No. 08-461

In the Supreme Court of the United States

DANIEL RAYMOND STEPHENSON ET AL.,

Petitioners,

v.

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the government contractor defense protects manufacturers of military defoliants against tort claims based on the presence of dioxin contamination in a government-specified product, where the military ordered the product after analyzing its toxicity and concluding that it presented no material health risk, and any allegedly undisclosed hazards were immaterial to the government's discretionary decision.

RULE 29.6 STATEMENT

Respondent Monsanto Company has no parent company, and no publicly-held company owns 10 percent or more of its stock.

Respondent The Dow Chemical Company has no parent company, and no publicly-held company owns 10 percent or more of its stock.

Respondent Occidental Chemical Corporation, the successor by merger to Diamond Shamrock Chemicals Company (which was known prior to September 1, 1983 as Diamond Shamrock Corporation), is an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, a publicly-held company.

Respondent Valero Energy Corporation, the successor by merger to Ultramar Diamond Shamrock Corporation, has no parent company, and no publicly-held company owns 10 percent or more of its stock.

Respondent Maxus Energy Corporation is an indirect, wholly-owned subsidiary of YPF S.A. Approximately 85 percent of YPF S.A.'s stock is owned by Repsol YPF S.A., a publicly-held company.

Respondent Tierra Solutions, Inc., formerly known as Chemical Land Holdings, Inc., is an indirect, wholly-owned subsidiary of YPF S.A. Approximately 85 percent of YPF S.A.'s stock is owned by Repsol YPF S.A., a publicly-held company.

Respondent Hercules Incorporated is wholly owned by Ashland Inc., a publicly-held company.

Respondent Uniroyal, Inc. is a dissolved corporation.

Respondent C.D.U. Holdings, Inc. is a dissolved corporation.

Respondent Uniroyal Chemical Corp. is wholly owned by the Crompton Corporation, a publicly-held company.

Respondent T H Agriculture & Nutrition Company, Inc. (now known as T H Agriculture & Nutrition L.L.C.) is a wholly-owned subsidiary of Philips Electronics North America Corporation. Philips Electronics North America Corporation is an indirect, wholly-owned subsidiary of Koninklijke Philips Electronics N.V., a publicly-held company.

Respondent Thompson-Hayward Chemical Co. is a subsidiary of Harcros Chemicals Inc.

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BRIEF IN OPPOSITION TO CERTIORARI

These cases arise out of petitioners' state-law claims that they were injured as a result of their exposure to various herbicides – referred to collectively as "Agent Orange" – that respondents manufactured at the direction of the U.S. military for use in the Vietnam War. Petitioners' claims center on the presence of trace amounts of dioxin in Agent Orange. The courts below held that the defendants are entitled to judgment based upon the government contractor defense.

This Court recognized the government contractor defense in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). The defense bars state tort liability for injuries arising from products manufactured for the government according to its specifications, thus protecting contractors who have implemented discretionary government decisions to take risks that state law may condemn in the consumer sphere. The defense prevents plaintiffs from circumventing the discretionary function exception of the Federal Tort Claims Act by suing contractors for acts as to which the government is immune from suit. See *id.* at 511-12. Because contractors would pass expected liability costs back to the government through higher prices – or, worse, simply refuse to manufacture products that might subject them to liability – suits against contractors for government decisions would undermine that exception.

Boyle precludes product defect suits against government contractors for products (1) made pursuant to reasonably precise government specifications, (2) that complied with those specifications, and (3) as to which the contractor warned the government of dan-

gers in the use of the product that were known to the contractor but not to the government. *Id.* at 512. "The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated" by the imposition of state tort law. *Ibid.* The third "is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability." *Ibid.*

All three of the courts of appeals that have been presented with Agent Orange litigation have held that Agent Orange represents a paradigmatic example of the need for the government contractor defense. The decision to pursue a defoliation strategy in the Vietnam War was made by President Kennedy. The government identified for itself the specific herbicides and formulations that would be most effective for military purposes and ordered them from the defendants, prescribing the chemical composition, concentrations, and labeling. The product supplied by the manufacturers complied with those specifications. Government scientists carefully studied the health risks associated with the planned use of those defoliants in Vietnam. They concluded that the defoliants were safe for that use, and that any risks were outweighed by a real and urgent military need for the product. As the Second Circuit has repeatedly observed, that conclusion was eminently reasonable: even today, there is no persuasive evidence that Agent Orange was hazardous to human health, and it is undisputed that the success of the defoliation strategy "saved many, perhaps thousands of, lives." *In re "Agent Orange" Prod. Liab. Litig.*,

818 F.2d 187, 192-93 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988).

It is in the military context that the balance between government discretion and the interests underlying consumer product liability law tilts most sharply in favor of protecting governmental discretion. The government had the discretion to use Agent Orange to combat the extreme, immediate risks posed to allied troops by Vietnam's dangerous terrain, notwithstanding any purely speculative health effects. This decision was precisely the type of contextual policy judgment that the discretionary function exception protects: it "involve[d] not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness," a process that is insulated from judicial "second-guessing." *Boyle*, 487 U.S. at 511.

The court below applied settled law to a unique and voluminous factual record, and arrived at a conclusion that is plainly correct. This Court's review is not warranted.

COUNTER-STATEMENT OF THE CASE

A. Statement of Facts

Petitioners suggest that the Second Circuit erred in evaluating the record, but they ignore virtually all of the facts and evidence that the court relied on in its opinion. A brief summary of that evidence follows.[1] Although petitioners dispute the inferences

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[1] The opinion did not contain a full recitation of the underlying facts, which already "have been addressed in so many different judicial opinions." Pet. App. 10a-11a.

that may be drawn from the record, they dispute almost none of the historical facts.

