No. 21-867

IN THE

Supreme Court of the United States

MIDWEST AIR TRAFFIC CONTROL SERVICE, INC.,

Petitioner,

v.

JESSICA T. BADILLA, *et al.*,

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF PROFESSIONAL SERVICES COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF PROFESSIONAL SERVICES COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Professional Services Council ("PSC") respectfully moves under Supreme Court Rule 37.2(b) for leave to file a brief as *amicus curiae* in support of Petitioner Midwest Air Traffic Control Service, Inc. ("Midwest").

All parties were timely notified of PSC's intent to file this *amicus* brief. Petitioner consents to its filing. Respondents Jessica T. Badilla, Ingrid S. Bulos, Consorcia A. Castillo, Josephine R Elbanbuena, Michelle S. Medina, Nela A. Padura, Acea M. Mosey, Erie County Public Administrator, do not consent to the filing of this brief. PSC thus files this motion seeking leave to file the attached brief.

PSC is the national trade association for the government professional and technology services industry. PSC's more than 400 member companies represent small, medium, and large businesses that support the U.S. military and Department of Defense, Department of Homeland Security, and other federal departments and agencies in foreign war zones and other high-risk environments.

PSC has a strong interest in the proper interpretation of the Federal Tort Claims Act's combatant-activities exception because its members face the same issues raised in this appeal when working with the U.S. military. PSC's members serve and have served as an essential component of the United States' strategic plan in Iraq and Afghanistan, respectively. PSC therefore seeks leave to file the attached brief to highlight why the failure of the court below to recognize the combatant-activities exception to the Federal Tort Claims Act, while simultaneously articulating a novel test to determine the scope of preemption and thereby deepening the conflict between circuits on this issue, creates significant implications for the Nation's military effectiveness. PSC's proposed amicus brief explains this result from its unique perspective and addresses how state tort liability implicates the policies underlying the Federal Tort Claims Act's combatant-activities exception. The proposed amicus brief does not repeat the Defendants-Appellants' arguments.

For the foregoing reasons, PSC respectfully requests that it be permitted to file the attached brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Professional Services Council ("PSC") is a non-partisan and non-profit national trade association for the government professional and technology services industry. PSC's more than 400 member companies represent small, medium, and large businesses that support the U.S. military and Department of Defense, Department of Homeland Security, and other federal departments and agencies in foreign war zones and other high-risk environments. PSC's members provide a wide range of professional and technology services, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, and scientific, social, and environmental services. Together, the association's members employ hundreds of thousands of Americans in all 50 states. These contractors have a strong interest in being able to continue to support military operations without interference from mass tort litigation.

The ability of PSC member companies to continue supporting the U.S. military is profoundly affected by the risks associated with operating in a wartime environment. Subjecting operational support contractors to the burdens of state tort suits arising from

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and no person other than amicus and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner's counsel has consented to the filing of this brief, but Respondents' counsel has withheld consent. Consequently, amicus has filed a motion for leave to file this brief. Counsel of record provided the required notice to the parties at least ten days before the filing deadline for this brief.

performance of their war-related contractual services will exponentially compound these risks and may very well deter or prevent contractor participation in future endeavors with the U.S. military. PSC therefore has a vital interest in ensuring the proper resolution of the issues before this Court and is uniquely qualified to provide an industry perspective on the consequences of applying state tort law to contractors' actions in support of U.S. military operations on the battlefield.

SUMMARY OF THE ARGUMENT

Throughout history, contractors have provided the United States with increased capacity, capabilities, and skills not otherwise available within the military structure. Since the Vietnam era, and particularly over the decade plus of combat operations in Iraq and Afghanistan, the U.S. military's integration of contract support has been unprecedented in both scope and scale. Battlefield contracting support—as distinguished from routine, non-contingency support—runs the gamut from armed private security guards and base camp services to highly skilled intelligence analysts, linguists, and trainers. The previous wars in Iraq and Afghanistan represent the first sustained military operations in which support contractors have comprised more than half of the total U.S. force in theater. Due to the increasingly complex global security environment, contractors are now essential to the readiness and effectiveness of the U.S. military. This is the reality of the modern battlefield.

