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 Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, AND THE NATIONAL FOREIGN TRADE COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


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## INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber"), the International Association of Defense Counsel ("IADC"), and the National Foreign Trade Council ("NFTC") respectfully submit this brief as *amici curiae*.

The Chamber is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than three million businesses and trade and professional organizations of every size and sector, and from nearly every geographic region. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts, including this Court. The Chamber regularly files *amicus curiae* briefs in this and other Courts in suits concerning the foreign application of domestic law, including *Kiobel v. Royal Dutch Petroleum Co.,* No. 10-1491, *Rio Tinto v. Sarei, et al.*, No. 11-649, and *Morrison, et al. v. National Australia Bank Ltd., et al.*, No. 08-1191.

The IADC is an invitation-only organization comprised of leading corporate and insurance attorneys and insurance executives. Since its founding in 1920, the IADC has played an important global leadership role in the civil justice system and the legal profession generally.

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[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to its preparation or submission.

The NFTC is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies, the NFTC and its affiliates now serve more than 250 member companies.

*Amici* have a direct and substantial interest in the issues presented in this case and in the appropriate application of state tort law to overseas business conduct more broadly. The accident in this case was profoundly tragic, and *amici* take no position on the factual issues. *Amici* address whether it is appropriate for courts to apply domestic state tort law to the operations of federal contractors working outside the United States. Applying state tort law to overseas operations poses thorny problems not only in the military context, but also in diplomatic and commercial contexts where important federal interests are implicated. The court of appeals' ruling invites an onslaught of state-law claims against overseas contractors. Such claims will invariably abut issues of U.S. military and foreign policy in conflict, post-conflict, reconstruction, and development areas throughout the world. This brief brings to the Court's attention the vast scope of public-private partnerships involving the federal government and business interests abroad, as well as the attendant costs imposed on U.S. interests when state tort law is applied to such overseas conduct.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The federal government's reliance on private contractors to carry out military and civilian

operations overseas has increased dramatically in recent decades. Contractors provide critical support for the Armed Forces, which rely on voluntary conscription and cannot spare warfighters for construction, transport, and other tasks historically assigned to soldiers. Contractors also play a key role in efforts such as post-war reconstruction, economic development, disaster relief, diplomatic security, intelligence operations, and counterterrorism initiatives.

Plaintiffs wishing to sue U.S. companies operating overseas have turned increasingly to state-law claims in the wake of this Court's decisions limiting the application of federal law to overseas conduct. For example, many Alien Tort Statute claims had been paired with state-law claims, and the latter have since come to the fore. *See, e.g.*, *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011). The court of appeals' decision in this case imprudently encourages the pursuit of these and similar state-law claims. The result will saddle federal courts with the burden of deciding which of fifty different state-law regimes governs in a given case and then applying that law to overseas conduct. It also creates enormous uncertainty for U.S. businesses seeking to bid on government and other overseas contracts because they cannot determine in advance which legal regime will apply or intelligently assess the scope of potential liability.

That uncertainty will inevitably raise the cost of doing business abroad and likely deter many companies from entering into such contracts in the first place. As a result, the federal government will

be forced to choose from among a reduced pool of candidates and to pay substantially higher fees to cover any remaining contractors' increased insurance premiums and potential liability costs. Foreign corporations may step into the breach to take advantage of the "tax" imposed on U.S. companies by the specter of state-law tort litigation.

In addition to limiting U.S. business opportunities and ultimately costing U.S. taxpayers, application of state law to overseas conduct risks undue and unwarranted interference with critical government projects and impingement on the Nation's foreign affairs prerogatives. And as has been true with cases brought under the Alien Tort Statute, plaintiffs can be expected to file state tort lawsuits to penalize corporations for, and thus deter them from, investing or doing business in countries with poor human rights records—a category that unfortunately includes many of the world's developing countries. Such lawsuits, which are effectively ad hoc attempts to impose embargoes or international sanctions through civil actions in U.S. courts, risk frustrating the federal government's policy of encouraging economic engagement with developing nations.

Federal contractors and businesses operating abroad often further U.S. interests in the world's most poorly developed and high-risk regions. State tort law is ill-equipped to respond to the situations that arise in such extreme circumstances. These concerns demand the Court's consideration.

