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

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

INTRODUCTION

For forty years, the United States government has lived with the "toxic" legacy of "Agent Orange." This legacy has led people throughout the world to believe that our government was callous in its self-interest – willingly poisoning both the Vietnamese population and our own soldiers. Petitioners' review of the evidence, including hundreds of thousands of pages of documents and citations to over 121 depositions, reveals that **nothing could be further from the truth**. Unlike the callous officials Respondents and others portray, our government and military charged with protecting our troops were unaware of the dioxin contamination and at all times desired an herbicide that would not even harm animals, much less humans. *See, e.g.,* AS43; AA6800-18, 6068; RS17.[1] This starkly contrasts with the mythology that developed first when the Second Circuit initially decided these issues absent any briefing by plaintiffs, then when the Fifth Circuit confronted them twice in the absence of any depositions or documents produced by plaintiffs, and finally when the Federal Circuit relied on these courts' legal conclusions that were based on records bereft of disputed facts. *See* Pet. 12-13.

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[1] References made are to: the Second Circuit Appellants' Appendix, designated "AA"; the *Stephenson* (05-cv-1760) opening and reply briefs, designated "AS" and "RS"; and the related *Bauer* (05-cv-1693) opening and reply, designated "AB" and "RB."

The factual matters that the Brief in Opposition discusses at length are diversions from the key facts that remain undisputed: The government did not prescribe the manufacturing method used by Respondents, which was solely responsible for the harmful presence of dioxin; nor did it know that use of that manufacturing led to dioxin contamination; and Respondents never shared the information in their sole possession about health risks attributable to dioxin.

In light of these undisputed facts, and in light of the fact that it has been over 20 years since this Court decided *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the direct conflict between the decision below and those of other circuits presents a perfect opportunity for this Court to clarify the critical *and purely legal* issues raised herein regarding the application of the government contractor defense.

I. Response to Reiterated "Facts" From Respondents' Summary Judgment Motion

Much of Respondents' brief argues facts that never appear in the Second Circuit's decision. These should not divert the Court from the inescapable fact that dioxin was present in Agent Purple/Orange only because Respondents used proprietary, defective manufacturing processes that dangerously contaminated 2,4,5-T with dioxin. Nevertheless, due to the legal record that developed in *other* cases, Petitioners address many of these facts below.

2,4,5-T was not chosen for use in Vietnam because it was a newly discovered, particularly potent chemical, but rather because every year 50 million tons of 2,4,5-T were being sprayed commercially, and purportedly safely in the U.S. AS44; AB18; RS43; RS66-71. As the official Air Force History of Operation Ranch Hand stated: "None of the herbicides . . . were of a new or experimental nature." RS62-63; *see also* AB15-18.[2]

At all times, those involved in selecting and contracting for the herbicides believed they were choosing the safest possible product to accomplish the goal of clearing dense foliage. AS42-43. Not a single person among more than 100 government personnel deposed ever testified to knowing that 2,4,5-T was contaminated with dioxin when it was sold to the government. AS40-42. Nor has a single document ever been produced stating that anyone in the

[2] Opp. 4-5 are erroneous. 2,4,5-T and 2,4-D had been sold separately or together for almost two decades. AB11-21. They killed different plants, so they were frequently used in combination to defoliate places such as railroad rights-of-way. Respondents' employees testified that the specifications for 2,4,5-T were the same whether the use was commercial or military. RS27; AB21-22. Dow even held a patent on Agent Purple. AB19-21; RS65-RS66. Although Respondents argue that Agent Purple/Orange were 100% herbicide, the chemical at issue, 2,4,5-T, constituted only 50% of these "Agents." Since 2,4,5-T was invariably sold commercially in stand-alone concentrations of 55% or more, commercial 2,4,5-T had a greater concentration of 2,4,5-T, and hence dioxin, than the 50% in the Agent Purple/Orange mixture. RS67.

government knew that the 2,4,5-T shipped to the government was contaminated with dioxin. RS13-14. Indeed, the government did not even have the means to test for dioxin contamination in 2,4,5-T. RS28.

