No. _____

In The
Supreme Court of the United States

LATASHA FREEMAN,

Petitioner,

v.

AMERICAN K-9 DETECTION SERVICES, LLC
AND HILL COUNTRY DOG CENTER, LLC,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has never held that the political question doctrine bars ordinary state-law tort actions by private plaintiffs against private defendants. Here, the Supreme Court of Texas held that it does, requiring immediate dismissal of Petitioner's case. But the case would not have been dismissed by several other courts that employ a different rule, including the Fifth Circuit.

The decision below inspired multiple dissents, one of which rightly recognized that the majority opinion "turns on a dangerous misapplication of the political question doctrine." App. 28 (Guzman, J., dissenting). "Multiple approaches have been employed, and this case presents a prime example of the lingering uncertainty." App. 29 (same). The split should be dealt with in this case on the simple facts of a dog bite.

The question presented is whether, and if so under what circumstances, the political question doctrine bars ordinary state-law tort actions brought by private plaintiffs against private defendants.

PARTIES TO THE PROCEEDING

LaTasha Freeman, petitioner on review, was the plaintiff below. American K-9 Detection Services, LLC, respondent on review, was a defendant below. Hill Country Dog Center, LLC, respondent on review, was a defendant below.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

LaTasha Freeman petitions for a writ of certiorari to review a judgment of the Supreme Court of Texas.

OPINIONS AND ORDERS BELOW

The decision below of the Supreme Court of Texas, App. 1–62, is reported at 556 S.W.3d 246. That Court's order denying Petitioner's motion for rehearing, App. 103, is unreported. The decision below of the Court of Appeals for the Thirteenth Court of Appeals District of Texas, App. 63–100, is reported at 494 S.W.3d 393. The decision below of the 198th District Court of Bandera County, Texas, App. 101, is unreported.

JURISDICTION

28 U.S.C. § 1257(a) supplies jurisdiction over the decision below. The Supreme Court of Texas rendered its final judgment on June 29, 2018, App. 61–62, and denied a timely motion for rehearing on October 19, 2018, App. 103.

CONSTITUTIONAL PROVISION

The Constitution of the United States provides as follows in Article III, Section 2, Clause 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this

> Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

1. In 2011, the United States Army operated a military base in Afghanistan called Camp Mike Spann. App. 2–4, 64. At the base, private companies supplied teams of trained working dogs and human handlers to do the job of detecting weapons at checkpoints. App. 2–4, 64.

"K-9 Kallie" was one of those working dogs. App. 3–4. American K-9 Detection Services, LLC ("AMK9") trained K-9 Kallie and her handler, employed the handler, and managed their work at the base. App. 3–4, 64. Hill Country Dog Center, LLC trained K-9 Kallie and her handler before AMK9. App. 3–4, 64.

While on a break, K-9 Kallie escaped the building that her handler had left her in by walking out a door that her handler had left open. App. 4–5, 71–72. Then

the dog attacked LaTasha Freeman, an innocent civilian bystander on the base doing work for another contractor. App. 2, 4–5, 64, 70–72.

2. Freeman sued AMK9 and Hill Country Dog Center in Texas state court, seeking actual damages with ordinary negligence claims. App. 6. According to her suit, the dog attacked without provocation because of negligent training and handling, and the dog escaped the building because of negligent handling. App. 2, 6, 64–65.

AMK9 denied wrongdoing and disputed causation with a proportionate responsibility defense. App. 2, 6. It pleaded that the attack was caused in part by a faulty Army-supplied kennel, App. 2, 6, which the dog had exited before escaping through the building door that AMK9's handler had left open, App. 4–5, 71–72.[1]

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[1] To facilitate this strategy, AMK9 designated the Army as a "responsible third party" under the proportionate responsibility scheme of Texas Civil Practice & Remedies Code Chapter 33. App. 6, 65. AMK9's designation of the Army as a Chapter 33 "responsible third party" did not make the Army an actual party to the case. The designation just meant that, if Army negligence was proven to have caused Freeman's injuries, the trier of fact would have to assign the Army a percentage of responsibility that would lessen the actual defendants' liability proportionally. *See* Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.013. No matter what a trier of fact finds, the resulting judgment would not "impose liability on the [Army]" and "may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the [Army]." Tex. Civ. Prac. & Rem. Code § 33.004(i).