## ARGUMENT

### I. THE FEDERAL GOVERNMENT RELIES HEAVILY ON AMERICAN CONTRACTORS AND BUSINESSES TO ADVANCE ITS INTERESTS OVERSEAS

To appreciate the breadth and magnitude of the consequences flowing from application of state tort law to overseas conduct, it is helpful first to survey the many challenging contexts in which American contractors and businesses protect and further U.S. interests abroad.

#### A. Military Combat Support.

The U.S. Department of Defense ("DoD") has long depended on civilian contractors to support overseas military operations. This reliance has increased sharply in recent years. In the past, conscripted soldiers typically performed combat support duties such as constructing and maintaining facilities, transporting supplies and personnel, providing life support to soldiers on the battlefield, and executing numerous other logistical tasks critical in active war zones. After the end of the Cold War, however, cessation of the draft combined with defense budget cuts resulted in a substantial reduction in the size of the U.S. Armed Forces, requiring DoD to hire private contractors to perform many combat support duties previously assigned to soldiers. [2] This trend shows no sign of abating.

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[2] *See* Moshe Schwartz & Jennifer Church, Cong. Research Serv., R43074, Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress 1 (2013) ("*DoD's Use of Contractors to Support*

Adjusted for inflation, total DoD contract obligations increased from $170 billion in 1999 to $360 billion in 2012.[3]

During the recent wars in Iraq and Afghanistan, private contractors made up 50 percent or more of the total U.S. military force. As of March 2013, approximately 65,700 U.S. troops and 108,000 DoD contractor personnel remained in Afghanistan. From 2007 through 2012, DoD obligations for contractual services performed in Iraq and Afghanistan totaled almost $160 billion. Most defense officials and analysts believe that private contractors will continue to play a critical role in military operations abroad because the modern U.S. military cannot function effectively on the battlefield without their support.[4]

### B. Post-Conflict Reconstruction.

When the United States declares an end to its active military operations in a region, it does not simply pack up its weapons and leave. "[W]eak

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*Military Operations*"); Moshe Schwartz & Wendy Ginsberg, Cong. Research Serv., R41820, Department of Defense Trends in Overseas Contract Obligations 1 (2013) ("*DoD Trends in Overseas Contract Obligations*"); Moshe Schwartz & Joyprada Swain, Cong. Research Serv., R40764, Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis 1 (2011) ("*DoD Contractors in Iraq and Afghanistan*").

[3] *DoD Trends in Overseas Contract Obligations,* at 3.

[4] *See* DoD's Use of Contractors to Support Military Operations, at 1-2; *see also Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008) (noting "ample evidence that the military finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission").

states and transitional societies are a central security challenge for the United States."[5] And "[p]romoting freedom and democracy and protecting human rights around the world are central to U.S. foreign policy."[6] For those reasons, in post-conflict and other politically unstable regions, State Department personnel step in to engage in "Transformational Diplomacy." The purpose of Transformational Diplomacy is to build and sustain stable democratic governments that are responsive to their people's needs and conduct themselves responsibly in the international arena.[7] To achieve this objective, the U.S. State Department, like DoD, relies heavily on civilian contractors.[8]

In Iraq and Afghanistan, for example, the State Department oversees tens of thousands of private contractors performing billions of dollars of work—including constructing or restoring infrastructure, developing new justice systems, training Iraqi and

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[5] Bureau of Conflict and Stabilization Operations, *Conflict Prevention and Crisis Response: Responding to Emerging Instability Overseas*, U.S. DEP'T OF STATE, http://www.state.gov/j/cso/what/index.htm (last visited Feb. 6, 2014)

[6] Bureau of Democracy, Human Rights, and Labor, U.S. DEP'T OF STATE, http://www.state.gov/j/drl/index.htm (last visited Feb. 6, 2014).

[7] U.S. Gov't Accountability Office, GAO-10-156, State Department: Diplomatic Security's Recent Growth Warrants Strategic Review 15, 26 (2009) ("*Diplomatic Security's Recent Growth*").

