No. 08-

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

PETITION FOR A WRIT OF CERTIORARI

MARK R. CUKER
MICHAEL J. QUIRK
WILLIAMS CUKER BEREZOFSKY
1617 J.F.K. Blvd, Ste 800
Philadelphia, PA 19103
(215) 557-0099

GERSON H. SMOGER
Counsel of Record
SMOGER & ASSOCIATES, PC
3175 Monterey Blvd, Ste 3
Oakland, CA 94602
(510) 531-4529

Counsel for Petitioners
(ADDITIONAL PETITIONERS' COUNSEL LISTED ON INSIDE COVER)

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ADDITIONAL COUNSEL

CHRISTOPHER E. BUCKEY
DOUGLAS E. KEMP
SHANLEY SWEENY REILLY & ALLEN, P.C
The Castle at Ten Thurlow Terrace
Albany, New York 12203
518-463-3210
Counsel for Petitioner Twinam

MARK I. BRONSON
NEWMAN, BRONSON & WALLIS
2300 West Port Plaza
St. Louis, Missouri 63146
(314) 878-8200
Counsel for Petitioners Bauer, Walker, and Hamilton

DAVID E. CHERRY
CAMPBELL, CHERRY, HARRISON, DAVIS & DOVE
P.O. Box Drawer 21387
5 Ritchie Road
Waco, Texas 76702
254-761-3300
Counsel for Petitioner Stearns

JAMES BOANERGES
LUEDERS & BOANERGES, P.C.
9432 Old Katy Road, Suite 100
Houston, Texas 77055
713-464-3383
Counsel for Petitioners Anderson and Garncarz

JOHN H. PUCHEU
PUCHEU, PUCHEU & ROBINSON, LLP
106 Park Avenue
Eunice, Louisiana 70535
337-457-9075
Counsel for Petitioners Breaux and Plowden

BERNARD F. DUHON
LAW OFFICE PF BERNARD F. DUHON
111 Concord Street, Suite B
Abbeville, Louisiana 70511
337-893-0030
Counsel for Petitioners Breaux and Plowden

CALLAHAN, FITZPATRICK, & LA KOMA
5237 West 95th Street
Oak Lawn, Illinois 60453
708-423-4500
Counsel for Petitioners Garncarz

NIRA T. KERMISCH
LAW OFFICES OF NIRA KERMISCH
36 W. Main Street, Suite 405
Rochester, New York 14614
585-232-7280
Counsel for Petitioner Gallager

STEPHEN B. MURRAY
MURRAY LAW FIRM
909 Poydras Street, Suite 2550
New Orleans, Louisiana 70112-4000
504-525-8100
Counsel for Petitioner Stephenson

ROBERT B. EVANS
PEDRO ESPINOZA
BURGOS & EVANS, LLC
3632 Canal Street
New Orleans, Louisiana 70119-6135
518-463-3210
Counsel for Petitioner Sampey

JEFFREY D. GUERRIERO
GUERRIERO & GUERRIERO
2200 Forsythe Avenue
Monroe, Louisiana 71201
318-325-4306
Counsel for Petitioners Kidd, Nelson, and Williams

JOAN H. HARROP
GOMEIN & HARROP
First Midwest Bank Building, Suite 300
220 West Main Street
P.O. Box 708
Morris, Illinois 60450-0708
815-942-0071
Counsel for Petitioner Garncarz

JAMES RUSSELL TUCKER
LAW OFFICES OF JAMES RUSSELL TUCKER, P.C.
5505 Celestial Road
Dallas, Texas 75240
214-740-3001
Counsel for Petitioner Patton

QUESTION PRESENTED

Whether the federal government contractor defense is available to manufacturers whose defective products injured U.S. servicemen and women when: 1) the claimed defect resulted solely from manufacturing processes of the contractors' own choosing and exclusive control; 2) neither the defect nor the health consequences of the defect were disclosed to the government; and 3) the contractors could have complied with both their federal contracts and their state-law duties to the plaintiffs.

PARTIES TO THE PROCEEDING

Petitioners: (Court of Appeals docket cites)

J. Michael Twinam (05-CV-1509)

Robert S. Bauer (05-CV-1693)

Sandra J. Bauer (05-CV-1693)

Sheryl A. Walker (05-CV-1694)

Eric C. Walker (05-CV-1694)

Stephen J. Walker (05-CV-1694)

William Hamilton (05-CV-1694)

Esther M. Hamilton (05-CV-1694)

Sherman Clinton Stearns (05-CV-1695)

Dortha Monyene Stearns (05-CV-1695)

Wilmer Plowden Jr. (05-CV-1696)

Charles T. Anderson (05-CV-1698)

Linda Faye Clostio-Breaux (05-CV-1700)

Racheal M. Breaux (05-CV-1700)

Joey M. Breaux (05-CV-1700)

April R. Breaux (05-CV-1700)

Stacy M. Breaux (05-CV-1700)

Eric J. Breaux (05-CV-1700)

Scott M. Breaux (CV-1700)

Charles J. Breaux (05-CV-1700)

Thomas G. Gallagher (05-CV-1737)

Daniel Raymond Stephenson (05-CV-1760)

Susan Stephenson (05-CV-1760)

Daniel Anthony Stephenson (05-CV-1760)

Emily Elizabeth Stephenson (05-CV-1760)

Casey J. Sampey, Jr. (05-CV-1771)

Christine Nelson (05-CV-1810)

Franklin Nelson (05-CV-1810)

Reginald Williams (05-CV-1810)

Karen Holland (05-CV-1810)

Franklin Nelson Jr. (05-CV-1810)

Shalisa Nelson (05-CV-1810)

Henry C. Kidd (05-CV-1813)

Shirleane J. Kidd (05-CV-1813)

Willie Williams Jr. (05-CV-1817)

Rita Williams (05-CV-1817)

Joe Isaacson (05-CV-1820)

Phyllis Lisa Isaacson (05-CV-1820)

Vickey S. Garncarz (05-CV-2450)

Jack Richard Patton (05-CV-2451)

Respondents:

Dow Chemical Company

Monsanto Company

Hercules Incorporated

Occidental Chemical Corporation

Ultramar Diamond Shamrock Corporation

Chemical Land Holdings, Inc.

T-H Agricultre and Nutrition Company, Inc.

Thompson Hayward Chemical Company

Harcros Chemicals, Inc.

Uniroyal, Inc.

C.D.U. Holdings, Inc.