Freeman opposed AMK9's effort to designate the Army as a Chapter 33 "responsible third party" both at trial and on appeal. But the trial court allowed the designation, App. 66, and so did

On the basis of these pleadings, AMK9 asserted that "Freeman's claims are nonjusticiable under the political question doctrine because they require an assessment of the Army's involvement in causing her alleged injuries." App. 6. It moved to dismiss the action for lack of jurisdiction. App. 6, 65.

The trial court dismissed Freeman's action against AMK9 for lack of jurisdiction. App. 6, 101. It also did so as to Hill Country Dog Center, App. 6, 101, even though they had not made any of AMK9's arguments.

The intermediate court of appeals reversed the dismissal as to both defendants, holding that the political question doctrine did not make the action nonjusticiable. App. 6, 63–100. Both defendants petitioned the Supreme Court of Texas for review. App. 7. Review was granted. App. 7.

3. A divided Supreme Court of Texas held that Freeman's case was nonjusticiable. It ordered an immediate dismissal of the action by holding that "the dispute cannot be resolved without inquiry into military judgments that the political question doctrine precludes." App. 1–2.

As a preliminary matter, the majority opinion held that the federal political question doctrine of *Baker v. Carr*, 369 U.S. 186 (1962), and its progeny determined

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the Supreme Court of Texas, App. 20–21. That procedural aspect of the case is not at issue in this petition, which takes the validity of AMK9's Chapter 33 designation for granted.

the case's justiciability. App. 1–2, 7–14. Freeman had argued otherwise, positing that the federal political question doctrine did not apply in state court. But in accordance with AMK9's position, the majority opinion employed the federal political question doctrine as the rule of decision because of "the separation of powers among the Texas judiciary and the federal Executive and Legislative Branches." App. 11.[2]

Procedurally, the majority opinion understood *Baker v. Carr* and other federal authorities to establish that a case is justiciable unless the political question is "inextricable," and that to determine that, the case had to be analyzed "as it would be tried." App. 14. Hence, the majority opinion set out to "decide whether litigating this case including AMK9's proportionate responsibility defense, will necessarily require reexamination of sensitive military decisions." App. 21. It held that it will:

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[2] In this respect, the opinion below distinguished between the rule being applied and the reasons for applying it. App. 10–12. The reasons came from both federal law (*e.g.*, "principles of federalism") and state law; but the rule itself was undoubtedly federal law's political question doctrine. App. 10–13; *see also* App. 23–24 ("The *political question doctrine requires us* to be mindful of the broader implications of reviewing sensitive military decisions, such as maintaining respect for the separation of powers and *the federalism system outlined in the United States Constitution*. . . ." (emphasis added)). Thus, in terms of *Michigan v. Long*, 463 U.S. 1032 (1983), the decision below rests "primarily on federal law" or, at a minimum, is "interwoven with the federal law." *Id.* at 1040–41. It does not "indicate[] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." *Id.*

> While Freeman argues that only AMK9's negligent failure to train and control Kallie caused her injury, AMK9 argues, and will argue at trial, that the Army's design was to blame. . . . If this case were to proceed, the fact-finder would be required to determine the degree to which the Army was responsible for Freeman's injury. This inquiry would require a reexamination of Army decisions, contrary to *Baker*'s first factor.

App. 21–22. Thus, the majority opinion held that AMK9's Army-related causation defense posed an "inextricable" political question: "The *jurisdictional* issue is whether litigating the case inextricably involves reviewing military decisions. It certainly does." App. 25.