[8] Doug Brooks & Fiona Mangan, *The Modern Use of Contractors in Peace and Stability Operations*, 18 BROWN J. OF WORLD AFFAIRS 181, 182-185 (2011).

Afghan police, and protecting U.S. diplomatic officials and civilian personnel.[9] As many as 80 percent of State Department personnel on the ground in Iraq and Afghanistan are private contractors.[10]

The Afghanistan Investment and Reconstruction Task Force of the U.S. Department of Commerce ("Task Force") also participates in the reconstruction effort by facilitating and coordinating activities designed to help Afghanistan achieve a sustainable economy. To carry out this work, the Task Force actively solicits U.S. companies to pursue business opportunities in Afghanistan.[11]

### C. Development And Disaster Relief.

"Humanitarian and economic development assistance is an integral part of U.S. global security

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[9] *See generally* Michael R. Gordon, *Civilians to Take U.S. Lead After Military Leaves Iraq*, N.Y. TIMES, Aug. 19, 2010, at A1; Jamie Crawford, *For Contractors Who Stay, It "Is Not Going To Be Easy"; Thousands Left in Iraq Will Navigate Complex Scenario*, CHI. TRIB., Oct. 23, 2011, at 27; Andrew Quinn, *Security Contractors Filling Big Void; State Department Doubling the Ranks to Protect Civilians*, CHI. TRIB., Aug. 22, 2010, at 23; Rajiv Chandrasekaran & Scott Higham, *Access to Afghan Projects to Be Lost*, WASH. POST, Oct. 27, 2013, at A01; *Use of Contractors to Train Afghan National Police: Hearing Before Comm. On Wartime Contracting* (2009) (Testimony of David T. Johnson, Assist. Secretary, Bureau of Int'l Narcotics and Law Enforcement Affairs), http://www.state.gov/j/inl/rls/rm/133872.htm; Afghanistan Justice Sector Support Program, http://www.jssp-afghanistan.com (last visited Feb. 6, 2014).

[10] Mary Beth Sheridan & Dan Zak, *In Iraq, It's Crunch Time for the State Department*, WASH. POST, Oct. 9, 2011, at A12

[11] U.S. Dep't of Commerce, http://trade.gov/afghanistan/tg_aftf_003399.asp (last visited Feb. 6, 2014).

strategy," not only in war-torn regions like Iraq and Afghanistan but throughout the world.[12] The U.S. Agency for International Development ("USAID"), which operates under the authority of the State Department, "is the lead U.S. Agency for administering humanitarian and economic assistance to 160 countries."[13] USAID performs foreign assistance work from its headquarters in Washington D.C. and from missions located all over the globe. USAID is responsible for billions of dollars of relief and reconstruction efforts in response to natural and man-made disasters wherever and whenever they occur, as well as for long-term development assistance programs in underdeveloped countries.

Since its inception in 1962, USAID's direct-hire staff has decreased dramatically, while the number of countries with USAID programs has more than doubled. As a result, USAID increasingly has had to rely on private contractors. Contractors currently perform about 80 percent of USAID's overseas projects.[14]

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[12] U.S. Gov't Accountability Office, GAO-03-946, Foreign Assistance: Strategic Workforce Planning Can Help USAID Address Current and Future Challenges 1 (2003) ("*Strategic Workforce Planning for USAID*").

[13] *Id.* at 4; *see id.* at 2-3, 6-11, 21.

[14] *See* Learning from Iraq: A Final Report from the Special Inspector General for Iraq Reconstruction: Hearing Before the Subcomm. on the Middle East and North Africa of the H. Foreign Affairs Comm., 113th Cong. 25-26 (2013); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-787, FOREIGN ASSISTANCE: DISASTER RECOVERY PROGRAM ADDRESSED INTENDED PURPOSES, BUT USAID NEEDS GREATER FLEXIBILITY TO IMPROVE ITS RESPONSE CAPABILITY 13 (2002); ALLISON

USAID partners not only with federal contractors but also with other private businesses to implement the Agency's programs overseas. Indeed, USAID proactively solicits private-sector involvement in its disaster relief and development efforts. USAID "has built more than 1,600 alliances with a wide variety of private sector entities in the past 11 years, leveraging more than $19 billion in public and private funds towards increasing the sustainable impact of our development assistance programs."[15]

