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

REPLY BRIEF

STEPHEN I. VLADECK
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198

FREDERICK C. BAKER
LISA MARIE SALTZBURG
JAMES W. LEDLIE
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000

SUSAN L. BURKE
Counsel of Record
LAW OFFICES OF
SUSAN L. BURKE
1611 Park Avenue
Baltimore, MD 21217
(410) 733-5444
sburke@burkepllc.com

Counsel for Petitioners

December 21, 2018

285629

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

STATUTES AND OTHER AUTHORITIES

REPLY BRIEF FOR THE PETITIONERS

The Petition's principal argument for certiorari is that the Fourth Circuit, along with four other courts of appeals, has wrongly expanded the political question doctrine in recent years to foreclose state-law tort suits against private military contractors. Pet. 10–20. Although the Brief in Opposition insists that there is "a lack of any issue warranting review," Br. Opp. 1, all it offers in support of that claim—other than repetition, *see id.* at 3, 12, 20, 23, 27—are merits arguments that fail to meaningfully respond to the Petition and vehicle objections that, to the extent they are even relevant, augur in favor of certiorari, rather than against it.

I. Petitioners' State-Law Tort Claims Do Not Satisfy Any of the *Baker* Factors

On the merits, Respondents devote nine pages to the claim that the Fourth Circuit's application of the political question doctrine "is consistent with other [lower] courts, which agree that tort suits challenging the military's battlefield judgments are non-justiciable." *Id.* at 20; *see id*. at 13 ("The uniformity of the authority confirms there is no issue meriting review."). The whole point of the Petition, however, is that these lower-court decisions have all misapplied *this* Court's jurisprudence—which has repeatedly explained that the political question doctrine is a "narrow exception" to the obligation of federal courts to decide cases properly before them. *Zivotofsky ex rel. Zivotofosky* v. *Clinton*, 566 U.S. 189, 195 (2012) ("*Zivotofsky I*"); *see El-Shifa Pharm. Indus. Co.* v. *United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring) ("The political question

doctrine has occupied a more limited place in the Supreme Court's jurisprudence than is sometimes assumed."). That the challenged circuit rulings are generally in agreement with each other hardly responds to Petitioners' detailed charge that they are fundamentally at odds with this Court's case law.

For example, in *Baker* v. *Carr*, the first factor this Court identified as suggesting a case presents a non-justiciable political question is if the Constitution reflects "a textually demonstrable commitment of the issue to a coordinate political department." 369 U.S. 186, 217 (1962). Like the circuit-level cases on which it relies, the Brief in Opposition repeatedly asserts that "military judgments are constitutionally committed to the political branches," *e.g.*, Br. Opp. 14, 16, 18, but never identifies specific constitutional text that so provides.[1]

Nor do Respondents have a satisfying explanation for the myriad cases in which federal courts, including this Court, *have* reviewed such "military judgments," even those turning on factual disputes over sensitive military conduct in foreign combat theaters. *See, e.g.*, *Latif* v. *Obama*, 677 F.3d 1175 (D.C. Cir. 2012). The Brief in

1. The Brief in Opposition cites the Commander-in-Chief Clause, U.S. CONST. art. II, § 2, cl. 1, the Raise Armies Clause, *id.* art. I, § 8, cl. 12, and the Second Militia Clause, *id.* cl. 16. *See* Br. Opp. 13. For good reason, though, Respondents never claim that *these* provisions are the source of the textual commitment that *Baker* requires. *See, e.g.*, *Nixon* v. *United States*, 506 U.S. 224, 240 (1993) (White, J., concurring in the judgment) ("There are numerous instances of this sort of textual commitment, *e.g.*, Art. I, § 8, and it is not thought that disputes implicating these provisions are nonjusticiable.").

