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 OF VETERANS GROUPS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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November 7, 2008

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are 32 military and veterans service organizations, collectively representing more than 7 million members. *Amici* join together in urging this court to grant certiorari for two compelling reasons. First, Vietnam War veterans suffering from fatal diseases caused by privately manufactured chemicals should at minimum be accorded the same rights as ordinary Americans to sue the manufacturers of those exact same chemicals who happened to be exposed during domestic use in the U.S. Secondly, and even more importantly, the Second Circuit's drastic expansion of the government contractor defense threatens the health and safety of all servicemen who must necessarily rely on products manufactured by contractors to protect this country and who, therefore, have a right to expect that those products will be manufactured as safely as is possible.

Amici,[2] urging this court to accept certiorari, include the following chartered veterans service organizations: 1) The American Legion, 36 U.S.C §217, *et seq.*, with nearly 3 million members;

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[1] All counsel of record received notice of *amici*'s intention to file this brief at least ten days before this brief was due. The parties have consented to the filing of this brief. *Amici* state that no portion of this brief was authored by counsel for the parties and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

[2] See Appendix for a detailed description of *Amici*.

2) The Veterans of Foreign Wars of the United States, §2301, *et seq.*, with 1.7 million members; 3) The Disabled American Veterans, §50301, *et seq.*, with 1.4 million members; 4) The Vietnam Veterans of America, §2305, *et seq.*, with 50,000 members; 5) The Catholic War Veterans of the United States, §401, *et seq.*, with 30,000 members; 6) The American Ex-Prisoners of War, §209, *et seq.*, with 27,000 members; 7) The Blinded Veterans of America, §1701, *et seq.*, with 10,200 members; 8) The Paralyzed Veterans of America, §1701, *et seq.*, with 20,500 members; 9) The Reserve Officers Association, §1901 *et seq.*; 10) The Marine Corps League, §1401, *et seq.*; 11) The Italian American War Veterans of the U.S.A., §1001, *et seq.*, with 10,000 members; and 12) The Military Chaplains Association §1403, *et seq.*

Amici also include the following unchartered organizations: 1) The Air Force Association, with 125,000 members; 2) The Air Force Sergeants Association, with 130,000 members; 3) The Air Force Women Officers Associated; 4) The Association of the United States Army; 5) The Chief Warrant and Warrant Officers Association, United States Coast Guard; 6) The Enlisted Association of the National Guard of the United States with 414,000 members; 7) The Fleet Reserve Association; 8) The Jewish War Veterans of the United States of America; 9) The Marine Corps Reserve Association; 10) The Military Officers Association of America, with 370,000 members; 11) The National Association for Uniformed Services, with 200,000 members; 12) The National Guard Association of the United States, with 45,000

members; 13) The National Order of Battlefield Commissions; 14) The Naval Enlisted Reserve Association; 15) The Navy League of the United States; 16) The Naval Reserve Association; 17) The Non-Commissioned Officers Association; 18) The United States Army Warrant Officers Association; 19) The Veterans of the Vietnam War, Inc.; and 20) The Reserve Enlisted Association.

SUMMARY OF ARGUMENT

Public policy demands that the Second Circuit's decision in this case be reviewed. That decision ignores the government's need to provide our military with equipment that is not unnecessarily defective. The defendant chemical companies hid information from the government regarding the dangerous nature of dioxin, the manufacturing process used that resulted in unnecessarily high levels of dioxin, and the numerous illnesses to their workers they knew to be caused by dioxin. Thus they should not benefit from the government contractor defense – a defense which public policy demands sharing knowledge of known dangers before contractors may benefit from it.

In this case, the exceptionally high levels of toxic dioxin, a byproduct of Agent Orange, were not the result of the government's instruction, design or specification. Dioxin, which has caused so many health problems to veterans who were exposed to Agent Orange in Vietnam, was created as a consequence of the manufacturing process chosen by the

defendant chemical companies, not by the government. The government did not require the chemical companies to utilize a manufacturing process that created dioxin and did not compel the chemical companies to create a defective or unreasonably dangerous product. Therefore, the public policy behind the government contractor defense would not be harmed or threatened by the rejection of that defense in this case.