Uniroyal Chemical Company

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INTRODUCTION

Certiorari should be granted because the Second Circuit's decision not only conflicts with this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), but because it also highlights and amplifies numerous conflicts that have developed within the circuits in the interpretation and application of *Boyle* over the past twenty years. The Second Circuit's decision conflicts with decisions of most other circuits that have applied Boyle's first prong–requiring that a contract contain "reasonably precise specifications"–to mean what it says: that specifications be found in the contract or during the process of contract development. It also conflicts with a legion of cases holding that *Boyle*'s third prong – an informed government – requires that safety and health information known to the contractor be disclosed to the government.

The Second Circuit's decision involves questions of exceptional importance, because it immunizes government contractors against suits for defects resulting from their own proprietary manufacturing processes, even when the government exercised no control over those processes and the contractors actually concealed the defect from the government. Instead of rewarding contractors for hiding information from the government, federal policy should be to maximize the information available to contracting officers so that they can best consider the safety and health of those using products purchased by the government. The Second Circuit has afforded such overbroad immunity to contractors that, if there is any doubt regarding the ramifications of its decision, this Court should seek guidance from the Solicitor General.

OPINIONS BELOW

The opinion of the Court of Appeals, App. 1a-63a, is reported at 517 F.3d 76 (2d Cir. 2008). The opinion and order of the district court granting Respondent's motion for summary judgment, App. 64a-154a, is reported at 304 F. Supp. 2d 404 (E.D.N.Y. 2004). A second ruling dismissing the action, App. 155a-160a, is reported at 344 F.Supp.2d 873 (E.D.N.Y. 2004).

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2008. Petitioners filed a timely petition for rehearing with a request for rehearing *en banc*, which the court of appeals denied on May 8, 2008. On July 28, 2008, Justice Ginsburg extended the time for filing a petition for a writ of *certiorari* until October 6, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Daniel Stephenson[1] served as a helicopter pilot in Vietnam, where he was exposed to dioxin-contaminated herbicides manufactured by Respondents. In 1998, he was diagnosed with multiple myeloma, a disease linked to dioxin exposure. Shortly thereafter he filed a *pro se* complaint against the Dow Chemical Company ("Dow") and Monsanto Company ("Monsanto") related to their manufacture of herbicides used in Vietnam. AA13374-A13381.[2] The

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[1] Despite the lack of coordinated procedings below, the court of appeals issued one opinion regarding summary judgment which was directed to all the cases that were before it, though only the *Stephenson* Petitioners were discussed directly. The other cases that were also subject to the Second Circuit's decision were: *Twinam v. Dow* (05-CV-1509), *Bauer v. Dow* (05-CV-1693), *Walker v. Dow* (05-CV-1694), *Stearns v. Dow* (05-CV-1695), *Plowden v. Dow* (05-CV-1696), *Anderson v. Dow* (05-CV-1698), *Breaux v. Dow* (05-CV-1700), *Gallagher v. Dow* (05-CV-1737), *Samprey v. Dow* (05-CV-1771), *Nelson v. Dow* (05-CV-1810), *Kidd v. Dow* (05-CV-1813), *Williams v. Dow* (05-CV-1817), *Isaacson v. Dow* (05-CV-1820), *Garncarz v. Dow* (05-CV-2450), and *Patton v. Dow* (05-CV-2451) These other Petitioners or spouses or parents of Petitioners listed herein likewise served in Vietnam, were exposed to Agent Orange, and were diagnosed with cancer and/or other illnesses caused by exposure to dioxin on or after 1995. The military service, dioxin exposure, and health conditions of these Petitioners were not discussed in the decisions below upon which this Petition is based, so they are not discussed here. However, this Petition is jointly brought on behalf of all Petitioners referenced by case number in the Second Circuit's decision.

[2] References made herein to the record before the Second Circuit are as follows: the related *Bauer* (05-CV-1693) opening

case then was transferred by the Multi-District Litigation Panel to the Eastern District of New York pursuant to MDL 381.

In October 1999, Respondents moved to dismiss Stephenson's claims, asserting that the claims were barred by a 1984 class action settlement that purported to resolve all present and future claims of Vietnam veterans stemming from their exposure to herbicides in Vietnam. In December 1999, the district court granted Respondents' motion, finding that Stephenson's claims were an impermissible collateral attack on the 1984 settlement. *See Stephenson v. Dow Chem. Co.* 273 F.3d 249, 256, (2d Cir. 2001). Stephenson, uninjured in 1984 and never eligible for compensation from the paid-out settlement fund, appealed to the Second Circuit, which unanimously reversed the dismissal. This Court affirmed the Second Circuit by an equally divided court, allowing Stephenson's claims (and those of other similarly situated plaintiffs who are also petitioners here) to proceed. *Dow Chem. Co. v. Stephenson,* 539 U.S. 111 (2003).

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and reply briefs are designated "AB" and "RB" respectively; the related *Isaacson* (05-CV-1820) opening and reply briefs are designated "AI" and "RI;" the *Stephenson* (05-CV-1760) opening and reply briefs are designated "AS" and "RS;" Appellants' Appendix in the Second Circuit is designated "AA." Petitioners' Appendix herein is designated "App."

A. The Underlying Case Against Respondents

Stephenson's case arises out of the government's purchase of various herbicides for use in Vietnam -- primarily "Agent Purple," an equal blend of 2,4-Dichlorophenoxyacetic acid ("2,4-D") and various esters of 2,4,5-Tricholorophenoxyacetic acid ("2,4,5-T"), and "Agent Orange," an equal blend of 2,4-D and one 2,4,5-T ester (hereinafter collectively referred to as "Agent Orange"). The 2,4,5-T in each of these "Agents" was contaminated by an extremely toxic unwanted byproduct, dioxin (2,3,7,8-Tetrachlorodibenzo-para-dioxin or TCDD).

Certain relevant facts regarding Stephenson's claim are uncontested: 1) during the manufacture of 2,4,5-T, increasing amounts of dioxin were produced in direct relationship to the amount of heat used during the manufacturing process, App. 12a, AB55, AS22, 25; 2) the Respondents knew at the time they were manufacturing 2,4,5-T that dioxin was a byproduct of its manufacture and that it could cause harm to humans exposed to it, App. 12a; 3) the Respondents had unfettered control over their often proprietary manufacturing processes, AB47-56, App. 12a;[3] 4) no

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[3] *See also Hercules Inc. v. United States*, 24 F.3d 188, 197 (Fed. Cir. 1994) ("Put another way, nothing the government did or failed to do had any impact upon Hercules' and Thompson's production of Agent Orange."); *Maxus Energy Corp. v. United States*, 898 F. Supp. 399, 402 (N.D. Tex. 1995), *aff'd* 95 F 3d. 1148 (5th Cir. 1996) ("[D]iamond was responsible for controlling product

contract specified or even mentioned the existence of dioxin in the product being delivered to the U.S. government, AS40, AB33-34; 5) unlike Respondents, the United States government officials involved in the procurement process were not aware of the existence of dioxin in the final product they had contracted for, AS40, AB34, AB36, RS13-14; and 6) unlike Respondents, the United States government did not possess the equipment necessary to test for dioxin contamination of 2,4,5-T. RS28, AA6454-4.[4] Finally, it is this dioxin that Petitioners claim caused the injuries of which they now complain.

