical battlefield support functions in Iraq and Afghanistan, including waste management and water services.

Petitioners allege they suffered harm from open air burn pits used to dispose of waste at military bases during the wars in Iraq and Afghanistan. Petitioners primarily complain that KBR should have used a safer method of waste disposal rather than burn pits, and that KBR should have selected better locations for burn pits within the bases. Petitioners also allege that KBR failed to conduct proper testing and monitoring of water.

Following extensive discovery, the district court found that "the military determined that no feasible alternatives to burn pits—such as the use of incinerators, landfills, or recycling—were available, and KBR could not unilaterally decide to use burn pits."

Pet.App.25a-26a. Thus, "[t]he record overwhelmingly shows that the military not only authorized but mandated the use of burn pits." Pet.App.42a. In addition, the court found that "the military decided where to locate the burn pits on all [bases] in Iraq and Afghanistan." Pet.App.103a. Further, the court found that "the military retained a high level of control over KBR's provision of water services" and "tested the water to ensure that the detailed military standards and methods were being met." Pet.App.110a-12a. Based on these factual findings, the district court held that Petitioners' claims directly challenge professional military judgments and therefore are non-justiciable. The Fourth Circuit affirmed. Petitioners seek certiorari based on a novel legal theory that their claims are per se justiciable.

A. Pre-remand proceedings

Beginning in 2008, Petitioners filed 63 lawsuits in 42 states asserting state common-law tort and breach-of-contract claims, primarily focused on KBR's allegedly negligent performance of burn pit services for the U.S. Army. For example, Petitioners alleged that KBR failed to use "safer, alternative means" of waste disposal, such as incinerators, C.A.App.350, 355-58, and improperly burned items, such as plastic water bottles, C.A.App.351-52. Petitioners also alleged that KBR improperly located burn pits "in close proximity to military activities and without proper consideration of prevailing wind conditions." C.A.App.350. These actions allegedly violated "contractual obligations" with the government and "interfered with the military mission." C.A.App.350, 353, 361.

The complaints were consolidated in the District of Maryland for pretrial proceedings. In February 2013, the district court granted KBR's motion to dismiss based on the political question doctrine, preemption under the combatant-activities exception to the Federal Tort Claims Act ("FTCA"), and derivative sovereign immunity. *In re KBR, Inc., Burn Pit Litig.*, 925 F. Supp. 2d 752, 753-74 (D. Md. 2013).

The Fourth Circuit vacated and remanded to the district court for further factual development. *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 334-52 (4th Cir. 2014) ("*Burn Pit III*"). The court concluded it "simply need[ed] more evidence to determine whether KBR or the military chose how to carry out these tasks." *Id.* at 339. For example, although the limited record contained "evidence show[ing] that the military exercised some level of oversight over KBR's burn pit and water treatment activities," *ibid.*, it also "contain[ed] evidence indicating that the military decided to use a burn pit at only a single military base," and that "KBR, not the military, was responsible for choosing the location of the burn pits," *id.* at 336-37.

KBR filed a petition for writ of certiorari, arguing that the pre-discovery record was sufficient to trigger application of the political question doctrine and related federal defenses. Pet. for Writ of Cert. at 17-20, *KBR, Inc. v. Metzgar*, 135 S. Ct. 1153 (2015) (No. 13-1241) ("KBR Pet., *Metzgar*"). KBR also challenged the Fourth Circuit's adoption of a choice-of-law rule related to the justiciability of KBR's causation defense. *Id.* at 25-29.

This Court called for the views of the Solicitor General. *KBR, Inc. v. Metzgar*, 134 S. Ct. 2833

(2014). In its response, the United States took the position that Petitioners' claims "should be dismissed" because they are preempted. Br. for the United States as Amicus Curiae at 18, *Metzgar*, 135 S. Ct. 1153 ("Br. for U.S., *Metzgar*"). According to the United States, allowing private plaintiffs to litigate these types of battlefield claims "would be detrimental to military effectiveness" and contrary to other uniquely federal interests. *Id.* at 21-22.

The government nevertheless recommended denial of certiorari on the grounds that "[t]he decision below [was] interlocutory, and it did not definitively resolve either the political-question issue or the preemption issue." *Id.* at 22. While it believed the claims were justiciable "at this stage of the litigation," the United States noted that "[t]his case ... may ultimately be deemed to raise a nonjusticiable political question." *Id.* at 7-8, 23. The Court subsequently denied KBR's petition. *KBR, Inc. v. Metzgar*, 135 S. Ct. 1153 (2015).

B. The expanded record on remand and the district court's factual findings

On remand, "the district court created an extensive factual record through a herculean discovery process." Pet.App.22a. The district court proceedings lasted nearly two years and resulted in the production of 5.8 million pages of documents, over 40 depositions (primarily of active or retired military officials), and a three-day evidentiary hearing at which more than a half-dozen witnesses testified, including two former U.S. commanding generals.

The district court summarized the key evidence in its 81-page opinion. Pet.App.73a-98a; C.A.App.5049-129. For example, retired Lieutenant

General Ricardo Sanchez, who served as commanding general of the U.S. forces in Iraq after the 2003 invasion, testified that he personally "mandated that burn pits be used for eliminating all of the trash" at bases in theater. Pet.App.74a. General Sanchez explained that he "made the military decision based upon the exigencies that [he] found in the field." *Ibid.* Alternative methods of waste disposal were either not feasible or posed "unacceptable" risks. Pet.App.26a. Building landfills within base perimeters "posed a risk of the spread of disease." *Ibid.* Commanders likewise rejected the option of transporting trash, like plastic water bottles, away from bases because the "threat would be too significant for [the Army] to put convoys on the road with empty water bottles to get them out of the country." Pet.App.75a.

