No. 21-867

In The Supreme Court of the United States

MIDWEST AIR TRAFFIC CONTROL SERVICE, INC.,
Petitioner,
v.
JESSICA T. BADILLA, ET AL.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Stephanie A. Maloney
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

Pratik A. Shah
Counsel of Record
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street, NW
Washington, D.C. 20006
(202) 887-4000
pshah@akingump.com

Aileen M. McGrath
AKIN GUMP STRAUSS HAUER & FELD LLP
580 California Street, Suite 1500
San Francisco, CA 94104

Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

This case presents an issue of considerable importance, resolution of which will impact the public-private partnerships that support our Nation's military, diplomatic, humanitarian, and peacemaking efforts abroad. The Chamber of Commerce of the United States of America ("Chamber") is particularly well-suited to provide additional insight into the broad implications of the decision below for businesses participating in these important partnerships.

The Chamber timely notified counsel of record for both parties that it intended to submit the attached brief more than 10 days prior to filing. Counsel for petitioner consented to the filing of this brief. Counsel for respondent declined to consent to this filing (without explanation). Therefore, pursuant to Supreme Court Rule 37.2, the Chamber respectfully moves this Court for leave to file the accompanying brief of *amicus curiae* in support of petitioner. No counsel for any party authored this accompanying brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of the brief.

As the world's largest business federation, the Chamber is well-positioned to address the thorny problems that arise when domestic state tort law is applied to American businesses operating overseas, including businesses working as contractors for the

federal government. Those problems have multiplied in recent years as courts have, to varying degrees, allowed state-law challenges against contractors operating overseas—including those supporting the Armed Forces—to proceed in federal court. Applying state tort law to overseas conduct imposes various uncertainties and attendant costs on businesses operating overseas, and thus diminishes the pool of businesses willing to contract with the federal government abroad. Ultimately the burden will fall on American taxpayers (who will absorb the resulting costs) and the developing world more generally (which will be deprived of the benefits public-private partnerships provide). The decision below—and the others applying state tort law to claims against federal contractors—exacerbates this dangerous trend by making it more difficult for businesses operating overseas to assess their risks from state-law tort suits.

The Chamber offers its understanding of the vast scope of public-private partnerships involving the federal government and business interests abroad, as well as the nature and extent of the costs imposed when state tort law is applied to this overseas conduct, to help explain why the question presented here warrants this Court's review. *See* Pet. 22-26. Because the proposed brief will aid this Court's consideration of the petition, the Chamber respectfully requests that the Court grant leave to file the attached brief urging the Court to grant the petition.

Respectfully submitted.

Stephanie A. Maloney
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER

Pratik A. Shah
Counsel of Record
Aileen M. McGrath
AKIN GUMP STRAUSS HAUER & FELD LLP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION:

Other Authorities:

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of the petition.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. 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. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, such as the foreign application of domestic law. *See, e.g.*, *Nestlé USA, Inc. v. Doe*, No. 19-416; *Kellogg Brown & Root Servs., Inc. v. Harris*, No. 13-817; *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491.

The Chamber has 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 the Chamber takes no position on the factual issues. The Chamber addresses only whether it is appropriate for courts to apply

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

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 in the military context and other circumstances where important federal interests are also implicated.