As part of this holding, the majority opinion rejected the option of postponing a dispositive political question decision until later in the pretrial process, when a more mature evidentiary record would exist. App. 23–24. It refused to have the determination "await full discovery," holding instead that "[t]he inextricable involvement of military decisions in this case is not a matter of fact but a matter of law." App. 24.

Finally, the majority opinion held that "Freeman's claims against Hill Country [Dog Center] must be dismissed on the same political question grounds outlined above." App. 26. It did so despite the fact that Hill Country Dog Center had never asserted the political question doctrine and never taken any of the positions about Army-related causation defenses that AMK9 had. Pet. 26. Instead of concluding that Hill Country

Dog Center had established an "inextricable" political question, the decision below concluded that a *sua sponte* dismissal was required because Hill Country Dog Center would "almost certainly" succeed in taking all of the procedural steps and making all of the arguments that AMK9 had. Pet. 26.

Justice Guzman issued a dissenting opinion. App. 27–40. She disagreed with the majority's decision to determine that a political question was "inextricable" on the basis of pleadings alone: "The Court views the Army as a responsible third party on AMK9's mere say so and dismisses the case without any evidence of that fact, concluding that simply designating the Army as a potentially responsible party means the merits of the case could never be determined without evaluating the military's battlefield decisions. I believe courts must first determine whether a fact issue exists that could obviate any need to assess the military's decisions—here, whether the Army actually caused an injury." App. 29. "In a decision carrying serious ramifications for those injured by private contractors in combat zones," Justice Guzman refused to join an opinion "hold[ing] that contractors can escape liability for their actions merely by pointing the finger at the military." App. 28.

Justice Divine issued a dissenting opinion that Justice Guzman joined. App. 40–58. He too took issue with the decision to order a dismissal based on pleadings that might be completely contradicted by evidence: "AMK9's plea is based on its allegation that the Army at least partly caused Freeman's injuries; but

Freeman alleges that AMK9, not the Army, proximately caused her injuries. This is a classic fact question." App. 41. He too would have held that AMK9's pleadings-only argument did not establish that a political question was "inextricable." App. 41.

REASONS FOR GRANTING THE PETITION

The Court should grant review because the Supreme Court of Texas's decision in this case simultaneously (1) decided an important federal question in a way that conflicts with both the decisions of several circuit courts and another state court of last resort, Sup. Ct. R. 10(b), and (2) decided an important question of federal law that has not been, but should be, settled by this Court, Sup. Ct. R. 10(c).

First, the Court should grant review because of a festering division of opinion about how to determine whether or not a political question is "inextricable" from a case such that dismissal is warranted. "Now, among the circuit courts, there is no uniformity" on this issue. *McManaway v. KBR, Inc.*, 554 F. App'x 347, 352 (5th Cir. 2014) (Jones, J., dissenting from the denial of rehearing en banc). The decision below deepens that split, and its simple facts present an optimal vehicle for supplying what the doctrine sorely lacks: a "uniform decision-making apparatus." *Id.*

Second, and more fundamentally, the Court should grant review because the decision below erroneously holds that the political question doctrine is capable of barring ordinary state-law tort actions brought by private plaintiffs against private defendants. *Baker v. Carr*, 369 U.S. 186 (1962), does not warrant that holding because none of its six formulations apply to this category of cases. Rather, the job of adjudicating cases like this dog-bite tort is a "familiar judicial exercise" and a prime example "what courts do." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). The political question doctrine should be returned to its role as a "narrow exception" to the rule that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Id.* at 194–95 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

I. Review is needed to resolve an acknowledged split about what it means for a political question to be "inextricable" from a case.