Retired Lieutenant General John Vines, who commanded the multi-national forces in Iraq during 2005-06, described KBR's work as "absolutely critical" to the military mission, and testified that he considered KBR to be "integrated in the command structure." Pet.App.76a. General Vines confirmed that the decision to use burn pits was a professional military judgment. Pet.App.76a-77a. He testified that the "base commander was the one ultimately responsible" for determining the locations of burn pits because there were "a whole range of things that had to be considered before anything was positioned" on a military base. Pet.App.77a. The location of a burn pit "could affect the road network, ... [the] potential for introduction of disease, [t]he effect of wind direction, the effect of smoke, [and the] operation on an air field." Pet.App.28a. As General Vines ex-

plained, "only the base commander was in a position to consider all those factors." Pet.App.77a.

Dr. Craig Postlewaite, one of the most senior health officials within the Department of Defense, testified that the decision to use burn pits was a professional military judgment that required the commander to consider "dozens of different factors" and "balance risk" because "that's what they get paid for." Pet.App.80a, 100a. Likewise, the decision to continue the use of burn pits despite the military's awareness of health risks "reflect[ed] a policy determination by military commanders ... that exposure to burn pit smoke is less risky than alternatives such as hauling waste outside of the protected base camps." Pet.App.80a-81a. Dr. Postlewaite further explained that the military, and not KBR, was responsible for monitoring health risks associated with burn pits, and "the military conducted extensive air, soil, and water quality sampling on operating bases in Iraq and Afghanistan." Pet.App.81a.

After considering the evidence, including testimony from military commanders, contracting officials, and KBR employees, as well as "thousands of pages of exhibits," Pet.App.91a, the court found "no credible evidence to suggest that KBR ever made a unilateral decision to use a burn pit at even a single [base] in either Iraq or Afghanistan," Pet.App.100a. "Not a single witness testified that KBR could have unilaterally decided to bring incinerators into theater, to use landfills, or to recycle waste instead of using burn pits. Every witness who testified on the subject confirmed that this would have to have been a military decision." Pet.App.107a-08a. Thus, "[a]ny alleged failure of KBR to use incinerators or other methods of waste disposal in fact reflected a military

judgment that those alternatives to burn pits were not feasible in the dangerous, wartime contingency environment." Pet.App.108a.

Addressing "[a]nother key allegation" in Petitioners' complaint—"that KBR improperly located burn pits" on bases—the court found "overwhelming evidence" showing that "the military alone retained and exercised complete control over the siting of facilities on all bases, and that the military decided where to locate the burn pits on all [bases] in Iraq and Afghanistan." Pet.App.103a (emphasis omitted).

C. The district court's decision on remand

Based on its factual findings, the district court dismissed the case on two grounds: the political question doctrine and preemption stemming from the FTCA's combatant-activities exception.

The district court applied the Fourth Circuit's test for justiciability set out in *Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F.3d 402, 411-12 (4th Cir. 2011), and also cited *Baker v. Carr*, 369 U.S. 186, 217 (1962). Pet.App.115a-16a, 127a-33a. The court emphasized that the political question doctrine requires a "discriminating inquiry into the precise facts and posture of the particular case," and cannot be resolved by "semantic cataloguing." Pet.App.116 (quoting *Baker*, 369 U.S. at 217); see also Pet.App.98a.

The court also considered recent contractor-on-the-battlefield jurisprudence from the Fourth Circuit and other appellate courts. The court distinguished the facts here from those in *Harris v. Kellogg Brown & Root Services, Inc.*, 724 F.3d 458, 467-69 (3d Cir.

2013), and the Fourth Circuit's decision in *Taylor*. Pet.App.126-28a. Unlike those cases, Petitioners' claims "directly challenge a number of military decisions—such as the critical decision to use burn pits in the first place, the location of the pits, and various details regarding their operation." Pet.App.126a.

Additionally, the district court emphasized that prior cases did not involve "factual circumstances remotely similar to those presented in this case." Pet.App.116a. In particular, no other case "involves sweeping allegations of tortious conduct by a contractor across two theaters of war over the course of nearly a decade." *Ibid.*; see also Pet.App.147a; Pet.App.128a.

The court held that "the actions [Petitioners] challenge simply cannot be evaluated without examining or questioning military judgments." Pet.App.128a. Indeed, "a review of the major allegations in Plaintiffs' Master Complaint ..., in light of the evidence uncovered during discovery and at the evidentiary hearing, now shows that *all of the decisions Plaintiffs challenge were in fact made by the military—not KBR*." Pet.App.131a. The court thus reached "the inescapable conclusion that these suits must be dismissed pursuant to the political question doctrine." Pet.App.134a.

Alternatively, the district court held that Petitioners' claims must be dismissed as preempted based on the FTCA's combatant-activities exception. Applying the Fourth Circuit's iteration of the preemption test from *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009), the court held that Petitioners' claims are preempted because they "challenge activities that stemmed from military commands and were

performed while KBR was completely integrated into the military command structure." Pet.App.146a. The court concluded that "military decisions are at the heart of Plaintiffs' claims, and all of the challenged conduct stemmed from quintessential military judgments." Pet.App.144a.

D. The Fourth Circuit's decision

The Fourth Circuit affirmed the dismissal based on the political question doctrine and did not reach the alternative ground of dismissal based on preemption. Pet.App.22a-47a ("*Burn Pit V*").

The Fourth Circuit, like the district court, analyzed Supreme Court and other jurisprudence surrounding the political question doctrine. Pet.App.35a-36a (citing *Baker*, 369 U.S. at 217; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 177 (1803); *Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012); and other precedents). And like the district court, the Fourth Circuit's opinion reflects the fact-intensive nature of the discriminating inquiry. Pet.App.22a, 40a-46a.