Numerous internal documents note the Respondents' extreme concern about the dioxin contaminant:

- "the most toxic chemical they have ever experienced," AA3643;
- "The extraordinary danger of the [TCDD] is not generally known," AA3628; and
- "It is one of the most toxic materials known causing not only skin lesions, but also liver damage," AA5906.

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quality").

[4] By contrast, Respondents regularly tested their products for dioxin contamination. *See, e.g.*, RB37-38, AA6837-38. The government itself did not know that such a test could be performed until 1970. AB37-38, A6449-5, AA6454-4.

In spite of their internal concerns, the manufacturers misinformed the Government about "the domestic safety record of ...these two chemicals, including the manufacturers alleged reports...regarding the **absence of ill effects on their workers**," leading the government to approve Agent Orange as "safe". App. 45a (emphasis added). Although scores of Respondents' workers had for years suffered systemic injuries as a result of their exposure to the dioxin contaminant while manufacturing 2,4,5-T in Respondents' plants, App. 43a-44a, AS29-33, AB 52, this was never reported to government officers involved in 2,4,5-T procurement. App. 44a-45a, AS29-40, AB52-54

Respondents' concern reached its peak in 1965 when Dow held a secret meeting of Respondents to discuss the dangers of the dioxin contamination. No government representatives were invited. Respondent Hercules wrote the following in summarizing the secret meeting with Dow:

> They are aware that their competitors are marketing 2,4,5-T acid which contains alarming amounts of acnegen [dioxin] **and if the government learns of this the whole industry will suffer. They are particularly fearful of a congressional investigation and excessive restrictive legislation**...

AS32, AA5681 (emphasis added) Dow itself wrote:

> As you well know, we had a serious situation in our operating plants because of contamination of 2,4,5-T with impurities, the most active of which is 2,3,7,8-TCDD [dioxin]. This material is exceptionally toxic, it has tremendous potential for producing chloracne and systemic injury. If it is present in the trichlorophenol, it will be carried through to the T Acid and into the esters and hence...public... [I]f this should occur, the whole 2, 4, 5-T industry would be hard hit and I would expect restrictive legislation either barring the material or putting very rigid controls upon it.

AA5679-A5680

B. Summary Judgment in the District Court

Notwithstanding these facts, Respondents filed a motion for summary judgment on November 11, 2003. "Defendants' Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried," AA131-A136, listed four undisputed facts: 1) "Defendants supplied Agent Orange to the United States pursuant to contract"; 2) "The United States approved reasonably precise specifications for Agent Orange" (based upon "prong 1" of this court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988)); 3) "The Agent Orange manufactured by

Defendants conformed to those specifications" (based upon "prong 2" of *Boyle* at 512); and 4) "The supplier warned the United States about the dangers in the use of Agent Orange that were known to the suppliers but not to the United States" (based upon prong 3 of *Boyle* at 512).

On February 9, 2004, the district court agreed that there was no material question as to each of the above asserted "undisputed facts" and on that basis granted summary judgment in favor of Respondents. App. 150a-153a. However, recognizing that Stephenson and other plaintiffs had never been given an opportunity to conduct discovery against Respondents and that all documentation from the *In re Agent Orange Product Liability* proceedings had been transferred to the National Archives and was substantially inaccessible, the district court gave plaintiffs until August 10, 2004, (subsequently extended) to conduct discovery and file a Motion for Reconsideration. App. 17a.

Neither Respondents' summary judgment motion nor the district court's decision addressed any of the cases brought by Petitioners other than the *Isaacson* and *Stephenson* plaintiffs. Nor were any of the cases of these Petitioners consolidated by the District court. Respondents, in fact, did not file summary judgment motions against any of these Petitioners until November 2004.

After Stephenson filed his Motion for

Reconsideration, the district court reaffirmed its summary judgment order, App. 155a-160a, albeit before: 1) Defendants had an opportunity to respond to the motion for reconsideration; 2) any oral argument had taken place; or 3) any Petitioner other than the Stephensons or the Isaacsons had a chance to file an opposition to Respondents' summary judgment motion. On December 2, 2004, the district court abated its decision affirming the summary judgment. AA7004-A7010 On March 2, 2005, the district court dismissed all cases brought by Vietnam veterans that were before it without further analysis. App. 162a-163a.

C. The Second Circuit's *De Novo* Analysis

On February 22, 2008, the Second Circuit affirmed the District Court's decision that summary judgment was warranted. App. 1a-63a. However, in doing so, the court held that two of the four facts that the Respondents claimed and the district court had held were not in dispute did, in fact, present triable issues of fact and were not subject to summary adjudication. Rather than finding that "the United States approved reasonably precise specifications for Agent Orange," the Second Circuit held:

> The defendants do not contest that the government's contractual specifications for Agent Orange **are silent regarding the method of manufacturing** or that

> the government harbored no preference, expressed or otherwise, regarding how the herbicides were to be produced. **Indeed, they admit that they were under no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.**
> ...
> **[There is a] triable issue of fact** as to whether the defendants could have complied with their contractual obligations to the government while using what the plaintiffs contend was a process that would have resulted in a defoliating agent substantially less dangerous to military personnel.

App. 31a, 33a (emphasis added).

And rather than finding that "the suppliers warned the United States about the dangers in the use of Agent Orange that were known to the suppliers but not to the United States," *Boyle* 487 U.S. at 512, the Second Circuit found that:

> **We doubt that the defendants can establish** as a matter of law on the present record ...**that they shared the knowledge of the dangers of which they were aware** with the government

> and that the government had far more knowledge about the dangers of Agent Orange in its planned use. Each is intensely factual and hotly disputed.
> ...
> **We acknowledge that there may well have been some aspects of the dangers of Agent Orange resulting from the trace presence of dioxin that personnel of one or more of the defendants were aware of that members of the military may not have known...**

App. 41a, 48a (emphasis added); *compare* these to App. 142a. Yet, despite finding disputes of fact on these two critical issues, the court affirmed the district court's grant of summary judgment.