The issue has become increasingly important in recent years, as courts have allowed state-law challenges against contractors operating overseas to proceed in federal court notwithstanding the Federal Tort Claims Act's ("FTCA") combatant-activities exception. The Second Circuit's ruling here is part of this pernicious trend, which will continue unabated absent this Court's intervention. Claims in these cases invariably implicate issues of U.S. military and foreign policy in conflict, post-conflict, and development areas throughout the world. This brief describes the vast scope of public-private partnerships involving the federal government and business interests abroad, as well as the threats those relationships face from the overseas application of state tort law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal government has long relied heavily on private contractors to carry out military and civilian operations overseas. For instance, contractors have provided critical support to the Armed Forces for construction, transport, and other tasks historically assigned to service members. Contractors also have played 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 American 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. Although plaintiffs have long paired Alien Tort Statute ("ATS") claims together with state-law claims, the Court has curtailed the application of the ATS to injuries occurring overseas. At the same time, federal courts of appeals have opened the courthouse door to state-law claims against federal government contractors operating overseas by distorting the preemption standard under the FTCA's combatant-activities exception. Each circuit to address the issue has articulated a different test for analyzing FTCA preemption in this context. *See* Pet. 14-19. Nevertheless, each standard is "both imprecise and too narrow," *id.* at 20 (quoting U.S. Br. 14, *Kellogg Brown & Root Servs., Inc. v. Harris*, No. 13-817), and has improperly allowed many suits challenging overseas activity to go forward, *see* Pet. 15, 17-18.

The Second Circuit's decision below opens that door even further, and imprudently encourages the pursuit of state-law tort claims for the overseas conduct of federal contractors. Those claims have proliferated in recent years, as the disarray in the circuits has persisted without this Court's intervention.

The result poses a significant threat to the federal government's critical ability to partner with private contractors. Federal courts are saddled 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. That choice-of-law issue creates enormous uncertainty for American businesses seeking to bid on overseas contracts because they cannot intelligently assess the nature or extent of potential liability. And the scope of that liability, and any related discovery, can be substantial. The specter of massive liability and sensitive discovery (often concerning events occurring in remote areas overseas) places enormous settlement pressure on these contractors.

That pressure and uncertainty inevitably will continue to raise the cost of contracting with the federal government abroad and likely deter many businesses (particularly smaller companies) from entering into such contracts at all. As a result, the federal government faces a reduced pool of candidates and higher rates to cover any remaining contractors' increased insurance premiums and potential liability costs.

In addition to limiting American business opportunities and ultimately costing American 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. Plaintiffs can be expected to file state tort lawsuits against not only businesses partnering with the U.S. military, but also companies working to promote diplomatic, humanitarian, peacemaking, and economic development opportunities overseas. Such lawsuits risk frustrating the federal government's interest in

providing aid and support abroad, particularly to developing nations.

Federal contractors and businesses operating abroad further the Nation's interests in the world's most fragile and high-risk regions. Those interests are at their apex when (as in this case) those companies partner with the federal government in armed conflict, peacemaking, and diplomatic efforts. State tort law is an ill fit for disputes that arise in those circumstances. These concerns demand the Court's prompt attention.

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 partner to further American governmental interests. Those partnerships arise in a number of critical areas, ranging from battlefield combat support and diplomatic security to peacemaking, post-conflict reconstruction, and economic development efforts.

A. Military Combat Support

Throughout its history, the U.S. Department of Defense ("DOD") has depended on civilian contractors to support overseas military operations. That reliance increased sharply in the wake of the Cold War, as the cessation of the draft combined with defense budget

cuts resulted in a substantial reduction in the size of the U.S. Armed Forces, leading the U.S. military to turn to private contractors. The result has been that contractors now perform many combat duties previously assigned to service members, including constructing and maintaining facilities, transporting supplies and personnel, providing life support to service members on the battlefield, and executing numerous other tasks in active war zones. Using contractors provides DOD with many benefits, including: "freeing up uniformed personnel to focus on military-specific activities; providing supplemental expertise in specialized fields, such as linguistics or weapon systems maintenance; and providing surge capabilit[ies] to quickly deliver critical support functions."[2]

The recent conflicts in Afghanistan and Iraq, and the global war on terror, illustrate the central role that contractors have long played in supporting U.S. troops in areas of armed conflict. Contractors made up 50 percent or more of the total DOD presence in Afghanistan and Iraq.[3] For instance, reports showed that over 100,000 DOD contractor personnel (in addition to over 65,000 U.S. troops) were present in

---

[2] *See* Heidi M. Peters, Cong. Rsch. Serv. IF10600, *Defense Primer: Department of Defense Contractors* 1 (Feb. 3, 2021) ("*Defense Primer*"); Moshe Schwartz & Jennifer Church, Cong. Rsch. 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 Military Operations*").