In much the same way, the Overseas Private Investment Corporation ("OPIC"), the federal government's development finance institution, offers loans and other forms of financial assistance to private U.S. companies to encourage them to engage in development efforts abroad (*e.g.*, constructing water treatment facilities in India or solar power plants in underdeveloped regions of South Africa). OPIC was established as part of the Foreign Assistance Act of 1961 to advance U.S. foreign policy objectives in the developing world. Operating under the policy guidance of the Secretary of State, OPIC administers a $16.4 billion portfolio with projects in 103 developing and post-conflict nations.[16]

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STANGER, ONE NATION UNDER CONTRACT 63 (2009) ("USAID has become a contract clearinghouse").

[15] USAID Website: http://www.usaid/.gov/partnership-opportunities/respond-solicitation; http://www.usaid/.gov/partnership-opportunities/build-partnership-us; & http://www.usaid.gov/partnership-opportunities/corporate (last visited Feb. 6, 2014).

[16] 2012 OPIC ANN. REP., at 3, 11-12, 23.

### D. Diplomatic Security.

The United States maintains approximately 285 diplomatic facilities, including embassies and consulates, in both friendly and high threat environments worldwide. The State Department Bureau for Diplomatic Security ("Diplomatic Security Bureau") has primary responsibility for safeguarding these facilities and the American diplomatic personnel deployed there (as well as their accompanying family members).[17]

In the modern era of transnational terrorism, attacks on these overseas posts and personnel are not uncommon. Current U.S. foreign policy dictates that the State Department operate diplomatic missions in high-threat locations where, in the past, the Diplomatic Security Bureau would have ordered evacuation.[18]

Because of its expanding workload, the Diplomatic Security Bureau's annual budget

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[17] *See generally Diplomatic Security's Recent Growth*, at 1, 4; SHAYERAH ILIAS, CONG. RESEARCH SERV., R98-567, THE OVERSEAS PRIVATE INVESTMENT CORPORATION: BACKGROUND AND LEGISLATIVE ISSUES 1, 2, 10 (2009); ALEX TIERSKY & SUSAN EPSTEIN, CONG. RESEARCH SERV., R42834, SECURING U.S. DIPLOMATIC FACILITIES AND PERSONNEL ABROAD: BACKGROUND AND POLICY ISSUES 1, 3-4, 7 (2013) ("*Securing U.S. Diplomatic Facilities and Personnel*"); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-266R, WARFIGHTER SUPPORT: A COST COMPARISON OF USING STATE DEPARTMENT EMPLOYEES VERSUS SECURITY SERVICES IN IRAQ 4 (2010) ("*Warfighter Support*").

[18] *Diplomatic Security's Recent Growth*, at 13, 19, 22-23 (noting 39 attacks between 1998 and 2009); *see also Securing U.S. Diplomatic Facilities and Personnel*, at 1, 6, 13-15.

increased from about $170 million before the 1998 bombings of the U.S. Embassies in Kenya and Tanzania, to approximately $1.8 billion in 2008. It is continuing to rise. While the Diplomatic Security Bureau has since more than doubled the size of its direct-hire workforce, it still requires substantial contractor support to meet its diplomatic security responsibilities.[19] Presently, about 90 percent of its 34,000 employees are private contractors.[20]

### E. Intelligence Gathering, Counterterrorism Training, And Narcotics Eradication.

Private contractors assist the United States in pursuing its interests abroad in additional ways. In Africa, for example, the U.S. military has outsourced air reconnaissance operations to contractors since at least 2009. Those contractors supply the aircraft and surveillance gear, as well as the pilots and other personnel, needed to collect and process electronic intelligence from the African airspace concerning Al-Qaeda affiliates and other enemies of the United States. American contractors also train Ugandan recruits to fight terrorists and pirates in Somalia. And American contractors regularly conduct millions of dollars of counternarcotics operations in South America.[21]

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[19] *See Diplomatic Security's Recent Growth*, at 16; *Warfighter Support*, at 4.

[20] *Securing U.S. Diplomatic Facilities and Personnel*, at 4-5.