Opposition criticizes the Petition for "selective quotations from cases addressing statutory and constitutional rights," Br. Opp. 16, but wholly misses the point of those quotations (and those cases). In both word and deed, these decisions have consistently rejected the argument that the Constitution categorically commits review of military judgments to the political branches—without regard to whether the underlying challenge arose under the Constitution, a statute, or the common law. *See, e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion); *id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *see also El-Shifa*, 607 F.3d at 856 n.3 (Kavanaugh, J., concurring) (listing cases); Pet. 13–14.[2]

The same structural flaws pervade Respondents' analysis of the second *Baker* factor—*i.e.*, whether Petitioners' claims present "a lack of judicially discoverable or manageable standards." 369 U.S. at 217. This Court has been clear that a claim only satisfies the second *Baker* factor when it "lacks sufficient precision to afford any judicially manageable standard of review" of the challenged action. *Nixon*, 506 U.S. at 230. For instance, the four-Justice plurality opinion in *Vieth* v. *Jubelirer* turned

2. Respondents purport to distinguish *Hamdi* on the ground that "[t]he question presented was how much process the plaintiff was due." Br. Opp. 16. That was certainly *one* of the issues in *Hamdi*. But before reaching that question, not only did this Court have to decide if the military had legal authority to detain Hamdi, *see* 542 U.S. at 516–24 (plurality opinion), but the lower courts had to decide if the federal courts had *any* role to play in reviewing battlefield captures of alleged enemy combatants—without regard to the grounds on which such detention might be challenged. *See Hamdi* v. *Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

on the conclusion that there were no legal standards courts could apply to differentiate an unconstitutional partisan gerrymander from valid legislative redistricting. 541 U.S. 267, 281–301 (2004) (plurality opinion); *see also Zivotofsky I*, 566 U.S. at 204 (Sotomayor, J., concurring) ("When a court is given no standard by which to adjudicate a dispute, or cannot resolve a dispute in the absence of a yet-unmade policy determination charged to a political branch, resolution of the suit is beyond the judicial role envisioned by Article III.").

Here, in contrast, the heart of Petitioners' claims is that, in disposing of hazardous materials through open-air burn pits, Respondents committed a series of common-law torts. The Brief in Opposition claims that there are no standards "for re-evaluating the propriety of decisions that reflect the military's balancing of battlefield strategic, logistical, and safety concerns." Br. Opp. 2. But that balancing goes to the *reasonableness* of Respondents' conduct, not the constitutional incompetence of courts to identify which legal standard should apply to the adjudicated facts. Indeed, "because the common law of tort provides clear and well-settled rules on which the district court can easily rely, this case does not require the court to render a decision in the absence of 'judicially discoverable and manageable standards.'" *Klinghoffer* v. *S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991).

To be clear, Petitioners are not, as Respondents claim, "advocating for an unprecedented, categorial rule that would make all state-law suits challenging military judgments justiciable." Br. Opp. 2. The more nuanced, modest position advanced in the Petition is that common-law tort suits seeking damages against private military

contractors fail to satisfy any of the *Baker* factors—even if claims seeking other forms of relief might. Despite Respondents' effort to caricature this argument as a "novel legal theory," *id.* at 4, it is the precise distinction between this Court's dueling justiciability decisions in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), and *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). *See* Pet. 14–15 n.2; *see also, e.g.*, *Al-Aulaqi* v. *Panetta*, 35 F. Supp. 3d 56, 70 n.21 (D.D.C. 2014).[3] And because none of the *Baker* factors are "inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." 369 U.S. at 217.

Were the law as Respondents portray it, *no* tort suit could ever be brought against the military or private military contractors for any conduct that called into question military judgments, whether on the battlefield or off, and whether against private military contractors or the federal government itself. By that logic, as the Petition explained, there would have been no need for Congress to exempt from the Federal Tort Claims Act "[a]ny claim

3. Respondents claim that *Scheuer* is inapposite because it "addressed the constitutionality of government conduct." Br. Opp. 17 n.2. But the claims in *Gilligan*, which this Court held to present non-justiciable political questions, also presented constitutional objections to the same government conduct. *See id.*

In other words, the distinction between *Gilligan* and *Scheuer* was not the source of the plaintiffs' claims, but the nature of the relief that they sought. *See Koohi* v. *United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("Damage actions are particularly judicially manageable. By contrast, because the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions.").

arising out of the combatant activities of the military or naval forces," 28 U.S.C. § 2680(j); those claims would never have been justiciable in the first place. Pet. 15.