Conversely, other compelling public policies are trampled by the improper application of the government contractor defense here. Public policy strongly encourages the protection of our military by providing the troops with the best and the safest equipment possible to serve our country. The record has been made clear in this litigation that the chemical companies had the ability to make Agent Orange without detectible levels of dioxin as a byproduct, by using less dangerous processes, such as the Boehringer process – but they chose not to. In addition, public policy favors holding the party in the best position to prevent the harm responsible for injuries. The chemical companies had much greater knowledge than did the government about the manufacturing processes which resulted in the creation of dioxin. Moreover, when harm occurs, public policy requires the culpable party to bear the cost. In this case, the government not only paid the chemical companies for the Agent Orange they manufactured, but also for the medical care and benefits owed to Vietnam veterans injured from the unnecessary exposure to dioxin. As a result,

the public has been forced to pay over and over again for the harm caused by the chemical companies. Moreover our Vietnam veterans have no recourse for their damages. Such a result flies in the face of public policy.

Should the decision of the Second Circuit be allowed to stand, private contractors will be encouraged to keep from the government knowledge they possess regarding important safety issues – including safer alternative manufacturing processes never contemplated, much less required, by the contract specifications. Moreover, contractors will use this holding as a license to ignore opportunities to evaluate safer processes and to learn about potential defects in the products they supply to the government. In either event, there is a substantial risk of our military being provided unnecessarily dangerous or defective products that impede the troops' ability to get the government's work done.

ARGUMENT

I. PUBLIC POLICY WOULD NOT ADVOCATE THE EXPANSION OF THE DEFENSE TO PROVIDE IMMUNITY TO THE CHEMICAL COMPANIES IN THIS CASE.

The government contractor defense is not statutory, but a creation of the Court, born out of public policy considerations that a contractor, who simply does what the government tells him to do, should not

be exposed to state-law tort liability for doing so. In *Boyle*, this Court set forth 3 requirements for a government contractor to take advantage of the immunity provided by the government contractor defense: (1) that the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) 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. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988).

A. *Boyle*'s rationale for the government contractor defense recognizes the need to protect the government's discretionary function while also encouraging manufacturers to share their knowledge of known dangers.

This Court imposed the first two requirements of *Boyle* in order not to frustrate the government's discretionary function. *Id.*, 487 U.S. at 512. In doing so, this Court considered that there would be a financial burden associated with holding government contractors liable that would ultimately be passed through to the federal government. *Boyle,* 487 U.S. at 511. Additionally, consideration was given to whether allowing suits against government contractors would result in "second guessing" the government's discretionary function through litigation. *Id. citing, United States v. Varig Airlines,* 467 U.S. 797, 814 (1984). Added to these was the third requirement. Its rationale was to prevent giving manufacturers "an

incentive to withhold knowledge of risks." *Boyle*, 487 U.S. at 512.

All of these concerns are best served by not allowing the government contractor defense to immunize the chemical companies in this case. The government's discretionary function is not impeded by holding contractors liable where they hid known information of dangers from the government, because the government was never able to exercise its discretionary authority in the first place. Furthermore, by allowing the manufacturers to hide behind the government contractor defense, when they withheld information of a known safer manufacturing process and intentionally withheld the health hazards associated with exposure to dioxin, flies in the face of *Boyle* and public policy.

B. The Second Circuit's application of *Boyle* frustrates the government's discretionary function.

A fair and just reading of *Boyle* would require contractors to share their knowledge of safer manufacturing processes for the herbicides ordered by the government. One purpose of the government contractor defense is to keep the government's discretionary function from being frustrated. *Id.* 487 U.S. at 511. "Discretion" implies the government has a choice in

its decision-making process.[3] By hiding information of safer available processes for manufacturing Agent Orange without dangerously high or even detectable levels of the toxic byproduct dioxin from the government, the chemical companies denied the government an opportunity to approve their selected method. With this information, the government would have been able to truly use its discretionary authority to make an informed decision regarding not only whether to use Agent Orange, but also which method should be used to manufacture that product. State tort claims against the chemical companies do not frustrate the government's discretionary authority, but the chemical companies' withholding information from the government surely does.

