No. _____

In the Supreme Court of the United States

WINSTON TYLER HENCELY,

Petitioner,

v.

FLUOR CORPORATION; FLUOR ENTERPRISES, INC.; FLUOR INTERCONTINENTAL, INC.; FLUOR GOVERNMENT GROUP INTERNATIONAL, INC.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Former U.S. Army Specialist Winston T. Hencely was critically and permanently injured by a suicide bomber inside Bagram Airfield in Afghanistan. The bomber, Ahmad Nayeb, worked on base for a government contractor. An Army investigation found that the attack's primary contributing factor was the contractor's actions in breach of its Army contract and in violation of the military's instructions to supervise Nayeb. Hencely sued the government contractor for negligence under South Carolina law. He did not sue the military under the Federal Tort Claims Act.

Even so, the Fourth Circuit held that Hencely's state claims are preempted by unspoken "federal interests" emanating from an FTCA exception. Invoking *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the court of appeals held that the FTCA's exception immunizing the *government* for "[a]ny claim arising out of the combatant activities of the military or naval forces … during time of war," 28 U.S.C. §2680(j), barred Hencely's South Carolina claims against the *contractor*. The decision below reaffirmed a 3-1-1 split among the Second, Third, Fourth, Ninth and D.C. Circuits over *Boyle*'s reach when contractors defend against state tort claims by invoking §2680(j).

The question presented is:

Should *Boyle* be extended to allow federal interests emanating from the FTCA's combatant-activities exception to preempt state tort claims against a government contractor for conduct that breached its contract and violated military orders?

PARTIES TO THE PROCEEDING

The parties to the proceeding below are as follows:

Petitioner is former U.S. Army Specialist Winston T. Hencely. He was the plaintiff in the U.S. District Court for the District of South Carolina and the appellant in the U.S. Court of Appeals for the Fourth Circuit.

Respondents are Fluor Corporation, Fluor Enterprises, Inc., Fluor Intercontinental, Inc., and Fluor Government Group International, Inc. Respondents were defendants in the district court and appellees in the Fourth Circuit.

RELATED PROCEEDINGS

The related proceedings below are:

1) *Hencely v. Fluor Corp.*, No. 6:19-cv-489-BHH (D.S.C.) — Summary judgment entered on August 11, 2021.
2) *Hencely v. Fluor Corp.*, No. 21-1994 (4th Cir.) — Judgment entered on October 30, 2024, and petition for rehearing en banc denied on November 26, 2024.
3) *Tangen v. Fluor Intercontinental, Inc.*, No. 6:21-cv-335-JD (D.S.C.) — 13 consolidated related cases involving the same bombing attack; stayed pending the resolution of this case.

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JURISDICTION

The Fourth Circuit entered judgment on October 30, 2024, and denied a petition for rehearing en banc on November 26, 2024. App.37. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act states: "the district courts … shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, … for … personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment[.]" 28 U.S.C. §1346(b)(1).

A later FTCA provision states: "[S]ection 1346(b) … shall not apply to … [a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* §2680(j).

The FTCA also states: "the term 'Federal agency' includes … the military departments … but does not include any contractor with the United States." *Id.* §2671. It further states: "'Employee of the government' includes … officers or employees of any federal agency[.]" *Id.*

INTRODUCTION

Specialist Hencely enlisted in the U.S. Army when he was 17. He was deployed to Afghanistan and stationed at Bagram Airfield. In November 2016, he suffered life-altering injuries while saving hundreds of fellow soldiers from a suicide bomber's attack inside the base. The bomber was Ahmad Nayeb, an employee of Respondent Fluor Intercontinental's subcontractor. An Army investigation found that failures by Fluor, a government contractor, within areas of its responsibility were "the primary contributing factor" to the bombing. App.10. Fluor's supervision failures enabled Nayeb to build the bomb on the job at Fluor's jobsite inside the base with Fluor's own components and tools. Fluor also violated military instructions to keep Afghans in close view while escorting them off base.

Fluor's systemic failures culminated in a tragic attack on Saturday morning of Veterans Day weekend. Nayeb roamed free on the base as he left his night shift. He walked toward hundreds of U.S. troops gathered for a Veterans Day 5K. Before reaching the assembly area, Nayeb was confronted by Hencely and others. Nayeb then detonated an explosive vest worn under his clothes, killing five U.S. soldiers and civilians and wounding more than a dozen more.

Back home in the United States, Hencely brought state tort claims against Fluor. The Fourth Circuit held that Hencely's claims are preempted. By what? Not by the text of any federal statute, but by unspoken penumbras of preemption emanating from the Fed-

eral Tort Claims Act. Never mind that the FTCA's exceptions bar suits against the *government*, not *government contractors*. 28 U.S.C. §§1346(b), 2671. According to the Fourth Circuit, the *spirit* of the FTCA's so-called "combatant-activities" exception bars Hencely's state claims against a government contractor. *See id.* §2680(j).

The decision below contradicts basic preemption principles. It declares state law preempted based only on a "brooding federal interest." *Kansas v. Garcia*, 589 U.S. 191, 202 (2020). Though the court below invoked *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), that decision addressed a different FTCA exception—about discretionary government functions—and was never an invitation to perpetuate judicial lawmaking. In any event, the court below transformed *Boyle*'s narrow conflict-preemption rule into a categorical rule that any state tort claim against a contractor that "touches" events in a military theater is preempted by "federal interests" emanating from the FTCA's combatant-activities exception. App.20-21.

Beyond this dubious extension of *Boyle*, the decision below reaffirms a 3-1-1 split on combatant-activities preemption acknowledged by lower courts, the Solicitor General, and Fluor itself. The D.C., Third, and Fourth Circuits read unwritten FTCA interests to preempt state tort claims against a government contractor, despite the FTCA's text, if that contractor is "integrated into combatant activities over which the military retains command authority." App.21. The Ninth Circuit takes a different approach, finding preemption of state law if it "create[s]" a duty of care

"against whom force is directed as a result of authorized military action." *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992). The Second Circuit takes yet another tack: State claims may proceed unless "the military specifically authorized or directed the action giving rise to the claim." *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 128 (2d Cir. 2021), *cert. denied* 143 S.Ct. 2512 (2023). Hencely's state claims wouldn't have been preempted in the Second Circuit because the military never specifically authorized or directed Fluor's supervision failures.

This case isn't about second-guessing the military's actions and judgments at Bagram or anywhere else. It's a state tort case against a government contractor that disregarded the military's instructions, its contractual duties, and state-law duties of care. Nothing in the FTCA precludes holding that contractor to account for its own negligence as an employer and systemic failure to meet its contractual responsibilities. This Court recently granted review of a decision about the FTCA's preemptive reach in suits against the government. *Martin v. United States*, No. 24-362 (U.S. Jan. 27, 2025). This petition is all the more worthy of review. The courts of appeals have extended the FTCA's preemptive reach further still—in suits where the government is not even a defendant. Even if that were somehow proper, those courts are deeply split on when and how to displace state claims based only on the spirit of the combatant-activities exception. It's time to return to basic preemption principles or, at minimum, to resolve the split.

STATEMENT OF THE CASE

A. An employee of Fluor's subcontractor perpetrates the 2016 Bagram Airfield bombing.

In 2016, U.S. Army Specialist Winston Hencely was stationed at Bagram Airfield. App.2. Early one November morning, hundreds of U.S. servicemembers gathered at an assembly area inside Bagram for a Veterans Day 5K race. App.8, 156. While there, Hencely saw an Afghan national later identified as Ahmad Nayeb approaching suspiciously. App.3, 72.

Nayeb was an employee of Fluor's subcontractor. App.3. He worked at Fluor's non-tactical vehicle maintenance yard, doing tasks like disposing of used motor oil. App.3, 76. In its military contract, Fluor had promised to supervise Nayeb and other Afghan employees and to personally escort them, in constant view, when they left their work sites. App.4-6. In Nayeb's case, Fluor broke that promise with devastating consequences.

