No. 19-648

IN THE

Supreme Court of the United States

CACI PREMIER TECHNOLOGY, INC.,

Petitioner,

v.

SUHAIL NAJIM ABDULLAH AL SHIMARI; SALAH HASAN NUSAIF JASIM AL-EJAILI; ASA'AD HAMZA HANFOOSH AL-ZUBA'E,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE KELLOGG BROWN & ROOT SERVICES, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amicus Kellogg Brown & Root Services, Inc. ("KBR") is a government-services-focused subsidiary of KBR, Inc., one of the world's preeminent engineering, construction, and services companies, which has approximately 38,000 employees, customers in more than 80 countries, and operations in 40 countries.[1] KBR has a long history of supporting defense and government agencies worldwide. Today, KBR provides comprehensive consulting and technology solutions for a wide range of markets, from aerospace and defense to energy and chemicals to intelligence.

Many of the services KBR provides are indistinguishable from traditional government functions, including military base operations, facilities management, border security, humanitarian assistance, and disaster response services. KBR has completed projects and performed services for the Army, NASA, and the Departments of Energy, State, and Homeland Security, among other government entities. KBR often performs under challenging circumstances in remote locations. For example, KBR personnel served as "force multipliers" by providing mission-critical services for the Army during the wars in Iraq and Afghanistan.

KBR has faced litigation arising out of the services it provides as a "contractor on the battlefield." In defending these suits, KBR has invoked federal-law-

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[1] The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; *amicus* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

based doctrines, including derivative sovereign immunity, as well as the political question doctrine, federal preemption, and other defenses. *See*, *e.g.*, *In re KBR Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014) ("*Burn Pit I*"); *In re KBR Burn Pit Litig.*, 893 F.3d 241 (4th Cir. 2018) ("*Burn Pit II*"); *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008); *Carmichael v. Kellogg Brown & Root Services, Inc.*, 572 F.3d 1271 (11th Cir. 2009); *Harris v. Kellogg Brown & Root Services, Inc.*, 724 F.3d 458 (3d Cir. 2013).

KBR also was a defendant in numerous battlefield contractor cases involving interlocutory appeals. *See Harris v. Kellogg Brown & Root Services, Inc.*, 618 F.3d 398 (3d Cir. 2010); *Martin v. Halliburton*, 618 F.3d 476 (5th Cir. 2010); *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224 (D. Or. 2010); *Fisher v. Halliburton*, 667 F.3d 602 (5th Cir. 2012); *McManaway v. KBR, Inc.*, 554 Fed. Appx. 347 (5th Cir. 2014).

KBR thus has considerable experience litigating these complex issues, a deep understanding of the real-world ramifications of protracted litigation in the context of battlefield-contractor suits, and substantial interest in ensuring that courts properly interpret the law applicable to these suits. KBR submits this brief to provide its unique perspective and understanding of the issues raised in the Petition.

SUMMARY OF ARGUMENT

The U.S. military's increased reliance on contractors in recent decades has had several consequences, including a proliferation of lawsuits arising out of the performance by contractors of functions historically carried out by military personnel. Although fre-

quently styled as routine claims against private entities, these suits raise legal issues of exceptional importance and implicate profound federal interests. The United States has explained that the scope of liability faced by battlefield contractors "has significant importance for the Nation's military" because imposing liability "for actions taken within the scope of [a contractor's] contractual relationship supporting the military's combat operations would be detrimental to military effectiveness." Br. of United States as Amicus Curiae, *Harris v. Kellogg Brown & Root Servs., Inc.*, No. 13-817 (U.S. Dec. 16, 2014) at 19. Further, these suits "can impose enormous litigation burdens on the armed forces." *Id*. at 20.

When a district court rejects threshold defenses in battlefield contractor suits—and in particular when, as here, a district court rejects an *immunity from suit*—the ensuing litigation will almost inevitably inflict the very harms to critical federal interests that the defenses are designed to prevent. *See* Pet. App. 127a (*Al Shimari v. CACI International, Inc.* (*"Al Shimari I"*), 679 F.3d 205, 225 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting) ("these are not routine appeals that can be quickly dismissed through some rote application of the collateral order doctrine")); Pet. App. at 6a ("Our narrow interpretation of the collateral order doctrine in this case has taken us down a dangerous road.") (Quattlebaum, J., concurring).