[21] *See* Craig Whitlock, *Contractors Run U.S. Spy Missions in Africa*, WASH. POST, June 14, 2012; Craig Whitlock, *U.S. Trains African Soldiers for Somali Mission*, WASH. POST, May 15, 2012,

### F. Government-Fostered International Business Investment.

Even businesses that are not working directly with the federal government frequently play a crucial role in facilitating the federal government's foreign affairs objectives. For example, the U.S. government has historically encouraged companies to use their economic leverage to promote economic development or influence social change around the world. *See, e.g.,* Amicus Curiae Brief of the United States, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (No. 07-919), 2008 WL 408389, at *21 (observing that, in the 1980s, "the United States supported economic ties with black-owned companies [in South Africa] and urged companies to use their influence to press for change away from apartheid") (citing Pub. L. No. 99-440, §§ 4, 101, 304-305, 100 Stat. 1089, 1099-1100 (1986); National Security Decision Directive 187 (Sept. 7, 1985), http://www.fas.org/irp/offdocs/nsdd/nsdd-187.htm).

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In short, American contractors and businesses today further U.S. national security and foreign policy interests in broad and significant ways. Given that the number of federal executive branch employees has remained essentially constant between 1963 and 2006,[22] private contractors have

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at A01; *Counternarcotics Contracts in Latin America: Hearing Before the Ad Hoc Subcomm. on Contracting Oversight of the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. 9, 64, 95-96, 99 (2010).

[22] Stanger, One Nation Under Contract, at 17.

been instrumental in bridging the gap between the federal government's expanding global efforts and the capacity of the federal workforce and Armed Forces. Along with U.S. business investment more generally, those federal contractors are essential to the promotion of U.S. interests abroad.

## II. EXTRATERRITORIAL APPLICATION OF STATE COMMON LAW TORTS IMPOSES SERIOUS COSTS ON U.S. BUSINESSES AND GOVERNMENT INTERESTS

### A. State Tort Liability Creates Enormous Uncertainty For U.S. Businesses.

This Court recently confirmed that federal law, such as the Alien Tort Statute, does not ordinarily apply in cases where "all the relevant conduct t[akes] place outside the United States." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013); *see also Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247 (2010). In response, plaintiffs are predictably turning to "state-court suits with foreign elements" to litigate against U.S. corporations operating abroad. Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. REV. 535, 549, 550 (2012) (observing that plaintiffs are likely to find state common-law actions more "worthwhile" in light of federal extraterritoriality restrictions and predicting an "unprecedented number" of such suits); *see* Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common*

*Law Apply Abroad?,* 102 GEO. L.J. 301, 305-306 (2014) (predicting that, "with U.S. courts now presumptively barred from applying *** federal tort statutes like RICO[] to conduct in foreign countries, the focus in transnational tort cases will soon turn to state common law tort claims"). Indeed, in many cases involving overseas conduct in which federal-law claims would now be subject to dismissal based on this Court's precedents, plaintiffs have alleged state-law claims arising from the same conduct. *See, e.g.*, *Doe*, 654 F.3d at 15; *Abdullahi v. Pfizer*, *Inc.*, 562 F.3d 163, 172 (2d Cir. 2009); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1312 (11th Cir. 2008).[23]

Simply substituting state-law tort claims for federal ones, of course, alleviates none of the deleterious effects of these suits. Many of them effectively seek "to impose embargoes or international sanctions through civil actions in United States courts." *Presbyterian Church of Sudan v. Talisman Energy*, *Inc.*, 582 F.3d 244, 261, 264 (2d Cir. 2009) (plaintiffs' Alien Tort Statute allegations "serve[d] essentially as proxies for their contention

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[23] Comparatively more favorable substantive tort law and procedural rules in U.S. courts "produce much larger recoveries" than could be obtained in foreign courts. Jack Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare:* Spinozzi v. ITT Sheraton Corp., 120 HARV. L. REV. 1137, 1137 (2007). Plaintiffs thus have a "powerful" incentive to sue domestically when, as here, "plaintiffs are injured outside the United States by defendants amenable to suit within the United States," *id.*, in the hopes that the "U.S. forum state's common law [will be applied] to the dispute rather than the law of the *** country where the injury occurred," Meyer, *Extraterritorial Common Law*, 102 GEO. L.J. at 304.

that [defendant corporation] should not have made any investment in the Sudan"), *cert. denied*, 131 S. Ct. 79 (2010). By deterring corporate investment abroad, such suits indiscriminately harm not just corporations but also the countries where they operate and U.S. foreign policy objectives. *See generally* Amicus Curiae Brief of the Chamber of Commerce of the United States, *Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659 (2013) (No. 10-1491).