Yet, taking on these functions has dramatically increased contractors' legal exposure. Although the United States is immune from lawsuits arising out of the military's combatant activities, there is a circuit split as to whether private contractors can be held liable under state law for performing military support

functions on foreign battlefields. In this case, the Second Circuit allowed a lawsuit against Petitioner Midwest Air Traffic Control Services, Inc. ("Midwest") to proceed to trial in New York federal court even though Midwest was performing air traffic control services as a subcontractor for the U.S. military in Afghanistan.

The Court should grant the Petition because whether these types of lawsuits should proceed is a question of exceptional importance. Contractors are integral to the national defense strategy and there must be consistent standards for all U.S. forces. Exposing contractors to the risk of tort liability will undermine the military's ability to conduct warfare and reduce the availability of critical resources.

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

Second, the risk of tort liability will raise costs and restrict the military's wartime flexibility. The cost of

battlefield support will inevitably rise if fewer contractors compete for government contracts. Contractors will also raise their prices to account for the risks of unknown tort liability, meaning the United States will indirectly bear the costs of actual and potential civil judgments. But more importantly, the government's ability to perform its traditional support functions will be limited as fewer contractors are willing to venture to foreign battlefields to partner with the U.S. military.

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

ARGUMENT

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

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

I. Private Contractors Perform Traditional Military Support Functions on the Modern Battlefield

The U.S. military has long relied on private contractors to perform critical services. Office of the Under Sec'y of Def. for Acquisition, Tech., and Logistics, Report of the Defense Science Board Task Force on Contractor Logistics in Support of Contingency Operations 10 (2014) ("Defense Science Board Report on Contractor Logistics in Support of Contingency Operations"). Over the last couple of decades, contractors in Iraq and Afghanistan have been "responsible for such critical tasks as providing armed security to convoys and installations, providing life support to forward deployed warfighters, conducting intelligence analysis, and training local security forces." Mosh Schwartz & Jennifer Church, Cong. Research Serv., R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis,*

and Issues for Congress 3 (2013) ("Schwartz & Church"). They also "wash clothes and serve meals, maintain equipment and translate local languages, erect buildings and dig wells, and support many other important activities." Comm'n on Wartime Contracting in Iraq & Afg., *At What Risk? Correcting Over-Reliance on Contractors in Contingency Operations*, Second Interim Report to Congress, at 7 (Feb. 24, 2011) ("Second Report to Congress").

These are functions that the military previously reserved for itself. *See* Steven L. Schooner & Collin D. Swan, *Dead Contractors: The Un-Examined Effect of Surrogates on the Public's Casualty Sensitivity*, 6 J. Nat'l Sec. L. & Pol'y 11, 14 (2012) ("Schooner & Swan"). But "with a smaller, all-volunteer force, many of these services are now contracted out." Office of the Under Sec'y of Def. for Acquisition, Tech., and Logistics, Report of the Defense Science Board Task Force on Improvements to Services Contracting 31 (2011) ("Defense Science Board Improvements to Services Contracting"). Today, "[a]lmost every defense function * * * is carried out in part by contracted services, including support for congressional directives," *id.* at 1, because there has been a "systemic change" toward relying on contractors to accomplish traditional military functions, *id.* at 31. This case is a clear example of that policy. Although the U.S. Air Force enlists Airmen to serve as air traffic controllers, the military made a decision to outsource these services in this instance. *See* U.S. Air Force, Careers, https://www.airforce.com/careers/detail/air-traffic-control (last visited Jan. 6, 2022) ("The lives of those in the air heavily depend on Airmen on the ground. Responsible for managing the flow of aircraft through all aspects of their flight, [U.S. Air Force] Air Traffic Control

specialists ensure the safety and efficiency of air traffic on the ground and in the air.").

The U.S. military now views private contractors as functionally integrated into—and an essential component of—the total military force. *See* U.S. Dep't of Defense, *Quadrennial Defense Review Report* 75 (Feb. 6, 2006); Schwartz & Church 2; *see also* U.S. Dep't of Defense, *Summary of the 2018 National Defense Strategy of the United States of America* 7 (2018) ("2018 National Defense Strategy") ("Recruiting, developing, and retaining a high-quality military and civilian workforce is essential for warfighting success."). The Chairman of the Joint Chiefs of Staff has stated that "[c]ontractors are *part of* the total military forces." Karen Parish, *Dempsey: Military Costs Must Shrink*, American Foreign Press Servs. (Mar. 6, 2012) (emphasis added). In fact, "we are in a situation where we have to substitute contractors for service members to do functions that normally service members would do." Hearing to Receive Testimony on the Situation in Afghanistan Before the S. Comm. On Armed Services, 115th Cong. 65 (2017) (testimony of U.S. Army General John Nicholson, Commander, NATO Resolute Support Mission and United States Forces–Afghanistan) ("Situation in Afghanistan"). As a result of this integration in this case, contractor personnel were authorized to wear military clothing and carry weapons, required to reside on a military base, and "subject to the jurisdiction of the Uniform Code of Military Justice," Brief for Petitioner at 5, *Midwest Air Traffic Control Serv., Inc. v. Badilla*, (No. 21-867), while performing in a location "regularly attacked" by insurgents and reporting to United States Air Force officers. *Badilla*, 8 F.4th at 112.