1. The Military's Defoliation Program

In the early 1960s, the United States' efforts to assist the South Vietnamese government in resisting the communist insurgency were thwarted by the dense vegetation on the ground, which provided cover for Viet Cong ambushes and made it difficult to locate and disrupt enemy supply lines. In June 1961, the unified command structure for U.S. forces in Vietnam decided to evaluate the feasibility of a defoliation strategy. That task was given an urgent priority and was assigned to the Army Biological Laboratories at Fort Detrick, Maryland, an agency within the Department of Defense. A612.[2]

The Fort Detrick researchers quickly concluded that none of the weed-killers available on the commercial market was up to the task of defoliating a triple canopy jungle with a limited number of sprayplane runs. A612; A402-03. Accordingly, the Defense Department determined that the government would need to develop its own defoliant compound for use in Vietnam. Over the following two years, military scientists screened 1,410 chemical compounds, ultimately determining that a 50/50 mixture of 2,4-dichlorophenoxyacetic acid ("2,4-D") and 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T") would be most effective and least toxic. A1870a-70b; see also Pet. App. 12a.[3]

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[2] "A___" cites refer to respondents' appendix in the Second Circuit.

[3] This was the formula for Agent Orange, which constituted the bulk of the herbicide used in Vietnam. Other "Agents" con-

In 1963, the Army Munitions Command promulgated the formal specifications that formed the basis for the government's procurement of Agent Orange. Pet. App. 121a; A2299-2334. The specifications also identified, *inter alia*, the markings that would appear on drums of Agent Orange, and prohibited any other markings or warnings. *Id.* at 121a-22a.

The specifications called for mixtures that were very different from the herbicides being produced for commercial use. A typical commercial product containing 2,4-D and 2,4,5-T would also contain a significant percentage of inert ingredients and would require substantial dilution before application. A398. Agent Orange, by contrast, was far more concentrated; it contained virtually no inert ingredients and was used in undiluted form. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 848-49 (E.D.N.Y. 1984); see also Pet. App. 12a, 26a. The military also planned to deploy the defoliant without dilution and at "'extremely high dose rates'" (Pet. App. 117a (quoting A402-03)) in order to achieve maximum results with the fewest applications, because each spray run endangered the plane and the pilot.

2. The Government's Investigation of Potential Health Hazards Associated With Agent Orange

Prior to launching a full-scale defoliation campaign, the government conducted extensive research into the toxicity of Agent Orange. Petitioners attempt, as they did in the courts below, to obscure

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tained different proportions of the two chemicals, or even different chemicals. For convenience, we refer to all mixtures as "Agent Orange" unless context requires differentiation.

these efforts and the resulting government knowledge by focusing on individual officials who testified that they lacked knowledge of particular facts. That approach, however, ignores the division of responsibility within the government. The agencies responsible for making each discretionary decision concerning Agent Orange possessed all of the information relevant to their decisions.

At President Kennedy's direction, the most important toxicity research was conducted by the Army Chemical Corps at Edgewood Arsenal. Pet. App. 115a. The Edgewood toxicity experts were well aware of the link between 2,4,5-T and dioxin. They reviewed all of the published literature on the toxicity of 2,4-D and 2,4,5-T; obtained unpublished information, including data from other government agencies; and performed their own toxicological studies on Agent Purple, a predecessor of Agent Orange that contained at least as much dioxin. *Id.* at 35a, A2589-94, A2602-03, A2610. The Edgewood task force knew that dioxin was associated with the 2,4,5-T production process and further knew that it had caused chloracne and liver problems in production workers exposed to relatively high concentrations of dioxin. Pet. App. 35a, 46a, A2127-29, 2131.[4]

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[4] Petitioners' citation-free assertion that "the existence, creation and mechanism of the defect all still remained unknown to any government officers involved in that testing or the product's procurement," Pet. 25, is thus unsupported by the record. As discussed below, at p. 24, plaintiffs' references to the knowledge of "procurement" officers should not divert attention from the fact that the officers responsible for evaluating toxicity – the exercise of government discretion that is at the center of this case – possessed all available and material information.

Although the Army was aware that dioxin posed risks to production workers, it concluded that Agent Purple – which, like Agent Orange, contained only trace amounts of dioxin – "posed no unacceptable hazard." Pet. App. 35a. The Army viewed dioxin as a concern only for manufacturers. *Id.* at 46a. A senior Edgewood scientist testified that "[t]he Army's purpose is to protect its own personnel who would not be involved in the manufacture" of the product. The health risks associated with dioxin exposure were "a significant fact for the manufacturer, but not for the Army." A2129; see also Pet. App. 47a.

On April 26, 1963, a meeting was held at Edgewood to evaluate the group's toxicity research and to "reach[] a conclusion about dose levels and hazards to health of men and domestic animals from 2,4-D and 2,4,5-T." Pet. App. 35a (citation and quotation marks omitted). As the court of appeals noted, "[t]hose in attendance included officials from various branches of the military and various other government agencies, and representatives from manufacturers Dow Chemical and AmChem Products." *Ibid.* The participants were presented with all of the information that had been amassed by the military's research team, as well as the toxicity data possessed by the manufacturers who were present. *Ibid.* Based upon all of this information, the Edgewood task force concluded that "*no health hazard is or was involved to man or domestic animals from the amounts or manner [in which] these materials were used* ***." *Id.* at 35a-36a (quoting A2370) (emphasis added).

Edgewood reported its results to the President's Science Advisory Committee ("PSAC"). A1620, A1567. At an April 1963 briefing, PSAC was pre-

sented with the data amassed at Edgewood Arsenal, as well as the Edgewood team's conclusion that the defoliation strategy was reasonably safe. Pet. App. 35a; A2385, A1891-92. It is undisputed that various PSAC members knew throughout the period when Agent Orange was being used in Vietnam that dioxin was a contaminant in Agent Orange. Pet. App. 116a, 118a; A1716-17, A1816-19, A1834-35, A2107-09.