Beyond the general deterrence of overseas corporate investment, the growing number of state-law tort suits pose distinctive problems for U.S. corporations that work for or in tandem with federal agencies abroad, for several reasons.

*First*, the prospect of state-law tort suits creates uncertainty for businesses seeking to ensure that their overseas conduct conforms to law. Permitting "extraterritorial application of different state tort regimes *** allows for unlimited variation in the standard of care that is applied to" these vital "public-private partnership[s]" abroad. *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 238, 240 (4th Cir. 2012) (Wilkinson, J., dissenting). And the standard of care is just one variable: corporations must also take into account the cognizability of claims for aiding and abetting and conspiracy, *see id.* at 229; the availability of punitive damages, *see id.*; and the recognition of affirmative defenses such as assumption of the risk, proximate cause, and contributory negligence, *see* Pet. App. 16-36.

A corporation's inability to predict *ex ante* which state's tort law will govern the conduct of its employees "lead[s] to inconsistent standards being applied and uncertainty on the part of actors who wish to conform their conduct to the law." Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1064 (2009). Such inconsistency and uncertainty affects the day-to-day operations of businesses currently in partnership (or considering partnership) with U.S. agencies abroad.

This case well illustrates the problem. Here, "[t]he District Court has not yet determined if" Petitioner's conduct will be subject to the law of its principal place of business (Texas), the law of the decedent's former residence (Tennessee), or even the law of the decedent's estate administrators' residence (Pennsylvania), which is also the administrators' chosen forum. Pet. App. 17 n.10.[24] As the court of appeals recognized, the district court's choice-of-law decision will determine the standard of care, the scope of the damages, and—at least under the court of appeals' novel framework for the political-question doctrine—whether the claims may proceed at all. *See*

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[24] The district court rejected the application of Iraqi law, *see* Pet. App. 96, even though other courts have applied Iraqi law in cases implicating similarly significant federal interests, *see Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 763 (D. Md. 2010) (holding that "Iraqi law applies to all of Plaintiffs' state law claims" involving embedded contractor conduct), *appeal dismissed*, *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012).

Pet. App. 45 (if Tennessee or Texas law applies, "the case contains nonjusticiable issues" and the court will have to "[a]t the least, *** eliminate any damages that are based on proportional liability"). Instead of being able to make informed decisions at the outset, Petitioner is placed in the untenable position of facing unknown legal consequences for past conduct—even now, years after suit was filed.

*Second*, corporations must factor in the cost of potential liability when they bid on or enter into contracts with government agencies. Calculating costs is immeasurably more difficult when corporations have to consider potential liability arising from "the tort regimes of all fifty states" as well as federal and local law. *Al Shimari*, 679 F.3d at 234 (Wilkinson, J., dissenting).

A corporation's inability to predict the potential scope of liability before contracting with the federal government, or even after the contract is performed, necessarily increases the cost of doing business, raises insurance premiums, and requires more expensive bank financing for overseas operations. It also raises the possibility that "different jurisdictions [could] issue inconsistent judgments" in the transnational tort context, leading to conflicting or multiple liability. Florey, *Reflections*, 84 NOTRE DAME L. REV. at 1064.

*Third*, allowing state tort law to operate extraterritorially encourages plaintiffs to bring an exceptionally expensive species of litigation in U.S. courts. Foreign tort cases like this one are costly because they are pressed half a world away from the

locus of the injury and from the relevant documents, witnesses, and evidence. *Cf. Atlantic Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 581 (2013) (access to proof, premises, witnesses, and cost are all relevant considerations in judging appropriateness of plaintiff's chosen forum). Those already high expenses are even worse in cases involving federal contractors, as the countries where they work tend to have "undeveloped legal system[s] that do[] not, or cannot, cooperate with discovery[.]" Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2190 (2012). Couple those expenses with "the prospect of punitive damages and other uncertain measures of recovery" under state law, *Al Shimari*, 679 F.3d at 239 (Wilkinson, J., dissenting), and corporations face an unusually high bill for the privilege of working with the federal government in foreign countries.