In light of "the critical role of contractors in military operations," Schwartz & Church 11, the military has found "the use of civilian contractors in support roles to be an essential component of a successful wartime mission," *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008). Private contractors have become "an operational necessity," *see* Defense Science Board Improvements to Services Contracting, Memo., because "the military is unable to effectively execute many operations, particularly those that are large-scale and long-term in nature, without extensive operational contract support," Schwartz & Church 2.

The reason for the military's reliance on battlefield support contractors is simple. "[C]ontractors can be force multipliers, affording access to an adaptable mix of unique skill sets that would otherwise be unaffordable or unavailable within a solely military and government civilian force." Defense Science Board Improvements to Services Contracting 23. "Contractors can provide significant operational benefits to DOD" by "freeing up uniformed personnel to conduct combat operations; providing expertise in specialized fields, * * * ; [] providing a surge capability, [and] quickly delivering critical support capabilities tailored to specific military needs." Schwartz & Church at 3. They also can be "hired when a particular need arises and released when their services are no longer needed." *Id.* And they are less expensive than "maintaining a permanent in-house capability." *Id.* These are few of many reasons why "analysts and defense officials believe that contractors will continue to play a central role in military operations." *Id.* at 1; Second Report to Congress 9 (noting that "the United States will continue to use contractors to carry out many of its contingency-related requirements").

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

During the most recent conflicts in Iraq and Afghanistan, contractors frequently *exceeded* the number of U.S. military forces in-country. Heidi M. Peters, Cong. Research Serv., R44116, *Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007-2020* 1 (2021) ("Peters"). For example, in September 2008, 163,446 private contractors were operating in Iraq alongside 146,800 U.S. military soldiers. Schwartz & Church at 25. During the same period, 68,252 private contractors were operating alongside 33,500 U.S. military troops in Afghanistan. *Id.* at 24. By March 2012, the number of contractors in Afghanistan ballooned to 117,227, compared to 88,200 troops. Peters 7. Between 2015 and 2020, the number of contractors

in Afghanistan fluctuated between 22,562 and 30,455. *Id.* 7–8.[2]

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

As private contractors have agreed to take on more of the military's support functions, their exposure to civil liability under state tort law has also increased. Contractors have been sued for performing traditional military support functions as varied as driving convoys of Army soldiers on the battlefield, *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009), performing electrical maintenance in a war zone, *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011), running military prisons, *Saleh v. Titan Corp*, 580 F.3d 1 (D.C. Cir. 2009), maintaining latrines at a forward operating base, *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751

[2] The Department of Defense ceased reporting the number of U.S. military troops deployed in Afghanistan, Iraq, and Syria in 2017. *See* Peters 3.

F. Supp. 2d 698 (S.D.N.Y. 2011), waste disposal and waste treatment services, *In re KBR, Inc., Burn Pit Litigation* (4th Cir. 2014), *cert. denied*, 574 U.S. 1120 (2015), and now, providing air traffic control at a pivotal U.S. military hub, *Badilla v. Nat'l Air Cargo Inc.*, 433 F. Supp. 3d 428, 433 (W.D.N.Y. 2020), *vacated and remanded sub nom. Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105 (2d Cir. 2021). While the U.S. military is immune from such lawsuits, *see* 28 U.S.C. § 2680(j); *Feres v. United States,* 340 U.S. 135 (1950), several courts, including the Second Circuit, have allowed private contractors to be sued under state law for performing military support functions.