After reviewing this extensive record, the Fourth Circuit concluded: "The facts found by the district court plainly show that KBR had little to no discretion in choosing *how* to manage the waste. The military mandated the use of burn pits as a matter of military judgment. KBR could not unilaterally choose to use landfills, recycling, or incinerators instead." Pet.App.40a. The court affirmed the district court's finding that the "sensitive decision" to use burn pits "reflected a military judgment" by senior commanders, reached "after balancing all the risks and alternative methods of waste disposal." Pet.App.25a-26a.

The Fourth Circuit determined that "the district court's conclusions that the military decided, authorized, and mandated the use of burn pits at all [bases] and that there were no instances of unauthorized use of burn pits are well supported by the record evidence." Pet.App.43a. The Fourth Circuit also rejected Petitioners' attempt to "place[] form over substance" by "ask[ing] us to abstractly look only to the formal, contractual relationship between the military and KBR while ignoring the actual, operational relationship between them." Pet.App.44a.

The Fourth Circuit agreed with the district court that "[t]he military's control over KBR was plenary and actual, making KBR's decisions pertaining to waste management and water services 'de facto military decisions' unreviewable by this Court." Pet.App.46a.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Warranting This Court's Review.

A. The courts of appeals agree the political question doctrine can bar review of tort suits challenging professional military judgments.

Petitioners ask this Court to grant review to consider whether the political question doctrine ever applies to tort claims for damages against battlefield contractors. But Petitioners do not dispute that *every* court of appeals confronted with this issue has held that the political question doctrine bars such suits against military contractors when they would require judicial review of professional military judgments. See Pet.2; *Harris v. Kellogg Brown & Root*

Servs., Inc., 724 F.3d 458, 465-66 (3d Cir. 2013); *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 411 (4th Cir. 2011); *Carmichael v. Kellogg Brown & Root Servs., Inc.*, 572 F.3d 1271, 1280-83 (11th Cir. 2009); *Lane v. Halliburton*, 529 F.3d 548, 558-60 (5th Cir. 2008); see also *Corrie v. Caterpillar*, 503 F.3d 974, 982-84 (9th Cir. 2007). The uniformity of this authority confirms there is no issue meriting review.

1. The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); see also *Baker*, 369 U.S. at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers."). With respect to wartime judgments, the Constitution designates the President as the "Commander in Chief" of the armed forces, U.S. Const. art. II, § 2, cl. 1, and states that "Congress shall have Power ... [t]o raise and support Armies," and "[t]o provide for organizing, arming, and disciplining, the Militia," *id.* art. I, § 8, cls. 12, 16.

The separation-of-powers principles underlying the political question doctrine preclude courts from second-guessing professional military judgments that are within the exclusive province of the political branches. Indeed, 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 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 "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essential 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." *Ibid.* In fact, the very nature of warfare requires military commanders to accept risks that would be unacceptable in civilian life.

2. Consistent with this Court's precedent, the courts of appeals have held that the political question doctrine forecloses tort claims against the military that challenge professional military judgments. See, *e.g.*, *Aktepe v. United States*, 105 F.3d 1400, 1402-04 (11th Cir. 1997) (upholding dismissal of claims stemming from military's inadvertent firing of live missiles during training exercise); *Tiffany v. United States*, 931 F.2d 271, 277-79 (4th Cir. 1991) (claims involving collision of military jet dispatched to intercept a private plane were non-justiciable); see also, *e.g.*, *Wu v. United States*, 777 F.3d 175, 179-82 (4th Cir. 2015) (affirming dismissal of claims arising out of accidental death of fisherman after military fired at and sank fishing vessel during counter-piracy mission); *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1362-67 (Fed. Cir. 2004) (claims regarding military's destruction of foreign facility as enemy property were non-justiciable).

These decisions apply the justiciability factors identified in *Baker*, 369 U.S. at 217. Under the first *Baker* factor, military judgments are constitutionally committed to the political branches. *Aktepe*, 105 F.3d at 1403; *El-Shifa Pharm.*, 378 F.3d at 1362-67 (decision whether to designate foreign facility as en-

emy property belonged solely to the President). The "strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Tiffany*, 931 F.2d at 277. Allowing courts "to second-guess these decisions run[s] the risk not just of making bad law, but also of imping[ing] on explicit constitutional assignments of responsibility to the coordinate branches of our government." *Wu*, 777 F.3d at 180 (internal quotation marks omitted).

Under *Baker*'s second factor, there are also no "judicially discoverable and manageable standards for resolving" whether the military reasonably balanced safety, combat, and strategic considerations. See *Aktepe*, 105 F.3d at 1404; *Tiffany*, 931 F.2d at 279. "More particularly, courts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." *Aktepe*, 105 F.3d at 1404.

3. Thus, Petitioners' contention that "[t]ort claims against the military are not generally barred by the political question doctrine," Pet.15; see also Pet.2-3, is invalid and premised on inapposite case law. For instance, Petitioners' reference to other limitations like sovereign immunity, the *Feres* doctrine, or the FTCA's combatant-activities exception, 28 U.S.C. § 2680(j), at most suggests that such suits may face *additional* barriers beyond the political question doctrine.[1] See Pet.1, 3-4, 15, 17. In some

[1] Petitioners' insinuation that the Solicitor General agreed these issues implicate the FTCA's combatant-activities exception rather than the political question doctrine is inaccurate. Pet.4. To the contrary, the Solicitor General cautioned that "[t]his case ... may ultimately be deemed to raise a nonjusticiable political question." Br. for U.S. at 23, *Metzgar*.

cases—like here—these defenses can provide alternative grounds for dismissal. See *infra* Part.II.B. But those other limitations do not supplant the distinct role of the political question doctrine in this context, which requires courts to refrain from second-guessing battlefield judgments reserved to the political branches.