The Brief in Opposition reads the existence of this provision to suggest only that "such suits may face *additional* barriers beyond the political question doctrine." Br. Opp. 15. But Respondents never explain why Congress would have needed to preserve the federal government's sovereign immunity over claims that, on Respondents' view, courts are constitutionally barred from adjudicating at all. If anything, the enactment of the FTCA's combatant activities exception (and the decades of case law applying it) suggests that Congress shares Petitioners' view—and that the political question doctrine does not generally preclude the federal courts from adjudicating state-law tort suits against the military itself, let alone against private military contractors. If nothing else, however, it underscores a point that Respondents never expressly deny—*i.e.*, that the Petition presents "an important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c).[4]

4. The Petition also identified a circuit split regarding how choice-of-law analysis should factor into whether a contractor's defenses turn an otherwise justiciable state-law tort suit into a non-justiciable political question. Pet. 21–23. Respondents, who have previously argued that the same split *justified* this Court's intervention, *see id.* at 21, now claim that it is irrelevant because Petitioners lost even under "the Fourth Circuit's plaintiff-friendly rule." Br. Opp. 24. In fact, the split (1) underscores the difficulties that lower courts have encountered in extending the political question doctrine into this context; and (2) would certainly be relevant if Petitioners are correct that the Fourth Circuit was wrong.

II. Respondents' Vehicle Objections are Inapposite, Unavailing, and Irrelevant

Implying that this Court in another case may want to resolve whether state-law tort suits against private military contractors are barred by the political question doctrine, the Brief in Opposition pivots away from the merits and toward three arguments for why this case would be a poor vehicle for settling the matter. Respectively, these arguments are inapposite, unavailing, and irrelevant.

First, Respondents argue that "Petitioners should be estopped from challenging the standard they fought for and obtained at earlier stages of these cases." Br. Opp. 27. This argument is specious. From the moment Respondents first asserted that these cases presented a non-justiciable political question, Petitioners have argued that none of *Baker*'s six factors should apply—beginning with the April 2010 response to Respondents' motion to dismiss in the district court. *See* Plaintiffs' Opposition to Defendants' Motion to Dismiss at 17, *In re KBR, Inc., Burn Pit Litig.*, 736 F. Supp. 2d 954 (D. Md. 2010).

As the Petition recounts, shortly thereafter, the Court of Appeals decided *Taylor* v. *Kellogg, Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011), the first time that the Fourth Circuit had expressly extended the political question doctrine to tort claims against private military contractors. *See* Pet. 7 & n.1. From that moment until the Fourth Circuit ruled against Petitioners in the decision at issue here, Petitioners (as they had to) accepted *Taylor* as the law of the circuit—and sought to litigate these cases within that framework. As soon as the Court of Appeals

ruled against Petitioners under *Taylor*, Petitioners timely (but unsuccessfully) sought rehearing en banc on the ground that *Taylor* could not be reconciled with *Baker* or the rest of this Court's jurisprudence with respect to the political question doctrine. Pet. App. 149a.

Whatever else may be said about the doctrine of judicial estoppel, it should go without saying that, as a doctrine of equitable discretion, *see New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001), it does not preclude parties from making the best available arguments under existing circuit precedent, and, if those arguments fail, *then* seeking to challenge that precedent en banc and before this Court. *See, e.g.*, *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 170 (2010) ("We do not fault the parties' lawyers for invoking . . . binding Circuit precedent that supported their clients' positions."). That is all that happened here.[5]

Second, Respondents suggest that the Petition should be denied because, even if the decision below is reversed, they are likely to prevail on remand on a completely different ground than the sole basis for the Court of Appeals' decision and judgment in this case—that Petitioners' state-law claims are "preempted" under reasoning analogous to this Court's decision in *Boyle* v.

5. This Court has identified "several factors" that inform the applicability of judicial estoppel, including whether a party "has succeeded in persuading a court to accept that party's earlier position" and "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire*, 532 U.S. at 751. Even if Petitioners had somehow not been bound to conform their claims to *Taylor*, those claims never resulted in a successful judgment below. *See Id.* at 750–51.