Petitioners offer no evidence to contradict the Second Circuit's conclusion that "[t]he government examined the toxicity of what the plaintiffs contend was the most toxic Agent Orange variant used in Vietnam – Agent Purple – and determined that it posed no unacceptable hazard." Pet. App. 35a; see also *id.* at 115a. Indeed, petitioners do not mention Edgewood or PSAC at all.

3. The Government's Efforts to Increase Production of Agent Orange

By the mid-1960s, the chemical companies' limited manufacturing capacity precluded them from satisfying the military's increasing need for large amounts of Agent Orange. The ensuing shortfalls became a matter of concern at the highest levels of the government. As a result, the government established a system of "rated orders," which required the manufacturers to fill government orders prior to those of other customers, on penalty of a fine or imprisonment. Pet. App. 11a. In 1966, when a shortage of Agent Orange developed despite the use of rated orders, military commanders on the ground in Vietnam warned that the "failure to obtain needed supplies would cause an unacceptable impact on military operations." *Id.* at 110a. In March 1967, the government took the exceptional step of shifting procurement to an "emergency basis," A377-80,

A2205, and requiring several of the manufacturers to sell their entire output of 2,4,5-T to the military. Pet. App. 113a. As a Commerce Department official noted, "this was the first time the entire production of a chemical had been taken by the military." A1325.

Late in 1966, the government took another major step to address the shortage of Agent Orange: it started planning for construction of a military herbicide manufacturing facility in Weldon Spring, Missouri. Pet. App. 110a. Although the project was ultimately cancelled, during the planning stages the government acquired even more knowledge regarding techniques used to manufacture 2,4,5-T and the related issues of dioxin contamination, chloracne, and liver damage. A1597-98, A2444, A2451. Much of that information came directly from the manufacturers. For example, government officials visited a Monsanto plant and learned of the chloracne problem. A1597-98. Dow sent a letter to Edgewood's Deputy Director of Procurement warning of a "serious potential health hazard to production workers," noting the availability of "methods to detect" dioxin content, and a process that had been developed by German chemical manufacturer C.H. Boehringer to reduce (though not completely eliminate) dioxin levels. A485. Petitioners now rely heavily on the Boehringer process to suggest that defendants failed to adopt state-of-the-art methods. Pet. 5, 18-19. In fact, however, Dow offered to consider making this particular "knowhow" available for the government's use at Weldon Spring (Pet. App. 47a), but the government expressed no interest.

4. The Success of the Defoliation Program

The record makes clear that the military viewed defoliation as a critically important program. As one Defense Department official put it:

> We were losing a lot of people from the most incredibly clever and insidious mechanisms. Men walking down trails with heavy foliage all around would be shot at close range by people whom they couldn't see. We had aircraft overhead who simply could not see the trails below them, so we had a lot of forces, and yet they were terribly vulnerable to just a few people hidden in the jungle growth.
>
> In that situation, the overriding interest was to see whether or not the science and technology that was available could be applied to get rid of some of this cover.

A1673-74.

Moreover, the program was a success. General William Westmoreland, the commander of American forces in Vietnam from 1964 to 1968, testified that Agent Orange fully met expectations – it enabled the military to "accomplish our military mission" in "a rather unique battlefield environment." A2096-98. The courts below agreed:

> The use of Agent Orange in Vietnam was believed necessary to deny enemy forces the benefits of jungle concealment along transportation and power lines and near friendly base areas. Its success as a herbicide saved many, perhaps thousands of, lives.

In re "Agent Orange", 818 F.2d at 192-93; see also Pet. App. 158a ("It is fair *** to note once again that

the use of Agent Orange and other herbicides to clear foliage during the Vietnam War prevented many more American and allied casualties than could possibly be attributed to exposure to such herbicides.").

B. Litigation History

Petitioners are the fourth wave of plaintiffs to claim injury as a result of exposure to Agent Orange. The first set of cases was filed in the late 1970s. The United States District Court for the Eastern District of New York certified a class that, after years of discovery, settled with defendants for $180 million plus interest. The settlement funds were distributed from 1987 through 1997 to the "291,000 class members who filed claims prior to the 1994 cutoff date." Pet. App. 14a. Both the district court (*In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. at 857) and the Second Circuit (*In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 149 (1987)) affirmed the fairness of the settlement. The court of appeals outlined "various weaknesses of plaintiffs' case," *id.* at 171, that supported the court's "belie[f] *** that the [plaintiffs' lawyers] had good reason to view this case as having only nuisance value," *ibid.*, including the government contractor defense, which the court viewed as an "impossible[] hurdle to surmount." *Id.* at 173.[5]

A second group of plaintiffs opted out of the class prior to settlement. As to that group, the Second Circuit affirmed summary judgment on the basis of

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[5] The Second Circuit further concluded that the plaintiffs faced "substantial" problems in proving causation and that "the clear weight of scientific evidence casts grave doubt on the capacity of Agent Orange to injure human beings." 818 F.2d at 149, 172.

the government contractor defense. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d at 193.

A third group of plaintiffs, consisting of veterans who manifested injury after the 1984 settlement, filed suit in the late 1980s. The Second Circuit found those plaintiffs to be bound by the settlement. See *Ivy* v. *Diamond Shamrock Chems. Co.*, 996 F.2d 1425, 1428-29 (1993). The court also reaffirmed the fairness of the modest settlement because "serious obstacles to recovery remain," most importantly the government contractor defense. *Id.* at 1436.

The current petitioners are a group of plaintiffs whose claimed injuries allegedly did not manifest until after the 1984 settlement funds were exhausted.[6] The Second Circuit held that such individuals are not bound by the settlement, *Stephenson* v. *Dow Chem. Co.*, 273 F.3d 249, 261 (2003); its ruling was affirmed by an equally divided Court. See *Dow Chem. Co.* v. *Stephenson*, 539 U.S. 111 (2003).