[3] *Defense Primer*, *supra* note 2 at 1.

Afghanistan as of March 2013, and DOD expended over $160 billion for contractual services performed in Iraq and Afghanistan between 2007 and 2012.[4]

There is no reason to expect DOD's use of contractors to abate in future armed conflicts. Defense officials and analysts believe that the U.S. military cannot function effectively on the battlefield without support from private contractors.[5] DOD has recognized that private contractors are functionally integrated into—and an essential component of—the total military force.[6]

B. Fragile Nation Support And Post-Conflict Reconstruction

Active military operations are only one component of our Nation's foreign policy mission. As part of its efforts to promote freedom and democracy around the globe, the federal government works to "strengthen fragile states where state weakness or failure would magnify threats to the American homeland and empower reform-minded governments, people, and civil society."[7] Over the past several decades, the United States has helped partner countries—including those recovering from or at risk of conflict—to become more self-reliant and

---

[4] *DOD's Use of Contractors to Support Military Operations*, *supra* note 2 at 1-2.

[5] *Id.*

[6] *See* U.S. Dep't of Defense, *Quadrennial Defense Review Report* 75 (Feb. 6, 2006).

[7] U.S. Dep't of State, *United States Strategy to Prevent Conflict and Promote Stability* 1, 4, 7, 14 (2020).

democratic. U.S. Department of State ("State Department") personnel step in to help such countries "build durable mechanisms to resolve conflicts, undertake difficult reforms where needed, enhance social cohesion, build critical institutions, *** and mobilize domestic resources that can enable lasting peace, stability, and ultimately prosperity." [8] To achieve those objectives, the State Department relies heavily on civilian contractors and other forms of public-private partnerships.[9]

The post-conflict reconstruction efforts in Afghanistan and Iraq illustrate how these partnerships operate in practice. Even as active combat operations diminished, military contractors continued to play a significant role focusing on reconstruction and rebuilding in those regions. As recently as the second quarter of FY2021, over 21,000 contractor personnel remained in Afghanistan, Iraq, and Syria, performing a range of functions including security, IT and communications support, construction, social services, and medical care.[10] The State Department has overseen tens of thousands of private contractors performing billions of dollars of work—including constructing and restoring infrastructure, developing new justice systems, and

---

[8] *Id.* at 7 (internal quotation marks omitted).

[9] *Id.* at 14.

[10] U.S. Dep't of Defense, *Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility* 1 (Apr. 2021).

protecting U.S. diplomatic officials.[11] As many as 80 percent of State Department personnel performing these on-the-ground functions in Afghanistan and Iraq have been private contractors.[12]

C. Development And Disaster Relief

"Humanitarian and economic development assistance is an integral part of U.S. global security strategy." [13] 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 about 160 countries." [14] USAID is responsible for billions of dollars of relief and reconstruction efforts in response to natural and man-made disasters. For instance, USAID has been a leader in the global fight against the COVID-19 pandemic, and has directed more than $9 billion in

---

[11] *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.

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

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

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

pandemic-related assistance to more than 120 countries.[15]

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.[16] As a result, USAID increasingly has had to rely on private contractors, who perform about 80 percent of USAID's overseas projects.[17]

USAID partners not only with federal contractors but also with other private companies to implement the agency's mission overseas. USAID proactively solicits private-sector involvement in its disaster relief and development efforts through a program called the Global Development Alliance. Through that program, USAID has engaged in over 2,300 private sector alliances, leveraging more than $43 billion in public and private funds to support countries in achieving

---

[15] USAID's COVID-19 Response, https://www.usaid.gov/coronavirus (last visited Jan. 6, 2022).