Petitioners' selective quotations from cases addressing statutory and constitutional rights have no bearing on the justiciability of state-law battlefield tort claims. Pet.2-3, 14, 16. In *Zivotofsky v. Clinton*, 566 U.S. 189, 191-95 (2012), the issue was whether a statute authorizing a citizen to have "Israel" listed on his passport as his place of birth unconstitutionally tread on the Executive's foreign-policy powers. It is "emphatically the province and duty" of the judicial branch to resolve the constitutionality of statutes. *Id.* at 196 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see also, *e.g.*, *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 857 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring) (explaining that "whether a statute intrudes on the Executive's ... Article II authority" requires analyzing Article II, not "by backdoor use of the political question doctrine"). Under *Baker*, "there is ... no exclusive commitment to the Executive of the power to determine the constitutionality of a statute." *Zivotofsky*, 566 U.S. at 197.

The decision in *Hamdi v. Rumsfeld*, 542 U.S. 507, 525-29 (2004) (plurality opinion), is likewise inapposite, as it involved a U.S. citizen's constitutional rights to habeas relief and due process to challenge his designation as an enemy combatant. The question presented was how much process the plaintiff was due—an inquiry that calls for a specific balanc-

ing of competing interests. *Ibid.* Thus, much like *Zivotofsky*, *Hamdi* reflects the general principle that federal courts can evaluate the constitutionality of governmental conduct.[2] By contrast, courts have no comparable constitutional commitment to re-evaluate professional military judgments when resolving common-law tort suits.

4. The political question doctrine can bar suits against a battlefield support contractor, just as they do claims against the military itself. The Fourth Circuit's approach here was consistent with other appellate courts, which all agree that tort claims against a contractor are non-justiciable when they challenge the military's battlefield judgments. Pet.App.46a.

In *Carmichael*, for example, the Eleventh Circuit held that negligence claims stemming from the rollover of a contractor-driven truck during a military-led convoy in Iraq were non-justiciable because "military judgments governed the planning and execution of virtually every aspect of the convoy." 572 F.3d at 1281. The military's pervasive control over the oper-

---

[2] Petitioners misplace reliance on *Scheuer v. Rhodes*, 416 U.S. 232, 249 (1974), *overruled in part by Harlow v. Fitzgerald*, 457 U.S. 800 (1982), when attempting to distinguish the application of the political question doctrine in *Gilligan*, 413 U.S. at 10-11. Pet.14 n.2. Like *Zivotofsky* and *Hamdi*, the *Gilligan* and *Scheuer* cases addressed the constitutionality of government conduct. The concurrence in *Gilligan* merely noted that a damages suit "would present wholly different issues," without suggesting that such suits would always be justiciable. 413 U.S. at 14 (Blackmun, J., concurring). *Scheuer* also rejected a bright-line rule, emphasizing that the alleged conduct violated constitutional rights for which Congress provided a right of action under 42 U.S.C. § 1983. 416 U.S. at 248-29.

ation "ensur[ed] that virtually any question concerning the ... mission would inevitably implicate military judgments." *Id.* at 1290.

Addressing the first *Baker* factor, *Carmichael* held the military decisions at issue regarding how to deliver vital supplies through hostile territory involve subtle professional decisions "that are properly insulated from judicial review." *Id.* at 1286-88 (citing *Gilligan*, 413 U.S. at 10). The second *Baker* factor also precluded judicial review because the "familiar touchstones" of reasonableness "have no purchase" in the wartime context, where any other decision "could well have jeopardized the entire military mission" and made the convoy vulnerable to insurgent attacks. *Id.* at 1289.

Even when allowing battlefield tort suits to proceed, courts have recognized that the intertwinement of claims with military judgments can render a suit non-justiciable. In *Harris*, the Third Circuit acknowledged that suits against defense contractors "may present nonjusticiable issues because military decisions that are textually committed to the executive sometimes lie just beneath the surface of the case." 724 F.3d at 465. When the military is directing the contractor's conduct, "review of the contractor's actions necessarily includes review of the military order directing the action," which is exempt from judicial review. *Id.* at 466. Determining whether a plaintiff's claims are non-justiciable can thus require a fact-specific inquiry regarding the extent of military direction over the contractor's work. See, *e.g.*, *id.* at 463, 467-69 (military did not control contractor's discrete work performed on specific water pump at military base); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1362 (11th Cir. 2007)

(military did not control challenged aspects of defendant's operations); *Lane*, 529 F.3d at 567 (rejecting facial challenge to justiciability of claims, while recognizing that "further factual development very well may demonstrate that the claims are barred").

Consistent with these precedents, the pervasiveness of military judgments was dispositive here. In *Burn Pit III*, the Fourth Circuit concluded that further discovery was needed to resolve whether the military controlled KBR by making the critical decisions that plaintiffs claimed were negligent. 744 F.3d at 335-39 (discussing "control" factor in *Taylor*, 658 F.3d at 411). Those decisions included the choice of waste-disposal method to use on military bases through Iraq and Afghanistan, the location of burn pits at bases, and the operation of the burn pits themselves. *Ibid.* Similarly, the court needed "more evidence" to resolve whether the military exercised sufficient control over KBR's water-treatment services. *Id.* at 339.