On remand, the district court held that the government contractor defense bars Agent Orange product liability claims by these plaintiffs (Pet. App. 150a-52a), just as it did claims by every other group of plaintiffs.

C. The Decision Below

The Second Circuit affirmed, finding that the defendants had satisfied all three prongs of the government contractor defense. Pet. App. 10a.

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[6] As of June 30, 1997, the funds generated by the 1984 settlement were completely distributed or committed for the benefit of the class. See Pet. App. 100a-01a (describing distribution of $330 million).

Reasonably precise specifications. The court of appeals found that "[t]he government approved specifications for a uniquely tailored product" (Pet. App. 24a), noting that "[t]he government was plainly the 'agent[] of decision' with respect to Agent Orange's contractually specified composition." *Id.* at 29a (citations and quotation marks omitted). The court rejected the plaintiffs' argument that because the specifications did not mention dioxin, the government "exercised no discretionary authority over that which is the subject of their state tort litigations." *Id.* at 24a. "Agent Orange was allegedly defective because it contained excessive trace amounts of dioxin, which were present as a result of the manufacture of a specified Agent Orange component, 2,4,5-T. *** It was therefore the 2,4,5-T that was alleged to be defective, not the dioxin." *Ibid.*

The court further held that "[t]he government made a discretionary determination regarding Agent Orange's toxicity" that "create[s] the type of conflict between tort law and government interests contemplated by *Boyle*." Pet. App. 29a, 30a. "We are tasked *** with determining whether the government's discretionary actions with respect to the allegedly defective design and the alleged state law duty conflict. If they do, the first *Boyle* requirement is met; if they do not, the government contractor defense does not apply ***." *Id.* at 30a (emphasis omitted).

The court started from the premise that the government's decision to order a particular product "with knowledge that the product has an arguable defect" constitutes approval of "'reasonably precise specifications' for that product, with the known defect, for purposes of the first *Boyle* requirement."

Pet. App. 34a (citing *Lewis* v. *Babcock Indus., Inc.*, 985 F.2d 83, 89 (2d Cir. 1993)). Reviewing the factual record, the court determined that in this case,

> the Army examined the toxicology data available to it and concluded that Agent Orange's components, [2,4-D and 2,4,5-T] – in the formulation that the government, in its discretion, used when ordering it, and as it was then being manufactured – posed "no health hazard" and were, at least under the circumstances of international armed conflict, suitable for use in Southeast Asia. Since the government continued to order Agent Orange after having evaluated its toxicity levels and declared them acceptable, we cannot second-guess the manufacturers' decision to produce the agents in the manner that they did.

Id. at 35a, 36a (citation and quotation marks omitted).

In discussing the conflict between federal and state interests, the court of appeals emphasized the particularly important role of the government contractor defense in this context, where the military's power to design and implement a wartime strategy is at stake.

> The government's "uniquely federal interest," [*Boyle*, 487 U.S.] at 504, in fully taking advantage of its ability to determine what level of risks and dangers must be tolerated in order to achieve a particular military goal need not be belabored. *** We pause only to note that the federal interest implicated by the lawsuits here is not only the ordinary

> need to ensure the government's "work" gets "done," *Boyle*, 487 U.S. at 505, but the ability to pursue American military objectives – in this case, protection of American troops against hostile fire.

Pet. App. 38a-39a. See also *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d at 192 ("Agent Orange was a product whose use required a balancing of the risk to friendly personnel against potential military advantage. That balancing was the exclusive responsibility of military professionals and their civilian superiors."); Pet. App. 122a ("The United States armed forces accepted the dangers it was aware of because, from a military point of view, the benefits in potential savings of the lives of members of our armed forces and those of our allies outweighed the possible risks.").

Compliance with specifications. The court noted that "[t]he plaintiffs' challenge to the defendants' ability to demonstrate the second requirement for *Boyle* protection – compliance with the contracts' specifications – does not warrant extensive discussion." Pet. App. 39a. Because the manufacturers indisputably delivered Agent Orange with 2,4,5-T "present in *** the proportions and purity levels called for by the terms of the contracts," the court found the second prong satisfied as a matter of law. *Id.* at 39a-40a. Petitioners do not address *Boyle*'s second requirement.

Disclosure of hazards known to the contractor but not to the government. As to *Boyle*'s third requirement – that the manufacturer warn the Government of "known risks" – the court of appeals stated that "[t]he record is clear *** that the defendants did not fail to inform the government of known dan-

gers *** of the type that would have had an impact on the military's discretionary decision regarding Agent Orange." Pet. App. 41a.

Virtually all of the documents cited by the plaintiffs for the proposition that the manufacturers failed to warn the government related to "the risk of chloracne (a severe skin disease) and liver damage [porphyria] to workers manufacturing Agent Orange." Pet. App. 43a. These risks associated with the *manufacture* of Agent Orange were irrelevant to the military, which was concerned only about "the likely effect on those exposed to the herbicides in the manner in which they were, and were to be, used in Vietnam," and which concluded that "operational use of Agent Orange posed 'no health hazard *** to men or domestic animals.'" *Id.* at 46a. Accordingly, more extensive disclosure of the risks associated with the 2,4,5-T manufacturing process would not have affected the government's analysis. *Id.* at 47a. "[N]othing in the record of which we are aware would create a triable issue of fact as to whether there was never-disclosed knowledge of a sort that might have influenced the government's decisionmaking process regarding Agent Orange as it was used in Vietnam." *Id.* at 48a.

REASONS FOR DENYING CERTIORARI

This case presents an exceptionally stark example of the "trade-off between greater safety and greater combat effectiveness" that this Court described in *Boyle*. It is undisputed that neither the government nor the contractors knew in the 1960s that exposure to Agent Orange as it was used in Vietnam would pose any risk of long-term illness. Pet. App. 46a. The government, which possessed far more information than the contractors did about the

way in which the product would be used and the attendant risks, studied the potential toxicity of Agent Orange and concluded that the risks to human health were both minimal and outweighed by military necessity. *Id.* at 35a-36a. That analysis is precisely the sort of "balancing of many technical, military, and even social considerations," that this Court held would warrant protecting manufacturers from state liability. *Boyle*, 487 U.S. at 511.