Because of Fluor's supervision failures, Nayeb was able to construct a suicide-bomb vest inside the base while on the job. App.9, 158, 180. Nayeb used Fluor's own tools and components to make his bomb. App.9, 171, 173-74. Then on the day of the attack, Fluor violated the military's instructions to personally escort him off base. App.10, 174-76, 186. Unwatched, Nayeb left his job site wearing the suicide vest and walked about an hour, undetected, toward the U.S. troops participating in the Veterans Day celebration. App.10, 156, 176, 186.

Hencely saved countless lives that day at significant personal cost. As Nayeb approached the troops, Hencely and others confronted Nayeb. App.72, 156. When Nayeb ignored his questions, Hencely grabbed Nayeb by his shoulder and felt the bulky explosive vest under Nayeb's robe. App.72. Nayeb detonated the bomb before getting any closer to the troops. App.72, 156. Still, the explosion killed three U.S. soldiers and two civilian contractors and injured seventeen other soldiers, including Hencely. App.8, 156. The Army's investigation found that Hencely's intervention "likely prevent[ed] a greater tragedy" that day. App.156; *see* App.73.

Hencely—then just 20 years old—sustained life-threatening injuries. App.2, 72. Projectiles from the bomb fractured Hencely's skull and tore through his brain. App.74. Now, Hencely cannot fully use his left arm, left hand, or left side of his face or mouth. *Id.* He suffers from abnormal brainwaves and seizures. *Id.* Traumatic brain injury has caused neuropathic pain, cognitive disorder, chronic PTSD, permanent short-term memory loss, and anxiety. *Id.* It has left him increasingly vulnerable to Alzheimer's, Parkinson's, and Lou Gehrig's. *Id.* His permanent injuries likely will require intensive care for the rest of his life. App.74-75.

B. The Army investigates the bombing, finds Fluor at fault, and exhaustively details Fluor's negligence.

The Army conducted a thorough investigation after the bombing. The Army found Fluor at fault: The

"primary contributing factor to [the] attack" was "Fluor's complacency and its lack of reasonable supervision of its personnel." App.158; *see* App.10. "These conditions enabled the suicide bomber to construct and employ a suicide vest inside the Bagram Airfield perimeter." App.158.

The Army's fault findings turned on the specific requirements of Fluor's military contract. Fluor's contract "clearly" imposed on Fluor a strict "supervisory responsibility" over all employees, subcontractors, and subcontractor employees, including Nayeb. App.168; *see* App.4. Fluor was "responsible" for "all of" their "actions" and all "necessary supervision." App.168; *see* App.5. As to any Afghan nationals hired by Fluor and its subcontractors, Fluor was "responsible for oversight of such personnel to ensure compliance with all [contractual] terms." App.168; *see* App.5.

The Army's investigation report explained, point by point, Fluor's "systemic" supervisory failures under its contract that enabled the bombing. App.176. "Fluor did not reasonably supervise Nayeb at the work facility." App.167. "As the only HAZMAT employee on night shift, Nayeb worked at the HAZMAT work center alone and with sporadic supervision." App.170; *see* App.9. Fluor personnel had "a poor understanding … as to who was responsible for Nayeb's supervision." App.171. This failure "demonstrates an unreasonable complacency by Fluor to ensure Local National employees were properly supervised at all times, as required by their contract and non-contractual, generally recognized supervisor responsibility." *Id.* "This

lack of reasonable supervision facilitated Nayeb's ability to freely acquire most of the components necessary for the construction of the suicide vest and the freedom of movement to complete its construction." *Id.*; *see* App.9-10.

The Army also found that Fluor "fail[ed]" to "supervise use of tools" by its employees, including Nayeb. App.169. Between August and November 2016, Nayeb "checked out multiple tools not associated with his duty as the HAZMAT employee." App.172; *see* App.9. One Fluor employee saw Nayeb check out a multimeter tool he did not need, but didn't stop Nayeb. App.173. Nayeb even signed a log, which showed that he took out the multimeter "nine times for up to six hours at a time" in a three-month period before the attack. App.172-73. The Army concluded this "apathy" showed Fluor employees knew the rules and then didn't enforce them. App.173. And it confirmed Fluor's "work culture of minimal supervision." App.173-74.

The Army found that Fluor not only failed to properly supervise Nayeb directly but also failed to fire him after repeated job violations. App.172. Nayeb repeatedly was absent without permission or slept on the job. App.10, 171-72. These infractions were terminable offenses under Fluor's own policy. App.171. But Fluor did nothing for those violations. App.10, 172. The Army found Fluor's "failure to enforce a work-related standard of performance and the unjustified retention of Nayeb amount[ed] to a lack of reasonable supervision." App.172; *see* App.10.

Beyond those failings, Fluor also failed to discharge its responsibility to escort Afghan nationals while on the base. The military had instituted a color-coded badging system for Afghan nationals on base. App.6. Nayeb had a red badge, meaning he required a Fluor escort "in all areas" if he left his work area. *Id*. Under Fluor's agreement to adhere to military policies, Fluor escorts were to remain in "close proximity" and in "constant view" of Nayeb outside of his work area. *Id*. At shift change, Fluor was required to escort Nayeb on a bus that would take him to an entry control point to leave the base. App.10, 175.

Instead of following those military orders, which it contractually agreed to follow, Fluor used a simple "sign in/sign out sheet." App.175. Fluor's escorts didn't even know who they were escorting. *Id*. On the day of the bombing, Nayeb never made it to the bus. App.10, 175. Instead, he left his work area and walked for about an hour, unwatched and undetected, to carry out his attack. App.10, 176. The Army faulted Fluor for its total failure to escort Nayeb off the base. App.10, 174, 176.

Based on those findings, the Army issued a show-cause notice to Fluor regarding potential termination of its government contract. App.179-82. After reviewing Fluor's response, the Army concluded that it was "indisputable that Fluor did not comply with the key contractual requirements," "namely in the areas of supervision of local national[s] … and adherence to escort requirements." App.186. Fluor had no "measures in place to keep [local nationals] from leaving the work area without escorts." *Id.* And while the Army decided

not to terminate Fluor's contract, the Army was unequivocal that Fluor, not the government, was responsible for the attack at Bagram. App.187.

C. Specialist Hencely's lawsuit.

1. Hencely sued Fluor in federal district court in South Carolina. That's where Fluor entities maintain their principal place of business. App.84, 86-87; D.Ct.Doc. 86, ¶¶46, 53; 475 F. Supp. 3d 464, 467 (D.S.C. 2020). Hencely brought negligent-supervision, negligent-entrustment, negligent-control, and negligent-retention claims under South Carolina law and sought compensatory and punitive damages. App.136-52.

Fluor moved to dismiss, arguing that Hencely's claims implicated nonjusticiable political questions. 2020 WL 2838687, at *1 (D.S.C. June 1). The district court denied the motion, explaining that his claims did not require any "evaluation of the reasonableness of military decisions." *Id.* at*11, 14-16. They were simply about the reasonableness of Fluor's particular actions. *See id.* at *15.

But the district court later agreed with Fluor's preemption theory. Fluor moved for summary judgment, contending that the federal interest that emanates from the FTCA's combatant-activities exception preempted Hencely's state-law claims. The district court granted Fluor's motion, holding that the combatant-activities exception revealed such a "federal interest[]." App.41.

2. The Fourth Circuit affirmed. The court first unanimously rejected Fluor's argument that Hencely's suit raised nonjusticiable political questions. App.12-19. The court concluded the claims were about Fluor, not "military decisions." App.19.

On the question of preemption presented here, the Fourth Circuit read the federal interest emanating from the FTCA's combatant-activities exception to preempt Hencely's state claims against Fluor. Even though "[b]y their terms" the FTCA's provisions "do not apply to government contractors," the court invoked *Boyle* to justify preempting state law "even absent a statutory directive or direct conflict" in "areas involving 'uniquely federal interests.'" App.20. The court pointed to "the conflict between federal and state interests in the realm of warfare" as its basis for "extend[ing] *Boyle*'s logic to the FTCA's combatant activities exception." App.21. The court deemed that conflict "much broader" than the "inconsistency" at issue in *Boyle*. *Id.* And it identified the unique federal interest emanating from the combatant-activities exception as "eliminating" any state "regulation of the military during wartime." *Id.* At Bagram or anywhere else, "the federal government occupies the field"—even for suits against government contractors. *Id.*

To decide whether Hencely's state claims implicate that "federal interest," the Fourth Circuit applied the same test as the D.C. and Third Circuits. *Id.*; *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009), *cert. denied* 564 U.S. 1037 (2011); *Harris v. Kellogg, Brown & Root Servs., Inc.*, 724 F.3d 458, 480 (3d Cir.