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

The proliferation of services contracts has expanded over the past decade and extends well beyond manufacturing products. Service contracts inherently encompass discretionary functions that do not fit within the *Boyle* standard. Charles Cantu, *The Government Contractor Defense: Breaking the Boyle Barrier*, 62 Alb. L. Rev. 403 (1998) (The *Boyle* standard, known as the government contractor defense, shields those successfully invoking it from liability for injuries caused by defective products they manufactured in accordance with the specifications and after warning the government of the dangers of its design.). Exposing contractors to the risk of tort liability will cripple the military's war-fighting capabilities. First, the risk of liability will deter private contractors from assisting the military in future wars. Second, it will increase prices for contractor support and will limit the military's flexibility to conduct warfare as it will have to

train and divert troops to perform support functions. Third, it will undermine the military's authority on the battlefield.

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

The fear of crippling tort liability is a major deterrent for private contractors because risks cannot possibly be avoided on the battlefield. "[T]ort law is based in part on the theory that the prospect of liability makes the actor more careful." *Koohi v. United States*, 976 F.2d 1328, 1334 (9th Cir. 1992). But "[t]he very purposes of tort law are in conflict with the pursuit of warfare." *Saleh*, 580 F.3d at 7; *see also Koohi*, 976 F.2d at 1335. "[A]ll of the traditional rationales for tort law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, *where risk-taking is the rule*." *Saleh*, 580 F.3d at 7 (emphasis added); *Johnson v. United States*, 170 F.2d 767, 769 (9th Cir. 1948) (remarking that combatant activities "by their very nature should be free from the hindrance of a possible damage suit"). "[C]aution that may be well-advised in a civilian context may not translate neatly to a military setting," just as "[r]isks considered unacceptable in civilian life are sometimes necessary on a battlefield." *Al Shimari v. CACI, Int'l, Inc.*, 679 F.3d 205, 226 (4th Cir. 2012) (Wilkinson, J., dissenting).

Seemingly normal tasks take on a dramatically different character in an environment typified by "overwhelming and pervasive violence which each side intentionally inflicts on the other." *Koohi*, 976 F.2d at 1335. For example, the simple act of driving down a

road in Iraq or Afghanistan is fraught with peril. *See, e.g.*, *Carmichael*, 572 F.3d at 1289 ("We do not face the question of whether the defendants drove a fuel truck unsafely, say, on Interstate I-95 between Miami, Florida and Savannah, Georgia."). The same is true of operating an essential air traffic control facility regularly attacked by insurgents. *See Badilla*, 8 F.4th at 112.

Even if battlefield support contractors could conform their conduct to a standard of reasonable care, the precise standard is unknown at the time the contractor must act. Each of the fifty States has developed its own tort law regime. Courts that allow battlefield support contractors to be sued must apply the forum state's choice-of-law principles to determine which jurisdiction's substantive law applies to a contractor's conduct on a foreign battlefield. *Harris v. Kellogg Brown & Root Services, Inc.*, 724 F.3d 458, 467 (3d Cir. 2013). Deciding which law applies to battlefield conduct occurs after the injury and depends on factors wholly unrelated to the contractor's conduct. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 582 (2013) ("A federal court sitting in diversity ordinarily must follow the choice-of-law rules of the State in which it sits."). Adding to the uncertainty, choice-of-law regimes vary greatly among the States. *Compare Dreher v. Budget Rent-A-Car Sys., Inc.*, 634 S.E.2d 324, 326–27 (Va. 2006) (the traditional *lex loci deliciti* test), *with Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980) (the Restatement's "most significant relationship" test). Each is an idiosyncratic formula to determine which substantive law applies.

This random, *ex post* selection of the standard of care would make it impossible for battlefield support contractors to conform their conduct *ex ante.* When a

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

These are not trivial concerns. In *Bixby v. KBR, Inc.*, the district court's choice of Oregon law allowed a jury to award the Oregon-based plaintiffs $75 million in punitive damages in addition to $6 million in compensatory damages. *Bixby v. KBR, Inc.,* No. 3:09-CV-632-PK, 2013 WL 1789792, at *29, *31 (D. Or. Apr. 26, 2013), *vacated,* 603 Fed. App'x 605 (9th Cir. 2015). But if the plaintiffs had been from Washington instead of Oregon, then the $75 million punitive damages would not have been possible. *See Kommavongsa v. Haskell*, 67 P.3d 1068, 1075 (Wash. 2003) (en banc) ("Washington does not permit punitive damages in personal injury cases."). Although *Bixby* was later vacated for lack of personal jurisdiction over the defendant, *Bixby v. KBR, Inc.*, 603 F. App'x 605, 606 (9th Cir. 2015), it illustrates how the luck of *ex post* choice-of-law rules can increase the contractor's liability more than tenfold.