Because of the American military's growing reliance upon the services of private contractors, "hundreds, perhaps thousands, of lawsuits have been filed in the wake of the wars in Iraq and Afghanistan and are wending a tortuous way through courts all over the country." *McManaway*, 554 F. App'x at 353 (Jones, J., dissenting from the denial of rehearing en banc). In an ever-growing number of these lawsuits, private plaintiffs are asserting ordinary state-law tort actions

against private defendants, and in response, defendants are arguing that the political question doctrine renders the action nonjusticiable because the military played a role in causing the injury at issue.

Assuming that the doctrine even covers this category of cases, *Baker v. Carr*, 369 U.S. 186 (1962), is recognized as holding that a political question causes nonjusticiability only if it is "inextricable" from an action. *Id.* at 217. But despite several decades of experience in this field, lower courts have failed to select a uniform way of determining when a political question is and is not "inextricable."

All agree that, if both the plaintiff's pleadings and a complete evidentiary record necessarily give rise to a political question, the problem is "inextricable" and warrants dismissal at that time. But in cases that entail less than that—*i.e.*, if either side's pleadings suggest that a political question is *possible but not inevitable*—courts diverge. Cases at these junctures are sometimes held to contain an "inextricable" political question and sometimes not. *See McManaway*, 554 F. App'x at 352 (Jones, J., dissenting from the denial of rehearing en banc) (acknowledging "circuit conflicts on the cognizability of suits against contractors-on-the-battlefield").

The conflict is not limited to federal courts. State courts field the same kind of case, carry out the same determination of whether or not a political question is "inextricable," and deepen the split with more disparate results.

Thus, Justice Guzman's dissenting opinion below rightly recognized that "courts have been inconsistent in determining how entwined a political question must be for it to be 'inextricable' from a case. Multiple approaches have been employed, and this case presents a prime example of the lingering uncertainty." App. 28–29 (Guzman, J., dissenting).

A. The decision below deepens an existing and persistent division of opinion.

The Supreme Court of Texas's decision below occupies a strict end of the spectrum. In determining whether or not a political question is "inextricable," the majority opinion below held that the defendants' pleadings are all that matter and that evidence is irrelevant. Under this holding, once a defendant pleads that their version of the facts entails a political question, the plaintiff does *not* receive an opportunity to extricate it by proving a competing, justiciable version of the facts. Instead, dismissal must occur immediately because of what the defendant pleaded. App. 20–26.

This holding is "contrary to the approach taken by federal appellate courts, which look to the evidence, not the allegations, to determine whether a political question is genuinely in play." App. 34–35 (Guzman, J., dissenting). Most notably, it contradicts the rule that would have applied if Freeman's case had arisen in a Texas federal court.

The Fifth Circuit employs a different, more expansive rule than the pleadings-only rule applied below.

See Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008). Under *Lane*, evidence can be accounted for. When a defendant pleads that their version of the facts entails a political question, *Lane* does not dismiss the action automatically because that alone does not "necessarily implicate the political question doctrine." *Id.* at 567. Instead, so long as the plaintiff has pleaded a plausible version of the facts that would make the case justiciable, the plaintiff is entitled to proceed for "further factual development." *Id.*

Indeed, *Lane* and this case are strikingly similar. Just like this case, *Lane*'s private plaintiffs were suing private defendants for damages with ordinary tort claims under Texas law. *Lane*, 529 F.3d at 554–57. Just as in this case, *Lane*'s defendants invoked the political question doctrine at the pleading stage, before evidence was developed. *Id.* Just as in this case, the *Lane* defendants asserted an Army-related causation defense. *Id.* at 561–65. And just as in this case, *Lane* undertook to determine whether this meant that a "political question will certainly and inextricably present itself." *Id.* at 566. But whereas the decision below held that such a case must be dismissed immediately, *Lane* held that it cannot be. *Id.* at 568 ("It is conceivable that further development of the facts on remand will again send this case toward the political question barrier. Permitting this matter to proceed now does not preclude the possibility that the district court will again need to decide whether a political question inextricably arises in this suit. The litigation is not yet there, if it ever will be.").