2013), *cert denied* 574 U.S. 1120 (2015). Is a government contractor "integrated into combatant activities over which the military retains command authority"? App.21-22. And does the tort claim arise out of "such activities"? *Id.* If so, the claim is preempted. *Id.*

In the Fourth Circuit's view, Hencely's claims met that test. First, "Fluor was 'integrated into combatant activities' at Bagram Airfield." App.22. The "particular activity at issue in Hencely's lawsuit—supervising Local National employees on a military base in a theater of war"—constituted combatant activities because it was "both necessary to and in direct connection with actual hostilities." App.22-23. Second, it was sufficient that "'the military retained command authority' over Fluor's supervision of Local National employees on the base," such as "entry and exit" decisions from the base, even though Fluor "possessed some discretion" on the base. App.23-25. Satisfied that this pliable standard was met, the Fourth Circuit deemed Hencely's claims preempted. App.28.

Along the way, the court rejected two arguments relevant here about the preemptive reach of the interest supposedly emanating from the combatant-activities exception. First, it rejected Hencely's argument that preemption was improper because "Fluor could comply with state tort duties *and* the military's directives." App.27. The Fourth Circuit said "that argument overlooks the 'more general' nature of 'battlefield preemption.'" *Id.* As the Fourth Circuit saw it, "the relevant question is *not* so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the state." *Id.* (emphasis

added). Rather, it's "the imposition *per se*" of state tort duties that "conflicts with the federal policy of eliminating such regulation of the military during wartime." *Id.* (cleaned up).

Second, the court rejected Hencely's argument that there is no "federal interest" emanating from the FTCA when a government contractor altogether flouts "Army instructions and fail[s] to comply with its contractual obligations." App.30. That argument, the court said, "misunderstands the nature of combatant activities preemption." *Id.* Its purpose "is not protecting contractors who adhere to the terms of their contracts; the exception aims to foreclose state regulation of the military's battlefield conduct and decisions"—even "in cases of alleged contractor misconduct." *Id.*

Judge Heytens concurred in part and dissented in part. He agreed that some of Hencely's claims are preempted. But he would have vacated the district court's grant of summary judgment on Hencely's claims for negligent entrustment and negligent retention of Nayeb as an employee and remanded them for trial. App.36. He read the record to reflect "genuine disputes of fact relevant to the second preemption requirement—whether the military 'retained command authority' over" Fluor's decisions "to allow employees to access tools they did not need or fire employees for poor job performance." *Id.* The Fourth Circuit denied Hencely's petition for rehearing en banc on November 26, 2024. App.37.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition because the opinion below contradicts this Court's bedrock preemption cases and stretches its decision in *Boyle* beyond recognition. S.Ct. R. 10(c). Beyond misreading *Boyle*, the circuits are entrenched in a 3-1-1 split over when the federal interest that supposedly emanates from the FTCA's combatant-activities exception preempts state claims against government contractors. The courts of appeals, the Solicitor General, and Fluor itself have acknowledged this split. Plenary review is warranted to resolve this critical question. S.Ct. R. 10(a).

I. The decision below contradicts this Court's preemption decisions.

A. The Fourth Circuit's judgment contravenes the foundational principle articulated in this Court's preemption cases: "'There is no federal pre-emption *in vacuo*,' without a constitutional text, federal statute, or treaty made under the authority of the United States." *Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (quoting *P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)). Preemption inquiries are not a "freewheeling judicial inquiry into whether a state [law] is in tension with federal objectives." *Id.* (quoting *Chamber of Com. of U.S.A. v. Whiting*, 563 U.S. 582, 607 (2011) (plurality op.)). Merely "'[i]nvoking some brooding federal interest or appealing to a judicial policy preference' does not show preemption." *Id.* (quoting *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (op. of Gorsuch, J.)). And it's "impermissibl[e]" to preempt state law based on "judicial

guesswork about 'broad federal policy objectives'" or "generalized notions of congressional purpose that are not contained within the text of federal law." *Id.* at 212 (Thomas, J., concurring).

The Fourth Circuit flouted all those rules. It preempted Hencely's claims "even absent a statutory directive." App.20. To do so, it divined a "federal interest[]" in shielding contractors from state-law liability from a statute that expressly does not shield contractors from liability. *Id.* Allowing Hencely's state tort claims to proceed against Fluor, it concluded, would undermine "an important federal policy of 'foreclos[ing] state regulation of the military's battlefield conduct and decisions.'" *Id.* Whatever might be said about that policy, no text enacted by Congress provides a basis to declare Hencely's state negligence claims against Fluor, a *contractor*, preempted. In fact, Congress said the opposite in the FTCA, as the Fourth Circuit recognized: "By their terms," the FTCA and its combatant-activities exception "do not apply to government contractors." *Id.* (citing 28 U.S.C. §2671).

At bottom, the Fourth Circuit's holding rests on a judicially divined federal interest—protecting federal contractors in military theaters—that *contradicts* the actual words of the relevant federal statute. That plain departure from the Court's repeated warnings against making "judicial policy" to preempt state law, *Garcia*, 589 U.S. at 202, warrants plenary review. *See* S.Ct. R. 10(c).

B. The opinion below also converts *Boyle* into a preemption rubber-stamp that disregards all of *Boyle*'s self-imposed limits.

1. In *Boyle v. United Technologies Corp.*, this Court held that the spirit of a different FTCA exception—the discretionary-function exception—precluded state tort claims against a government contractor for a design defect in military helicopters. 487 U.S. 500, 512 (1988); *see* 28 U.S.C. §2680(a) (barring suits for claims against the government "based upon the exercise or performance or the failure to exercise or perform a discretionary function").

Boyle fashioned an atextual, "federal common law" defense for contractors. 487 U.S. at 504. *Boyle* deemed preemption appropriate after a two-part analysis. First, *Boyle* identified "an area of uniquely federal interest"—"the procurement of equipment by the United States." *Id.* at 507. It said the government's "obligations" and "rights" under its contracts, and the ability to "get[] [its] work done" under them, should be "governed exclusively by federal law." *Id.* at 504-05. The Court thought subjecting federal contractors to state claims would implicate those federal interests by altering a contractor's pricing or willingness to manufacture the government's chosen design. *Id.* at 507.

Second, *Boyle* deemed preemption appropriate only after finding a "'significant conflict' between" those "federal interests and state law in the context of Government procurement." *Id.* at 511. That significant conflict's "outlines" arose from the FTCA's discre-

tionary-function exception, which shields the government from FTCA liability for discretionary choices such as picking "the appropriate design for military equipment." *Id.* Subjecting contractors to state claims for those kind of discretionary government choices "would produce the same effect sought to be avoided by the FTCA exemption," *id.,* and thus "does in some circumstances present a 'significant conflict' with federal policy and must be displaced," *id.* at 512.

But only in *some* circumstances—not in *all* circumstances. Most important, *Boyle* confirmed that "[n]o one suggests that state law would generally be pre-empted" if *no* conflict exists between the federal interest and state law, such that "[t]he contractor could comply both with its contractual obligations and the state-prescribed duty of care." *Id.* at 509. Similarly, preemption is not appropriate in circumstances that would "perversely impede" the federal interest, as when a contractor withholds from the government information critical to its decision or disregards its direction. *Id.* at 513. All this confirms that *Boyle* is a conflict-preemption case: Rather than wholesale displacing state claims against federal contractors, *Boyle* requires a careful "conflict" analysis before displacing state law, for a "conflict there must be." *Id.* at 508.

2. *Boyle* did not involve the FTCA's combatant-activities exception. And its exploration of the FTCA's discretionary-function exception does not control here. *Cf. Negusie v. Holder*, 555 U.S. 511, 520 (2009) (a decision "address[ing] a different statute enacted for a different purpose … does not control").