The courts below applied a well-established legal standard to a unique and complex set of facts that is documented by a "massive" record, and arrived at a result that is entirely consistent with *Boyle* and with the fundamental purpose of the government contractor defense. Pet. App. 10a. Both Judge Weinstein, who has been involved in every stage of this case since before the 1984 settlement, and the Second Circuit, which has heard numerous appeals of Agent Orange cases, have found that defendants are entitled to summary judgment. The other lower courts are in accord: the courts of appeals for the Fifth and Federal Circuits have likewise held that the government contractor defense protects the companies that manufactured Agent Orange for use in Vietnam.

Petitioners are unable to identify any legal error in this unanimous conclusion. And their attempts to manufacture conflict among the lower courts rest on mischaracterizations of both the decision below and the other cases they cite. Petitioners' policy arguments fare no better: they offer no reason to conclude that government contractors should be subject to endless litigation and potential liability for speculative risks that the government considered and accepted. Further review by this Court is unwarranted.

I. THE DECISION BELOW NEITHER CREATES NOR DEEPENS A CIRCUIT SPLIT.

Petitioners' attempt to construct conflict among the lower courts falls flat. This case presents the unusual situation in which three different courts of appeals – the Second (on three separate occasions, see pp. 11-12 *supra*), Fifth, and Federal Circuits – have applied the same legal standard to the same fact pattern and reached the same conclusion. In *Miller* v. *Diamond Shamrock Co.*, the Fifth Circuit dismissed Agent Orange claims brought by civilian Defense Department employees. 275 F.3d 414, 419 (2001). And the Federal Circuit dismissed two manufacturers' claims for indemnification of their share of the settlement, holding that "there can be no serious doubt that had the class action Agent Orange litigation proceeded to termination, no liability would have been imposed" because of the government contractor defense. *Hercules Inc.* v. *United States*, 24 F.3d 188, 200 (Fed. Cir. 1994), aff'd on other grounds, 516 U.S. 417 (1996).

Petitioners largely ignore those decisions and instead discuss a series of cases in which courts have applied *Boyle* to fact patterns totally unlike that presented here. Specifically, none of the cases cited by petitioners involved:

- Independent government studies of product risks;
- A government decision to deploy the product in a manner that would increase any risks associated with its use;
- "Rated" contracts under the Defense Production Act, a procurement system that no longer exists; or

- Chemical exposures that allegedly produced long-term risks of which no one was aware at the time of contracting (and that are highly questionable even today).

More importantly, *all* of the courts applied the *legal* standard set forth in *Boyle* in the same way as the Second Circuit here. Review in this case would amount to no more than the application of settled law to a unique and non-recurring fact pattern.

A. There Is No Conflict Among The Lower Courts Concerning The Application Of The Defense To Defects Arising During The Manufacturing Process.

Petitioners' first argument is that the defect they allege is a manufacturing defect, not a design defect, because the presence of dioxin in Agent Orange resulted from the manufacturing process. They contend that the circuits are divided as to whether the government contractor defense applies to "defects arising out of the 'manufacturing' process rather than from a product's contractually specified 'design.'" Pet. 18. This strained effort to demonstrate a relevant conflict in the lower courts cannot withstand even cursory examination.

1. The Second Circuit rejected the plaintiffs' attempt to recast their design defect claims as manufacturing defect claims.

> The plaintiffs at times refer to the defendants' failure to use the Boehringer process as resulting in a "manufacturing" defect. Not so. The plaintiffs allege a defective process, not that the process used was somehow erroneously applied.

Pet. App. 58a n.15. And the court found that the plaintiffs' *actual* manufacturing defect claims had been waived: "Because the plaintiffs' briefs make no arguments regarding the district court's findings as to their failure-to-warn or manufacturing defect claims, we deem these claims to have been abandoned." *Id.* at 56a n.9. Review of a manufacturing defect claim that was neither raised nor decided below is, of course, not warranted. See, *e.g.*, *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us").

2. The circuits are not divided on the issue that petitioners claim is presented here. Petitioners simply misdescribe the cases. In *none* of the decisions they cite did any court adopt the rule that petitioners propose: that the government contractor defense is inapplicable to a defect if it *arises during manufacturing*. Petitioners rely on an apparent disagreement between the Fifth Circuit and the Eleventh Circuit over the meaning of the term "manufacturing defect" – a purely semantic debate that has not produced conflicting outcomes.

The Eleventh Circuit held in *Harduvel* v. *General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), that "[i]f a defect is one inherent in the product or system that the government has approved, it will be covered by the defense. Where a defect is merely an instance of shoddy workmanship, it implicates no federal interest." *Id.* at 1317. A claim of "shoddy workmanship" essentially presents the same issues as the second prong of *Boyle*: the failure of the item to comply with government specifications. *Id.* at 1321 ("To say that a product failed to conform to specifications is just another way of saying that it was defectively

manufactured.").[7] The *Harduvel* court also stated that the "distinction between 'aberrational' defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design." *Id.* at 1317.

Petitioners contend that *Harduvel* is in conflict with the Fifth Circuit's decision in *Mitchell* v. *Lone Star Ammunition, Inc.*, 913 F.2d 242, 246, 248 (5th Cir. 1990). In a footnote, *Mitchell* criticized the Eleventh Circuit's indication that "manufacturing defects consist only of aberrational defects ***. One can certainly conceive of situations in which a manufacturer's shoddy workmanship – neither approved nor authorized by the Government – produces a defect that occurs throughout an entire line of products. *** In such situations, no federal interest would support the extension of the government contractor defense." *Id.* at 247 n.10.