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

at 9 (noting that liability will "discourage[] contractors from participating in [planning and execution] where their expertise would help to better the product"). If fewer contractors are willing to assist the U.S. military in future conflicts, the military's ability to conduct warfare will be significantly degraded.

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

Exposing battlefield support contractors to tort liability will inevitably increase costs for the U.S. military. "[T]he government receives its best value in terms of price, quality, and contract terms and conditions" when it makes "effective use of competition." Steven L. Schooner, *Desderata: Objective for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103, 104 (2002). The government has "a responsibility to gain full value from every taxpayer dollar spent on defense." 2018 National Defense Strategy 10. But with fewer bidders willing to compete for contracts to perform traditional military functions on the battlefield, the prices of those contracts will invariably rise. *See Burke v. Ford*, 389 U.S. 320, 322 (1967) ("When competition is reduced, prices increase.").

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

immunity for military accidents conferred upon the government itself." *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986).

With fewer contractors willing to perform traditional military support functions on the battlefield, the "government's ability to perform its traditional functions" will also be limited. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) (quoting *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)). The assurance of immunity from suit and/or liability preserves the government's ability to perform its traditional functions by "ensuring that talented candidates are not deterred from public service." *Id.* But the government must attract both talented individuals willing to wear the uniform and talented contractors to support those wearing the uniform. *id.* at 1665–66 ("[I]t is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals."). "Contractors are able to access a worldwide labor force with skill sets and experience not available in deployable military or civilian personnel, and also may be able to provide a labor force willing to work certain jobs at a far lower cost than members of the all-volunteer military." Contractor Logistics in Support of Contingency Operations 24. Because contractors "do not depend on the government for their livelihood, they have the freedom to select other work—work that will not expose them to liability for government actions." *Filarsky*, 132 S. Ct. at 1666.

Fewer contractors willing to accept the risk of tort liability will cause the military to lose the flexibility that it enjoyed in Iraq and Afghanistan. There is already a growing concern among Defense officials, experts and academia that the U.S. military is losing

its technological edge in critical areas such as "artificial intelligence (AI), autonomy, unmanned systems, and high-powered computing." Michèle A. Flournoy, *How to Transform the Pentagon for a Competitive Era*, Foreign Affairs (May/June 2021), https://www.foreignaffairs.com/articles/united-states/2021-04-20/flournoy-americas-military-risks-losing-its-edge. Cutting-edge commercial companies with healthy balance sheets will be disincentivized to work with the Government if they risk liability for simply performing in accordance with the terms of their contract. The unknown exposure will make them less likely to enter the government marketplace. Consequently, the military will lose the ability to enlist contractors "when specific expertise is needed for a rapid response to an unexpected adversary capability." *See* Defense Science Board Improvements to Services Contracting 11. Without contractor support and innovation for key capabilities, such as responding to cyberattacks; electronic warfare and signal jamming, to name a few, "military commanders would be unable to field and sustain a force for any period of time longer than roughly 14 days." Contractor Logistics in Support of Contingency Operations 23.

The benefits from "engaging the services of companies that work in both commercial and government sectors" to learn and "apply successful business practices, technologies, and skills" will also be lost. *Id.* A key component of the military's force modernization plan to "foster a culture of experimentation and calculated risk-taking" involves leveraging commercial sector expertise. 2018 National Defense Strategy 7–8. Given the volunteer military's reduced force structure and increased reliance on contractors, permitting these "suits will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to

expose their employees to litigation-prone combat situations." *Saleh*, 580 F.3d at 8; *see also Tiffany v. United States*, 931 F.2d 271, 276 (4th Cir. 1991) (explaining that the "cumulative force of liability '[will] seriously handicap efficient government operations'" (citation omitted)).