The Fourth Circuit is aligned with the Fifth Circuit. *See In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014). It too will reserve judgment on whether or not a political question is "inextricable" if a more mature evidentiary record might extricate the political question. *Id.* at 339 ("[W]e simply need more evidence to determine whether KBR or the military chose how to carry out these tasks. We therefore cannot determine whether the military control factor renders this case nonjusticiable at this time.").

The split regarding inextricability standards is not limited to issues of evidentiary development. In the same way that some courts let the development of evidence extricate a once-apparent political question, some courts also let a case's legal developments do so.

The Third Circuit employs this approach. *See Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3d Cir. 2013). Even if a defendant's pleadings about causation give rise to a political question, the Third Circuit will not hold that a political question is "inextricable" if outstanding legal rulings like choice of an applicable law might avoid it. *Id.* at 482 ("[I]t is possible that [plaintiffs'] claims are not foreclosed by the political-question doctrine. To decide [that] issue, the District Court will first need to decide which state's law applies."). When *Harris*'s defendants sought review in this Court, the Solicitor General supported this facet of the holding. Br. for the United States as Amicus Curiae at 10, *Kellogg Brown & Root Servs., Inc. v. Harris*, 135 S. Ct. 1152 (2015) (No. 13-817) ("The court correctly held . . . that determining

whether such an assessment will be necessary for respondents to succeed on their claims must await further developments in the litigation, including identification of the applicable rules of liability.").

Relative to the Supreme Court of Texas, the Supreme Court of Mississippi occupies the opposite end of the spectrum. *Ghane v. Mid-South Inst. of Self Defense Shooting, Inc.*, 137 So. 3d 212 (Miss. 2014). Courts there determine whether a case's political question is "inextricable" by looking only to the *plaintiff's* allegations and proof. *Id.* at 221. In that jurisdiction, courts must *not* account for "the manner in which [a defendant] intended to defend itself" on the theory that doing so "would give defendants too much power to define the issues." *Id.* at 220-21 (quoting *McMahon v. Gen. Dynamics Corp.*, 933 F. Supp. 2d 682, 694 (D.N.J. 2013)).

Thus, three very different outcomes obtain in cases where, as here, the plaintiff's pleadings set forth a case that could be proven in a justiciable fashion and the defendant's pleadings set forth a defense that could render it nonjusticiable. The rule employed below is to dismiss the case immediately; the rule in the Fifth, Fourth, and Third Circuits is to wait and see what evidence and/or legal rulings show; and the rule in Mississippi is to ignore the defendant's defense altogether.

B. The Court should resolve the split.

Further percolation would not be useful because lower courts are not going to solve this problem on

their own. Only with the aid of authoritative guidance from this Court will uniformity be restored.

In the last two decades, plenty of opportunities for the lower courts to reach a consensus have come about. But to no avail. Jurists acknowledge that further guidance from this Court—not more percolation—is the only way forward. *See* App. 29 (Guzman, J., dissenting) ("the existing political-question jurisprudence is . . . decidedly uneven regarding inextricability, and the Supreme Court has not weighed in to settle the matter").

Federal circuits, in particular, are not likely to improve the situation. Opportunities to do so have come and gone repeatedly. Petitions for rehearing en banc that might have resulted in useful guidance were denied by both the Fourth Circuit, *see In re: KBR, Inc., Burn Pit Litig.*, 893 F.3d 241, 254 (4th Cir. 2018), and Fifth Circuit, *see McManaway v. KBR, Inc.*, 554 F. App'x 347 (5th Cir. 2014). And since the decision below was issued in full view of contrary cases such as *Lane*, 529 F.3d 548, and *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, it stands to reason that the Supreme Court of Texas will not be relinquishing its conflicting position.