Extensive discovery confirmed that—as in *Carmichael*—the military exercised "actual and plenary" control by directing not only "'what' must be done but also prescrib[ing] 'how' KBR must accomplish" its waste- and water-management tasks. Pet.App.40a-42a. As the Fourth Circuit explained in *Burn Pit V*, the district court's findings—which Petitioners do not challenge—included findings that "KBR had little to no discretion in choosing *how* to manage the waste" because the "military mandated the use of burn pits as a matter of military judgment" and "exercised plenary control over where to construct the burn pits, what could or could not be burned, when KBR could operate the burn pits, how high the flames should be, and how large each burn

should be." Pet.App.40a-41a. The military also "directed the frequency and quantity of potable water to be produced and dictated how much should be stored." Pet.App.41a. The military's control over these services "was actual": the operational command "determined the methods of waste management and water services that KBR was to use, dictated their requirements for support, and directed KBR to provide the necessary services through the contracting arm, ... [and] continuously and meticulously evaluated whether KBR was meeting the commanders' intent." Pet.App.41a-42a. Thus, "KBR's decisions pertaining to waste management and water services [were] 'de facto military decisions'" that courts cannot second-guess. Pet.App.46a (quoting *Taylor*, 658 F.3d at 410).

In sum, the Fourth Circuit's approach is consistent with other courts, which agree that tort suits challenging the military's battlefield judgments are non-justiciable. There is no split warranting review.

B. Petitioners' proposal to make all tort claims against battlefield contractors justiciable contravenes this Court's precedent.

As explained above, courts of appeals have applied the *Baker* factors when recognizing that tort suits against contractors challenging sensitive military judgments are non-justiciable. Petitioners likewise treat the *Baker* factors as the controlling test for justiciability, but they wholly misapply *Baker*'s principles. Pet.2, 11-18.

The flaws in Petitioners' analysis are apparent from their discussion of the *Baker* factors. Pet.13-18. Most fundamentally, Petitioners' bright-line ap-

proach cannot be squared with *Baker* itself. *Baker* requires a "discriminating inquiry into the precise facts and posture of the particular case," without resorting to "semantic catalouging." 369 U.S. at 217; see also *id.* at 210-11 (demanding "case-by-case inquiry"). Yet by advocating for a blanket rule that would make *all* contractor-on-the-battlefield suits justiciable, Petitioners forgo any "discriminating inquiry" and resort to "semantic cataloguing," which *Baker* forbids. See Pet.13-18; see also Pet.18-20 (complaining about need for discovery). In fact, Petitioners previously admitted "that this Court has rejected such a *per se* rule" regarding justiciability. Br. in Opp'n to Pet. for Writ of Cert. at 13, 16, *Metzgar*, 135 S. Ct. 1153 ("Opp'n Br., *Metzgar*") (citing *Baker*, 369 U.S. at 217).

Moreover, this Court has rejected Petitioners' contention that separation-of-powers concerns evaporate when a plaintiff chooses to sue a military contractor instead of suing the military. As *Baker* explained, "even in *private litigation* which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to" determinations that belong uniquely to the political branches. 369 U.S. at 214 (emphasis added) (addressing political determination of when a war begins and ends). This Court has also recognized that "the identity of the litigant is immaterial to the presence of [political questions] in a particular case." *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (emphasis omitted) (private party could assert that federal statute violated separation-of-powers).

Nor are courts always equipped to evaluate whether a contractor acted negligently under *Baker*'s second factor, as Petitioners' contend. Pet.15-17 & n.3. If the factual record confirms that the contractor's conduct is inextricably intertwined with professional military judgments, courts *are* left "truly rudderless" to ascertain the underlying question. Pet.16 (internal quotation marks omitted). Courts would be forced to ask whether "reasonable care was taken to achieve military objectives while minimizing injury and loss of life," an inquiry that "def[ies] resolution by means of conventional judicial standards used in ordinary tort cases."[3] *Carmichael*, 572 F.3d at 1290 (internal quotation marks omitted).

In addition to the first and second *Baker* factors discussed above, see *supra* Part I.A, the remaining

---

[3] Petitioners' references to other decisions are misleading. Pet.17. *Al Shimari v. CACI Premier Technology*, 840 F.3d 147, 161 (4th Cir. 2016), *distinguished* "negligence cases calling into question military standards of conduct"—like Petitioners' claims here—from a claim involving statutory-interpretation issues. For the negligence claim, *Al Shimari* held courts lack power to review a contractor's conduct that was under the military's actual control, so long as that conduct does not violate international or criminal law. *Id.* at 159.

In *McManaway v. KBR, Inc.*, 554 F. App'x 347, 351-52 (5th Cir. 2014) (Jones, J., dissenting from denial of reh'g en banc), the dissent observed that the elements of a negligence claim do not vary between jurisdictions, to reinforce a different point that the contractor's causation defense, alone, triggered the political question doctrine. The impact of defensive issues is irrelevant here because *Petitioners' claims* are non-justiciable. See *infra* Part.I.C. But the dissent's reasoning in *McManaway* is instructive: the political question doctrine bars these suits because any ensuing trial would "requir[e] hindsight review of the wisdom of military decisions." 554 F. App'x at 352.

three factors are also triggered when tort claims against military contractors call for second-guessing professional military judgments. When a contractor's alleged negligence hinges on military decisions that balanced competing battlefield concerns, it is impossible to resolve the claim "without an initial policy determination of a kind clearly for nonjudicial discretion" under *Baker*'s third factor. See 369 U.S. at 217. In this situation, courts cannot avoid having to "second-guess internal structural decisions made by the political branches," Pet.18, which would fail to accord due respect to their decisions under *Baker*'s fourth factor. 369 U.S. at 217. And the unique concerns on the battlefield create an "unusual need for unquestioning adherence to a political decision" by the military (fifth factor) and refraining from "the potentiality of embarrassment from multifarious pronouncements by various departments" that would result if courts were to second-guess the propriety of military judgments (sixth factor). *Ibid.*

At bottom, Petitioners' proposal to make all battlefield-contractor suits justiciable not only contravenes *Baker*, but would also undermine U.S. policy. With the transition to an all-volunteer military, the government depends on contractors to perform essential battlefield functions. Allowing courts to question sensitive military judgments carried out by contractors creates the risk that contractors will hesitate to undertake these services. The resulting threat to the nation's warfighting capability reinforces that state-tort suits are not the proper vehicle for seeking relief. Petitioners' misapplication of the political question doctrine counsels against granting review.