Nevertheless, the Fourth Circuit and other courts have "extended *Boyle*'s logic to the FTCA's combatant activities exception." App.21. Doing so contradicts this Court's cases. Since *Boyle*, this Court has "sworn off the habit of venturing beyond Congress's intent" and deciding cases based on the Court's view of "how desirable [the outcome] might be as a policy matter." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). And this Court has cautioned lower courts to hesitate "before taking up an invitation to try their hand at common lawmaking." *Rodriquez v. FDIC*, 589 U.S. 132, 138 (2020). *Boyle* was decided "under the *ancien regime*" of federal common lawmaking. *Sandoval*, 532 U.S. at 287. And it dealt with the FTCA's separate discretionary-function exception in a dispute where the government specifically prescribed the challenged design. *Boyle*, 487 U.S. at 511. That decision was never an "invitation to have one last drink" and extend atextual, judicial lawmaking to the combatant-activities exception. *Sandoval*, 532 U.S. at 287.

This federal common lawmaking is especially problematic in the preemption context. By definition, those judge-made rules are not "'federal law 'made in pursuance of' the Constitution, through its prescribed processes of bicameralism and presentment." *Va. Uranium*, 587 U.S. at 778 (op. of Gorsuch, J.). Preemption by judge-made rules "undercut[s] the principle that it is Congress rather than the courts that pre-empts state law." *Chamber of Com.*, 563 U.S. at 607 (plurality op.). "The Supremacy Clause cannot be deployed to elevate abstract and unenacted legislative desires"—or judicial desires—"above state law." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022) (cleaned up).

And "implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution." *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in judgment). By extending *Boyle*'s common lawmaking, the Fourth Circuit wandered far from the text of the FTCA's combatant-activities exception and elevated unenacted policy desires above state law.

3. To the extent *Boyle* has any relevance here, it illuminates just how far afield the Fourth Circuit strayed from it in two ways.

First, the Fourth Circuit's test does not even purport to ask whether the specific state claims against the contractor would pose a "significant conflict" with any identified "federal interest." *Contra Boyle*, 487 U.S. at 507-08; *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) ("conflict" is "a precondition" for federal common-law preemption). It presumes that "the imposition *per se*" of state-law liability on contractors would conflict with "the federal policy of eliminating … regulation of military during wartime." App.27. But that's wrong.

Nothing in *Boyle* suggests that the FTCA's discretionary-function exception confers that kind of blanket, immunity-like defense for government contractors so long as the state claims would have fallen within that exception if brought against the government. Rather, *Boyle* taught that "a significant conflict" is the heart of the matter. 487 U.S. at 508-09 (cleaned up). State law should not be preempted if "the

contractor could comply with both its contractual obligations and the state-prescribed duty of care." *Id.* at 509. "No one suggests that state law would generally be pre-empted in this context." *Id.* Under *Boyle*, the failure to identify a "significant conflict" is "fatal" to preemption. *O'Melveny*, 512 U.S. at 88.

Here, the Fourth Circuit bypassed *Boyle*'s main inquiry by refusing to entertain Hencely's argument that his state claims shouldn't be preempted because "Fluor could comply with state tort duties *and* the military's directives." App.27. It reasoned that Hencely's "argument overlooks the 'more general' nature of 'battle-field preemption'" that the court of appeals thought displaces state law regardless of whether the contractor could comply with both its contractual obligations and state law. *Id.* Nothing about *Boyle* endorses that "more general" inquiry, *id.*, devoid of any particularized analysis in search of a "significant conflict," *Boyle*, 487 U.S. at 508, 512; *see also O'Melveny*, 512 U.S. at 88.

Second, the decision below extends *Boyle* by barring state claims even when they do not implicate a specific exercise of military judgment. App.27. *Boyle* at most contemplates a preemption defense where the "government has directed a contractor to do the very thing that is the subject of the claim." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001). In *Boyle*, the military—not the contractor—"specifically" picked the allegedly defective helicopter design after considering "the trade-off between greater safety and greater combat effectiveness." 487 U.S. at 511. This Court barred state design-defect claims there because

a state tort duty requiring a different design would have "second-guess[ed]" that military judgment. *Id.* On the other hand, there's no military judgment being contradicted if the military were merely a passive purchaser who did not "specify[]" "the precise manner of construction" or simply purchased helicopters that "happen to be" designed a certain way. *Id.* at 509. It would be "unreasonable" to displace state law in that latter context. *Id.*

But the court below did not ask whether the military exercised its judgment and "specifically" directed Fluor to retain Nayeb, leave him unsupervised, give him unfettered access to tools outside his job description, or dispense with its escorting responsibilities as part of a "trade-off." *Id.* at 511. Instead, the Fourth Circuit merely asked whether the "ultimate command authority" was "retained" by the military. App.26. That inquiry extends *Boyle* by authorizing a preemption defense even where the specific action by the contractor was not actually "considered by a Government officer," 487 U.S. at 512, so long as the military retains the "ultimate" authority—regardless of whether the military actually exercised authority over the challenged action.

As a result, the Fourth Circuit's rule contradicts *Boyle* by "perversely imped[ing]" the federal interest that the court below thought emanates from the combatant-activities exception. *Id.* at 513. Where *Boyle* withheld the discretionary-function preemption defense from contractors who fail to disclose known design risks or fail to conform to government-approved design, the opinion below grants combatant-activities

preemption to contractors who fail to follow the military's orders and their contractual obligations. And the opinion below grants such a defense even to contractors whose misconduct is so egregious that they thwart the military's own goals.

*

The decision below departed from this Court's preemption principles by displacing state law without any statutory basis. And it erroneously extended *Boyle* to a different statutory provision and beyond its stated limits. Those departures warrant this Court's review.

II. The circuits are split on when federal interests emanating from the FTCA's combatant-activities exception preempt state tort claims against government contractors.

Even if *Boyle* can justify preempting state tort claims against government contractors under the spirit of the combatant-activities exception, the decision below reaffirms an acknowledged 3-1-1 circuit split over when it does so. This split on this critical issue warrants plenary review. S.Ct. R. 10(a).

A. 1. The Ninth Circuit was the first court of appeals to extend *Boyle*'s reasoning to the FTCA's separate combatant-activities exception. The Ninth Circuit held that even in suits against government contractors, "preemption is appropriate" to the extent the state-law claims against that contractor "would create a duty of care where the combatant activities exception is intended to ensure that none exists." *Koohi v.*

United States, 976 F.2d 1328, 1336-37 (9th Cir. 1992). It thought "one purpose" of the combatant-activities exception was "to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." *Id.* at 1337.

2. Since then, the D.C., Third, and Fourth Circuits have adopted a more sweeping test shielding government contractors from state tort claims.

The D.C. Circuit ruled first. It identified the relevant federal interest emanating from the combatant-activities exception as "the elimination of tort from the battlefield." *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009), *cert. denied* 564 U.S. 1037 (2011). To protect that federal interest, the D.C. Circuit crafted the following rule: "During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted." *Saleh*, 580 F.3d at 9. Only a test that broad, it reasoned, could further "the policy embodied by the combatant activities exception" and eliminate "tort from the battlefield." *Id.* at 7. *Saleh* did not perform a particularized analysis of how the state-law claims there created a "significant conflict" with that federal interest. Instead, according to the D.C. Circuit, this federal interest should yield to a "more general conflict preemption"—one that mimics "field" preemption. *Id.* For "it is the imposition *per se* of the state … tort law"—not any one particular tort or tort theory—"that conflicts with the

FTCA's policy of eliminating tort concepts from the battlefield." *Id.*

The Third Circuit adopted that same test. *See Harris v. Kellogg, Brown & Root Servs., Inc.*, 724 F.3d 458, 480 (3d Cir. 2013), *cert denied* 574 U.S. 1120 (2015). It called the D.C. Circuit's test "well-tailored to the purpose underlying" the combatant-activities exception. *Harris*, 724 F.3d at 481. That purpose, it reasoned, "is to foreclose state regulation of the military's battlefield conduct and decisions." *Id.* at 480.