In disagreeing with the key findings of the district court, the panel acknowledged that this was **the very first** time that any court had been provided with extensive contrary evidence or any related expert reports[5] on the government contractor issue by any plaintiff exposed to Agent Orange in Vietnam:

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[5] Petitioners produced two uncontested affidavits by Ralph C. Nash, Jr., the nation's foremost expert on government contract law, who testified that the herbicide contracts could not be described as precise or design contracts but rather were standard performance contracts. AA6989-7000; AA10347-10355.

> The Fifth Circuit, relying in large part on our *Agent Orange I* determination, concluded the same. See *Miller v. Diamond Shamrock Co.*,275 F.3d 414, 421 (5th Cir. 2001).[6] But we are required to review the factual record anew as it is presented to us, not as it was presented to a different panel twenty years ago. **And we note**, as we did in *Agent Orange I,* **that we were in 1987 without the benefit of briefing by the parties on this subject**. *Agent Orange I Opt-Out Op.*, 818 F.2d [187, 190 (2d Cir. 1987)]."

App. 60a-61a (Emphasis added).

The Second Circuit further found that Respondents had not told the government that:

- "[they] were concerned about the health effects of dioxin, specifically chloracne

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[6] At the time that *Miller v. Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001), and *Winters v. Diamond Shamrock Co.*, 149 F.3d 387 (5th Cir. 1998), were heard by the Fifth Circuit, all documents and depositions from MDL381 were being stored at the National Archives and were relatively inaccessible. As a result of this or other reasons, Plaintiffs' counsel in *Winters* submitted no evidence in response to defendants' submissions and in *Miller* the only responsive "evidence" submitted was a single affidavit from Admiral Elmo Russell Zumwalt, Jr.

and liver damage, of their workers." A-44a;

- they were aware of "temporary nerve damage (Monsanto) and unspecified 'systemic injury' (Dow)," *id.* at n.21; and

- they knew that dioxin "[v]ery conceivably [could] be a potent carcinogen." *Id.* at n. 22.

In affirming the decision of the district court, the Second Circuit never addressed whether there was "a conflicting, express contractual duty" which made it impossible to both comply with the government contracts and accommodate state law safety concerns. (contrast with *Boyle* at 507, 509).

Furthermore, despite finding that the errant manufacturing processes that used too much heat and produced substantial amounts of dioxin were entirely within the control of Respondents and not specified by any contract, App. 12a, the Second Circuit still held that summary judgment could be granted even though the contractual specifications did not conflict with the state law duty of care. Rather, it held that once the government does any type of safety analysis on a product it receives, no matter how imprecise the specifications are or how ignorant the government is about the nature of the product's defects or potential to cause harm, the subsequent analysis, by itself, "plays the identical role in the defense as listing

specific ingredients, processes, or the like" at the time the contract was being entered into. App. 37a-38a; *see also* App. 35a-36a.

Finally, in contrast to this Court's holding in *Boyle* at 512, the Second Circuit also found that it was not essential that the government be informed of the safety and health dangers of a product which are known by a product's manufacturers. Going back to what it described without citation as its pre-*Boyle* precedent,[7] the panel held as a matter of law that summary judgment was warranted because in its determination the known but undisclosed health risks were not "substantial enough to influence the military decision" to purchase Agent Orange. App. 41a. Thus, instead of applying this Court's objective test -- whether information on hazards and safety known to the manufacturers was disclosed to the government -- the panel substituted its own subjective *ex post facto* test, requiring a reviewing court to determine as a matter of law what the government might have done if the hidden hazards had been disclosed to its procurement officers. App. 41a-43a.

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[7] Applying the same pre-*Boyle* precedent cited by the panel, Judge Pratt had 25 years earlier **denied summary judgment**, on the very basis the panel granted it: "One question of fact is whether this knowledge, if disclosed to the government, might have made a difference in the government's decision-making process." *In re "Agent Orange" Prod. Liab. Litig.*, 565 F.Supp.1263, 1270 (E.D.N.Y. 1983).

REASONS FOR GRANTING THE PETITION

I. OVER THE PAST TWENTY YEARS SIGNIFICANT CONFLICTS HAVE DEVELOPED AMONG THE CIRCUITS OVER THE APPLICATION OF THE GOVERNMENT CONTRACTOR DEFENSE; THESE HAVE BEEN SUBSTANTIALLY EXACERBATED BY THE DECISION BELOW.

In *Boyle* at 512, this Court set forth a three-pronged test that a government contractor must satisfy to be immune from liability for the design of defective products. To obtain summary judgment under this test, a contracting defendant must show, as a matter of law, that: 1) the United States approved reasonably precise specifications; 2) the product 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. This Court grounded the defense on the "discretionary function exception" to the Federal Tort Claims Act, which immunizes the government for its discretionary decisions about military procurement. 28 USC § 2680(a). At the same time, this Court expressly refused to grant categorical immunity to government contractors, even in wartime. *Boyle* at 510. The limited defense was only intended to insulate government manufacturers for the design of their products, *id.* at 512, when the products could not simultaneously comply with the government's

contracting needs and state health and safety concerns, *i.e.* when a state's duty-of-care standard is "precisely contrary to the duty" required of the contractor pursuant to a government contract. *Id.* at 509.

Over the past twenty years, the lower courts have struggled with how correctly to interpret this Court's decision in *Boyle*.[8] Conflicts have arisen over: 1) the extent to which the defense may be applied to "manufacturing defects" as opposed to "design" defects, and how those terms are defined; 2) what constitutes "reasonably precise specifications;" and now, with this decision, 3) the type of safety and health information, otherwise unknown to the government, which should be disclosed to the government's contracting officers. Given the burgeoning nature of government and particularly military procurement, there is no better time for this Court to resolve these conflicts. Indeed, the Second Circuit's decision presents an ideal vehicle for doing so, because it

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[8] See Watts, S., *The Government Contractor Defense: an Analysis Based on the Current Circuit Split Regarding the Scope of the Defense,* 40 Wm. & Mary L. Rev. 687 (1999) (Describing a circuit split between "courts that have interpreted *Boyle* narrowly, limited it to the facts presented, and issued opinions that conflict with Boyle's rationale" and "courts that have expanded Boyle, [who] have had to defend the merits of their decisions about a federal interest that has not been enacted or codified". *Id.* at 716. This commentator concluded that this split has been "especially pronounced given that, as federal common law, the decision is the only articulation of the federal government contractor defense." *Id.* at 712.)

conflicts markedly with the decisions and analysis of other circuits as to when and on what basis a contractor should be entitled to summary adjudication.