This supposed "split" in the circuits is a purely semantic disagreement. The fundamental holding of both *Harduvel* and *Mitchell* is that a defect that results from "shoddy workmanship" and is "neither approved nor authorized by the Government" is not protected by the government contractor defense. *Harduvel*, 878 F.2d at 1317; *Mitchell*, 913 F.2d at 247 n.10. If shoddy workmanship affects the entire line of products, it would be termed a design defect under *Harduvel* and a manufacturing defect under *Mitchell*, but neither court would hold that such a de-

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[7] See also *Zinck* v. *ITT Corp.*, 690 F. Supp. 1331, 1338 (S.D.N.Y. 1988) ("For the same reasons that ITT satisfied the second prong of the government contractor defense, plaintiffs cannot prevail on their claim of manufacturing defect.").

fect is protected by the defense. Indeed, in a later case the Fifth Circuit specifically stated that "[w]e agree with the Eleventh Circuit [in *Harduvel*] that whether the defense will apply cannot be determined by the label attached to the claim," but rather "depends *only* on whether *Boyle's* three conditions are met ***." *Bailey* v. *McDonnell Douglas Corp.*, 989 F.2d 794, 801-02 (5th Cir. 1993) (emphasis in original). The Ninth Circuit decision cited in the petition followed the same rule. See *Snell* v. *Bell Helicopter Textron, Inc.*, 107 F.3d 744, 749 (9th Cir. 1997) ("whether the defense applies to a claim based on an alleged manufacturing defect depends on whether the particular product at issue was manufactured in conformity with reasonably precise specifications approved by the government").[8]

3. In any event, all of the decisions cited by the petitioners are in accord with the opinion below. The Second Circuit correctly found that the government

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[8] Petitioners also rely on dictum in a dissenting opinion in *Carley* v. *Wheeled Coach*, 991 F.2d 1117 (3d Cir. 1993), without identifying it as either dictum or a dissent. See Pet. 22. In *Carley*, the issue was whether the government contractor defense is available to nonmilitary contractors. The majority held that it is, as a matter of federal common law, because otherwise the contractors' "increased financial burdens would pass through to the government." 991 F.2d at 1122. Dissenting from that conclusion, Judge Becker noted that "since liability for manufacturing defects is not shielded by the government contractor defense, the argument that the purpose of the defense is to prevent the passing of liability costs on to the government carries little weight." *Id.* at 1132 (Becker, J., dissenting). That observation, in which "manufacturing defect" appears to be shorthand for an instance of shoddy workmanship that is neither intended nor approved by the government, is not in conflict with *Harduvel*, *Mitchell*, or the decision below.

analyzed the toxicity of 2,4,-D and 2,4,5-T as they were manufactured by the defendants and made an informed decision that Agent Orange did not pose a risk to military personnel or others who might be exposed to it that outweighed the benefits of the product. Pet. App. 36a ("Since the government continued to order Agent Orange after having evaluated its toxicity levels and declared them acceptable, we cannot second-guess the manufacturers' decision to produce the agents in the manner that they did."); *id.* at 35a (noting that Army evaluated and approved Agent Orange "as it was then being manufactured"). The "alleged design defect (toxic 2,4,5-T)" (*id.* at 35a), therefore, was "inherent in the product or system that the government has approved" (*Harduvel*, 878 F.2d at 1317) and would be protected by the defense under *Harduvel*, *Mitchell*, and all the other cases cited in the petition.

And even the linguistic quibble between *Harduvel* and *Mitchell* is not implicated here, because both cases use the term "manufacturing defect" to describe instances of "shoddy workmanship," rather than – as petitioners would have it – all defects that arise during the manufacturing process. Accordingly, the defect alleged by petitioners would not be considered a "manufacturing defect" under either case, or any other decision of which we are aware. This Court's review is not warranted.

B. The Lower Courts Are In Agreement Regarding Application Of The First *Boyle* Prong.

Petitioners next contend that the circuits are divided as to the level of detail and government oversight required to satisfy *Boyle*'s first-prong requirement of "reasonably precise specifications." They

contend that the Second Circuit allowed the defense even though the defect was "never considered by any contracting government officer," Pet. 25, whereas other circuits require either "exhaustively detailed specifications" or "continuous back and forth" between manufacturer and government. *Id.* at 24. Petitioners mischaracterize both the decision below and the law in other circuits.

1. Petitioners' discussion of the ruling below is highly misleading. Far from finding that "the design feature in question" was "never considered by any contracting government officer," Pet. 25, the Second Circuit determined that "the record discloses that the government *explicitly evaluated the alleged design defect* (toxic 2,4,5-T), and thereafter continued to order 'replacement' herbicides." Pet. App. 35a (emphasis added). Petitioners' use of the term "contracting government officer," rather than "Government officer" – the phrase used in *Boyle*, see 487 U.S. at 512 – is designed to shift the Court's focus toward low-level contract specialists and away from high-level policymakers; but it is the latter who indisputably evaluated the potential toxicity of Agent Orange and weighed it against urgent military needs, *i.e.*, who exercised governmental discretion. The defense is intended to protect discretionary government decisions; it makes no sense to exclude decisions because they were made at *higher* levels of government.