In *Boyle,* this Court said, "second guessing" the government's discretionary function should be avoided. *Id.* However, a second look is mandated in this case because the chemical companies, as the Second Circuit acknowledged, failed to provide all information known to them regarding known defects in the products they were selling to the government. The Second Circuit's ruling improperly grants blanket immunity based on a faulty interpretation of *Boyle*. If left standing, this ruling sends the wrong

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[3] Discretion: power of free decision or latitude of *choice* within certain bounds imposed by law. Dictionary.com. Merriam-Webster's Dictionary of Law. Merriam-Webster, Inc. http://dictionary.reference.com/browse/discretion (accessed: October 24, 2008).

message to government contractors and is contrary to the public policy considerations of protecting our troops.

C. Public policy demands full disclosure by government contractors.

The Second Circuit held that the government determined that the herbicides it was receiving were "safe" and that such a determination is equivalent to approving reasonably precise specifications about that danger. *In re "Agent Orange,"* 517 F. 3d 76, 97 (2nd Cir. 2008). It is not. Here, as the Second Circuit admits, the government did not have full knowledge of the catastrophic and systemic health dangers associated with the unspecified dioxin. More importantly, the government was unaware that the unreasonable dangers of exposing troops to toxic dioxin could have been reasonably avoided by the use of an alternative manufacturing process. This further ignores the fact that while the government was determining that the product was "safe," the defendant chemical companies were busy hiding information from the government regarding the health problems they knew were occurring in their own workers from exposure to the dioxin byproduct. The relevant inquiry should be whether the government was given knowledge of the danger and the opportunity to consider approving another plausible manufacturing process that would have drastically alleviated the danger. The evidence proves it was not. It is illogical to determine something is "safe" without

knowledge of the specific dangers and the way to avoid those dangers.

II. IN A CASE OF THIS MAGNITUDE, THE COURT SHOULD REVIEW THE SECOND CIRCUIT'S DECISION, WHICH GREATLY EXPANDS THE SCOPE OF THE GOVERNMENT CONTRACTOR DEFENSE.

The Second Circuit's decision expands the government contractor defense by requiring a showing by the injured party that the knowledge withheld by the contractor would have made a difference to the government in its decision-making process. *Agent Orange,* 517 F. 3d at 97-98. If the government contractor defense is to be expanded from *Boyle*'s requirements, it should be this Court that articulates the new standard.

A. *Boyle* does not require a showing that the knowledge withheld by the contractor would have made a difference to the government in its decision-making process.

In deciding to immunize the chemical companies in this case, the Second Circuit stated that, even if health and safety evidence was proven to be hidden, the plaintiff has the burden of proof at the summary judgment stage to demonstrate that the evidence shows that the information withheld from the government is of "the type that would have an impact on

the military's discretionary decision." The Second Circuit thereby admitted it was adding an additional requirement to the defense. *Agent Orange,* 517 F. 3d at 97. Nowhere in *Boyle* did this Court require an injured party to show that the withheld information would have had an impact on the military discretionary decision or, conversely, for a plaintiff to show that admittedly hidden health and safety information would have had an impact on the military discretionary decision.

B. The Second Circuit disregarded factual disputes.

Even though the Second Circuit acknowledged the presence of factual issues left to be resolved as it considered the three *Boyle* requirements, the court ultimately ignored those disputes and took it upon itself to determine that defective manufacturing processes and safer alternative methods do not rise to the level of danger that must be disclosed to the government. *Agent Orange,* 517 F. 3d at 97, 101-102. The Second Circuit's analysis extends far beyond what is required by *Boyle,* and, in this case, results in the court taking the place of the jury to decide important factual disputes. Moreover, it defies logic to reason that, had the government been fully informed by the chemical companies of a safer manufacturing process that would result in an equally effective Agent Orange defoliant, it would still have chosen Agent Orange made with a less safe process that produced dangerously high levels of dioxin. Certainly,

such a determination must at least be made by a finder of fact, not an appellate court.

C. *Boyle* does not address defects resulting from a manufacturing process that was neither compelled nor specified in the contract.