[16] *See* Curt Tarnoff, Cong. Rsch. Serv. R44117, *U.S. Agency for International Development (USAID): Background, Operations, and Issues* 1, 7 (2015); *see also* Emily M. Morgenstern, Cong. Rsch. Serv. IF10261, *U.S. Agency for International Development: An Overview* 2 (Aug. 14, 2020).

[17] *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, 43 (2013).

"sustained development and humanitarian outcomes."[18]

In much the same way, the Overseas Private Investment Corporation ("OPIC"), the federal government's international 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.*, helping Ukraine construct a nuclear storage facility, or supporting financial institutions in India and Costa Rica to improve women's access to capital). [19] Operating under the policy guidance of the Secretary of State, OPIC administers a portfolio that exceeds $10 billion, with projects in dozens of developing and post-conflict nations.[20]

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 those facilities and the American diplomatic personnel

---

[18] USAID, *Private-Sector Engagement Policy* 5, available at https://www.usaid.gov/sites/default/files/documents/1865/usaid_psepolicy_final.pdf (last updated Mar. 16, 2021).

[19] OPIC, Annual Report on Development Impact 13, 15 (Oct. 2018).

[20] *Id.* at 11.

deployed there (along with their accompanying family members).[21]

The Diplomatic Security Bureau's workload has continued to expand, in part due to the increasing frequency of attacks on overseas posts.[22] Although the Bureau has doubled the size of its direct-hire workforce, it still requires substantial contractor support to meet its diplomatic security responsibilities. Approximately 90 percent of the Bureau's 34,000 employees are private contractors.[23]

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. In past missions, these contractors have supplied aircraft and surveillance gear, as well as pilots and personnel, to obtain electronic intelligence concerning terrorist organizations. Contractors have also trained Ugandan recruits to fight terrorists in Somalia, and have engaged in counternarcotics operations in South America.[24]

---

[21] *See* Alex Tiersky & Susan B. Epstein, Cong. Rsch. Serv. R42834, *Securing U.S. Diplomatic Facilities and Personnel Abroad: Background and Policy Issues* 1, 3-4, 7 (2014).

[22] *See id.* at 1, 6, 13-15.

[23] *Id.* at 4-5.

[24] *See* Craig Whitlock, *Contractors Run U.S. Spying Missions in Africa*, Wash. Post, June 14, 2012; Craig Whitlock,

* * * * *

In short, American contractors and businesses further U.S. national security interests, including military, reconstruction, development, diplomacy, and other foreign policy efforts, in broad and significant ways. Private contractors have given the federal government extraordinary flexibility, and have been instrumental in bridging the gap between our Nation's expanding global efforts and the capacities of the Armed Forces and federal civilian workforce.

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

The Second Circuit's decision contributes to the disarray and uncertainty regarding whether, when, and where plaintiffs may bring state tort claims against American businesses operating overseas. Pet. 19-21. Under the various imprecise and fact-intensive standards the courts of appeals have adopted, these businesses cannot predict what state law will apply to their overseas conduct, whether and where they will be subjected to burdensome discovery, and if they will ultimately face significant monetary judgments. This uncertainty makes it more difficult for important public-private partnerships to form, and ultimately American taxpayers bear the brunt of the resulting

---

U.S. Trains African Soldiers for Somali Mission, Wash. Post, May 13, 2012, 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).

costs. Absent this Court's intervention, the threat of state-tort lawsuits against federal contractors—a real threat, as the number of recent cases illustrates—will continue to impair the Nation's military, security, and foreign policy interests.

A. The Second Circuit's Decision Further Opens The Door To State Tort Suits Against Government Contractors Operating Overseas.

By deepening the circuit conflict regarding the scope of FTCA preemption and further muddling the applicable standard (Pet. 14-19), the Second Circuit's decision will open the door to a greater number of state-law tort suits against American businesses operating overseas.