The Fourth Circuit was next in line. The opinion below follows an earlier Fourth Circuit decision that adopted the D.C. Circuit's test for the same reasons as the Third Circuit. *In re KBR, Inc. Burn Pit Litig.*, 744 F.3d 326, 349-51 (4th Cir. 2014), *cert. denied* 574 U.S. 1120 (2015). The Fourth Circuit reaffirmed this test in this case. App.21-22, 37.

3. The Second Circuit has taken a different approach. In the Second Circuit, the combatant-activities exception does not preempt state-law claims against government contractors "unless (1) the claim arises out of the contractor's involvement in the military's combatant activities, and (2) the military specifically authorized or directed the action giving rise to the claim." *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 128 (2d Cir. 2021), *cert. denied* 143 S.Ct. 2512 (2023). Under this test, the federal interest "preempts only those claims that would, if successful, impose state-law duties in conflict with the military's battlefield decisionmaking." *Badilla*, 8 F.4th at 128. In other words, "[p]reemption arises

when the Government specifically authorizes or directed the contractor action, not when the Government generally permits the contractor to undertake a range of actions." *Id.* at 129-30. In contrasting its own rule to the rule adopted by other circuits, the Second Circuit explained that "the fact that 'the military retain[ed] command authority' might create a question of fact as to whether the military authorized a particular action, but it would not be dispositive." *Id.* at 128 n.11 (quoting *Saleh*, 580 F.3d at 9).

Applying that test, it was dispositive in *Badilla* that there was no evidence that the military "authorized" or "directed" the contractor's negligent acts that led to an airplane crash at Kabul Airport. *Id.* at 129. And although there was "evidence that the military retained *some* authority" over air traffic control—including by approving standards to be followed "at a very general level"—there was "no evidence that the Government directed [the contractor's] actions at issue" or that it "issue[d] a specific instruction that compelled [the contractor's] directions" to the flight crew. *Id.* That particularized inquiry bears far more resemblance to *Boyle* than the across-the-board field-preemption rule applied below.

B. This square split is outcome determinative here. The Fourth Circuit told Hencely that the spirit of the combatant-activities exception preempts his claims simply because they involve a government contractor at a military base, and the military retained the "ultimate command authority" over Fluor's conduct, extrapolated at the highest level of generality. App.26.

Had Hencely instead been in the Second Circuit, his claims would have proceeded. There, state-law claims against contractors are not preempted "unless … the military specifically authorized or directed the action giving rise to the claim." *Badilla*, 8 F.4th at 128. In this case, there is no dispute that the military did not "specifically authorize[] or direct[]," *id.*, Fluor to entrust its tools to Nayeb, who then used those tools to assemble a suicide bomb during work hours, App.26. Rather, Fluor could "decline to lend its employees" any tools that weren't "needed to complete their jobs." *Id*; *see also* App.36 (Heytens, J., dissenting). Nayeb's Fluor supervisors simply "poorly enforced" the rules regarding the use of tools. App.173.

Nor did the military specifically authorize or direct Fluor to let Nayeb go unsupervised during his work hours for months preceding the attack, which allowed him to "freely acquire most of the components necessary" for the bomb and assemble it. App.171; *see also* App.25 n.6. To the contrary, the military contractually required Fluor to supervise its own employees and subcontractor employees. App.4-5, 168, 186.

Nor did the military specifically authorize or direct Fluor to retain Nayeb despite his terrible job performance. App.10, 171-72. Though the military sponsored Nayeb for employment as part of the military's Afghan First strategy, App.3, it's not enough that "the [military] *generally* permit[ted]" Fluor to hire and retain Nayeb, *Badilla*, 8 F.4th at 130 (emphasis added). Fluor had discretion to "monitor its employee's work and fire them for poor performance." App.26; *see also* App.36 (Heytens, J., dissenting in part). The Army

found that Fluor's "unjustified retention of Nayeb amounts to a lack of reasonable supervision" that enabled the bombing attack. App.172.

And clearer than anything else in this case, the military certainly did not specifically authorize or direct Fluor to let Nayeb wander for an hour unescorted from his job site to where hundreds of U.S. troops were gathered. To the contrary, the military *prohibited* Afghan workers like Nayeb from wandering unescorted. App.6, 174-75, 186. Under base rules, Fluor—not the military—was required to "continuously monitor" Nayeb "in close proximity" and "in constant view" and escort him from his job site to the bus that would take him off base and ensure that all Afghan workers being escorted were accounted for. App.6. Fluor "indisputabl[y]" failed to comply with the military's escorting instructions, and this failure further enabled the bombing attack. App.186; *see* App.10.

In short, the military never "specifically authorized or directed," *Badilla*, 8 F.4th at 128, Fluor's negligent supervision, entrustment, retention, and control that enabled Nayeb to plan, prepare for, and carry out the bombing. Had Hencely brought his tort claims in the Second Circuit, they would not have been preempted. But because he sued in the Fourth Circuit, they were.

C. The United States has repeatedly articulated its position on this issue, underscoring the importance of the question presented. At this Court's invitation, the Solicitor General filed cert-stage briefs in *Saleh*, *Harris*, *Burn Pit*, and *Badilla*. Those briefs confirm

two things relevant here, both supporting plenary review.

First, the Solicitor General has acknowledged that a split exists. In its *Badilla* brief, the United States said that "[t]he D.C., Third, and Fourth Circuits have, broadly speaking, all adopted substantially the same framework." U.S.-*Badilla*.Br.17-18. In the next paragraph, it acknowledged that the Second Circuit in *Badilla* "did articulate a different formulation." *Id.* at 18. (The United States views "the Ninth Circuit's decision in *Koohi*" as "comport[ing] with" the majority rule. *Id.*) So by the Solicitor General's telling, there is a 4-1 split among the circuits. Yet it recommended denying the *Badilla* petition because it thought it was "not clear that this different articulation would make a substantial difference in practice." *Id.* Hencely's case proves that wrong. *See supra* at 25-27.

Second, the Solicitor General's repeated filings establish the United States' confirmed position on the merits. The Solicitor General has criticized the majority rule as "inexact, unclear, and potentially misguided," U.S.-*Saleh*-Br.15, and "misunderstanding … the role of private contractors" as "combatants," U.S.-*Harris*-Br.14. Those filings also explain that the Solicitor General would replace the majority rule with a test holding state-law claims against contractors to be preempted if (i) a similar claim against the United States would be within the FTCA's combatant-activities exception because it arises out of the military's combatant activities, and (ii) the contractor was acting within the scope of its contractual relationship

with the federal government at the time of the incident out of which the claim arose. *E.g.*, U.S.-*Saleh*-Br.15-16; U.S.-*Harris*-Br.15; U.S.-*Burn Pit*-Br.15.

But every circuit that considered the government's proffered alternative test has rejected it. The Third Circuit thought that "the Solicitor General's test is overinclusive." *Harris*, 724 F.3d at 480. Because that test would preempt state-law claims "so long as the [contractor's] conduct is within the 'scope of [the contractor's] contractual relationship,'" it would "insulate contractors from liability even when their conduct does not result from military decisions or orders." *Id.* In the Third Circuit's view, "[a] scope of preemption that includes contractors' contractual violations is too broad to fit [the combatant-activities exception's] purpose because the conduct underlying these violations is necessarily made independently of the military's battlefield conduct and decisions." *Id.* at 481. The Fourth Circuit agreed that "if the interest underpinning the combatant activities exception is foreclosing state regulation of the military's battlefield conduct and decisions, the United States' test is far too broad." *Burn Pit*, 744 F.3d at 350. That test "recommends preemption when state tort law touches any actions within the scope of the contractor's contractual relationship with the government, even actions that the military did not authorize" and "even when they do not conflict with the federal purpose underlying the combatant activities exception." *Id.* at 350-51.

All this means the Court has already received—repeatedly—the views of the Solicitor General on this

issue. And the Solicitor General agrees that there's a circuit split.

*

The decision below squarely presents an acknowledged circuit split on a critical issue of federal law. Even Fluor agrees there's a circuit split, acknowledging that the Second Circuit adopted a "narrower *Badilla* test." Fluor-CA4-Br.35 n.18. Now is the time, and this is the case, to resolve it.

