No. 13-817

IN THE

Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC.,

Petitioner,

v.

CHERYL A. HARRIS, CO-ADMINISTRATRIX OF THE ESTATE OF RYAN D. MASETH, DECEASED; AND DOUGLAS MASETH, CO-ADMINISTRATOR OF THE ESTATE OF RYAN D. MASETH, DECEASED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Defense Industrial Association ("NDIA") is a non-partisan and non-profit organization comprised of more than 1,700 corporations and 39,000 individuals spanning the entire spectrum of the defense industry. Members include individuals from Government, the military services, small businesses, corporations, prime contractors, academia, and the international community. NDIA members provide a wide variety of goods and services to the Department of Defense, and include some of the nation's largest defense contractors. NDIA members have served as an essential component of the United States' strategic plan in Iraq and Afghanistan. These wars represent the first sustained military operations in which support contractors have comprised more than half of the total U.S. force in theater.

NDIA members face significant risks supporting the U.S. military in a wartime environment. Subjecting them to state law tort suits for those operations will exponentially compound these risks. NDIA therefore has a vital interest in ensuring the proper resolution of the important questions presented in the Petition. NDIA is

1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* state that Petitioners and Respondents, upon timely receipt of notice of NDIA's intent to file this brief, have consented to its filing. Blanket consents have been filed with the Court.

also uniquely qualified to provide an industry perspective on the adverse effects of extending state tort law to private contractors performing traditional military support functions on the battlefield.

SUMMARY OF ARGUMENT

Contractors have provided crucial services to the U.S. military throughout history. Over the last decade, however, the military's reliance on battlefield support contractors has been unprecedented in both scope and scale. Contractors have deployed in droves to the foreign battlefields of Iraq and Afghanistan and integrated into military units, supporting traditional military functions by acting as security guards, intelligence analysts, linguists, builders, and trainers. The number of battlefield support contractors in Iraq and Afghanistan has at times exceeded the number of uniformed American soldiers on the battlefield.

Taking on these functions has dramatically increased contractors' legal exposure. Although the United States is immune from lawsuits arising out of the military's combatant activities, courts have reached conflicting decisions regarding whether private contractors can be sued under state law for performing traditional military support functions on foreign battlefields. In this case, the Third Circuit allowed a lawsuit against Petitioner Kellogg Brown & Root Services, Inc. ("KBR") to proceed in a Pennsylvania federal court even though KBR was performing electrical maintenance services for the military in Iraq.

The Court should grant the Petition because whether these types of lawsuits should proceed is a question of exceptional importance. Exposing battlefield support contractors to the risk of tort liability will undermine the military's ability to conduct warfare.

First, the risk of tort liability will deter battlefield support contractors from providing their expertise to the U.S. military in new conflicts. War is incompatible with tort law because it is intentionally violent. The caution that tort law requires is impossible to abide in an environment where risk taking is the norm. Contractors simply cannot adhere to a standard of reasonable care while at the same time supporting American soldiers in this hostile environment. Even if they could, contractors cannot possibly know which state's standard of care applies at the time they must act. The inability to avoid tort liability—due to the nature of warfare and the *ex post* choice-of-law maze—discounts the benefits of partnering with the military. Because the risks of crippling tort liability are so great, many contractors will take a pass the next time the military calls for their help on a foreign battlefield.

Second, the risk of tort liability will raise costs and restrict the military's wartime flexibility. The cost of battlefield support will inevitably rise if fewer contractors compete for government contracts. Contractors will also raise their prices to account for the risks of tort liability, and they will pass the costs of civil judgments along to the United States. But more importantly, the government's ability to perform its traditional support functions will be limited as fewer contractors are willing to venture to foreign battlefields to partner with the U.S. military.

Third, the risk of tort liability will undermine the chain of command on the battlefield. Private contractors will question battlefield commanders if military orders increase the risk of civil liability or go beyond the scope of their contracts. Hesitation and timidity will flourish in an environment where lives depend on reflexive obedience to military directives. Further, if the lawsuits proceed, service personnel, including military commanders, will be called off the battlefield and into courtrooms around the nation to testify as to whether the military or the contractor is to blame for a plaintiff's injury. The inevitable finger-pointing that follows will undermine the trust between the military and its contractors. In short, exposing battlefield support contractors to the risk of tort liability has the same effect as if the lawsuit were brought against the military itself.