Respondents, on the other hand, secretly tested their products for dioxin and hid its extreme toxicity from the military. AB37-38, 47-56; Pet. 7-8, *see also* AA7664. Their briefing does not claim that even one of their 76 deposed employees testified that he told the army about the dioxin contamination. RB9; RS20-22. Instead, they ignore almost all of Petitioners' briefing and evidence (Pet. 6-7, 43-44a; AS29-33; AB52), and attempt to minimize their own knowledge by pointing to an ostensibly "isolated employee who has speculated about possible dangers." Opp. 29 n.10. These so-called "isolated" *employees* were Dr. Rowe, Dow Chemical's head of toxicology, AS29-32, and Dr. Kelly, Monsanto's chief of medicine. AS32-33, 36-37; AA7675.[3]

Notwithstanding this, Respondents seek to indict PSAC and the Edgewood Arsenal task force[4] for their

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[3] Respondents also misrepresent today's medical understanding of the injuries caused by exposure to dioxin. Instead of telling this Court that the NAS/IOM has found that numerous cancers have been related to exposure to dioxin-contaminated 2,4,5-T; RB19-23, they quote a **twenty year old** Second Circuit opinion to say: "Even today, . . . no . . . evidence that Agent Orange was hazardous to human health." Opp. 2.

[4] Respondents do not dispute that none of those involved in the selection of the herbicides, the procurement of contracts to purchase them, or the inspection process were aware that Respondents' 2,4,5-T was contaminated with dioxin. AS28-43;

(Continued on following page)

supposed willingness to use 2,4,5-T despite alleged knowledge of health risks. *See* Opp. 6-7 ("a significant fact" that the Edgewood task force "knew it had caused chloracne and liver problems in production workers."). This is patently false – Respondents themselves misrepresented the health effects to both entities: "Major manufacturers have certified that none of the workmen in their factories have shown any ill effects." AS44; *see* Pet 45a.[5]

Respondents even attempt to pass the buck to President Kennedy, referencing supposed orders for toxicity testing, Opp. 6, when they know that Cyrus Vance, Paul Warnke and Secretary Robert McNamara himself testified that no such orders ever came from the President. RS16-17. In fact, when Secretary McNamara testified as to what he would have done if Respondents' secrets had been disclosed to him, he pointedly disagreed with the conclusion of the court below:

RS1,17-20, 38-41. Instead, they allege that more attenuated governmental bodies had such awareness – even though fourteen separate members of the Edgewood task force testified they had no such knowledge, AS40-41; RS39-40, and PSAC's technical assistant from 1958-1969, Spurgeon Keeny, testified that dioxin in herbicides was never discussed at any meeting. RS48.

[5] *See*, *e.g.*, AA3396-97 (letter from Dow's Lynne to General Delmore, chief of Edgewood Arsenal: "We have been manufacturing 2, 4-D and 2, 4, 5-T for over 10 years. To the best of our knowledge, none of the workmen in these factories have shown any ill effects as a result of working with these chemicals" – despite Dow and other manufacturers having such knowledge for two decades. AS28-40).

Q: What would you have done?

A: I certainly would have pursued the extent of the potential adverse affects on human beings.

Q: And no such knowledge came to your attention while you were Secretary of Defense?

A: I have no recollection of it ever coming to my attention.

AA6139.

II. Legal Argument

A. Certiorari Should Be Granted to Resolve the Circuit Split Exacerbated by the Decision Below, Effectively Applying the Government Contractor Defense to Claims of Shoddy Workmanship.

The Second Circuit found, Pet. 32-33a, that the toxic contaminant dioxin was detectable in Respondents' Agent Purple/Orange end product only because the manufacturers used temperatures above 165°. This was substantially higher than those used by the German manufacturer, Boehringer, and higher than Respondents knew to be safe. AS24-25; AB44-56. There also is no dispute that the method of manufacturing, including the temperatures chosen, were not prescribed by any government specifications. Having so found, Pet. 31a, the Second Circuit's holding on summary judgment as a matter of law effectively allows the government contractor defense to

immunize shoddy workmanship, starkly contrasting with the law developed by other circuits.