III. The Fourth Circuit's rule is wrong.

On the merits, this Court should vacate the decision below. The rule applied to bar Hencely's claims cannot be reconciled with this Court's precedent. That rule displaces state-law claims against government contractors "*in vacuo*" based on "judicial policy preference." *Garcia*, 589 U.S. at 202. No federal statute preempts state-law claims against contractors in theater. In virtually any other context, the complete absence of a conflicting federal statute would have been dispositive and Hencely's state claims against Fluor would be resolved on the merits. *See, e.g.*, *Isla Petroleum*, 485 U.S. at 503-04.

Compounding the problem, the Fourth Circuit's rule creates a preemption defense by extending *Boyle*'s federal common lawmaking, which this Court has since disfavored. *See, e.g.*, *Rodriguez*, 589 U.S. at 138. The majority rule erroneously took the "one last drink" of atextual judicial lawmaking and extended it to a new statutory provision. *Sandoval*, 532 U.S. at 287.

Perhaps most inexplicably, the majority rule creates a preemption defense for contractors under the spirit of the FTCA *despite* Congress's express decision to exclude contractors from the FTCA's exception that pertains only to the *government*. 28 U.S.C. §2671; *Saleh*, 580 F.3d at 5; *Harris*, 724 F.3d at 478; App.20. "[T]o an outsider coming to the statute cold," this outcome would be "irrational." *Va. Uranium*, 587 U.S. at 778 (op. of Gorsuch, J.).[1]

Even if *Boyle*'s reasoning can be extended to the combatant-activities exception, the majority rule applies *Boyle* in name only. *Boyle* at most contemplates a preemption defense where the "government has directed a contractor to do the very thing that is the subject of the claim." *Malesko*, 534 U.S. at 74 n.6. And after finding a significant conflict between federal interests and state law, *Boyle* fashioned a test that *limits* "the scope of displacement" of state law. 487 U.S. at 512.

The rule applied below is anything but limited. It asks only whether the military retained ultimate command authority over a contractor's activities. App.26. On a military base, framed at the highest levels of generality, the answer to that question will be "yes" every time. But that can't be squared with *Boyle*'s discrete-conflict rationale. *See* 487 U.S. at 508-09; *O'Melveny*, 512 U.S. at 88; *Malesko*, 534 U.S. at 74 n.6. At

[1] Because *Boyle* derived a preemption defense from the FTCA's discretionary-function exception rather than its combatant-activities exception, this Court need not revisit *Boyle* to resolve Hencely's petition.

the very least, that exception cannot extend to government contractors acting in derogation of their contractual obligations and violation of the military's orders. *Cf. Malesko*, 534 U.S. at 74 n.6; *Boyle*, 487 U.S. at 512-13.

After all, the Fourth Circuit's test derives from the D.C. Circuit's overbroad articulation of the federal interest as "the elimination of tort from the battlefield." *Saleh*, 580 F.3d at 7. So framed, the majority rule mimics a field preemption test with little resemblance to *Boyle*'s "significant conflict" inquiry. *Id.* (stating that "the federal government occupies the field and its interest in combat is always 'precisely contrary' to the imposition of a non-federal tort duty"); *accord* App.21. But "the D.C. Circuit's blanket statement 'loses sight of the fact' that the FTCA 'does not provide immunity to nongovernmental actors.'" *Badilla*, 8 F.4th at 127. "[T]o say that Congress intended to eliminate all tort law is too much." *Id.*

If a federal interest emanates from the combatant-activities exception, its proper formulation is narrower. Just as *Boyle* zeroed in on the *government's* procurement responsibilities, any case implicating the combatant-activities exception must zero in on *the military's* battlefield conduct. *See Badilla*, 8 F.4th at 127 (framing federal interest as "foreclos[ing] state regulation of *the military's* battlefield conduct and decision" (emphasis added)). This "more narrowly defined federal interest … will result in a correspondingly more modest displacement of state law." *Id.* at 128. "No significant conflict exists between *that* inter-

est and state law unless the challenged action can reasonably be considered the military's *own* conduct or decision and the operation of state law would conflict with that decision." *Id.* So, state-law claims against contractors should not be preempted unless "(1) the claims arise out of the contractor's involvement in the military's combatant activities, and (2) the military specifically authorized or directed the action giving rise to the claim." *Id.* This test "assure[s] that the [contractor's action giving rise to the claim] was considered by a Government officer, and not merely by the contractor itself." *Id.* (quoting *Boyle*, 487 U.S. at 512). And it "preempts only those claims that would, if successful, impose state-law duties in conflict with the military's battlefield decisionmaking." *Id.*

IV. This case is an ideal vehicle for reaching the question presented.

This case is an ideal vehicle to reach the critical question presented. This petition presents a pure question of law about preemption principles and a square split on how they apply: Should *Boyle* be extended to allow federal interests emanating from the combatant-activities exception to preempt state negligence claims against a government contractor who indisputably violated the U.S. military's orders, and its contractual obligations, at the cost of U.S. servicemembers' lives?

No further percolation is needed. The Solicitor General previously recommended denying the petitions in *Saleh*, inviting "further explication in future

cases." U.S.-*Saleh*-Br.7. In *Harris* and *Burn Pit*, however, the Solicitor General stated that the importance of the "preemption question" warranted this Court's attention despite the lack of "circuit conflict" (while recommending denying the petitions for other reasons). U.S.-*Harris*-Br.19; U.S.-*Burn Pit*-Br.21. This Court's review is all the more needed now because the Second Circuit's opinion in *Badilla* expressly rejected the majority rule and, as the Solicitor General acknowledged, "articulate[d] a different formulation." U.S.-*Badilla*-Br.18. Even Fluor concedes that the Second Circuit adopted a "narrower *Badilla* test." Fluor-CA4-Br.35 n.12.

Nor is this case in an interlocutory posture—the reason why the Solicitor General recommended denying the petitions in *Harris*, *Burn Pit*, and *Badilla*. U.S.-*Harris*-Br.20; U.S.-*Burn Pit*-Br.22; U.S.-*Badilla*-Br.19. Rather, this petition arises from a grant of summary judgment that resulted in final judgment against Hencely.

This case also presents a critical federal question about government contractor liability. The majority rule embodied in Fourth Circuit's decision hampers the Nation's war efforts and endangers American servicemembers by eliminating incentives for contractors to avoid negligence. *But see Boyle*, 487 U.S. at 512-13 (cautioning against "displacement of state law" to the extent it "create[s] some incentive" for government contractors "to withhold knowledge of risks" if "withholding it would produce no liability"). Fluor's negligence directly enabled a terrorist to assemble a bomb—on company time at a U.S. military base—and

perpetrate a suicide-bombing attack on U.S. troops. App.9, 158. Whether the interests behind a federal statute that expressly excludes immunity for government contractors can nonetheless be invoked to *grant* a sweeping preemption defense to *negligent* contractors is a question of surpassing importance.

It's also a recurring one. Such negligence by government contractors has killed or gravely injured U.S. servicemembers in Iraq and Afghanistan through a contractor plane crash,[2] a shooting by a contractor who was allegedly horseplaying with a loaded gun,[3] a malfunctioning truck negligently maintained by the contractor,[4] exposure to toxic chemicals,[5] a slip-and-fall accident from negligent construction,[6] electrocution due to faulty electric wiring by the contractor,[7] and faulty electrical grounding,[8] to name just a few. Given the heavy burdens incident to military service, American servicemembers should not have to worry

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[2] *McMahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1318 (M.D. Fla. 2006), *aff'd* 502 F.3d 1331 (11th Cir. 2007).

[3] *Woods v. Triple Canopy, Inc.*, No. 1:19-cv-290 (E.D. Va.).

[4] *Lessin v. KBR*, 2006 WL 3940556, at *1 (S.D. Tex. June 12).

[5] *Bixby v. KBR*, 748 F. Supp. 2d 1224, 1230 (D. Or. 2010).

[6] *Aiello v. KBR Serv., Inc.*, 751 F. Supp. 2d 698, 700 (S.D.N.Y. 2011).

[7] *Harris*, 724 F.3d at 463.