Nor did the Second Circuit hold that the government's decision to reorder a product "retroactively constitutes approval of every possible 'design feature in question.'" Pet. 25 (quoting Pet. App. 34a). Rather, the court of appeals held that "reordering the same product *with knowledge of its relevant defects* plays the identical role in the defense as listing spe-

cific ingredients, processes, or the like." Pet. App. 37a-38a (emphasis added). Such a decision demonstrates that the "federal policies and interests and the exercise of federal discretion" at issue are "contrary [to] state law." *Id.* at 38a (emphasis added). That is a straightforward application of *Boyle*'s requirement that "the design feature in question [be] considered by a Government officer, and not merely by the contractor itself." 487 U.S. at 512.[9]

Finally, petitioners ignore the fact that the court of appeals required defendants to show that the government "independently and meaningfully review[ed] the specifications such that the government remain[ed] the agent of decision." Pet. App. 28a (citation and quotation marks omitted). The court cited a raft of documents in support of its conclusion that "based on the evidence in the extensive record *** no reasonable jury could find that the government did not exercise sufficient discretion" over the specifications for Agent Orange. *Id.* at 29a. Indeed, the court cited *Harduvel* for the proposition that a "continuous back and forth" between contractor and government is sufficient to satisfy *Boyle*'s first prong (*id.* at 28a) and found that the record in this case demonstrated just such a dialogue. *Id.* at 28a-29a (citing evidence that on multiple occasions the government rejected the contractors' suggestions of particular ingredients, tests, and purity levels).

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[9] Relatedly, the Second Circuit did not hold that "*any* safety and health testing, no matter now imprecise or ineffective, is sufficient to satisfy the requirement of reasonably precise specifications, even for an otherwise totally imprecise contract." Pet. 28. Rather, the court discussed in detail the extensive toxicity testing conducted by the government. Pet. App. 35a-36a.

2. Contrary to petitioners' assertion, the law in other circuits is entirely consistent with the Second Circuit's approach below. In *Snell*, for example, the Ninth Circuit held that *Boyle*'s first prong requires an "exercise of judgment by the government in the design of the particular feature at issue." 107 F.3d at 747. The *Snell* defendant was not entitled to summary judgment because the record "[did] not establish as a matter of law that the government exercised its discretion with respect to the [allegedly defective] drive shaft and its components." *Id.* at 748.

The Fifth Circuit's decision in *Trevino* v. *General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989), likewise focused on whether the government had exercised a discretionary decision, not on formalistic tests dealing with the precise contract requirements or the degree of contractor-government interaction. "When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion. A rubber stamp is not a discretionary function; therefore, a rubber stamp is not 'approval' under *Boyle*." *Id.* at 1480. Because "the record clearly show[ed]" that the contracts "left design entirely to the discretion of" the contractor," the defense was unavailable. *Id.* at 1486-87 (citations and quotation marks omitted). Here, by contrast, the precise design of Agent Orange was selected by the government.

Finally, in *Kleemann* v. *McDonnell Douglas Corp.*, the Fourth Circuit found the defense satisfied. While the court stated that "active government oversight is relevant to all three elements," it did not hold that a "continuous exchange" is required. See 890 F.2d 698, 701, 702 (1989).

All of these decisions, like the decision below, involved applications of widely agreed-upon legal principles to particular facts. They do not reflect any doctrinal split regarding the nature of the defense.

C. The Circuits Are Also In Agreement Regarding Application Of The Third *Boyle* Prong.

There is likewise no conflict concerning the third *Boyle* prong. This Court recognized in *Boyle* that protection from product liability could create a perverse "incentive for the manufacturer to withhold knowledge of risks." 487 U.S. at 512. Accordingly, it held that the defense applies only when "the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Ibid.* The warning requirement is not boundless. It is designed to deter the intentional withholding of material information – not to allow plaintiffs, decades later, to thwart the defense by pointing to non-disclosures of irrelevant or immaterial risks.

1. *The Second Circuit Correctly Held That The Contractor's Duty Is To Inform The Government Of Risks That Are Material To The Exercise Of Governmental Discretion.*

The Second Circuit held, uncontroversially, that the contractor must warn only of risks "of the type that would have had an impact on the military's discretionary decision ***. *Boyle* did not contemplate requiring disclosure of any and all potential risks by the contractor to the government, irrespective of their relation to the governmental discretionary decision at issue." Pet. App. 41a-42a. The court noted

that "the undisputed record *** is that during the entirety of the production of Agent Orange, the manufacturers knew only that it was possible that those handling herbicides containing 2,4,5-T might develop the skin disease chloracne." *Id.* at 46a. That risk, the court found, would have had no impact on the government's exercise of discretion:

> We conclude *** that no reasonable fact-finder could find that the defendants had knowledge of a danger that might have influenced the military's conclusion that "operational use" of Agent Orange posed "no health hazard to men or domestic animals," and its presumably related decision to continue to purchase Agent Orange ***. We find nothing in the record to support an assertion that the defendants "cut off information highly relevant to discretionary decisions" of the government, *Boyle*, 487 U.S. 513, *i.e.*, that they possessed knowledge of dangers unknown to the government that, had they been shared, might have influenced the government's decision ***.

Id. at 47a (citations, brackets, ellipses, and quotation marks omitted).

Petitioners barely challenge this ruling on the merits. Nor can they; it is simply an application of the third prong, as set forth in *Boyle*, to the unusual facts of this case. *Boyle* limits the warning requirement in three pertinent ways. First, *Boyle* requires warning only of "dangers in the *use* of the equipment," not of hazards that relate to the manufacturing process and do not threaten military personnel and other individuals exposed to the end product. 487 U.S. at 512 (emphasis added). This restriction is

consistent with the purpose of the third prong, which is to ensure that the "effort to protect discretionary functions [not] perversely impede them by cutting off information *highly relevant to the discretionary decision*." *Id.* at 512-13 (emphasis added). The Second Circuit emphasized the military's focus on "the likely effect on those exposed to the herbicides in the manner in which they were, and were to be, *used* in Vietnam," as distinct from "all the possible dangers associated with the *manufacture* of the chemical ***." Pet. App. 46a, 47a (emphases added). The court concluded that these manufacturing hazards would not have "influenced the military's conclusion that *operational use* of Agent Orange" was adequately safe. *Id.* at 47a (emphasis added; citation and quotation marks omitted).