C. Asserted conflicts on other issues are irrelevant to the outcome of this case.

Faced with this uniform authority confirming that their claims are non-justiciable, Petitioners attempt to generate a cert-worthy question by citing KBR's prior cert petition and an opinion decided on state-law grounds. Pet.10-11, 20-24. Neither provides a basis for review.

1. The circuit-level disagreement cited in KBR's previous petition is now irrelevant to the outcome of this case because Petitioners' claims were dismissed under the Fourth Circuit's plaintiff-friendly rule.

Following *Burn Pit III*, KBR sought review of the Fourth Circuit's decision to remand for further discovery. KBR's cert petition included an argument that the evidentiary record was already sufficient to establish that the military made all the key decisions underlying Petitioners' claims, which made these suits non-justiciable. KBR Pet. at 17-20, *Metzgar*. On remand, Petitioners received the benefit of the additional discovery that the Fourth Circuit allowed. And as the Fourth Circuit held in *Burn Pit V*, the expanded factual record confirmed that Petitioners' claims are non-justiciable. Pet.App.22a-23a, 46a.

Petitioners now point to a different portion of KBR's petition, which disputed the relevance of choice-of-law principles to the justiciability of these suits. Pet.21-23; KBR Pet. at 20-29, *Metzgar*. *Burn Pit III* had concluded a contractor's defense that the military's conduct caused the alleged injuries does not make a suit non-justiciable unless the applicable state law employs a proportionate-responsibility scheme that permits allocation of fault to the mili-

tary. *Burn Pit III*, 744 F.3d at 339-41 (adopting *Harris*, 724 F.3d at 474-75; analyzing this issue under second *Taylor* factor).

Whatever impact KBR's *defenses* may have on justiciability—and the relevance of choice-of-law to that issue—has no bearing on the Fourth Circuit's distinct conclusion in *Burn Pit V* that Petitioners' *claims* are non-justiciable because the military controlled and directed KBR's challenged conduct. Pet.App.46a. Indeed, the district court did not conduct a choice-of-law inquiry to resolve the ramifications of KBR's causation defense, and the Fourth Circuit did not address it. Review is unwarranted to address a choice-of-law conflict that would not change the outcome.

2. Petitioners also complain that *Freeman v. American K-9 Detection Services, LLC*, 556 S.W.3d 246 (Tex. 2018), relied on "untested" allegations that the military caused a plaintiff's injuries. Pet.23-24. But *Freeman* is irrelevant because the Supreme Court of Texas, although "guided in [its] view of the political question doctrine by *Marbury* and *Baker* as well as by other federal-court decisions," applied the doctrine "as required for the separation of powers mandated by the *Texas* Constitution." 556 S.W.3d at 254 (emphasis added). This plainly-stated, adequate, and independent state-law ground for decision supplies no basis for review. See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

In addition, *Freeman* affirmed dismissal based on the contractor's causation defense which, under Texas law, would allow the jury to assign a percentage of fault to the military. 556 S.W.3d at 257-59. As noted, the impact of a causation defense has no

bearing on the Fourth Circuit's conclusion that Petitioners' claims, standing alone, are non-justiciable.

II. Review Also Should Be Denied Because Of Serious Vehicle Problems.

A. Petitioners embraced the legal framework they now attempt to challenge.

Even if this case presented an issue worthy of this Court's review, Petitioners would not be the right parties to pursue it. Throughout these cases—including the two appeals to the Fourth Circuit—Petitioners advocated for the same fact-intensive determination on justiciability they now insist was erroneous. This Court should not grant review to consider Petitioners' newly-fashioned arguments against the justiciability standard they championed all along.

In *Burn Pit III*, Petitioners argued that the Fourth Circuit's justiciability test from *Taylor* comports with *Baker*, that any bright-line approach would "violate[] Supreme Court jurisprudence," and that *Taylor*'s analysis hinges on "key facts ... established after full discovery created a complete evidentiary record." Br. of Appellants at 13-15, 18-19, 21-23, 25-26, 57-59, *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014) (No. 13-1430). Those arguments are the exact opposite of Petitioners' current contentions that the Fourth Circuit's framework violates *Baker*, a bright-line justiciability rule is warranted, and extensive discovery was improper.

Petitioners doubled down on their prior positions when opposing KBR's previous petition for writ of certiorari. Characterizing the Fourth Circuit's approach as "unremarkable," Petitioners endorsed the

need "for development of a factual record sufficient to resolve justiciability under *Baker v. Carr*." Opp'n Br. at i, 12-15, 23, *Metzgar*. That is the same fact- and discovery-dependent inquiry they now claim was wrong.

Only *after* the fully-developed record decisively refuted Petitioners' contentions did they reverse themselves and assert the Fourth Circuit's justiciability standard was wrong—in a petition for rehearing en banc, which was summarily denied. Pet. for Reh'g *En Banc* at 5-14, *In re KBR, Inc., Burn Pit Litig.*, 893 F.3d 241 (4th Cir. 2018) (No. 17-1960); Pet.App.149a-71a. Petitioners should be estopped from challenging the standard they fought for and obtained at earlier stages of these cases. See *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase"). At minimum, Petitioners' failure to timely and properly preserve their arguments is reason alone to deny review. See, *e.g.*, *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (refusing to consider argument raised for first time in opposition to petition for rehearing in the court of appeals).