ARGUMENT

WHETHER PRIVATE CONTRACTORS CAN BE SUED FOR PERFORMING TRADITIONAL MILITARY SUPPORT FUNCTIONS ON FOREIGN BATTLEFIELDS IS A QUESTION OF EXCEPTIONAL IMPORTANCE.

The Petition presents an exceptionally important question that should be decided now. The U.S. military relies on private contractors to perform traditional military support functions on the battlefield. Exposing these battlefield support contractors to the risks of tort liability will undermine the military's ability to conduct warfare. The Court should grant the Petition and reverse the judgment below.

A. Private Contractors Perform Traditional Military Support Functions On The Modern Battlefield.

Private contractors are routinely performing critical services for the U.S. military on foreign battlefields. Over the last decade, contractors in Iraq and Afghanistan have been "responsible for such critical tasks as providing armed security to convoys and installations, providing life support to forward deployed warfighters, conducting intelligence analysis, and training local security forces." Mosh Schwartz & Jennifer Church, Cong. Research Serv. R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* 3 (May 17, 2013) ("Schwartz & Church"). They also "wash clothes and serve meals, maintain equipment and translate local languages, erect buildings and dig wells, and support many other important activities." Comm'n on Wartime Contracting in Iraq & Afg., *At What Risk? Correcting Over-Reliance on Contractors in Contingency Operations*, Second Interim Report to Congress, at 7 (Feb. 24, 2011) ("Second Report to Congress").

These are functions that the military previously reserved for itself. *See* Steven L. Schooner & Collin D. Swan, *Dead Contractors: The Un-Examined Effect of Surrogates on the Public's Casualty Sensitivity*, 6 J. Nat'l Sec. L. & Pol'y 11, 14 (2012) ("Schooner & Swan"). But "with a smaller, all-volunteer force, many of these services are now contracted out." Office of the Under Sec'y of Def. for Acquisition, Tech., and Logistics, Report of the Defense Science Board Task Force on Improvements to Services Contracting 31 (2011) ("Defense Science Board"). Today, "[a]lmost every defense function ... is carried out

in part by contracted services, including support for congressional directives," *id.* at 1, because there has been a "systemic change" toward relying on contractors to accomplish traditional military functions, *id.* at 31.

The U.S. military now views private contractors as functionally integrated into—and an essential component of—the total military force. *See* U.S. Dep't of Defense, *Quadrennial Defense Review Report* 75 (Feb. 6, 2006); Schwartz & Church 2. The Chairman of the Joint Chiefs of Staff has stated that "[c]ontractors are *part* of the total military forces." Karen Parish, *Dempsey: Military Costs Must Shrink*, American Foreign Press Servs. (Mar. 6, 2012) (emphasis added). In light of "the critical role of contractors in military operations," Schwartz & Church 11, the military has found "the use of civilian contractors in support roles to be an essential component of a successful war-time mission," *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008). Private contractors have become "an operational necessity," *see* Defense Science Board, Memo., because "the military is unable to effectively execute many operations, particularly those that are large-scale and long-term in nature, without extensive operational contract support," Schwartz & Church 2.

The reason for the military's reliance on battlefield support contractors is simple. "Contractors can provide significant operational benefits to DOD" by "freeing up uniformed personnel to conduct combat operations; providing expertise in specialized fields, ... ; [] providing a surge capability, [and] quickly delivering critical support capabilities tailored to specific military needs." *Id.* at 3. They also can be "hired when a particular need arises and released when their services are no longer needed."

Id. And they are less expensive than "maintaining a permanent in-house capability." *Id.* These are few of many reasons why "analysts and defense officials believe that contractors will continue to play a central role in military operations." *Id.* at 1; Second Report to Congress 9 (noting that "the United States will continue to use contractors to carry out many of its contingency-related requirements").

With this dramatic shift, the number of contractors on the battlefield has reached "unprecedented levels." *See* Second Report to Congress 16. Over 7,000 different companies have sent civilian contractors to Afghanistan and Iraq. *See* Comm'n on Wartime Contracting in Iraq & Afg., *Transforming Wartime Contracting: Controlling Costs, Reducing Risks,* Final Report to Congress, at 198 (Aug. 31, 2011) ("Final Report to Congress"). The Army alone reported that "almost 60,000 contactor employees [were] support[ing] ongoing military operations in Southwest Asia" in 2006, compared to less than 10,000 contractor employees supporting U.S. military operations during the 1991 Persian Gulf War. U.S. Gov't Accountability Office, GAO-07-145 *Military Operations: High Level DOD Action Needed to Address Long-Standing Problems with Management and Oversight of Contractors Supporting Deployed Forces* 1 (2006).