A. There Is a Conflict Over the Application of the Defense to Defects Arising Out of the "Manufacturing" Process Rather Than From a Product's Contractually Specified "Design."

In *Boyle, supra.*, this court looked at "when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect." *Boyle* at 502. This Court concluded that the product "design ultimately selected may well reflect a significant policy judgment by government officials." *Boyle* at 513. On this basis, this Court held that under certain specific circumstances it was unreasonable for government contractors to be held responsible under state law for government-caused design problems in their products. However, this Court never addressed defects which occur as a result of manufacturing processes.

Petitioners' main contention in these lawsuits is that there were defects in Respondents' manufacturing processes, and that defective manufacturing caused the creation of extremely large amounts of the unwanted, dangerous dioxin contaminant. Supported by the uncontested affidavit of Dr. Harry Ensley, AA3953-A3966, who had written the chapter on 2,4,5-T production in the EPA's Book, Dioxins. Vol. III.

Assessment of Dioxin-Forming Chemical Processes, Petitioners argued that Respondents had the ability to control the temperature at which they cooked their 2,4,5-T. If they had used lower temperatures, they would have produced 2,4,5-T without any detectable dioxin. A-12a ("The amount of dioxin contained in a particular batch of Agent Orange varied depending on the production method used by its manufacturer.")[9] The government procurement officers, unaware of even the existence of dioxin, never involved themselves in the proprietary production processes in any way. Petitioners contend that the defect was a manufacturing one, because Respondents were not constrained by any design restrictions for manufacturing their 2,4,5-T and they could have manufactured it according to government specifications while controlling their cooking temperatures. App. 12a.

Since this Court in Boyle only described "design" defects as being within the scope of the government contractor defense, the courts of appeals have struggled with when (if ever) a "manufacturing" defect may be considered a "design" defect. App. 58a n.15. Here, the Second Circuit determined that the production of the dioxin contaminant during the manufacturing process was a "design defect" by relying

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[9] The lower the temperature used, the less dioxin contaminant created with no detectable contaminant below 155 degrees. However, when higher production temperatures were used, 2,4,5-T would be more quickly produced and manufacturing profits would increase. Since different production runs even by the same manufacturer might occur at different temperatures, the dioxin produced by each manufacturer would vary between runs.

on language from the Eleventh Circuit's decision in *Harduvel v. Gen. Dynamics Corp.*, 878 F. 2d 1311, 1317 (11th Cir 1989). *Harduvel* treats any defect occurring throughout an entire line of products as a "design defect" and limits the definition of "manufacturing defect" to "aberrational defects" that occur solely when the process used is "somehow erroneously applied." *Id.*

Other Circuits have taken issue with this distinction. In *Mitchell v. Lone Star Ammunition Inc.*, 913 F2d 242, 248 n. 10 (5th Cir. 1990), the Fifth Circuit stated:

> This Court, however, believes the Eleventh Circuit's reasoning that manufacturing defects consist only of aberrational defects is unfortunate. 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. Indeed, the defect in the present case appeared throughout the same Lot of mortar shells as the shell that killed Marines Salazar and Hunt. Defects of this nature are clearly a result of the manufacturing process, not the design process. **In such situations, no federal interest would support the extension of the government contractor defense. In this Court's opinion, the relevant**

> **inquiry is the degree of the manufacturer's responsibility for the defect in question.**

Id. at 248 n.10 (emphasis added).[10]

While the Fifth Circuit later returned to a discussion of *Harduvel, supra.* in deciding *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794 (5th Cir. 1993), there is a definite lack of clarity as to when problems created during the "manufacturing" process may be described as defects in the "design" which would qualify for the government contractor defense. The result is that some circuits in addition to the Eleventh have held that the defense can be applied to manufacturing defects in certain situations. *See, e.g.*, *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 749 (9th Cir. 1997). However, circuits other than the Second Circuit that have considered the question have also found that the government must have a detailed understanding of the nature of the defect.[11]

The Third Circuit has raised the more fundamental question of whether the government

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[10] Although the Fifth Circuit later granted summary judgment for these same Respondents in an Agent Orange-related case, it did so without the benefit of the full record provided here. *See supra.* at n. 6.

[11] *See* Levin, A. *The Safety Act of 2003: Implications for the Government Contractor Defense*, 34 Pub. Cont. L.J. 175 (2004) (recognizing and discussing this split in the circuits).

contractor defense should ever be applied to a manufacturing defect at all. Thus, in *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir. 1993) the Third Circuit stated that "the government contractor defense, by definition, applies only to design defects, and not to manufacturing defects," because "[t]he primary purpose behind the formulation of the [defense] was to 'prevent the contractor from being held liable when the government is actually at fault' ... [T]he protective shield in favor of the contractor collapses when the actions of the government contractor... produce the damaging defect." *Id.* at 1132 (emphasis added).

Here, the Second Circuit has stated the opposite, eviscerating any reasonable distinction between "design" and "manufacturing" defects. Conflicting with every other circuit's interpretation, the Second Circuit broadened the government contractor defense to include manufacturing defects even where the "government's contractual specifications" "are silent regarding the method of manufacturing," "the government harbored no preference" regarding the method of production, App. 31a, and government procurement agents were at all times unaware of the defect, the creation of dioxin, which resulted from Respondents' chosen method of manufacture.

B. The Circuit Courts Are In Conflict Over the Meaning and Intent of this Court's Requirement That a Contract Have "Reasonably Precise Specifications."

In *Boyle* at 512, this Court explained why the government contractor defense requires the approval of "reasonably precise specifications":

> The first two of these conditions assure that the suit is within the area where the policy of the "discretionary function" would be frustrated – *i.e.*, they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself.

In *Snell*, *supra*, the Ninth Circuit decided whether summary judgment was properly granted where the defect in question was the design and placement of a helicopter drive shaft. Although the specifications for the helicopter itself were, as a whole, extremely detailed, the specifications for the drive shaft were general and left great discretion to the contractor. The Ninth Circuit reversed the granting of summary judgment, stating that "when only minimal or very general requirements are set for the contractor by the United States [the military contractor defense] is inapplicable," *Id.* at 748, quoting *McKay v. Rockwell International Corporation*, 704 F.2d 444 at 450 (9th Cir. 1983).