This Court should reject Petitioners' attempted end-run around the factual determinations they insisted were necessary, that are subject to a deferential standard of review, and that do not merit re-examination by this Court. See, *e.g.*, *NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented "primarily a question of fact, which does not merit Court review"); *S. Power Co. v. N.C. Pub. Serv. Co.*, 263 U.S. 508, 509 (1924).

B. Petitioners' claims are preempted by the combatant-activities exception to the Federal Tort Claims Act.

Suits challenging battlefield judgments face another obstacle: preemption under the FTCA's combatant-activities exception, which preserves the government's sovereign immunity for any "claim arising out of the combatant activities of the military ... during time of war." 28 U.S.C. § 2680(j). The Fourth Circuit did not reach this issue, Pet.App.46a-47a, but the district court held that the FTCA's combatant-activities exception provides an alternative ground for dismissal, Pet.App.138a-46a. Because Petitioners' claims are preempted even under the Fourth Circuit's test—as well as the tests adopted by the D.C. Circuit and proposed by the United States—a decision by this Court on justiciability would not change the ultimate outcome in this case.

1. As the D.C. Circuit explained, "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 v. Titan*, 580 F.3d 1, 7 (D.C. Cir. 2009). Much as this Court held in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511-13 (1988), that the uniquely federal interests underlying the FTCA's discretionary function exception can preempt state-law tort claims against contractors, the critical federal interests protected by the combatant-activities exception "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." *Saleh*, 580 F.3d at 6-7.

Indeed, litigation of battlefield tort claims would "hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations." *Id.* at 8. And "the costs of imposing tort liability on government contractors" will ultimately be "passed through to the American taxpayer." *Ibid.* To safeguard these federal interests, the D.C. Circuit formulated a preemption test that focuses on whether the battlefield contractor was "integrated into combatant activities over which the military retains command authority." *Id.* at 9.

The United States has endorsed a broader test under which claims against battlefield contractors are preempted if: "(i) a similar claim against the United States would be within the FTCA's combatant-activities exception because it arises out of the military's combatant activities, and (ii) the contractor was acting within the scope of its contractual relationship with the government at the time of the incident out of which the claim arose." Br. for U.S. at 15, *Metzgar*. Under that approach, "federal preemption would generally apply even if an employee of a contractor allegedly violated the terms of the contract," provided the contractor's conduct fell within the scope of its contractual relationship with the government. *Id.* at 16.

In *Burn Pit III*, the Fourth Circuit agreed that the federal interests underlying the combatant-activities exception can conflict with, and thus preempt, tort suits against military contractors. 744 F.3d at 346-51. The Fourth Circuit framed the federal interest more narrowly than the D.C. Circuit and rejected the United States' proposed preemption

test, *ibid.*, holding that the purpose of the combatant-activities exception "is to foreclose state regulation of the military's battlefield conduct and decisions," *id.* at 348 (quoting *Harris*, 724 F.3d at 480). Under the Fourth Circuit's view, "when state tort law touches the military's battlefield conduct and decisions, it inevitably conflicts with the combatant activity exception's goal of eliminating such regulation of the military during wartime." *Id.* at 349.

Incorporating the *Saleh* test, the Fourth Circuit held that KBR's services qualified as activities "arising out of combatant activities" of the military because "[p]erforming waste management and water treatment functions to aid military personnel in a combat area is undoubtedly 'necessary to and in direction connection with actual hostilities.'" *Id.* at 351 (quoting *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948)). But the court concluded that more evidence was needed about the extent to which the military actually controlled KBR's activities, to resolve whether KBR was "integrated into the military chain of command." *Ibid.*

2. Petitioners' claims are preempted under any of these tests. Under the Fourth Circuit's approach, uncontroverted evidence showed that the military exercised actual control over the aspects of KBR's waste-management and water-treatment services underlying Petitioners' allegations. Indeed, "the military made *all* key decisions surrounding KBR's provision of waste and water treatment services, without leaving KBR discretion." Pet.App.144a. Thus, "KBR's actions all stemmed from military commands and military judgments." Pet.App.145a.

Petitioners' claims are also preempted under the *Saleh* test because KBR's services were "integral to," indeed, "absolutely essential to the military mission" in Iraq and Afghanistan. Pet.App.114a (internal quotation marks omitted). KBR performed these essential combat-support functions at the direction of, and in close coordination with, U.S. military personnel. Pet.App.139a-40a. KBR was "inextricably embedded into the military structure" and was part of the military's daily operations. *Ibid.* (internal quotation marks omitted). And under the United States' proposed test, it is clear that uniformed soldiers, who performed the same work at most bases, would be covered by the exception, and that KBR's work fell within the scope of its contract. See *In re KBR, Inc., Burn Pit Litig.*, 736 F. Supp. 2d 954, 970 (D. Md. 2010) ("waste disposal and water treatment were generally within the scope" of KBR's duties).

Thus, there is little point in reviewing Petitioners' arguments regarding justiciability when their claims are otherwise preempted. And given Petitioners' insistence that military decisions underlying tort suits should be addressed under preemption principles rather than the political question doctrine, Pet.3-4, 15, this Court should at minimum await a case where it has the benefit of a circuit decision on both issues, and where both issues are squarely before this Court.

III. The Fourth Circuit's Ruling Is Correct.

The district court's findings, which the Fourth Circuit upheld (and Petitioners do not challenge), establish that this is a paradigmatic case in which state-law tort claims directly challenge sensitive mil-

itary judgments. The military—not KBR—made the decisions that Petitioners claimed were negligent. Under the political question doctrine, these suits were correctly dismissed.