At times, battlefield support contractors have even *exceeded* the number of U.S. military forces in Iraq and Afghanistan. *See* Schwartz & Church 1-2. In September 2008, 163,446 private contractors were operating in Iraq alongside 146,800 U.S. military soldiers. *Id.* at 25. During the same period, 68,252 private contractors were operating alongside 33,500 U.S. military troops in Afghanistan. *Id.* at 24. By March 2013, the number of

contractors in Afghanistan ballooned to 108,000, almost 18,000 of which were private security personnel. *Id.*

Because they blanket the battlefield, private contractors have bled and died alongside American soldiers at staggering rates. *See* Schooner & Swan 26 ("In addition to outsourcing jobs that were previously performed by soldiers, the government is outsourcing the physical risks of injury and death associated with those jobs[.]"). By 2011 more than 2,600 contractors had been killed in Iraq and Afghanistan, *id.* at 29, representing nearly 30 percent of all U.S. fatalities in those conflicts, *id.* The U.S. Commission on Wartime Contracting has expressed concern that "[t]he extensive use of contractors obscures the full human cost of war" because "significant contractor deaths and injuries largely remain[] uncounted and unpublicized by the U.S. government and the media." *See* Final Report to Congress 16-17.

As private contractors have agreed to take on more of the military's traditional support functions, their exposure to civil liability under state tort law has also increased. Contractors have been sued for performing traditional military support functions as varied as driving convoys of Army soldiers on the battlefield, *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009), performing electrical maintenance in a war zone, *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011), running military prisons, *Saleh v. Titan Corp*, 580 F.3d 1 (D.C. Cir. 2009), and maintaining latrines at a forward operating base, *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698 (S.D.N.Y. 2011). While the U.S. military is immune from such lawsuits, *see* 28 U.S.C. § 2680(j); *Feres v. United States*, 340 U.S. 135

(1950), several courts, including the Third Circuit, have allowed private contractors to be sued under state law for performing traditional military support functions on foreign battlefields.

B. Exposing Battlefield Support Contractors To The Risk Of Tort Liability Undermines The Military's Ability To Conduct Warfare.

Exposing contractors to the risk of tort liability will cripple the military's war-fighting capabilities. First, the risk of liability will deter private contractors from assisting the military in future wars. Second, it will increase prices for the military and limit its flexibility to conduct warfare. Third, it will undermine the military's authority on the battlefield.

1. The Risk Of Tort Liability Will Deter Battlefield Support Contractors From Assisting The U.S. Military In Future Conflicts.

The fear of crippling tort liability is a major deterrent for private contractors because they cannot possibly avoid tort liability on the battlefield. "[T]ort law is based in part on the theory that the prospect of liability makes the actor more careful." *Koohi v. United States*, 976 F.2d 1328, 1334 (9th Cir. 1992). But "[t]he very purposes of tort law are in conflict with the pursuit of warfare." *Saleh*, 580 F.3d at 7; *see also Koohi*, 976 F.2d at 1335. "[A]ll of the traditional rationales for tort law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, *where risk-taking is the rule*." *Saleh*, 580 F.3d at 7 (emphasis added); *Johnson v. United States*, 170

F.2d 767, 769 (9th Cir. 1948) (remarking that combatant activities "by their very nature should be free from the hindrance of a possible damage suit"). "[C]aution that may be well-advised in a civilian context may not translate neatly to a military setting," just as "[r]isks considered unacceptable in civilian life are sometimes necessary on a battlefield." *Al Shimari v. CACI, Int'l, Inc.*, 679 F.3d 205, 226 (4th Cir. 2012) (Wilkinson, J., dissenting).

Seemingly normal tasks take on a dramatically different character in an environment typified by "overwhelming and pervasive violence which each side intentionally inflicts on the other." *Koohi*, 976 F.2d at 1335. For example, the simple act of driving down a road in Iraq or Afghanistan is fraught with peril. *See, e.g., Carmichael*, 572 F.3d at 1289 ("We do not face the question of whether the defendants drove a fuel truck unsafely, say, on Interstate I-95 between Miami, Florida and Savannah, Georgia."); *Whitaker v. Kellogg, Brown & Root, Inc.*, 444 F. Supp. 2d 1277, 1282 (M.D. Ga. 2006) ("While Plaintiffs' simplistic labeling of this case as a 'garden variety road wreck' is superficially appealing, it ignores the true nature of the circumstances giving rise to this tragedy."). The same is true of operating essential facilities in a combat zone. *See, e.g.*, *Taylor,* 658 F.3d 402.