This is not a hollow concern. KBR's experience litigating battlefield-contactor suits over the past two decades illustrates the significant harms that have been inflicted to federal interests when courts failed to provide early resolution of immunity and related

defenses. Thus, KBR's experience provides a real-world glimpse down the "dangerous road" that Judge Quattlebaum warned of in his concurring opinion. That road includes not only unnecessarily-protracted litigation, but also massive burdens on U.S. military personnel and supporting federal services; unchecked intrusion into military and foreign affairs and sensitive military decision-making, including through probing and exacting discovery; and, enormous expenditures of government resources and money, including costs ultimately paid by U.S. taxpayers.

Because the very process of litigating a battlefield-contractor suit causes these serious harms to federal interests, the question presented—whether contractors are entitled to an immediate appeal when an immunity-from-suit is denied—is one of great significance. The Court should grant the petition, and the Court should clarify that such an immediate appellate right is essential in order to minimize damage to federal interests, and in particular to prevent unnecessary and unwarranted judicial interference with military prerogatives.

The Court also should grant the petition because the Fourth Circuit's decision conflicts with this Court's precedent, including *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016), and *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18 (1940). In *Campbell-Ewald*, the Court rejected application of derivative immunity under the specific facts presented, but the Court reaffirmed two important points: (i) contractors may be entitled to derivative immunity under certain circumstances, and (ii) such an immunity provides a contractor a shield "from suit." *See* 136 S. Ct. at 666.

ARGUMENT

I. In Battlefield Contractor Suits, Courts Should Resolve Threshold Defenses At An Early Stage To Avoid Unnecessarily-Protracted Litigation And Unwarranted Harms to Federal Interests.

A. Immunity and Related Defenses Are Designed to Protect Uniquely Federal Interests.

The Fourth Circuit's decision disregards the critical need for *early* resolution of immunity and related threshold defenses in battlefield-contractor suits, including through immediate appellate review of denied immunity claims. That need arises, in the first instance, due to the very nature of the immunity, which is designed to protect federal interests that are harmed by the very process of litigation.

The Petition ably sets forth why this matter implicates profound federal interests. *See* Pet. at 25-30. For example, as the Fifth Circuit explained in an analogous setting, "the basis for many of these defenses is a respect for the interests of the Government in military matters," and thus "district courts should take care to develop and resolve such defenses at an early stage while avoiding, to the extent possible, any interference with military prerogatives." *See Martin*, 618 F.3d at 488. Likewise, as Judge Wilkinson warned in a prior appeal in this suit, denial of immediate appellate review in battlefield-contractor suits is "anything but innocuous" because it "gives individual district courts the green light to subject military operations to the most serious drawback of tort litigation." Pet.

126a (*Al Shimari I*) (Wilkinson, J., dissenting); *see also McManaway*, 554 Fed. Appx. at 354 (Jones, J., dissenting) ("the court, by condoning indecision here that amounts to a decision, has abandoned the restraint we ought to exercise when facing wartime conduct that we are constitutionally and statutorily forbidden and ill-suited to evaluate").

We write separately to highlight how recent battlefield-contractor litigation has in fact caused real, concrete harms to federal interests, largely due to the absence of early, definitive appellate decisions.

B. As Demonstrated by Recent Litigation, Lack of Immediate Appellate Review in Battlefield Contractor Suits Inevitably Causes Significant Harms to Federal Interests.

KBR's litigation experience over the past two decades illustrates the need for early and definitive judicial rulings on threshold immunity or related defenses raised by battlefield contractors. In suits that were not resolved early, the burdens and impositions on the U.S. military and related government agencies have been enormous, and these intrusions into military affairs have already had untold consequences for current and future engagements.[2]

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[2] To be sure, KBR's litigation matters have not always involved the specific defense and procedural posture raised here—i.e., entitlement to immediate appellate review for denial of a derivative-immunity defense. But regardless of the labels used, the lesson learned applies with equal force: When courts fail to resolve immunity and other threshold defenses in battlefield-contractor suits at an early stage, the litigation process itself inflicts significant harms to federal interests. *See* Pet. App. 201a (*Al*