### B. State Tort Liability Will Deter Some U.S. Contractors And Lead Others To Demand Higher Fees.

Due to the problems and uncertainty described above from the extraterritorial application of state tort law, American contractors may well hesitate to enter into the vital partnerships that sustain U.S. government operations, including military operations, abroad. *See Filarsky v. Delia*, 132 S. Ct. 1657, 1666 (2012) (recognizing that "private individuals [who] work in close coordination with public employees[] and face threatened legal action for the same conduct" will "think twice before accepting a government assignment"). Just as a

domestic tort suit helped encourage Talisman Energy to stop doing business in Sudan, *see* Stephen J. Korbin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425, 426 (2004), it would hardly be surprising if federal "contractors *** prove reluctant to expose their employees to litigation-prone combat situations," post-conflict zones, disaster relief efforts, and the like. *Saleh v. Titan Corp.*, 580 F.3d 1, 8 (D.C. Cir. 2009); *see Al Shimari*, 679 F.3d at 238-239 (Wilkinson, J., dissenting) (faced with "extraterritorial application of different state tort regimes," "[c]ontractors can be forgiven for not wanting to entrust their employees to the vagaries and caprice of individual verdicts and trials[]").

Given the government's regular and "particular need for specialized knowledge or expertise," it must often "look outside its permanent work force to secure the services of private individuals." *Filarsky*, 132 S. Ct. at 1665-1666; *see Al Shimari*, 679 F.3d at 240-241 (Wilkinson, J., dissenting) ("Few, if any, governmental tasks are undertaken today without some form of public-private partnership."). Limiting the pool of available contractors will reduce the government's options and may eliminate those service providers best able to support or carry out critical government functions abroad.

Expansive state tort liability may also deter multinational companies working with the United States abroad from establishing a domestic business presence in the United States or otherwise investing here. That would dampen a "key driver of the economy and *** an important source of innovation,

exports, and jobs." U.S. DEP'T OF COMMERCE, THE U.S. LITIGATION ENVIRONMENT AND FOREIGN DIRECT INVESTMENT, SUPPORTING U.S. COMPETITIVENESS BY REDUCING LEGAL COSTS AND UNCERTAINTY 2 (2008).[25]

By the same token, increasing the cost to U.S. companies will give wholly foreign firms a competitive advantage and eliminate prospective jobs for Americans. Because foreign corporations "are beyond the reach of U.S. courts both as a legal and practical matter," they "may have little to fear from *** litigation *** under state tort law[.]" Sykes, *Corporate Liability*, 100 GEO. L.J. at 2193. Enhanced liability under U.S. law thus effectively imposes a state-tort "tax" on domestic corporations that "reduce[s] the competitiveness of U.S. firms and other multinationals subject to suit in the United States." *Id.* at 2194; *see* Goldsmith & Sykes, *Lex Loci Delictus* at 1144 ("[T]he structure of U.S. personal jurisdiction and choice-of-law rules can result in the more pro-plaintiff standards of U.S. tort law being applied discriminatorily to the detriment of U.S. firms who operate abroad.").

Permitting extraterritorial state tort liability also means that the U.S. government will pay more to work with the smaller pool of contractors that remains. Given that contractors "predictably raise their prices to cover, or to insure against, contingent

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[25] Although this Court recently rejected a theory broadly "subject[ing] foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate," *Daimler AG v. Bauman*, 134 S. Ct. 746, 759-60 (2014), such corporations may still be subject to suit domestically if they have sufficient general or specific contacts of their own, *id.* at 757-758.

liability" for their federal work, the costs of "state tort suits against contractors" will "ultimately be passed through, substantially if not totally, to the United States itself." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511-512 (1988) (noting that state laws encouraging this result present a "significant conflict" with federal policy). Those higher costs will "chill both the government's ability and willingness to contract by raising the price of partnering with private industry[.]" *Al Shimari*, 679 F.3d at 243 (Wilkinson, J., dissenting). And ultimately, the cost for "imposing tort liability on government contractors" is borne by "the American taxpayer." *Saleh,* 580 F.3d at 8.