State-law suits are increasingly attractive vehicles for plaintiffs interested in suing American businesses for their overseas conduct. This Court has recently, and repeatedly, held that federal laws (like the ATS) ordinarily do not apply in cases involving overseas conduct. *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). Just last Term, the Court confirmed that the ATS does not apply even when overseas activity is connected to domestic "operational decisions." *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021).

But as this Court has held such federal-law suits targeting overseas conduct barred, the Second Circuit (and other courts) have gradually expanded plaintiffs' ability to bring state-law claims against American businesses, including those operating abroad, despite the preemptive language of the FTCA. Pet. 14-17.

Commentators predicted that plaintiffs would turn to "state-court suits with foreign elements" to challenge overseas activity. 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) ("[w]ith U.S. courts now presumptively barred from applying *** federal tort statutes *** to conduct in foreign countries, the focus in transnational tort cases will soon turn to state common law tort claims") (footnote omitted).

Those predictions have come true. Pet. 14-19. For over a decade, plaintiffs have alleged state-law claims alongside federal-law claims for the same conduct. *See, e.g.*, *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 172 (2d Cir. 2009). In the last few years alone, district courts have considered a burgeoning number of cases raising tort claims against federal contractors for injuries arising out of sensitive military operations. *See, e.g.*, *Cloyd v. KBR, Inc.*, 536 F. Supp. 3d 113, 117 (S.D. Tex. 2021) (suit arising out of injuries from Iranian ballistic missile attack at a U.S. Army base); *Hencely v. Fluor Corp.*, --- F. Supp. 3d ---, 2021 WL 3568397, at *1 (D.S.C. 2021) (lawsuit arising out of "an attack by a foreign enemy—a

Taliban operative—on a U.S. Military" base in Afghanistan); *Loquasto v. Fluor Corp.*, 512 F. Supp. 3d 728, 731 (N.D. Tex. 2021) ("personal-injury case arising out of a suicide bombing *** at a United States Military base in Afghanistan"); *Norat v. Fluor Intercontinental, Inc.*, No. 6:16-cv-00603-BHH, 2018 WL 1382666, at *1 (D.S.C. Mar. 19, 2018) (case arising out of a motor vehicle accident at a U.S. military airfield in Afghanistan).

As these cases illustrate, the winding down of active military operations in Afghanistan and Iraq has not translated to a decrease in cases challenging federal contractors' activities there. And such suits will likely only continue to grow with the aid of decisions (like the Second Circuit's) making it easier for plaintiffs to sue and more difficult for defendants to invoke the combatant-activities exception. *See* Pet. 23-24.

B. State Tort Liability Creates Enormous Uncertainty For American Businesses Operating Overseas.

The growing number of state-law tort suits creates distinctive problems for American businesses that work for or in tandem with federal agencies (especially the U.S. military) abroad. These businesses face several uncertainties stemming from state-law tort suits that combine to produce powerful settlement pressure. The prospect of enormous liability, following suit in an unexpected forum, based on state tort requirements that may be unknown until years into the litigation, after unusually expensive and burdensome discovery, will compel many

defendants to settle even meritless suits. This is not an abstract concern: Commentators have attributed war-zone tort-dispute settlements to the "significantly muddled" state of the law. *See* Brent Kendall, *Contractor's Torture Settlement a Milestone; Payment of $5.28 Million to Resolve Abuse Claims at Abu Ghraib in Iraq Underscores Legal Risks for Firms in War Zones*, Wall St. J., Jan. 10, 2013. The settlement pressure is exacerbated by the gray areas the Second Circuit's fact-specific preemption analysis creates (Pet. App. 33a), which make it more difficult for companies to assess their litigation risk.

First, the prospect of state-law tort suits creates uncertainty for businesses, including federal contractors, 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. Businesses must also take into account, for instance, the cognizability of claims for aiding and abetting and conspiracy and the availability of punitive damages. *See id.* at 229.

A business'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) ("*Reflections*"). Such inconsistency and uncertainty affects the day-to-day operations of American businesses working in partnership (or considering partnership) with U.S. agencies abroad.