Snell articulated one of two general principles that have been followed by every circuit court other than the Second Circuit in deciding whether "the design feature in question was considered by a Government officer, and not merely by the contractor itself." *Boyle* at 512. These courts have required that there be either exhaustively detailed specifications or a "continuous back and forth" between the contractor and the government to demonstrate that the government exercised discretion over the specifications that led to the injury. For instance, in *Kleemann v. McDonnell Douglas Corp.* 890 F.2d 698 (4th Cir. 1989), the court only granted summary judgment because there was a "continuous exchange" between the government and the contractor and the government allowed no deviation without express military approval. Similarly, in *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir.), *cert.* denied, 493 U.S. 935 (1989), summary judgment was denied because there was no evidence to indicate that the government did anything other than passively accept the contractor's independently developed design choices. *See* 865 F.2d at 1480 ("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").[12]

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[12] The Fifth Circuit granted summary judgment in *In re Air Disaster v. Lockheed Corp.*, 81 F.3d 570, 575 (5th Cir. 1996), but only because "the Government did not leave "the critical design decisions to the private contractor," but worked closely with the defendants every step of the way." Similarly, the Sixth Circuit granted summary judgment in *Tate v. Boeing Helicopters,* 55 F.3d

The Second Circuit's rule is in conflict with each of these decisions. According to the Second Circuit, neither exhaustively detailed specifications nor a "continuous back and forth" is necessary. Summary judgment may be granted despite the finding that the design feature in question-- the creation during the manufacturing process of high levels of toxic dioxin-- is never considered by any contracting government officer. Instead, the Second Circuit has held that when the government reorders a product after any testing has demonstrated "no health hazard," App. 36a, that retroactively constitutes approval of every possible "design feature in question." App. 34a. This subsequent testing obviates the need to determine whether "the design feature in question was considered by a Government officer, and not merely by the contractor itself" or whether the government "made a discretionary determination about the material it obtained that relates to the defective design feature at issue." App. 25a. According to the Second Circuit, this is true even when at the time of the testing in question, the existence, creation and mechanism of creation of the defect all still remained unknown to any government officers involved in that testing or the product's procurement.

1150, 1154-1156 (6th Cir. 1995), holding that the Army closely reviewed the design feature in question before approving it. *See* also *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3rd Cir. 1990), affirming summary judgment where the military submitted detailed design and performance specifications and military personnel reviewed and approved every element of the proposed design and every proposed design change.

Thus, unlike *Snell,* where the Ninth Circuit required that the specifications at the time of the contract must be precise rather than "minimal or very general,"or the decisions in the other circuits that require either that the government specifically review and approve sufficiently detailed contract specifications that contain the design defect in question or that there be a continuous "back and forth" regarding the design specifics which have led to the defect in question, the Second Circuit has held that "listing specific ingredients, processes, or the like" in contracts is entirely unnecessary. App. 38a.

Indeed, under the Second Circuit's formulation, the contractor can benefit from the defense even when it denies the government the opportunity to evaluate the costs and benefits of a product up-front. The mere fact of subsequent government testing in some general relationship to the "defect"[13] and repurchase of the product is, according to the Second Circuit, sufficient to retroactively satisfy *Boyle's* precise specification requirement – even if that repurchase decision is only made because the government has already committed itself to a certain system and purchased and deployed

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[13] The Second Circuit never explained what "defect" the government supposedly found and approved. App. 29a. The testing they referred to neither found dioxin nor looked for the specific endpoints feared as a result of dioxin exposure. Essentially, the panel stated that the government approved the product precisely because **it did not find a defect**. App. 35a-36a. Even under the Second Circuit's view of the government contractor summary judgment requirements, the government should not be held to ratify a defect which it **failed** to discover.

millions of dollars worth of the product.

This reliance on subsequent testing not only conflicts implicitly with the cases cited above, but also *explicitly* with the Fifth Circuit's decision in *Mitchell*, *supra*. In *Mitchell*, the Government approved an "assembly and inspection process [that] could not prevent the distribution of faulty mortar shells and the Government would not permit [the contractors] to institute a more effective procedure." 913 F.2d at 246. But rather than use the government inspection to excuse the contractor's failure to provide an appropriately safe product in the first place, the Fifth Circuit stated that "[t]he very fact that the Government approved an inspection procedure, however ineffective, evidences the Government's intolerance for these types of faulty conditions." *Mitchell*, supra, at 248.(emphasis added).

The Second Circuit below drew the opposite inference, and does so as a matter of law. The toxicity testing done by the government was designed to determine the amount or dose of 2,4,5-T required to kill 50% of animals tested (LD50). App. 35a-36a; AA4626; AA4772-73. The government did not know of dioxin's presence, and did not even possess the technology to test for the existence of dioxin. AB37-38; AA6454-2. Indeed, the government never tested the herbicide for any of the long term systemic effects known by Defendants to be caused by dioxin, such as neurological problems, liver disease and other systemic effects, because it was unaware of those potential

adverse health endpoints. Nevertheless, the Second Circuit determined that *any* safety and health testing, no matter how imprecise or ineffective, is sufficient to satisfy the requirement of reasonably precise specifications, even for an otherwise totally imprecise contract.

C. The Conflict Regarding the Extent to Which it is Necessary to Inform the Government of Known Risks is Significant.

In *Boyle* at 512, this Court required that: "the supplier warn[] the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." As this Court has stated, this third prong of Boyle was written to insure that the manufacturer would not "withhold knowledge of risks." *Id.* at 512. "[I]n 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." *Id.* at 512.

In *Carley*, *supra*, the district court had found that the government approved reasonably precise specifications for a vehicle which had a center of gravity 43 inches above the ground. This was the "design feature in question" which was claimed to be defective. The contractor claimed that the government was aware of the rollover potential of vehicles with a

high center of gravity based on numerous crash-worthiness tests that the government had conducted. Nevertheless, the Third Circuit reversed the grant of summary judgment, stating it had "consistently refused to hold that the government contractor defense is established as a matter of law absent a substantial showing that the manufacturer informed the government of known risks in the use of the product." *Id.* at 1127. The court continued:

> The record in this case is devoid of communications between Wheeled Coach 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 roll over. The government ordered an ambulance with a center of gravity up to 43 inches above the ground and inspected the finished vehicle. **These facts alone do not establish, as a matter of law, that the government knew as much as Wheeled Coach about the risks associated with the ambulance's center of gravity.**

Id. (Emphasis added)

As did the Third Circuit, the court below also found that it could not determine as a matter of law

"that the government knew as much as" Respondents about the "risks" of Respondents' product:

> **We doubt that the defendants can establish** as a matter of law on the present record ...**that they shared the knowledge of the dangers of which they were aware** with the government and that the government had far more knowledge about the dangers of Agent Orange in its planned use. Each is intensely factual and hotly disputed.