### C. State Tort Liability Will Undermine Vital Government Operations And Impinge On Foreign Policy.

The threat of state tort liability against U.S. companies and contractors working with the federal government abroad has noneconomic costs as well. Insulating private persons doing the public's work from tort liability helps "[e]nsur[e] that those who serve the government do so 'with the decisiveness and the judgment required by the public good,'" and protects against "'unwarranted timidity' on the part of those engaged in the public's business." *Filarsky*, 132 S. Ct. at 1665 (citations omitted). Removing that layer of protection by imposing extraterritorial "tort law may *** lead to excessive risk-averseness on the part of potential defendants," *Al Shimari*, 679 F.3d at 226 (Wilkinson, J., dissenting), and will "surely hamper military flexibility and cost-effectiveness," *Saleh,* 580 F.3d at 8. This concern is especially

pressing where U.S. military personnel or other federal employees are immune from state tort liability, requiring private actors to tread lightly or "be left holding the bag[.]" *Filarsky*, 132 S. Ct. at 1666; *see id.* (discussing implications when private actors "fac[e] full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity").

Moreover, given the close interaction of public and private personnel today, even a routine foreign tort case will require the collection of evidence and testimony from military and government personnel—often in foreign combat or reconstruction zones. In this case, for example, "the parties deposed seventeen current and former members of the military and U.S. government, including senior Army officers, senior enlisted personnel, and contracting officials." Pet. 11. That is seventeen officials *so far*. *See* Pet. App. 96 n.16 (noting that depositions of "Colonel Leon Parrott" and others "remained outstanding"). Such "broad-ranging discovery and the deposing of numerous persons *** can be peculiarly disruptive of effective government," *Harlow v. Fitzgerald*, 457 U.S. 800, 816-817 (1982), and especially in the military context, where a trial is liable to "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions," *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977). Yet this type of judicial "interference" with the conduct of important government business "is precisely what we invite by ascribing to the fifty states the unexpressed wish that their tort law

govern the conduct of military [and other governmental] operations abroad." *Al Shimari*, 679 F.3d at 232 (Wilkinson, J., dissenting).

In the end, the largest cost for the federal government may come in the form of interference with its foreign policy prerogatives. Our Constitution expressly entrusts the political branches of the national government with the foreign affairs power, *see* U.S. CONST. art. I, § 8, cls. 1, 11-15; art II, § 2, cls. 1-2, and thereby deprives the States of the same, *id.* art. I, § 10. Therefore, when a state's law encroaches upon the "effective exercise of the Nation's foreign policy," it "must give way." *Zschernig v. Miller*, 389 U.S. 429, 440 (1968); *see American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 399, 413 (2003) (state law must "yield" when it conflicts with "express federal policy").

That is why suits like this one are so fundamentally problematic. Congress and the Executive Branch set standards for how workers under federal contracts should conduct themselves in foreign nations, as well as how they are held responsible for the harms they cause doing the government's work. Allowing fifty different states to regulate the way that contractors operate on far-flung battlefields and in embassies, on overseas reconstruction projects, and during international humanitarian missions will alter that carefully struck balance. The ensuing lack of uniform federal standards may "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments" and nations. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381

(2000); *see Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the *** whole nation[] imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."). Such state tort intrusion "undercuts the President's diplomatic discretion and the choice he has made exercising it." *Garamendi*, 539 U.S. at 423-24.

As Judge Wilkinson observed in his dissenting opinion in *Al Shimari*, "[i]t defies belief that, notwithstanding the constitutional entrustment of foreign affairs to the national government, [a state] silently and impliedly wished to extend the application of its tort laws to events overseas[] *** in active disregard of [this Court's] pronouncements." *Id.* at 231. "Simply put, *** state tort claims have no passport that allows their travel in foreign battlefields[.]" *Id.* at 227. This Court should take the opportunity to consider whether the steep and significant costs to both U.S. companies and the federal government justify the application of state law to federal contractors operating overseas.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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