Even if battlefield support contractors could conform their conduct to a standard of reasonable care, the precise standard is unknown at the time the contractor must act. Each of the fifty States has developed its own tort law regime. Courts that allow battlefield support contractors to be sued must apply the forum state's choice-of-law principles to determine which jurisdiction's substantive law applies to a contractor's conduct on a foreign

battlefield. *Harris*, 724 F.3d at 467. Deciding which law applies to battlefield conduct occurs after the injury and depends on factors wholly unrelated to the contractor's conduct. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 582 (2013) ("A federal court sitting in diversity ordinarily must follow the choice-of-law rules of the State in which it sits."). Adding to the uncertainty, choice-of-law regimes vary greatly among the States. *Compare Dreher v. Budget Rent-A-Car Sys., Inc.*, 634 S.E.2d 324, 326-27 (Va. 2006) (the traditional *lex loci deliciti* test), *with Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980) (the Restatement's "most significant relationship" test). Each is an idiosyncratic formula to determine which substantive law applies.

This random, *ex post* selection of the standard of care would make it impossible for battlefield support contractors to conform their conduct *ex ante*. When a court permits "extraterritorial application of different state tort regimes … [it] allows for unlimited variation in the standard of care that is applied to critical combatant activities." *Al Shimari*, 679 F.3d at 238 (Wilkinson, J., dissenting) (emphasis added). This leads to inconsistent and unpredictable outcomes. In *Al Shimari*, for example, the Fourth Circuit "clear[ed] the way for one federal court, sitting in Maryland, to apply Iraqi tort law to the alleged conduct … of a Virginia-headquartered contractor …, and for another federal court, sitting in Virginia, to apply Virginia tort law to a similarly situated contractor for alleged conduct also occurring in an Iraqi war zone." *Id.* at 227.

These are not trivial concerns. In *Bixby v. KBR, Inc.*, the district court's choice of Oregon law allowed a

jury to award the Oregon-based plaintiffs $75 million in punitive damages in addition to $6 million in compensatory damages. *Bixby v. KBR, Inc.*, No. 3:09-CV-632-PK, 2013 WL 1789792, at *29, *31 (D. Or. Apr. 26, 2013), *appeal docketed*, No. 90-567 (9th Cir. June 11, 2013). But if the plaintiffs had been from Washington instead of Oregon, then the $75 million punitive damages would not have been possible. *See Kommavongsa v. Haskell*, 67 P.3d 1068, 1075 (Wash. 2003) (en banc) ("Washington does not permit punitive damages in personal injury cases."). The luck of *ex post* choice-of-law rules increased the contractor's liability more than tenfold.

Adding to the confusion, the Third Circuit found the political question doctrine turns on the same game of chance. *Harris*, 724 F.3d at 467 ("Ultimately, whether the claims or defenses introduce a political question depends on which state's law applies."). The court found that the doctrine would not apply if Pennsylvania law governs, but would apply if Tennessee or Texas law governs the case. *Id.* at 478. This is nonsensical. Given the unpredictability of the governing law at the time when contractors must act, their liability cannot hinge on a future plaintiff's home state or forum selection, especially when contractors are literally dodging bullets and mortar fire when they must act.

The arbitrary risks of such staggering liability, and the uncertainty of which substantive law applies, will "discourage [military contractors] from bidding on essential military projects." *Bynum v. FMC Corp.*, 770 F.2d 556, 566 (5th Cir. 1985); *see also Saleh*, 580 F.3d at 9 (noting that liability will "discourage[] contractors from participating in [planning and execution] where their

expertise would help to better the product"). If fewer contractors are willing to assist the U.S. military in future conflicts, the military's ability to conduct warfare will be significantly degraded.

2. The Risk Of Tort Liability Will Increase Costs And Restrict The Military's Wartime Flexibility.

Exposing battlefield support contractors to tort liability will inevitably increase costs for the U.S. military. "[T]he government receives its best value in terms of price, quality, and contract terms and conditions" when it makes "effective use of competition." Steven L. Schooner, *Desderata: Objective for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103, 104 (2002). But with fewer bidders willing to compete for contracts to perform traditional military functions on the battlefield, the prices of those contracts will invariably rise. *See Burke v. Ford*, 389 U.S. 320, 322 (1967) ("When competition is reduced, prices increase.").