[8] *McGee v. Arkel Int'l, LLC*, 671 F.3d 539, 541 (5th Cir. 2012).

about getting killed or injured by a negligent contractor. In these tragic circumstances, a state tort remedy is often the only meaningful way to deter contractors from "shift[ing] the risk of loss to innocent third parties" and to compensate innocent U.S. servicemembers killed or injured by contractor negligence. *Saleh*, 580 F.3d at 27 (Garland, J., dissenting).

Finally, the decision below cements a particularly unjust imbalance in the Fourth Circuit. A district court within that circuit has permitted foreign nationals who sued under *international* law via the Alien Tort Statute to recover millions of dollars from contractors. Am. Judgment, *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08-cv-00827-LMB-JFA (E.D. Va. Jan. 10, 2025) (Doc. 1861) (awarding $42 million), *appeal pending*, No. 25-1043 (4th Cir.). If the judgment here is not vacated, U.S. servicemembers injured by contractor negligence seeking to vindicate their rights under *state* law cannot do so. Our troops deserve better.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

February 24, 2025

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APPENDIX

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Appendix A — Opinion of the United States Court of Appeals for the Fourth Circuit (October 30, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1994

WINSTON TYLER HENCELY,

Appendix

Plaintiff—Appellant,

v.

FLUOR CORPORATION; FLUOR ENTERPRISES, INC.; FLUOR INTERCONTINENTAL, INC.; FLUOR GOVERNMENT GROUP INTERNATIONAL, INC.,

Defendants—Appellees.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Bruce H. Hendricks, District Judge. (6:19-cv-00489-BHH)

Before AGEE, RUSHING, and HEYTENS, Circuit Judges.

Affirmed by published opinion. Judge Rushing wrote the opinion, in which Judge Agee joined. Judge Heytens wrote an opinion concurring in part and dissenting in part.

March 10, 2022, Argued; October 30, 2024, Decided

Appendix A

RUSHING, Circuit Judge:

This lawsuit arises out of a 2016 suicide bombing at the United States military base at Bagram Airfield in Afghanistan. The bomber was employed on base by a private military contractor, which provided support services to the armed forces. He is suspected to have constructed an explosive vest while working unsupervised during his night shift and, on the morning of the attack, made his way undetected to a crowded location where he detonated the device.

An American soldier wounded in the attack sued the contractor under South Carolina law, alleging that the contractor's supervision, entrustment, and retention of the bomber were negligent. He also alleged the contractor breached its contract with the U.S. Government.

The district court granted judgment to the contractor on all claims. The court concluded that federal law preempted the plaintiff's tort claims and that he was not a third-party beneficiary entitled to enforce the Government's contract. After careful review, we affirm.

I.

A.

The plaintiff, Specialist Winston Tyler Hencely, is a former soldier in the U.S. Army. In 2016, Hencely was stationed at Bagram Airfield, formerly the largest U.S. military base in Afghanistan, as part of Operation Freedom's Sentinel.

Appendix A

The defendant, Fluor Corporation, had a contract with the U.S. Department of Defense to provide base life support services and theater transportation mission functions to U.S. and coalition forces in Afghanistan, including at Bagram Airfield. These services included, among other things, construction, facilities management, laundry, food, recreation, and, relevant here, vehicle maintenance and hazardous materials management.

The suicide bomber, Ahmad Nayeb, was an Afghan national. He was employed by a Fluor subcontractor and worked the night shift at the hazardous materials section of the non-tactical vehicle yard at Bagram Airfield. Nayeb was hired pursuant to the "Afghan First" program. This program was part of the United States' counterinsurgency strategy in Afghanistan, with the goal of "developing the Afghan economy" and fostering a "moderate, stable, and representative Afghanistan capable of controlling and governing its territory." J.A. 3041. One aspect of the program involved training and employing Afghans for "jobs being performed by contracted personnel, [Department of Defense] civilians, and even US military personnel." J.A. 3042. In accordance with the Afghan First program, Fluor's contract with the U.S. Government obligated it to hire Afghans—referred to as "Local Nationals" or "Host Nationals"—"to the maximum extent possible." J.A. 3048 ¶ 01.07(b). Fluor subcontracted with a labor broker to hire Local Nationals, including Nayeb, to work at Bagram Airfield. The Army sponsored Nayeb's hiring.

Appendix A

B.

By way of background, "[s]ince the United States began its military operations in Afghanistan and Iraq in 2001 and 2003, respectively, the U.S. military has depended heavily on contractors to support its mission." *In re: KBR, Inc., Burn Pit Litig.*, 893 F.3d 241, 253 (4th Cir. 2018). Indeed, contractors often comprised the majority of the U.S. Department of Defense's presence in Afghanistan. *See* Heidi M. Peters, Cong. Rsch. Serv., RL44116, *Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007–2020* 1 (2021). The Army's contracting program is called the Logistics Civil Augmentation Program, or "LOGCAP" for short. This case involves the fourth generation of the program, LOGCAP IV. The military executes LOGCAP IV through "task orders," which incorporate "statements of work" defining a contractor's responsibilities.

The Department of Defense entered its LOGCAP IV contract with Fluor in 2007. Two years later, Fluor was awarded Task Order 0005, which included Fluor's work in the eastern and northern sections of Afghanistan. Task Order 0005 was governed by a Performance Work Statement (PWS). As relevant here, the PWS required Fluor to "provide all necessary personnel, supervision, [and] management . . . required in support of this [Task Order]." J.A. 3053 ¶ 03.03(a). The PWS elsewhere stated that Fluor "shall provide the necessary personnel with appropriate skills" to perform the contracted services; that Fluor "is responsible for ensuring all personnel supporting this [Task Order] comply with the standards

of conduct" and all contract terms and conditions; and that Fluor "shall provide the necessary supervision for personnel required to perform this contract." J.A. 3048 ¶ 01.07(a).

As mentioned, the PWS also obligated Fluor to "hire [Local National] personnel and Subcontractors to the maximum extent possible in performance of this contract." J.A. 3048 ¶ 01.07(b). Fluor was "responsible for oversight of such personnel or Subcontractors to ensure compliance with all terms of the [contract]." J.A. 3048 ¶ 01.07(b).

In addition to these contractual obligations, Fluor was required to comply with the military's force protection and base security policies at Bagram Airfield. We turn to those policies next.

C.

Base security and force protection were the military's responsibility at Bagram Airfield. The military controlled base entry and exit, as well as security inside the perimeter. Regarding Local Nationals in particular, the military in some cases identified and sponsored certain individuals for training and employment at Bagram Airfield and in all cases vetted and approved each Local National for employment on base. The military established screening protocols which required that Local Nationals be searched before entering the base at Entry Control Points. Inside the perimeter, the military employed bomb-sniffing dogs and random searches of Local Nationals and physical areas throughout the base. The military also

conducted periodic counterintelligence interviews of Local Nationals to determine whether they should continue to receive access to the base.

As part of its security and force protection measures, the military established and enforced protocols regarding supervision of the Local National workforce on base. These protocols were set forth in an official policy document—the Bagram Airfield Badge, Screening, and Access Policy—and subject to change at the discretion of the Bagram Support Group (BSG) Commander. Fluor was required to follow the military's protocols for supervising its Local National employees.

Pursuant to this policy, the Force Protection Screening Cell, under the direction of the BSG Commander, granted base-access badges to non-uniformed personnel, including Local Nationals. The badge color determined the wearer's level of access and need for supervision while on base. Red badges were the default for Local Nationals and provided the wearer with the least amount of access. According to the policy in effect at the time of the suicide bombing, a Local National with a red badge required an escort in all areas of Bagram Airfield except his work facility. Escorts were required to "continuously monitor" the individuals they were escorting, remaining "in close proximity" and "in constant view" of them. J.A. 2892–2893 (internal quotation marks omitted). The BSG Commander could authorize qualifying Local Nationals to hold a yellow badge, which represented an increase in base access. Yellow badge holders were authorized to travel unescorted

at Bagram Airfield and were permitted to escort up to ten other Local Nationals.[1]

The military's security policies also regulated the items that Local Nationals were permitted to use while on base. For example, the military prohibited Local Nationals from possessing cameras or using networked computers, and the military forbade Local Nationals from carrying cellular phones without permission from the BSG Commander. The policies did not, however, restrict Local Nationals' access to tools.