Respondents contend this split is one of semantics over whether a product-wide defect that arises during manufacturing is deemed a "manufacturing" or "design" defect. Opp. 21 (discussing *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 246-48 (5th Cir. 1990), and *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1317-21 (11th Cir. 1989)). But they agree 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." Opp. 21 (citing *Mitchell*, 913 F.2d at 247 n.10; *Harduvel*, 878 F.2d at 1317) (emphasis added). Respondents thus either admit that the Second Circuit's finding was erroneous or that there is a clear conflict between the Second Circuit's analysis of "shoddy workmanship" and that of other circuits.

In *Bailey v. McDonald Douglas Corp.*, 989 F.2d 794 (5th Cir. 1993), the Fifth Circuit reversed the trial court's grant of summary judgment precisely because the trial court had erroneously agreed with defendants that "the question of conformity with specifications could never be divorced from the question of manufacturing defect." *Id*. at 799:

> [I]t is possible to have an allegedly defective feature about which the government specifications are silent. For example, if the government specifications regarding the bellows canister did not specify the type or quality of

> metal to be used, a metallurgic defect in the canister would not be inconsistent with a finding that the canister conformed to specifications.

Id. at 799. The court considered these principles so important that it went on to state:

> [A] manufacturing defect is not necessarily equivalent to nonconformity with government specifications, because those specifications may be silent about some features, making possible the existence of a manufacturing defect in spite of conformity with the government specifications.

Id. at 801.[6]

Similarly, in *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744 (9th Cir. 1997), the specifications were silent as to the feature claimed to be defective. The Ninth Circuit followed *Bailey's* lead, reversing the grant of summary judgment precisely for this reason.

By contrast, the Second Circuit recognized 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

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[6] *See also id*. at 801-02 ("Whether [the government contractor defense] will apply to a particular claim depends only upon whether *Boyle*'s three conditions are met with respect to the particular product feature upon which the claims is based.").

military personnel." Pet. 33a. Nevertheless, the court granted summary judgment because it believed that the shoddy workmanship is irrelevant *unless there is a non-conformity* with government specifications. *Id*.[7]

B. The Lower Courts Are in Conflict Over the Degree of Specificity Required Under *Boyle*'s First Prong.

Unquestionably, the Second Circuit jettisoned *Boyle*'s requirement that the Government approve "reasonably precise specifications" before it purchases a product and extended immunity when such products are later "re-ordered" subsequent to testing, in this case "acute toxicity" testing. Pet. 35-36a. But even when it was re-ordered after the testing, the government still lacked the same necessary information about dioxin and its contamination of Respondents' 2,4,5-T through shoddy proprietary manufacturing processes.

Given that this "acute toxicity" testing was performed without knowledge of dioxin's presence or the health problems Respondents were aware of, the

[7] The court then recast Petitioners' "manufacturing defect" claims as ones involving "design defects." Pet. 31a-33a. Respondents thus quote Pet. 56a n.9 (*see* Opp. 20) out of context. The manufacturing defect claims related to high temperatures and the failure to use the Boehringer process are thoroughly discussed at AB43-56 and RS, Section VII, titled "Dioxin was Produced as a Result of Defective Manufacturing Processes. . . . "

testing could not address the specific adverse medical endpoints that needed to be evaluated. RS17-19, RS39-40. There also was never testing for "chronic" exposure, which Respondents themselves knew had resulted in systemic disease to their workers. AS28-44.

Furthermore, by extending this post-purchase immunity even when **post-purchase testing itself does not discover any defect in question**, Pet. 35a-36a, the Second Circuit markedly conflicts with every other Circuit that has considered the first prong of *Boyle*. Respondents acknowledge, for example, that the Ninth Circuit in *Snell*, *supra*, held that *Boyle*'s first prong requires an "exercise of judgment by the government **in the design of the particular feature at issue**." *See* Opp. 26 (quoting *Snell*, *supra*, 107 F.3d at 747) (emphasis added). This is precisely what the government **never had an opportunity to do** with regard to dioxin in 2,4,5-T. Accordingly, Respondents cannot explain away the circuit split over this application of *Boyle*'s first prong.