The government contractor defense as articulated in *Boyle* does not fit well with the peculiar facts of this case. *Boyle* sets forth the manner in which a court must evaluate a state court product liability claim by comparing the contract at issue with the alleged defect. This case involves a defective manufacturing process that was chosen not by the government, but by the chemical companies; and, more importantly, one that could have been avoided. The record shows that the chemical companies had superior knowledge regarding the manufacturing process. The Second Circuit even acknowledged that there existed a factual dispute as to whether the chemical companies could have honored their contractual obligations using the safer manufacturing process, but wrongly disregarded that dispute. *Agent Orange,* 517 F. 3d at 93.

As such, Agent Orange became unreasonably dangerous as a direct result of the defective manufacturing process *chosen by the chemical companies*. This case centers on a defective manufacturing process and not a design defect. A design defect is a defect inherent in the design of the product. It has nothing

to so with the ultimate process to manufacture that design. Here, there is no issue as to the chemicals or design chosen. The issue is defendants chose not to use safer manufacturing methods, including the Boehringer method. Applying *Boyle*, which addresses design defect claims, is inadequate to analyze the problems created by the defendants's failure to use safer methods. Under the Second Circuit's reasoning, the chemical companies are now off the hook, even though the government never was given the opportunity to exercise discretion over the manufacturing process.

III. THE CHEMICAL COMPANIES, RATHER THAN INJURED VETERANS, THE GOVERNMENT, OR TAXPAYERS, SHOULD BEAR THE COST OF HARM THAT WAS PREVENTABLE.

Sick or the loved ones of now deceased Vietnam veterans should not be relying exclusively on the government to pay for the errors of the defendant companies. This is especially true since those companies did not share valuable health and safety information which could have prevented serious injuries and death and were paid substantial sums of money under the contracts. When these Vietnam veterans sustained injuries and deadly diseases, the government paid again – this time with VA benefits and healthcare expenses. As of March 2000, there were approximately 7,520 Vietnam veterans receiving compensation through the Department of Veterans

Affairs for Agent Orange related injuries without any fund or assistance from those companies that manufactured the deadly product.[4]

It is the purpose of our tort system to allow injured parties to recover when the acts or omissions of another causes them harm. It is a fundamental principle "that risk should be borne by those with the best ability to manage risk by safeguarding against injury or bearings its cost."[5] As stated above, the chemical companies here were in the best position to safeguard against injury. And for that reason, they should have to bear the cost.

A. Manufacturers are in the best position to prevent these injuries.

Government contractors are clearly in a better position to prevent defects in the products they produce. The chemical companies had been manufacturing herbicides for decades before the Vietnam War. These companies should not be allowed to check all their resources and knowledge at the door when they

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[4] http://www.vba.va.gov/bln/21/Milsvc/Docs/VNFacts.doc, *citing* 6. "Agent Orange: Statistical Update," March 2000, VA Office of Public Affairs, Media Relations Office (80-F). This number does not include the children of Vietnam Veterans who receive benefits for their injuries due to the use of Agent Orange.

[5] Hazel Glenn Beh, *The Government Contractor Defense: When Do Governmental Interests Justify Excusing A Manufacturer's Liability for Defective Products?* 28 SETON HALL 430, 448, n.103 (1997).

work for the government. The chemical companies have the skill, technology, and financial ability to ensure that the products they manufacture are effective, safe and meet the specifications as set forth by the government.

The Department of Defense has spent $100 billion on procurement contracts in 2008.[6] The manufacturers bidding on these contracts are major corporate entities, not small-time players. In 2006, the top ten defense contracting companies produced revenues over $193.7 billion purely from defense contracts and their total combined revenues – defense contracting and other sources of revenues – were over $331.4 billion.[7] Although not in the top ten defense contracting companies, the defendants here are hardly lacking in resources: Monsanto reported $8.6 billion in net sales for 2007, while Dow Chemical reported $53.5 billion for the same period.[8] These are industry leaders who set standards for the rest to follow.

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[6] Budget of the United States Government, Fiscal Year 2008, http://www.whitehouse.gov/omb/budget/fy2008/pdf/budget/defense.pdf.

[7] Defense News, List of Top Military Contractors, http://www.defensenews.com/static/features/top100/charts/rank_2007.php?c=FEA&s=T1C.