App. 41a (emphasis added).

Yet, unlike the Third Circuit, the Second Circuit held that this finding was just the beginning of the requisite enquiry. App. 41a-43a. In contrast with the Third Circuit, the Second Circuit added a second requirement that a reviewing court must determine, as a matter of law, whether the withheld information was "substantial enough to influence the military decision." Admitting that health and safety information was withheld, including information about liver damage to workers, systemic injury, and conceivable carcinogenicity, *supra.* at 16, the Second Circuit still held that as a matter of law – and without citation to any supporting testimony – knowledge of these hazards would not have affected the government's

purchasing decision.[14]

The Second Circuit's two-pronged failure to disclose analysis has never been employed by any other circuit court that has considered the question. *See e.g. Ramey v. Martin-Baker Aircraft Co. Ltd.*, 874 F.2d 946, 951 (4th Cir. 1989) (granting summary judgment on the government contractor defense only because the Navy had "full knowledge of the danger"); *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir. 1991) (granting summary judgment only because "the danger posed ... was actually known to the government"); *Harduvel v. General Dynamics Corp.* 878 F. 2d 1311 (11th Cir. 1989) (granting summary judgment because Defendant produced uncontested evidence that its engineers withheld no information on chafing or other problems from the Air Force).

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[14] The Second Circuit rested its decision on matters neither alleged in the summary judgment motion to the district court nor briefed to the district or circuit court. Even though the Respondents never made this argument in the lower court, and the lower court made no findings about it, there is ample evidence that this lack of disclosure would have been highly material to the government's decision-making process. When first informed of dioxin *in 1970*, Dr. Robert Darrow, one of those responsible for recommending 2,4,5-T stated that "the feeling was there that it should have been disclosed before." AA6064-606; AB17-18; *see also* RS84, AA654-2.

II. THE SECOND CIRCUIT'S RADICAL EXPANSION OF THE GOVERNMENT CONTRACTOR DEFENSE CAN ONLY ENDANGER THE MEN AND WOMEN WHO RELY ON THE WORK OF GOVERNMENT CONTRACTORS.

A. The Second Circuit's Decision Creates a Dangerous Incentive For Manufacturers to Provide Only Vague Specifications During the Procurement Process, Thereby Immunizing Contractors Without Any Concomitant Protection of Federal Interests.

The Second Circuit's decision is not simply incorrect. It will induce government contractors to hide critical safety and health information from the government during the specification process.

By ignoring this Court's finding that precise specifications in the original contract are necessary to demonstrate that a government officer has assessed all aspects of a product at the beginning of the process, the Second Circuit applies an after-the-fact test to an already contracted-for product. This ignores the fact that the government's burden is much greater if it has to recall a product already in use than if it must cancel a product in the initial procurement phase. This effectively allows the contractor to "bait" the government with vague specifications that are

"switched" to precise specifications for purposes of the government contractor defense simply because the government, having already deployed the equipment, is forced to make the type of after the fact cost-benefit analysis it would not have had to make in the design phase.

Additionally, because the military tests virtually every product it specially orders from the private sector, *see e.g.* F.A.R.§9.3 (First Article Testing and Approval), contractors, aware of the Second Circuit's formulation, will be encouraged to sit back and wait to see what happens during that testing process. Meanwhile, absent precise specifications in the first instance, the government is placed in the untenable position of guessing what to test for. Then, when the government fails to detect a risk that it has not been informed of and is not aware exists, the Second Circuit will still grant contractors blanket immunity simply because the government's ill-informed testing regime mistakenly accepted the product as safe.

To place such an onus on the government is not in keeping with the underlying purpose for which this court developed the government contractor defense. The defense depends upon forthrightness of contractors in the first instance. Invariably, contractors will have greater technical expertise than government procurement officers – often the primary reason contracts are awarded in the first place. Unless the government is made aware of design decisions in the first instance, it is not in position to prevent death or

injury.[15] Retroactive immunity as a result of subsequent testing defeats the salutary intent behind this Court's first *Boyle* prong.

B. By Initiating a Subjective Test That Permits Contractors to Knowingly Hide Health and Safety Risks, the Second Circuit Creates a Dangerous Incentive For Manufacturers to Hide Known Risks In Order to Achieve Sales At the Cost of Health and Safety While Increasing the Government's Costs.

The Second Circuit's decision not only encourages contractors to write vague, imprecise contracts, but it also encourages them to hide relevant health and safety data from the government. There is no beneficial purpose that could conceivably be served by permitting government contractors to hide relevant safety data from the government until years later in the hope that a court may, as a matter of law,

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[15] *See* Stewart, E., *The Government Made Me Do It!: Boyle v. United Technologies Extended the Government Contractor Defense Too Far?* 57 J. Air L. & Com. 981 (1992); *see also* Severson, M., *Defense Industry-1, Injured Parties-0,* 21 Pub. Cont. L.J. 572 (1992); Eades, R., *Attempts to Federalize and Codify Tort Law*, 36 Tort & Ins. L.J. 1 (2000) ("No one would say with a straight face that military contractors like McDonnell Douglas, Boeing, and General Dynamics have knowledge and expertise inferior to that of the government procurement and design officials with whom they contract.").

determine retrospectively that the data would have made no difference to government officers engaging in the procurement decision. This dangerous precedent takes safety decisions away from contracting officials and places immunity from liability ahead of accident and injury prevention. By the time a court evaluates whether or not the government would have found the hidden safety and health information determinative of its purchasing decision, injuries will necessarily already have occurred. [16]

The absence of full disclosure can also prove costly to the government. The district court, App. 42a-43a, and the Second Circuit, App. 142a-143a, concern themselves with the added costs of government procurement if the *Boyle* guidelines are strictly followed. However, the "Agent Orange" saga clearly demonstrates the cost to the government when contracting officers are kept in the dark by manufacturers. Over two million gallons of Agent Orange, purchased from the Defendants at a cost to taxpayers of at least eight million dollars in the currency of that era, were not used to protect soldiers, but rather were taken out to sea and incinerated because of high dioxin content. AA7558-7559. The subsequent costs of disposal added eight million dollars to the government's tab. Of course, this is dwarfed by the hundreds of millions of dollars since spent by the

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[16] To make matters worse, the Second Circuit did not base its ruling on even a single government official's testimony stating that the information hidden would not have mattered to the government. App. 47a-48a.

government to compensate Vietnam Veterans who have contracted a variety of deadly diseases related to their exposure. Even without including the human costs resulting from these diseases, the dollar costs to the taxpayer of giving Respondents and other contractors free rein over their production methods dwarfs any savings that might have been realized by immunizing them from liability. Imposing liability on these contractors for failing to exercise their discretion to accommodate safety will not cost the taxpayers – it will save them money, and, more importantly, in the future may save many lives as well.