The *Burn Pit* litigation is a case in point. In *Burn Pit I*, the Fourth Circuit reversed and remanded an early dismissal (based on non-justiciabiliy, derivative sovereign immunity, and preemption) because the court concluded that a larger factual record was needed. *See* 744 F.3d at 351-52. Rather than achieving an early resolution, litigation concerning KBR's "threshold" defenses ensued for a decade. After the remand, for several years the district court presided over a "herculean discovery process," which "yielded over 5.8 million pages of documents, including almost a million pages of contract documents, and 34 witness depositions." *Burn Pit II*, 893 F.3d at 253, 254. The majority of these witnesses were military personnel, including multiple commanding generals and other high-ranking government officials. Some military witnesses were serving on active duty—meaning, personnel were pulled away from their posts supporting the nation's defense in order to participate in the litigation. During depositions and at a three-day evidentiary hearing, military commanders were subjected to rigorous examination regarding the sensitive "military judgment[s]" they made "in a dangerous, wartime contingency environment." *See In re KBR Burn Pit Litig.*, 268 F.Supp.3d 778, 807 (D.Md. 2017).

The *Burn Pit* litigation also diverted substantial legal resources of the federal government notwithstanding that the United States was not a named party. The litigation required participation by dozens of government attorneys from the Department of Justice, the Department of Defense, the Army, and the

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Shimari I) (Niemeyer, J., dissenting) ("Surely our jurisdiction to consider the district courts' orders cannot depend wholly on labels such as 'preemption' and 'immunity.'").

Defense Contract Management Agency. Government counsel appeared at most hearings and depositions, and they were tasked with reviewing and producing hundreds of thousands of wartime contracting records. *See Burn Pit*, 268 F.Supp.3d at 787-88.

Ultimately, the expansive and harmful remand proceedings were not even essential to resolution of the suit, as the core factual predicate for the eventual dismissal (based on the threshold justiciability question) had already been established prior to remand. *Compare Burn Pit I*, 744 F.3d at 337 (citing sworn testimony regarding key military decisions); *with Burn Pit II*, 893 F.3d at 254 (same).

In that respect, the *Burn Pit* suit was by no means an outlier. KBR has been involved in numerous other suits that followed similar trajectories and imposed serious harms that could have—and should have—been avoided had there been definitive, early appellate rulings. In *Harris*, for example, the Third Circuit rejected an interlocutory appeal in a posture similar to that presented here (denial of a motion to dismiss based on non-justiciability and preemption). *See Harris*, 618 F.3d at 398. Thereafter, the district court presided over several years of remand proceedings, which included depositions of nearly 20 active and retired military personnel. Senior commanders were compelled to testify about their sensitive judgments regarding troop safety amidst the wars in Iraq and Afghanistan. *See Harris v. Kellogg Brown & Root Services, Inc.*, 878 F.Supp.2d 543, 547-52 (W.D.Penn. 2012), *rev'd*, 878 F.Supp.2d 543 (3d Cir. 2013) (citing testimony from top military officers showing that "the military exposed soldiers to what its commanders de-

termined to be an acceptable level of risk after considering all of the other hazards of war"). Had the Third Circuit asserted jurisdiction under the collateral order doctrine early on, these harms and litigation burdens could have been avoided.

Similarly, in *Fisher*, the Fifth Circuit reversed an early dismissal order; thereafter, the case proceeded through extensive discovery, again involving numerous senior military witnesses and testimony concerning the wisdom of their wartime decisions. Of particular note, during the remand proceedings the Army sought to quash proposed testimony of a commanding general based on the Army's concerns about "the detrimental impact of unfettered access to current and former DoD and Army officials" in private litigation; the district court rejected that argument, thus allowing the purportedly-harmful testimony to proceed. *See Fisher v. Halliburton*, No. 4:05-cv-01731 (S.D. Tex.), ECF 516-1 at 10 (Mar. 1, 2010).

C. The Court Should Grant Certiorari In Order to Clarify the Law and Protect Critical Federal Interests.

There is a common thread that runs throughout the suits described herein: failure by appellate courts to interpret immunity and related defenses in a manner that allows the defenses to accomplish their critical purpose of protecting federal interests. This is no small matter. As these cases demonstrate, protracted litigation has *already* resulted in significant burdens and impositions on the U.S. military, and the proliferation of battlefield-contractor litigation during the past two decades has *already* exacted an unquantifiable toll on U.S. military policy and practices. Through

these suits, dozens of senior military leaders have been compelled to testify; those commanders faced probing questions about their sensitive wartime judgments; and, those battlefield judgments have been subjected to extensive second-guessing via the judicial process.[3] Beyond that pernicious intrusion, substantial government manpower has been diverted away from our national defense and instead devoted to the support of litigation matters brought by private plaintiffs arising out of overseas contingency and wartime scenarios.