Second, *Boyle* requires warning only of actual "dangers *** that were *known* to the supplier." 487 U.S. at 512 (emphasis added). Petitioners have not asserted, nor can they, that the contractors knew in the 1960s that exposure to Agent Orange risked any of the long-term injuries that plaintiffs allege they suffered.[10] To the contrary, as the Second Circuit observed, the evidence that petitioners have cited for the proposition that "the defendants knew of dioxin's hazards *** pertain[s] almost universally to the risk of chloracne and liver damage to *workers manufacturing* Agent Orange." Pet. App. 43a (emphasis added).

Third, and conversely, the warning requirement is limited to "dangers *** *not [known]* to the United

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[10] That an isolated employee may have speculated about possible dangers that were never substantiated is plainly insufficient to support such a contention. See Pet. 14.

States." *Boyle*, 487 U.S. at 512 (emphasis added). It is undisputed that the only testing relevant to the long-term health effects of which petitioners complain was conducted, not by the manufacturers, but by the government. A129-279.

2. There Is No Conflict Among The Lower Courts On This Question.

Petitioners assert that the Second Circuit's application of *Boyle*'s third requirement conflicts with the approach taken by the Third Circuit in *Carley*. To the contrary, *Carley* focused on *precisely* those risks that were relevant and material to the government's assessment of the alleged defect. The plaintiff contended that the defendant's ambulance "was unreasonably prone to turn over during intended use because of an excessively high center of gravity." 991 F.2d at 1118. The court of appeals held that the defendant had failed to satisfy the third prong of the government contractor defense because

> the record [was] devoid of communications between [the defendant] and the GSA pertaining to the risks of high centers of gravity. Nor is there any other competent evidence indicating that the government knew that the height of the ambulance's center of gravity might give the vehicle a dangerous propensity to rollover.

Id. at 1127. The Third Circuit did not suggest that the alleged nondisclosure of immaterial or irrelevant risks would bar the defense.

Similarly, none of the other decisions that petitioners cite (Pet. 31) – *Ramey* v. *Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989); *Stout* v. *Borg-Warner Corp.*, 933 F.2d 331 (5th Cir. 1991); or *Har-*

duvel – involved an alleged failure to warn of an immaterial risk, and none suggests that the contractor would fail the third prong in such a case. Indeed, all of those decisions found the defense to be satisfied. There simply is no conflict among the lower courts on this issue.

3. Petitioners' Policy Concerns Are Misplaced And Do Not Warrant This Court's Review.

Petitioners conclude with a plea for a disclosure requirement substantially broader than what this Court established in *Boyle*. Petitioners propose that contractors should lose the benefit of the defense if they fail to disclose information that is neither relevant to the government's contracting decision nor related to the harm that plaintiffs claim decades later. Such a requirement would make the availability of the defense a matter of chance, hampering the government's ability to obtain the products that it needs, while doing little to make those products safer. Moreover, their farfetched hypotheticals involving bait-and-switch schemes and active concealment of known hazards in the use of military equipment, Pet. 32-33, bear no resemblance to this case, in which petitioners have alleged, at most, a failure to disclose purely occupational hazards of no relevance to the military.

Petitioners assert that the Second Circuit's ruling creates incentives for manufacturers to conceal or withhold information about product risks from the government. This argument ignores the court of appeals' explicit determination *that there was no evidence of such concealment here*. Pet. App. 48a; see also pp. 16, 28 *supra*. Petitioners ask this Court to adopt a rule that the defense is not available unless

the contractor disclosed *all* risks – no matter how immaterial to the government's decisionmaking process or to the harm that plaintiffs ultimately claim. Such a rule would serve no purpose and would be antithetical to the purposes of the defense.

Petitioners' assertion that the Second Circuit's ruling will encourage non-disclosure is nonsensical. As this Court observed in *Boyle*, a contractor might have an incentive to conceal risks if "conveying that knowledge might disrupt the contract." *Boyle*, 487 U.S. at 512. In other words, the contractor would be tempted to conceal only those risks that are *material* to the government's decision. The Second Circuit would deny the defense to any contractor who succumbed to that temptation.

On the other hand, denying the defense for failure to disclose *immaterial* risks would be counterproductive. The Second Circuit recognized that requiring contractors to flood the government with disclosures, "irrespective of their relation to the government discretionary decision at issue," would

> overwhelm government decision makers with largely irrelevant data, extending the time and costs associated with federal contracting and obscuring those risks most likely to have an impact on contracting decisions. A rule that required full disclosure of *all* possible risks to *anyone* would be contrary to *Boyle*'s underlying rationale of protecting the federal interest in "getting the Government's work done."

Pet. App. 42a-43a (emphases in original).

In this case, there is no evidence that would permit the conclusion that the military would have

abandoned its efforts to protect American troops with a defoliation program, or chosen a less effective chemical, if it had received a clearer warning about the risk of chloracne or liver damage to production workers. Indeed, there is substantial direct evidence that the government considered that risk irrelevant. A2129-30. Nor is there any evidence to suggest that the government would have required the manufacturers to employ a different production process, which plaintiffs argued would have been slower and more expensive (see, *e.g.*, Reply Br. in 05-1760-cv (2d Cir.) at 2; Opening Br. in 05-1693-cv (2d Cir.) at 53-54), to protect against risks that were at most matters of speculation. But it is not at all far-fetched to suggest that, had the manufacturers anticipated massive class actions, they might have resisted demands to supply a government program in support of an unpopular war.[11]

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[11] If certiorari is granted on the government contractor defense issue, respondents will argue as an alternative ground for affirmance that the current plaintiffs are bound by the 1984 class settlement. Petitioners were allowed to proceed with their cases after this Court affirmed, by an equally-divided Court, the Second Circuit's ruling that plaintiffs were not bound by the 1984 class settlement because they did not manifest injury until after the settlement funds were exhausted and consequently had been inadequately represented at the time of the settlement. *Dow Chem. Co.*, 539 U.S. 111. That decision is, of course, without precedential effect. See *Neil* v. *Biggers*, 409 U.S. 188 (1972).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2009