Moreover, the contractor that wins a battlefield support contract will inevitably "raise its price" to account for the increased risk of civil liability. *Boyle v. United Techs. Corp.*, 487 U.S 500, 507 (1988). "The financial burden of judgments against the contractors [will] ultimately be passed through, substantially if not totally, to the United States itself[.]" *Id.* at 511-12; *see also Saleh*, 580 F.3d at 8 ("Of course, the costs of imposing tort liability on government contractors is passed through to the American taxpayer."). "Such pass-through costs ... defeat the purpose of the immunity for military accidents conferred upon the government itself." *Tozer v. LTV*

Corp., 792 F.2d 403, 408 (4th Cir. 1986). In the current fiscal reality, with sequestration and budget cuts the new normal, a key advantage to using contractors—private-sector expertise at a lower cost—will be lost. *See* Defense Science Board 11 ("For expeditionary logistics support ... private sector competitive procurement was projected to be roughly 90 percent less costly than using federal workers.").

With fewer contractors willing to perform traditional military support functions on the battlefield, the "government's ability to perform its traditional functions" will also be limited. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) (quoting *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)). The assurance of immunity from suit and/or liability preserves the government's ability to perform its traditional functions by "ensuring that talented candidates are not deterred from public service." *Id.* But the government needs to attract more than just talented individuals willing to wear the uniform. With an all-volunteer force, the government also needs to attract talented contractors to support those wearing the uniform. "[I]t is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals." *Id.* at 1665-66. Because contractors "do not depend on the government for their livelihood, they have the freedom to select other work—work that will not expose them to liability for government actions." *Id.* at 1666.

Fewer contractors willing to accept the risk of tort liability will cause the military to lose the flexibility that it enjoyed in Iraq and Afghanistan. Jobs now efficiently

performed by private-sector specialists will be returned to military personnel. As a result, the military will lose the ability to deploy contractors "when specific expertise is needed for a rapid response to an unexpected adversary capability." *See* Defense Science Board 11. And the benefits from "engaging the services of companies that work in both commercial and government sectors" to learn and "apply successful business practices, technologies, and skills" will also be lost. *Id.* Given the volunteer military's reduced force structure and increased reliance on contractors, permitting these "suits will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations." *Saleh*, 580 F.3d at 8; *see also Tiffany v. United States*, 931 F.2d 271, 276 (4th Cir. 1991) (explaining that the "cumulative force of liability '[will] seriously handicap efficient government operations'" (citation omitted)).

3. The Risk Of Tort Liability Will Undermine The Military's Chain Of Command On The Battlefield.

Battlefields require unquestioned discipline to ensure swift action in dynamic situations. *See Chappell v. Wallace*, 462 U.S. 296, 300 (1983) ("[N]o military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting."). Indeed, "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and espirit de corps." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), *superseded on statutory grounds by* 18 U.S.C. § 774. Because contractors are integrated into the total military force, the need for contractors to obey battlefield commanders is paramount.

But with the fear of state tort liability hanging over their heads, battlefield support contractors may hesitate to obey—or may even openly question—military commanders when lives are on the line. While immunity "free[s] military commanders from the doubts and uncertainty inherent in potential subjection to civil suit," *Saleh*, 580 F.3d at 7, "those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with" the military, *Filarsky*, 132 S. Ct. at 1666. The fear of such liability incentivizes contractors to question orders that increase their legal exposure. *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1348 (11th Cir. 2007) (noting that imposing liability on wartime activities will "impair essential military discipline"). Contractors will ask for safer convoy routes, lengthier site investigations, and more time to complete assigned tasks carefully. They may warn of an order's danger and suggest safer alternatives so they can reduce their legal exposure and point to the military as the proximate cause of any later injury. They certainly will avoid scenarios such as those in *Carmichael*, where a fatigued convoy driver worked long hours, even though the battlefield may demand that kind of flexibility. *See* 572 F.3d at 1285.