The Third Circuit's decision in *Harris v. Kellogg Brown & Root Services, Inc.*, 724 F.3d 458 (3d Cir. 2013) well illustrates this problem. There, "[t]he District Court ha[d] not yet determined if" the defendant's conduct would 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). *Id.* at 469 n.10. As the court of appeals recognized, the district court's choice-of-law decision would determine the standard of care and scope of damages, and perhaps even whether the claims could proceed at all. *Id.* at 478. But the choice-of-law question was not resolved until many years into the litigation. *Harris v. Kellogg, Brown & Root Servs., Inc.*, 151 F. Supp. 3d 600, 603-604 (W.D. Pa. 2015). Instead of being able to make informed decisions at the outset, businesses are placed in the untenable position of facing unknown legal consequences for past conduct, with no certainty as to the applicable law.

Second, businesses operating abroad face uncertain—and potentially extraordinary—litigation costs if haled into federal court on state-law tort claims. Foreign tort cases are costly in part 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 Tex.*, 571 U.S. 49,

62-63 (2013) (access to proof, premises, witnesses, and cost bear on appropriateness of forum). Those expenses are even higher in many suits against 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). And discovery is doubly burdensome in cases, like this one, where documents and evidence pertain to battlefield incidents and sensitive military decisionmaking, *see* Pet. App. 3a-5a, and may be located in post-conflict regions (like Afghanistan) where contractors are no longer present, *see* Jack Detsch, *Report: Departure of Private Contractors Was a Turning Point in Afghan Military's Collapse*, Foreign Policy (Aug. 16, 2021).

The fact-intensive approach exemplified by the Second Circuit's decision here compounds the costs, turning on evidence regarding, *inter alia*, the U.S. military's specific involvement in the particular event at issue. *See* Pet. App. 35a-37a. Costly discovery into that relationship is all but certain, even into claims that are eventually determined to be preempted. *Compare Cloyd*, 536 F. Supp. 3d at 127 (denying motion to dismiss lawsuit as preempted under FTCA combatant-activities exception and ordering discovery), *with Cloyd v. KBR, Inc.*, --- F. Supp. 3d ---, 2021 WL 5494685, at *6-*10 (S.D. Tex. 2021) (later granting summary judgment on grounds of FTCA preemption following discovery). Even supposedly "limited" discovery into these threshold preemption questions has proven to be "massive" in practice. *In re*

KBR Inc., Burn Pit Litig., 268 F. Supp. 3d 778, 787-788 (D. Md. 2017), *aff'd in part, vacated in part and remanded by In re KBR, Inc.*, 893 F.3d 241 (4th Cir. 2018) (describing "limited" jurisdictional discovery, which included "over 5.8 million pages of documents, including more than 3 million pages of emails and other electronic data" and "thirty-four depositions of various witnesses *** including military personnel in both the operational and contracting commands"). Under that approach—which many circuits have sanctioned, *e.g.*, Pet. 13-20—the mere filing of a lawsuit threatens a federal contractor with extensive (and expensive) discovery.

Third, businesses must account for potential, possibly astronomical, liability. Substantive tort law and procedural rules in U.S. courts "produce much larger recoveries" than could be obtained in foreign courts. Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare:* Spinozzi v. ITT Sheraton Corp., 120 Harv. L. Rev. 1137, 1137 (2007). Awards in cases against war-zone contractors illustrate this reality. *See Bixby v. KBR, Inc.*, 603 F. App'x 605, 606 (9th Cir. 2015) (vacating $80 million damages award in case against military contractor). Projecting those potential costs can be difficult, particularly when businesses have to consider potential liability arising from "the tort regimes of all fifty states." *Al Shimari*, 679 F.3d at 234 (Wilkinson, J., dissenting). Businesses must also consider the prospect that "different jurisdictions [could] issue inconsistent judgments," leading to conflicting or multiple liability. Florey, *Reflections*, 84 Notre Dame L. Rev. at 1064.