Nor do they do so in their cursory treatment of *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989). *See* Opp. 26. *Trevino* held with regard to *Boyle*'s first prong that "the government does not exercise a discretionary function by merely approving the contractor's work." 865 F.2d at 1485. Here, the government accepted the contractor's work without knowledge of the dioxin contamination of 2,4,5-T and without any specifications referencing the dioxin, or control over the processes creating it.

C. Respondents Fail to Blunt the Split of Authority Over *Boyle*'s Third Prong Implicated by the Second Circuit's Holding on Materiality.

Complete governmental knowledge of the risks known by the manufacturer was central to the Third Circuit's holding that the contractor failed to satisfy *Boyle*'s third prong in *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir. 1993):

> Nor is there any 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. *Carley* and the Fifth Circuit's decision in *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 246-247 (5th Cir. 1990) demonstrate, contrary to Respondents' assertion, that other Circuits have addressed "independent government studies of product" as part of their *Boyle* analysis. *See* Opp. 18. In *Mitchell*, the defendant unsuccessfully argued that, because the defectively manufactured mortar shell survived a "government-approved assembly and inspection process," this demonstrated the government's ratification of the manufacturing defect. The Fifth Circuit rejected the argument, noting that, "because of the potential of the government contractor defense to displace large chunks of the states' traditional prerogative over tort law, the defense must be applied with caution." *Id.* at 247 n.9.

A second basis for Respondents' contention that the Circuits are not split is that some of these cases do not involve "[c]hemical exposures that allegedly produced long-term risks of which," they allege, "no one was aware at the time of contracting." Opp. 19. As a factual matter, there is substantial evidence to show that Respondents were very much aware of long term *risks* to those exposed to their 2,4,5-T product. *See* AS28-44, *supra* at 3-4, Pet. 13-14 (citing Pet. 61a n.21). Moreover, *Boyle*'s use of the word "risk" is very deliberate – Respondents were unquestionably aware of the dire potential health risks to those exposed to dioxin in their products. *Id*.

Finally, Respondents argue that there is nothing novel in the Second Circuit's ruling that the third prong of *Boyle* requires that information knowingly withheld from the government be "material to the government's assessment of the alleged defect." Opp. 30. Yet, no other Circuit confronted with analyzing the government contractor defense is in accord with the Second Circuit on this point. Moreover, this Court has recognized in other settings that a "materiality inquiry, involving as it does 'delicate assessments of the inferences a "reasonable [decisionmaker]" would draw from a given set of facts and the significance of those inferences to him' [is] **peculiarly one for the trier of fact**." *United States v. Gaudin*, 515 U.S. 506, 512 (1995) (emphasis added) (citations omitted); *see also United States v. Wells*, 519 U.S. 482, 494-95 (1997) ("[I]t does not lie with one knowingly making false statements with intent to mislead the officials of the corporation to say that the statements were not

influential or the information not important.") (citation omitted).

Respondents do not address why it is in this government's public policy interest to immunize a manufacturer that intentionally fails to disclose all known risks of their product. Nor is there Secretary McNamara's testimony that he thought the information would have been material. *Supra* at 5.

In light of the foregoing, Respondents have failed to harmonize the Second Circuit's decision applying a materiality requirement as a question of law (or even fact) with either this Court's precedent treating materiality as a factual determination or the other circuit court authority that "consistently has 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 its product." *Carley*, *supra*, 991 F.2d at 1127; *see also Stout v. Borg-Warner Corp.*, 933 F.2d 331, 337 (5th Cir. 1991) ("[B]ecause the Army had knowledge of the risk involved in repairing the unit in the manner which resulted in Stout's injuries, the district court's summary judgment award holding that Fairchild was entitled to immunity under the government contractor defense was not erroneous."); *Harduvel*, *supra*, 878 F.2d at 1321 ("The final *Boyle* condition requires that the supplier warn the United States about dangers in the use of the equipment that were known to the supplier but not to the United States.").

CONCLUSION

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

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