What is more, these suits also have had an enormous financial impact, not merely on private parties but, even more significantly, on the public fisc. That is because the costs of battlefield-contractor litigation are borne, either directly or indirectly, by U.S. taxpayers. *See*, *e.g.*, *McManaway*, 554 Fed.Appx. at 354 (Jones, J., dissenting) ("The United States ultimately pays the judgment, if not by indemnifying KBR, then by having to pay ever-higher costs for private contractors who must be hired to fill vital gaps in military actions."). Indeed, pursuant to basic cost-reimbursement contracting principles, the United States is typically the real party in interest, as "many military contracts performed on the battlefield contain indemnification or cost reimbursement clauses passing liability and allowable expenses of litigation directly on to the United States in certain circumstances." *See* Br. of U.S. as Amicus in *Harris* at 19-20 (citing 48 C.F.R.

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[3] *Cf. Stencil Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977) (affirming dismissal of indemnity action against United States where trial would "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").

§ 52.228-7(c)); *see also* 48 C.F.R. §§ 31.205–33 and –47; *Land v. Dollar*, 330 U.S. 731, 738 (1947) (any suit in which "the judgment sought would expend itself on the public treasury . . . is [a suit] against the sovereign"); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511-12 (1988) ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself…").

The issue presented in the Petition will only become increasingly important in the future. The U.S. military, as constituted now and for the foreseeable future, cannot fight and sustain wars without contractor support.[4] Thus, lawsuits against battlefield contractors are inevitable. These suits raise complex and often novel issues that are of profound importance. Yet, as KBR's experience illustrates, the lower courts have struggled with these issues, and as a result failed to establish clear rules that effectively protect the vital federal interests at stake. Absent guidance from this Court, damaging litigation patterns will persist, and the judicial branch will continue to run roughshod over the very federal interests that immunity and related defenses are designed to protect. *See* Pet. 128a (*Al Shimari I*) (Wilkinson, J., dissenting) ("None of us have any idea where exactly all this is headed or whether the damage inflicted on military operations will be only marginal or truly severe."). To

[4] *See*, *e.g.*, CRS Report R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress*, by Moshe Schwartz and Jennifer Church (May 17, 2013) ("most analysts and defense officials believe that contractors will continue to play a central role in overseas military operations").

avoid that result, the Court should grant certiorari in order to clarify that denials of immunity-based defenses are immediately appeallable under the collateral order doctrine.

II. The Fourth Circuit's Decision Conflicts With This Court's Precedent.

The Court should grant certiorari also because, for reasons set forth in the Petition, the Fourth Circuit's decision conflicts with this Court's precedent. *See* Pet. at 18-25. We write separately to highlight additional, relevant precedent.

First, this Court recently reiterated that contractors may be entitled to immunity *from suit*. In *Campbell-Ewald*, the Court rejected application of derivative sovereign immunity under the specific facts presented, but the Court reiterated two points that are of consequence here: (i) contractors may be entitled to derivative immunity—for example, under circumstances in which they comply with federal law and government instructions, and (ii) such a derivative immunity provides a contractor a shield "from suit." *See* 136 S. Ct. at 666 (describing question presented as whether contractor was "immune from suit"); *id.* at 672 (reiterating that "second question before us is whether Campbell's status as a federal contractor renders it immune from suit"); *id*. (holding that *Yearsley* immunity does not "shield[] the contractor from suit" if contractor "violates both federal law and the Government's explicit directions").

Second, for reasons expressed herein and in the Petition, where a defendant asserts "an immunity from suit rather than a mere defense to liability," that immunity "is effectively lost if a case is erroneously

permitted to go to trial," and that is why this Court has "repeatedly [] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *See Saucier v. Katz*, 533 U.S. 194, 200-201 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) and *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)). That well-settled rule applies to the immunity-from-suit at issue here, and should entitle Petitioner to an immediate appeal under this Court's precedent. *See* Pet. App. 197a (*Al Shimari I*) (Niemeyer, J., dissenting) ("The defendants claim entitlement to be protected *from the litigation process*, and the court's refusal to grant the immunity denied them that protection and was therefore an appealable decision under *Mitchell*, *Behrens*, *Iqbal*, *Jenkins*, *Winfield*, and *McVey*.").

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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