C. State Tort Liability Will Deter Some American Contractors And Lead Others To Demand Higher Fees.

Suits challenging overseas conduct deter corporate investment abroad, thereby harming not only businesses but also the countries where they operate. *See generally* Amicus Curiae Br. of the Chamber of Commerce of the United States of America, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (2013). For all the reasons discussed, American contractors—particularly smaller businesses with fewer resources to absorb the various layers of uncertainty—may well hesitate to enter into the vital partnerships that sustain U.S. interests abroad. *See Filarsky v. Delia*, 566 U.S. 377, 390-391 (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[25] helped encourage Talisman Energy to stop doing business in Sudan, *see* Stephen J. Kobrin, *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-

[25] Plaintiffs effectively sought "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 (2d Cir. 2009) (plaintiffs' ATS allegations "serve[d] essentially as proxies for their contention that [defendant business] should not have made any investment in the Sudan"), *cert. denied*, 562 U.S. 946 (2010).

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 trust 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*, 566 U.S. at 390-391; *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 companies best able to assist the government.

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).

At the same time, increasing the cost to U.S. companies will give 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 businesses that "reduce[s] the competitiveness of U.S. firms and other multinationals subject to suit in the United States." *Id.* at 2194.

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. The risk of state tort lawsuits creates a significant cost that American businesses must absorb. *See* pp. 16-20, *supra*. Those businesses, in turn, "predictably raise their prices to cover, or to insure against, contingent liability" for their work as federal contractors. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 511-512 (1988). The costs of "state tort suits against contractors" will "ultimately be passed through, substantially if not totally, to the United States itself." *Id.* (noting that state laws encouraging this result present a "significant conflict" with federal policy). Those higher costs "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). Ultimately, the costs for "imposing tort liability on government contractors" are borne by "the American taxpayer." *Saleh*, 580 F.3d at 8.

D. State Tort Liability Undermines Vital Government Operations And Impinges On Foreign Policy.

As this Court has observed, suits challenging overseas conduct raise significant "foreign policy concerns." *Nestlé USA*, 141 S. Ct. at 1939. 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*, 566 U.S. at 390 (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. That concern is especially pressing where U.S. military personnel or other federal employees may be immune from state tort liability, requiring private actors to tread lightly or "be left holding the bag[.]" *Filarsky*, 566 U.S. at 391; *see id.* (discussing implications when private actors "fac[e] full liability for actions taken in conjunction with government employees who enjoy immunity").

Moreover, given the close interaction between public and private personnel today, even a routine foreign tort case requires the collection of evidence and testimony from military and government personnel.

Depositions of military officials and contracting personnel are disturbingly common in these cases. *See, e.g.*, *Harris v. Kellogg, Brown & Root Servs. Inc.*, 878 F. Supp. 2d 543, 557-560 & 567 n.16 (W.D. Pa. 2012), *rev'd by Harris*, 724 F.3d 458 (3d Cir. 2013); *see also In re KBR, Inc., Burn Pit Litig.*, 268 F. Supp. 3d at 792-802 (describing evidentiary hearing testimony from U.S. Army commanding generals and senior DOD officials). Such "broad-ranging discovery and the deposing of numerous persons *** can be particularly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. 800, 816-817 (1982). That is especially true 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 such 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).

Congress and the Executive Branch set standards for how workers under federal contracts should conduct themselves in foreign nations, and for 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). Such state tort intrusion "undercuts the President's diplomatic discretion and the choice he has made exercising it." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 423-424 (2003).

For that reason, as Judge Wilkinson has observed, "state tort claims have no passport that allows their travel in foreign battlefields[.]" *Al Shimari,* 679 F.3d at 227. The time has come for this Court 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.

Stephanie A. Maloney
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER

Pratik A. Shah
Counsel of Record
Aileen M. McGrath
AKIN GUMP STRAUSS HAUER & FELD LLP

January 10, 2022