For these very reasons, the United States government itself argued strenuously for complete disclosure requirements in its *amicus curiae* brief to this court in Boyle. Seeking to protect both the integrity of the military procurement process and the well-being of service members, the government wrote:

> While the government is a sophisticated and competent participant in the process of weapons design and manufacture, **it is not necessarily aware of every risk about which its contractors know.** The relationship between the military and its contractors is improved on the whole by **a requirement that ensures that the information flowing from contractors to the military is as full and frank as is reasonably possible and that all risks and dangers known**

> **to contractors have been disclosed.** The military's interest in protecting the well-being of service members is advanced by such a requirement.

Brief for the United States as Amicus Curiae Supporting Affirmance at 29-30, *Boyle v. United Technologies Corp.*, (No. 86-492) (U.S. filed 1987) (Emphasis added)

As the government's brief in *Boyle* shows, the Second Circuit's concerns about the costs to the government of an insufficiently broad government contractor defense are misplaced. App. 42a-43a. As the government argued in *Boyle*, the military's interest in protecting the well-being of our service members is advanced by a requirement that all risks and dangers known to a contractor are disclosed. This is not a minor quesiton. The 2007 defense budget allocated over $84 Billion for procurement.[17] It is for the government in the first instance, not subsequent courts, to determine to what extent full disclosure would affect its purchasing decisions. To hold otherwise, stands *Boyle's* goal of a free and full flow of information on its head and rewards contractors for withholding safety and health information from the government. If there

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[17] Office of the Under Secretary of Defense (Comptroller),"Procurement Programs (P-1)." Department of Defense Budget. Fiscal Year 2007, available at http://www.defenselink.mil/comptroller/defbudget/fy2007/fy2007_p1.pdf at Page 4.

is any doubt whatsoever about where the interest of the United States lie, this Court should request the views of the Solicitor General on this question.

C. The Second Circuit Ignores the Interests of the States in Protecting the Health and Safety of its Citizens When it Jettisons the Need to Even Review Whether a Conflict Exists Between Federal Common Law and State Law.

This Court in *Boyle* at 511-512 recognized that our federal system requires a careful balance between federal procurement and laws designed to protect the health and safety of the residents of the various states. On this basis, this Court required that summary judgment pursuant to the government contractor defense be based upon a "significant conflict" between contract specifications and state law duties. *Id.* at 508-509.

Yet, both the district court and the Second Circuit jettisoned any need for such an analysis. In their formulation of the government contractor defense, they gave primacy to military procurement divorced from any concern of whether the terms of the government contract actually conflicted with the states' needs to protect the health and safety of their

residents.[18] Indeed the district court "did not rely on a contractual duty to demonstrate the required conflict between federal interests and state law." App. 60a Neither did the Second Circuit. App. 38a. (*Boyle* "did not hold that a conflicting, express contractual duty was required for the contractor defense to preempt state law.") Instead, the Second Circuit removed state law interests from the equation:

> The government's 'uniquely federal interest,' ... 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. *See* Agent Orange I Opt-Out Op., 818 F.2d at 191 ("Civilian judges and juries are not competent to weigh the cost of injuries caused by a product against the cost of avoidance in lost military efficiency. Such judgments involve the nation's geopolitical goals and choices among particular tactics....")

App. 38a-39a.

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[18] One commentator has noted that there are plenty of incentives for companies to manufacture products for the government, even with potential liability: "To say that government contractors will be deterred from engaging in the government contract business and from participating in the design process fails to recognize the cash cow that is the United States Department of Defense." Davis, M., *The Supreme Court and Our Culture of Irresponsibility*, 31 Wake Forest L. Rev. 1075, 1096 (1996).

Essentially, the Second Circuit, in conflict with all of the other circuits, has found that the field should be preempted whenever a government contract involves military uses, which is precisely what *Boyle* sought to avoid. The presumption by the Second Circuit that this country's priority is to immunize government contractors even when there is no conflict between the performance of a government contract and state law duties is profoundly important to the hundreds of thousands of men and women who serve in the U.S. armed forces. It is too easy to forget the very real costs of dangerous products that our civil justice system is designed to remedy.[19]

In the case below, Respondents could have made their products much safer simply by cooking their products at a lower temperature. They chose not to do so. But no government contract prevented them from doing so. Moreover, there is absolutely no difference between the state lawsuits brought by veterans exposed in Vietnam and the numerous lawsuits brought against these same Respondents when they exposed Americans domestically to the exact same dioxin-contaminated 2,4,5-T. Shouldn't our veterans be able to rely on the safety of products supplied by

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[19] Beh, H., *The Government Contractor Defense: When Do Governmental Interests Justify Excusing a Manufacturer's Liability for Defective Products?* 28 Seton Hall L. Rev. 430, 446 (1997)("In short, tort law has always been imperfect in its allocations among tortfeasors; however, it remains superior to leaving the risk to the injured victim.").

government contractors just as much as those not serving our country?

With ever more sophisticated equipment needed by the government, the government must be able to rely on its contractors to disclose the risks of their products in order to avoid serious injury, illness, or even death to government personnel. Although the Second Circuit purported to base its dismissal of this case on national security concerns, App. 48a-49a, immunizing the Respondents for the spraying of toxic chemicals on thousands of servicemen that has resulted in cancer and other chronic illnesses among our Vietnam veterans does not further the national security of this country, nor does it strengthen our national defense. Instead, it does precisely what *Boyle* sought not to do: grant blanket immunity to contractors simply because they are providing materials to the Defense Department. If a manufacturer is not required to disclose that its product is contaminated with one of the most toxic materials known to man, what undisclosed risk would be sufficient to create a jury question? Vietnam veterans who suffer from crippling and lethal diseases as a result of their service to this nation deserve better from the constitutional system they fought to protect.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

GERSON H. SMOGER
Counsel of Record
SMOGER & ASSOCIATES, P.C.
3175 Monterey Blvd., Suite 3
Oakland, CA 94602
(510) 531-4529

MARK R. CUKER
MICHAEL J. QUIRK
WILLIAMS CUKER BEREZOFSKY
1617 J.F.K. Blvd., Suite 800
Philadelphia, PA 19103
(215) 557-0099

Counsel for Petitioners

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