Contractors may also spurn military commands that create new obligations not contemplated in their contracts. A contractor's legal exposure can hinge on whether it was acting within the scope of the government contract. *See Carley v. Wheeled Coach*, 991 F.2d 1117, 1120 (3d Cir. 1993); *Boyle*, 487 U.S. at 515; *Br. for United States as Amicus Curiae*, *Al Shimari v. CACI Int'l, Inc.*, No. 09-1335, 2012 WL 123570, at *17-18 (4th Cir. Jan. 14, 2012). If stepping outside the scope of a contract increases

the risk of liability, battlefield support contractors will have incentives to refuse to adapt to the military's changing needs in hostile situations until they have time to evaluate the liability exposure of new tasks. *See Al Shimari*, 679 F.3d at 229 (Wilkinson, J., dissenting) (imposing liability implies that "the contractors should have paused to consider their potential liability ... before agreeing to supply the military needed personnel under the government contract"). This is inconsistent with the military's need for unquestioned obedience on the battlefield. *Chappell*, 462 U.S. at 300 ("[T]he habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."). The slightest hesitation or outright refusal to act will impede the military's ability "prepare for and perform its vital role." *Goldman*, 475 U.S. at 507.

This is exactly what the Court feared in *Filarsky*. There, the Court extended immunity from tort liability to contractors performing traditional governmental functions to "avoid 'unwarranted timidity' in performance of public duties." 132 S. Ct. at 1665. The Court noted that guarding against "unwarranted timidity" is "the most important special government immunity-producing concern." *Id.* (citation omitted). And it is of "vital importance regardless whether the individual sued as a state actor works full-time or on some other basis" for the government. *Id.* Courts that have extended tort liability to battlefield support contractors will cause them to be exceedingly timid in performing traditional military functions on the battlefield.

Moreover, lawsuits against battlefield contractors will inevitably drag American soldiers from foreign

battlefields into domestic courtrooms. Another goal of immunity is "preventing the harmful distractions ... that can accompany damages suits." *Filarsky*, 132 S. Ct. at 1665. But lawsuits against contractors will "often affect any public employees with whom [contractors] work by embroiling those employees in litigation." *Id.* at 1666. American soldiers will inevitably be "haled into lengthy and distracting court or deposition proceedings ... where, as here, contract employees are so inextricably embedded in the military structure." *Saleh*, 580 F.3d at 8. These lawsuits will "interfer[e] with and detract from the war effort" because they will "burden[] the military and its personnel with onerous and intrusive discovery requests." *Br. for United States as Amicus Curiae*, *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, No. 09-683, 2010 WL 2214879, at *13 (U.S. May 28, 2010); *see also Br. for United States as Amicus Curiae*, *Al Shimari v. CACI Int'l, Inc.,* No. 09-1335, 2012 WL 123570, at *5 (4th Cir. Jan. 14, 2012) ("Courts should be properly sensitive to the concern that unfettered discovery proceedings could affect military readiness."). The government's interests are threatened by the prospect of "compelled depositions and trial testimony by military officers concerning the details of their military commands." *United States v. Stanley*, 483 U.S. 669, 682-83 (1987).

More troubling is that these lawsuits could pit contractors and the military against each other. The litigation would require "members of the Armed Services and their contractors to testify in court as to each other's decisions and actions." *Al Shimari*, 679 F.3d at 245 (Wilkinson, J., dissenting) (citation and internal quotation marks omitted). Trials will "involve second-guessing military orders" in an attempt to determine "the degree

of fault, if any, on the part of the Government's agents." *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977). This will inevitably "devolve into an exercise in finger-pointing between the defendant contractor and the military." *Saleh*, 580 F.3d at 8. And absurdity will be on display as "commanding officers [try] to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions." *United States v. Shearer*, 473 U.S. 52, 58 (1985); *see also Carmichael*, 572 F.3d at 1279 ("[A]djudicating the plaintiff's claims would require extensive reexamination and second-guessing of many sensitive judgments surrounding the conduct of [the military].").

The long-term effect of such finger pointing will be to "undermin[e] the private-public cooperation and discipline necessary for the execution of military operations." *Al Shimari*, 679 F.3d at 245 (Wilkinson, J., dissenting). Instead of working toward a common goal, contractors will be forced to treat service members as potential adversaries in a civil suit. They will be weary to trust soldiers whom they may need to cross-examine later, further undermining military command. It is "difficult to devise more effective fettering of a [modern] field commander" than to allow these lawsuits to proceed. *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

CONCLUSION

For the forgoing reasons, and for those set forth in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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