United Technologies Corp., 487 U.S. 500 (1988). Br. Opp. 28–31. In fact, after holding that Petitioners' claims were barred by the political question doctrine, the Fourth Circuit in this case vacated as moot the district court's alternative holding to that effect. Pet. App. 46a–47a. As the Petition explained, the fact that the Fourth Circuit affirmed the district court's dismissal of Petitioners' claims based solely on the political question doctrine is why this Petition is the *right* vehicle for resolving the scope of that doctrine, not the wrong one. Pet. 25.[6]

In any event, it is hardly clear that Petitioners' claims *are* "preempted" under *Boyle*. Even if *Boyle* was correctly decided,[7] this Court grounded the judicial displacement of state-law tort remedies against government contractors in analytical considerations that are specific to the FTCA's discretionary function exception, 28 U.S.C. § 2680(a). *See Boyle*, 487 U.S. at 509–10; *see also, e.g.*, *Kerstetter* v. *Pac. Scientific Co.*, 210 F.3d 431, 435 (5th Cir. 2000) (describing *Boyle* as being limited to the discretionary function exception); *Oliver* v. *Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996) (same). And as then-Judge Garland has explained at length, there are compelling reasons why

6. Respondents suggest that this Court wait for a future case presenting *both* the political question and *Boyle* issues. Br. Opp. 31. But the presence in the same case of alternative grounds for affirming a lower-court decision usually militates against certiorari, not in favor of it. *See, e.g.*, *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121–22 (1994) (per curiam); *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183–84 (1959).

7. When asked to identify a case he had gotten wrong, Justice Scalia "did not hesitate" in choosing his opinion for the Court in *Boyle*. Gil Seinfeld, *The Good, the Bad, and the Ugly: Reflections of a Counterclerk*, 114 Mich. L. Rev. First Impressions 111, 115 (2016).

"[t]he Supreme Court has never extended *Boyle* beyond the discrete conflicts that application of the discretionary function exception targets." *Saleh* v. *Titan Corp.*, 580 F.3d 1, 24 (D.C. Cir. 2009) (Garland, J., dissenting). The fact that lower courts have nevertheless extended Boyle to the FTCA's combatant activities exception in other cases hardly provides a reason why this Court should leave intact the Fourth Circuit's unjustified expansion of a *different* doctrine.

Third, Respondents suggest that the need for this Court's intervention is mitigated by the alternative remedies available to Petitioners to seek redress for their injuries. Br. Opp. 35 ("[T]he existence of other avenues for recovery bolsters the conclusion that state-tort suits are not the proper means for seeking relief."). Whether plaintiffs have alternative means of redress may well be relevant to the scope of constitutional remedies. *See, e.g.*, *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1858 (2017). But even if the alternatives that Respondents identify are adequate (they aren't), this Petition is not about a constitutional right to a remedy; it is about whether the federal courts are constitutionally precluded from considering Petitioners' state-law tort claims. If the Fourth Circuit's expansion of the political question doctrine was wrong, no alternative remedy would eliminate such a problematic precedent.

* * *

The Brief in Opposition concludes its discussion of the merits with an *in terrorem* prudential argument—that private military contractors are exercising functions that are too important for them to be subjected to liability under state tort law. *See, e.g.*, Br. Opp. 23 ("[T]he

government depends on contractors to perform essential battlefield functions."). In Respondents' view, allowing state-law tort claims to go forward "creates the risk that contractors will hesitate to undertake these services," resulting in a serious "threat to the nation's warfighting capability." *Id.*

Reasonable minds can and will disagree as to the political and policy wisdom of delegating so many core military functions to private military contractors. But what cannot be gainsaid is that this debate has nothing whatsoever to do with constitutional limits on the adjudicatory power of the federal courts. *See Baker*, 369 U.S. at 217 ("The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'"). That lower courts—such as the Fourth Circuit in *Taylor*—have looked to such prudential considerations in extending the political question doctrine beyond the exhaustive circumstances *Baker* identified only reinforces why certiorari should be granted.

CONCLUSION

For the foregoing reasons and those previously stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Stephen I. Vladeck
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198

Frederick C. Baker
Lisa Marie Saltzburg
James W. Ledlie
Motley Rice, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
(843) 216-9000

Susan L. Burke
Counsel of Record
Law Offices of
Susan L. Burke
1611 Park Avenue
Baltimore, MD 21217
(410) 733-5444
sburke@burkepllc.com

Counsel for Petitioners