II. The question presented is very important.

This Court's precedent has long recognized the importance of maintaining a precise political question doctrine because the principle is "a function of the separation of powers." *Baker*, 369 U.S. at 210. Given that

a court's obligation to exercise the jurisdiction conferred upon it is "virtually unflagging," *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), it is critical that the political question doctrine be extended as far as the Constitution demands—but not a step further.

Practical implications also make the issue important, both for the plaintiffs' and defendants' side of the equation. In case after case, the political question doctrine has proven to have "serious ramifications for those injured by private contractors in combat zones," App. 28 (Guzman, J., dissenting), and at the same time, "[e]fficiently untangling Executive Branch decisions from review in court cases should be a high judicial priority." *McManaway v. KBR, Inc.*, 554 F. App'x at 351 (Jones, J., dissenting from the denial of rehearing en banc).

III. This simple case is an ideal vehicle.

This case presents a suitable vehicle for resolving the question presented. Factually, this is so because of the claim's very simple gist: What caused K-9 Kallie to bite an innocent bystander: faulty training, faulty handling, or a faulty kennel?

The case is also a suitable vehicle because no procedural shortcomings exist. Preservation is not a problem because Freeman asserted all of her current positions throughout the proceedings below. And whatever answer the Court gives to the question presented

will resolve this case. Freeman submits that the political question doctrine never applies to this category of action (an ordinary state-law tort claim by a private plaintiff against a private defendant), *infra* Part IV.A, in which case the decision below is categorically wrong and must be reversed. Petitioner also submits that, even if the political question doctrine applies to this category of case, it does not do so in this procedural posture and on these facts. *Infra* Part IV.B. If that is the case, the decision below is also wrong and must be reversed.

IV. This case is justiciable.

The decision below held that the political question doctrine renders Freeman's actions against both AMK9 and the Hill Country Dog Center nonjusticiable, requiring immediate dismissal. The Court should grant review to hold that that was error.

A. Categorically, the political question doctrine never bars ordinary state-law tort claim by private plaintiffs against private defendants.

Most importantly, the Court should grant review to correct a fundamental error that afflicts both the decision below and others involved in the split. The whole exercise of determining whether and when cases of this sort present "inextricable" political questions is wrong. As a categorical matter, the political question doctrine

never bars ordinary state-law tort claims by private plaintiffs against private defendants.

Baker v. Carr, 369 U.S. 186 (1962), set forth six formulations to use in identifying cases rendered nonjusticiable by a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

"Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Id.* Properly viewed, *none* of *Baker*'s six concerns are inextricable from ordinary state-law tort claims by private plaintiffs against private defendants.

The decision below held otherwise by invoking *Baker*'s first two formulations. App. 8–9. But neither line of reasoning succeeds.

First, with respect to this kind of case, there is no "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. True, Article I gives Congress the power to "declare War" and to "provide for organizing, arming, and disciplining" armed forces, U.S. Const. art. I, § 8, cls. 11–16, and Article II makes the President the "Commander in Chief." U.S. Const. art. II, § 2. But the applicable "constitutional commitment" for the category of cases at issue here is that of Article III, which demonstrates that the "judicial Power" to adjudicate "Cases" and "Controversies" belongs to courts. U.S. Const. art. III, §§ 1–2. Hence *Marbury*'s recognition that "decid[ing] on the rights of individuals" is the proper "province of the court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

Second, there is no "lack of judicially discoverable and manageable standards for resolving" this category of cases. *Baker*, 369 U.S. at 217. The decision below illustrates this by holding without hesitation that black-letter state tort law supplies a "sufficient legal standard for determining an allocation of responsibility." App. 20–21 & n.74 (citing *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex. 2000)). Indeed, "when the question posed is whether a plaintiff has a remedy at common law for an alleged harm, there is an almost tautological—though still quite meaningful—sense in which the question cannot be answered by any branch but the judiciary." Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 Yale L.J. 350, 412 (2011);

see also Gordon v. Texas, 153 F.3d 190, 195 (5th Cir. 1998) (damages claims "typically do not require courts to dictate policy to federal agencies, nor do they constitute a form of relief that is not judicially manageable").