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

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

But with the fear of state tort liability hanging over their heads, battlefield support contractors may hesitate to obey—or may even openly question—military commanders when lives are on the line. While immunity "free[s] military commanders from the doubts and uncertainty inherent in potential subjection to civil suit," *Saleh*, 580 F.3d at 7, "those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with" the military, *Filarsky*, 132 S. Ct. at 1666. The fear of such liability incentivizes contractors to question orders that increase their legal exposure. *See McMahon v. Presidential Airways, Inc.,* 502 F.3d 1331, 1348 (11th Cir. 2007) (noting that imposing liability on wartime activities

will "impair essential military discipline"). This creates a situation where contractors may have to think twice about whether to perform as contractually required or seek specific authorization for everything they do, thereby inhibiting operations. Contractors will ask for lengthier site investigations, additional resources, and more time to complete assigned tasks carefully. They may warn of an order's danger and suggest safer alternatives so they can reduce their legal exposure and point to the military as the proximate cause of any later injury. They certainly will avoid scenarios such as those in *Carmichael,* where a fatigued convoy driver worked long hours, even though the battlefield may demand that kind of flexibility. *See* 572 F.3d at 1285.

Contractors may also spurn military commands that create new obligations not contemplated in their contracts. A contractor's legal exposure can hinge on the very nuanced question of whether it was acting within the scope of the government contract. *See Carley v. Wheeled Coach*, 991 F.2d 1117, 1120 (3d Cir. 1993); *Boyle,* 487 U.S. at 515; *Br. for United States as Amicus Curiae*, *Al Shimari v. CACI Int'l, Inc.*, No. 09-1335, 2012 WL 123570, at *17-18 (4th Cir. Jan. 14, 2012). This was commonplace in the most recent conflicts, where contractors were routinely "placed in an unenviable position to meet the demands of the commander * * * in a rapidly changing and non-permissive environment," and undertook "extraordinary efforts to fulfill requests that were not in the original tasking—yet were crucial to the war effort." Contractor Logistics in Support of Contingency Operations 18. If being asked to perform non-contracted in-scope services increases the risk of liability, support contractors will have incentives to refuse to adapt to the military's changing needs in hostile situations until they have time to evaluate the liability exposure of

new tasks. *See Al Shimari*, 679 F.3d at 229 (Wilkinson, J., dissenting) (imposing liability implies that "the contractors should have paused to consider their potential liability * * * before agreeing to supply the military needed personnel under the government contract"). This is compounded when contractors are utilized to fill a particular need, such as night-time air traffic control. *Badilla*, 8 F.4th at 112. Further subjecting contractors to the Uniform Code of Military Justice creates an inflexible environment where every action must be carefully assessed.

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

Moreover, lawsuits against support contractors will inevitably drag American soldiers from foreign battlefields into domestic courtrooms. Another goal of immunity is "preventing the harmful distractions * * * that can accompany damages suits." *Filarsky*, 132 S. Ct. at 1665. But lawsuits against contractors will "often affect any public employees with whom [contractors] work by embroiling those employees in litigation." *Id.* at 1666. American soldiers will inevitably be "haled into lengthy and distracting court or

deposition proceedings * * * where, as here, contract employees are so inextricably embedded in the military structure." *Saleh*, 580 F.3d at 8. These lawsuits will "interfer[e] with and detract from the war effort" because they will "burden[] the military and its personnel with onerous and intrusive discovery requests." *Br. for United States as Amicus Curiae*, *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, No. 09-683, 2010 WL 2214879, at *13 (U.S. May 28, 2010); *see also Br. for United States as Amicus Curiae*, *Al Shimari v. CACI Int'l, Inc.,* No. 09-1335, 2012 WL 123570, at *5 (4th Cir. Jan. 14, 2012) ("Courts should be properly sensitive to the concern that unfettered discovery proceedings could affect military readiness."). The government's interests are threatened by the prospect of "compelled depositions and trial testimony by military officers concerning the details of their military commands." *United States v. Stanley*, 483 U.S. 669, 682–83 (1987); *see also Al Shimari v. CACI Premier Tech., Inc.*, 775 Fed. App'x 758, 760–61 (4th Cir. 2019) (Quattlebaum, J., concurring) ("This proceeding has allowed discovery into sensitive military judgments and wartime activities.").

More troubling is that these lawsuits could pit contractors and the military against each other. The litigation would require "members of the Armed Services and their contractors to testify in court as to each other's decisions and actions." *Al Shimari*, 679 F.3d at 245 (Wilkinson, J., dissenting) (citation and internal quotation marks omitted). Trials will "involve second-guessing military orders" in an attempt to determine "the degree of fault, if any, on the part of the Government's agents." *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673 (1977). This will inevitably "devolve into an exercise in finger-pointing between

the defendant contractor and the military." *Saleh*, 580 F.3d at 8.

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

CONCLUSION

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

Respectfully submitted,

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