1. Petitioners' core allegation was that KBR should have used other waste-disposal methods like recycling or incinerators instead of burning solid waste. C.A.App.349-50, 355-56, 361, 368. Yet "[t]he military mandated the use of burn pits as a matter of military judgment," and "KBR could not unilaterally choose to use" any of these alternative disposal methods. Pet.App.40a; see also Pet.App.100a-01a. In fact, there were "no instances in which KBR used burn pits without military authorization." Pet.App.101a.

Petitioners' allegations that KBR improperly located and operated the burn pits also challenged military decisions. The military "retained and exercised complete control over the siting of facilities on all bases," including burn pits. Pet.App.103a (emphasis omitted). The military "dictat[ed] the hours of operation of the burn pits and direct[ed] that certain items be burned"—including plastic water bottles and other items that Petitioners claimed were improperly burned. Pet.App.105a; see also Pet.App.28a, 40a-41a. Petitioners' isolated and vague allegations that KBR violated prohibitions against burning hazardous material did not negate the overwhelming evidence of plenary military control. Pet.App.45a.

These military decisions reflect "complex, subtle, and professional decisions" that should not be second-guessed by federal courts. See *Gilligan*, 413 U.S. at 10. For instance, the military decided to use burn pits only "after balancing all the risks and al-

ternative methods of waste disposal." Pet.App.99a; see also Pet.App.106a. As commanders explained, "alternatives such as landfills or recycling services were not feasible because the slightest movement [of the U.S. forces] expose[d] those moving to hostile actions." Pet.App.26a (internal quotation marks omitted). Using landfills inside the base "would have posed a risk of the spread of disease, stench, and vermin, and landfills outside the [bases] would have posed an unacceptable level of security risk to personnel disposing of waste." *Ibid.* Incinerators required military funding, and their transportation via military convoys would "potentially divert[] combat personnel." Pet.App.27a.

Moreover, the military decided to continue using burn pits despite its awareness of potential health risks. In doing so, military commanders made a "policy determination ..., after weighing the available options and considering the conditions on the ground, that exposure to burn pit smoke is less risky than alternatives such as hauling waste outside of the protected base camps." Pet.App.100a.

These decisions involving "strategy and tactics employed on the battlefield are clearly not subject to judicial review." *Tiffany*, 931 F.2d at 277. There are no workable standards for evaluating whether the military reasonably calibrated this balance between logistical, tactical, and safety concerns when deciding that solid waste would be burned at all bases in Iraq and Afghanistan, where any other decision "could well have jeopardized the entire military mission." See *Carmichael*, 572 F.3d at 1289; see also, *e.g.*, *Gilligan*, 413 U.S. at 10. Nor are there standards "with which to assess whether reasonable care was taken to achieve military objectives while mini-

mizing injury and loss of life," *Aketpe*, 105 F.3d at 1404, when the military directed where to place the burn pits, what would be burned, and how the burn pits would be operated. Yet these military judgments lie at the heart of Petitioners' claims. Resolving these suits "would lead to scrutinizing military decisions for which [courts] lack the constitutional warrant and judicial competence." Pet.App.37a.

2. In fact, the government has provided alternative remedies and utilized other mechanisms for regulating the conduct of battlefield contractors. These detailed regimes underscore that the adequacy of a contractor's work should be assessed by the government itself, and not through state-law tort suits.

Petitioners have several alternatives for recovery. The Department of Veterans Affairs provides compensation to veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty." 38 U.S.C. § 1110; see also 38 U.S.C. § 1131. Similar relief is available under the Defense Base Act, a "federal compensation scheme for civilian contractors and their employees for injuries sustained while providing functions under contracts with the United States outside its borders." *Fisher v. Halliburton*, 667 F.3d 602, 610 (5th Cir. 2012); 42 U.S.C. § 1651(a)(4). These mechanisms provide remedies for individuals who claim they were harmed by burn-pit emissions on the battlefield.

Congress has also enacted a statute directing the Department of Veterans Affairs to create an Open Air Burn Pit Registry to identify and monitor veterans who were exposed to burn-pit emissions. See Dignified Burial and Other Veterans' Benefits Improvement Act of 2012, Pub. L. No. 112-260, § 201,

126 Stat. 2417, 2422 (38 U.S.C. § 527 note). Over 163,000 individuals have signed up with the Registry. *VA's Airborne Hazards and Open Burn Pit Registry*, U.S. Dep't of Veteran Aff., https://www.publichealth.va.gov/exposures/burnpits/registry.asp (last visited Dec. 14, 2018).

In addition, military contractors are always accountable to the U.S. government. Military oversight "applied across the board to every task KBR performed." C.A.App.1901. Federal regulations vest the military with authority to accept or reject a contractor's work. See 48 C.F.R. § 52.246-5. The military could issue formal directives to "adjust or modify KBR's performance." C.A.App.2935. The government also performed a "judgmental evaluation" at intervals to assess whether KBR would be entitled to an award fee. 48 C.F.R. § 16.305. Tellingly, despite all this oversight, not once did the government suggest that KBR's challenged actions in this case were wrongful.

The fact that the government regulated KBR's work in real-time reinforces why the judiciary should not intervene in these matters. And the existence of other avenues for recovery bolsters the conclusion that state-tort suits are not the proper means for seeking relief. These suits were properly dismissed as non-justiciable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WARREN W. HARRIS
Counsel of Record
YVONNE Y. HO
BRACEWELL LLP
711 Louisiana St., Suite 2300
Houston, Texas 77002
(713) 223-2300
warren.harris@bracewell.com

RAYMOND B. BIAGINI
ROBERT A. MATTHEWS
DANIEL L. RUSSELL JR.
MARIANNE F. KIES
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Counsel for Respondents

DECEMBER 14, 2018

#5799636.8