That is not to say that federal law cannot limit state tort law's application to military contexts when necessary. Federal immunity and preemption doctrines do just that. *See* 28 U.S.C. § 2674; *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988); *Hercules Inc. v. United States*, 516 U.S. 417 (1996); *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666 (1977); *Feres v. United States*, 340 U.S. 135 (1950); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). But it is these rules alone—not the political question doctrine—that the law should use to protect the military's need for independence. *See* Br. for the United States as Amicus Curiae at 11, *KBR, Inc. v. Metzgar*, 135 S. Ct. 1153 (2015) (mem.) (No. 13-1241) ("The United States shares petitioners' concern with the application of state tort law to regulate important contractor functions in an active war zone. That concern, however, is more appropriately addressed through preemption, not the political-question doctrine.").

B. It is too soon to tell whether a political question is "inextricable" from this action.

1. Assuming that the political question doctrine applies to this category of case, dismissal should not have been ordered at this stage because it is too soon to tell whether or not the supposed political question is "inextricable." Even if a political question might at some point prove to be "inextricable" from Freeman's actions against AMK9 and Hill Country Dog Center, that is not the case *yet*.

In this respect, Petitioner submits that Justice Guzman's dissenting opinion from below is correct, App. 27–40, as is Justice Devine's, App. 40–58. Instead of using the pleadings alone to determine whether the case contained an "inextricable" political question, the court below should have allowed a factual inquiry into issues such as whether the Army's kennel design was, in fact, responsible for Freeman's injuries. *See* App. 29–32 (Guzman, J., dissenting).

Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008), represents the correct model for a decision here. As to Freeman's suit, it cannot be said that "all plausible sets of facts that could be proven would implicate particular authority committed by the Constitution to Congress or the Executive." *Id.* at 559–60. In other words, Freeman's suit "presented a plausible set of facts . . . that might allow causation to be proven under one tort doctrine without questioning the Army's role."

Id. at 561–62.[3] Dismissal on the basis of pleadings alone, without regard to what evidence could or did show, was therefore improper.

2. Apart from Freeman's case against AMK9, the decision below erroneously held that the political question doctrine requires dismissal of Freeman's case against Hill Country Dog Center. App. 26. Unlike AMK9, Hill Country Dog Center never presented an Army-related causation defense and never asserted a political question doctrine argument of any kind—not in the trial court, not in the intermediate court of appeals, and not in the state supreme court. Instead of disputing this, the decision below held that it did not matter. It held that courts *must—sua sponte—*

[3] Army kennels that housed K-9 Kallie before this attack are the keystone of AMK9's causation defense. But as pleaded, Freeman's case against AMK9 and Hill Country Dog Center might very well succeed without implicating any judgment whatsoever about the wisdom of the Army's kennels. This is so because Freeman's action asserts that the defendants' negligence caused the attack *regardless of how K-9 Kallie got out of the kennel in the first place*. The case depends not upon how or why K-9 Kallie exited the kennel, but upon (a) whether it was nonetheless negligent for a handler (that the defendants trained) to leave the building door—not the *kennel* door—open, and (b) whether it was nonetheless negligent for the dog (that the defendants trained) to attack an innocent bystander like Freeman without provocation. Both kinds of negligence liability are sustainable without the need to cast judgment upon the Army's kennel. *See* App. 36 (Guzman, J., dissenting) ("a factual determination that the military was involved in the chain of causation is not equivalent to finding the military responsible"); App. 45 (Devine, J., dissenting) ("no matter who proximately caused Kallie's escape, a juror could reasonably conclude that AMK9's allegedly negligent training was the attack's sole proximate cause").

override a litigant's actual choices and conduct a political-question inquiry on the basis of what a savvy litigant would "almost certainly" do in the future. App. 26. This flatly contradicts *Baker*'s inextricability requirement.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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