[8] Monsanto 2007 Annual Report, http://www.monsanto.com/pdf/pubs/2007/2007AnnualReport.pdf; The Dow Chemical Company 2007 10-K and Stock Holder Summary, http://www.dow.com/PublishedLiterature/dh_010b/0901b8038010bafe.pdf?filepath=financial/pdfs/noreg/161-00696.pdf&fromPage=GetDoc.

Manufacturers should not be encouraged to withhold safety information when they are manufacturing products for use by the government and profit in the process. Yet, that is precisely what the Second Circuit's ruling allows. It is unfitting that these manufacturers should profit from providing unnecessarily defective and highly dangerous herbicides that cause systemic injuries to our Vietnam veterans when they went to great lengths to hide health and safety dangers from the government.

The government contractor defense only requires that contractors inform the government of all *defects and dangers they are aware of. Boyle* 487 U.S. at 512. This is not a burdensome duty. Such disclosures would not require any significant additional work as contractors seek to comply with the terms of a government contract. They are not being asked to make design changes. They are not being asked to manufacture perfect products. Nor are they being asked to test products and determine all possible defects. They are simply being asked to responsibly inform the government of information that could prevent harm and may implicate the safety of the material that the government is planning to purchase.

B. Parties withholding information and causing injury should bear the costs of those injuries.

Manufacturers that fail in their responsibility to prevent harm should, as the culpable party, bear the

costs of those harms. In this case, the burden should not fall to the government to pay for injured Vietnam veterans. Nor should the injured veterans be left without recourse where neither they nor the government were responsible for the harm. Yet, under the Second Circuit's ruling, this is precisely the case.

Receiving government healthcare or veterans' benefits does not have the same affect as being able to bring a lawsuit against a party that caused one harm. First and most importantly, such lawsuits ensure that the culpable party pays for its wrongful actions and/or omissions. In this case, the chemical companies who willfully neglected their obligation to inform the government of a safer manufacturing process should have to answer for their failures. Second, only a tort action provides the ability to validate the victim's belief that he or she was harmed by another while also instilling confidence that a remedy can be found by participating in the judicial system. Our Vietnam veterans deserve the opportunity to have their day in court against the chemical companies that could have prevented the illnesses from which they now suffer. Third, tort liability sets standards by which others know how to act. In this case manufacturers and contractors would be encouraged to be open and honest with the government about their knowledge and their capabilities to operate to the best of their ability.

As the Second Circuit has applied the government contractor defense, the culpable parties remain

completely immune from having to provide compensation to either the injured Vietnam veterans or the federal government. This does not embody the standards considered important to continuing the legitimacy of our tort system.

IV. PUBLIC POLICY SHOULD BE TO PROTECT OUR TROOPS TO THE BEST OF OUR ABILITY FROM UNNECESSARY OR PREVENTABLE HARM.

Human life is the greatest resource our military has. It is not in the government's interest to procure defective products that cause serious illnesses where a safer alternative method to manufacture a product is available. The government invests a large portion of its budget in the defense of our country. For 2008, the Department of Defense's budget is estimated to be $560 billion with over $100 billion of that allocated for military personnel. The government has an interest in procuring the best personnel, best resources, and best equipment for the personnel that protect our country. The Second Circuit wrongly permits the manufacturers of products rather than the government to determine in the first instance what health risks may be acceptable for these men and women. This is wrong. The government should be provided all known health and safety information in order for it to determine how best to protect our troops.

As to Vietnam veterans, the government should certainly not have a greater interest in providing

immunity to contractors than in protecting our Vietnam veterans from harm. Products manufactured by government contractors are not a greater or more important resource than these troops. Although injury and even death are risks every soldier faces, those risks should not come from an unnecessarily defective, extremely toxic product, whose dangers have been hidden from the government.

CONCLUSION

The Second Circuit's application of the government contractor defense unduly expands the government contractor defense beyond its intended scope. The policy reasons for the government contractor defense – the interest in protecting both the government's discretionary functions and our military – should be of paramount importance to any reviewing court. *Amici* urge this Court to grant the petition for writ of *certiorari*.

Respectfully submitted,

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November 7, 2008

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