For obvious reasons, the military required Fluor's strict compliance with its base security and force protection policies, including the badge and escort protocols for supervising Local National employees. The military operated a surveillance system throughout Bagram Airfield to monitor, among other things, Fluor's compliance with the escort protocols. And on a regular basis, the military conducted feedback sessions to compare Fluor's self-reporting with the military's surveillance and give Fluor an opportunity to correct any deficient performance. It is undisputed that, before

1. Within weeks of the attack, the military changed its base security protocols. Among other things, the updated policy eliminated yellow badges, making restrictive red badges the only authorized badge for Local Nationals, and it prohibited Local Nationals from escorting other Local Nationals at Bagram Airfield. The military also changed the policy to require constant escort of red badge holders, "eliminat[ing] the exemption that allowed Local Nationals to operate unescorted within their workplace." J.A. 2953.

the bombing, Fluor had proposed providing additional escort supervision of Local Nationals while at their work facilities, but the Army rejected that proposal. *See*, *e.g.*, J.A. 3698 (explaining that "the price tag was going to be excessive").

D.

The bombing occurred early in the morning on November 12, 2016, a few hundred meters from the starting line for a Veterans Day 5K race at Bagram Airfield. Hencely and others observed Nayeb approaching and confronted him. Nayeb then detonated an explosive vest he was wearing under his clothes, killing himself and five others and severely wounding seventeen more, including Hencely. The Taliban took credit for the attack, claiming it had been planned for months.

After the bombing, the military conducted a formal investigation under Army Regulation 15-6, or "AR 15-6" for short. The military issued its AR 15-6 report on December 31, 2016. A heavily redacted version of that report was produced in this litigation.[2]

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2. Hencely moved *in limine* for an order deeming the redacted AR 15-6 report as admissible into evidence. Fluor opposed the motion, arguing among other things that the report is unreliable, contains hearsay, and is materially incomplete. The district court denied Hencely's motion without prejudice, concluding it could not "pass on the admissibility of a government report that neither it, nor the parties have seen in a form that is even close to complete." J.A. 3907. Hencely did not appeal that ruling. Both parties nevertheless discuss the substance of the AR 15-6 report on appeal.

Appendix A

The AR 15-6 investigation revealed that the military knew Nayeb was a former Taliban member. Believing Nayeb had renounced his ties to the insurgency, the military had sponsored him for employment as an effort at reintegration. The military vetted Nayeb and granted him access to Bagram Airfield with a red badge. The military also conducted several counterintelligence screening interviews with Nayeb over his five years of employment on base. According to the AR 15-6 report, Nayeb's answers to counterintelligence questions appeared "trained and coached" during an interview in March 2016, several months before the bombing, which in hindsight was a "missed indicator" of the threat Nayeb posed to the military's operations at Bagram Airfield. J.A. 2943. The investigation further revealed that, the night before the bombing, intelligence indicated that an attack was imminent. Fluor did not have access to this military intelligence, nor did the military inform Fluor about Nayeb's Taliban ties.

According to the AR 15-6 investigation, Nayeb likely built his bomb vest while inside the military base, working as the sole employee on the night shift at the hazardous materials work center in the non-tactical vehicle yard, with only sporadic supervision. He likely smuggled homemade explosives through security onto the base and then used supplemental materials and tools available on base to construct the bomb vest. For example, Nayeb checked out tools unassociated with his duties in the hazardous materials work center, including a tool called a multimeter, which measures voltage, current, and resistance.

Appendix A

On the morning of the attack, Nayeb was supposed to have been escorted by Fluor personnel on a bus ride to an Entry Control Point, where the military would then escort him off base. At the non-tactical vehicle yard, a Local National coworker signed out Nayeb and the other Local National employees at the end of the night shift. At the bus, a Local National with a yellow badge and escort responsibilities vouched that all Local Nationals, including Nayeb, were accounted for and the bus could leave. But according to the AR 15-6 report, Nayeb told a Local National coworker that he would miss the bus because he needed to attend a hazardous materials class, which was a lie. The report concluded that Nayeb likely did not board the bus but instead walked for 53 minutes, undetected, to the blast site.

In its AR 15-6 report, the military determined "the primary contributing factor" to the attack was "Fluor's complacency and its lack of reasonable supervision of its personnel." J.A. 2917. The report criticized Fluor for lending Nayeb tools his job didn't require, not adequately supervising Nayeb while he worked in the hazardous materials work center, and retaining Nayeb despite reported instances of sleeping on the job and absences without authority. The report also faulted Fluor for deficient performance of its escort duties between the non-tactical vehicle yard and the Entry Control Point. The Army concluded that Fluor "did not comply" with its contractual obligations regarding "supervision of local national . . . labor and adherence to escort requirements," but declined to terminate Fluor's contract. J.A. 3293.

E.

Hencely sued Fluor in the U.S. District Court for the District of South Carolina. His amended complaint is the operative pleading. It alleges that under South Carolina law Fluor was negligent in supervising Nayeb at his worksite and escorting Nayeb the morning of the attack, negligent in entrusting tools like a multimeter to Nayeb, and negligent in retaining Nayeb despite the "unreasonabl[e] danger[]" he presented. J.A. 1661. The amended complaint further alleges vicarious liability, negligent control, and breach of contract, specifically breach of the LOGCAP IV contract, Task Order 0005, and the PWS. In addition to punitive damages, the amended complaint seeks compensatory damages for medical expenses, pain and suffering, and lost income. Fluor denied liability and asserted several defenses faulting the military for Hencely's injuries, including contributory and comparative negligence.

Three dispositive motions filed by Fluor are relevant to this appeal. First, Fluor moved to dismiss all of Hencely's claims as nonjusticiable under the political question doctrine. The district court denied that motion and ordered discovery to proceed. *See Hencely v. Fluor Corp. Inc.*, No. 6:19-cv-00489-BHH, 2020 U.S. Dist. LEXIS 94842, 2020 WL 2838687 (D.S.C. June 1, 2020). Subsequently, Fluor moved for judgment on the pleadings regarding Hencely's breach of contract claim. The district court granted that motion, agreeing with Fluor that Hencely is not a third-party beneficiary of LOGCAP IV or the related agreements. *See Hencely v. Fluor Corp.*,

No. 6:19-cv-00489-BHH, 2021 U.S. Dist. LEXIS 152834, 2021 WL 3604781 (D.S.C. Aug. 13, 2021). And finally, Fluor moved for summary judgment on all remaining claims, arguing that the Federal Tort Claims Act's "combatant activities" exception preempts the state tort laws undergirding those claims. The district court agreed and granted summary judgment in Fluor's favor. *See Hencely v. Fluor Corp.*, 554 F. Supp. 3d 770 (D.S.C. 2021).

Hencely timely appealed the orders dismissing his claims. In addition to defending the district court's judgments, Fluor also reasserts its position that the political question doctrine bars judicial resolution of Hencely's complaint. We have appellate jurisdiction under 28 U.S.C. § 1291.

II.

We begin with the political question doctrine, which implicates our authority to decide this dispute.[3] The political question doctrine is a "narrow exception" to the general rule that "the Judiciary has a responsibility to decide cases properly before it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–195, 132 S. Ct.

3. Our Court has characterized the political question doctrine as an issue of subject matter jurisdiction. *See Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 154–155 (4th Cir. 2016); *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 407 n.9 (4th Cir. 2011). "Jurisdictional defects can be raised at any time," *Stewart v. Iancu*, 912 F.3d 693, 701 (4th Cir. 2019), and Hencely does not object to Fluor raising the matter in its Response Brief rather than filing a cross-appeal from the district court's unfavorable ruling.

1421, 182 L. Ed. 2d 423 (2012). A controversy involves a political question "'where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department'" or "'a lack of judicially discoverable and manageable standards for resolving it.'" *Id.* at 195 (quoting *Nixon v. United States*, 506 U.S. 224, 228, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993)).

"'Most military decisions are matters solely within the purview of the executive branch'" and therefore present nonjusticiable political questions. *In re: KBR, Inc., Burn Pit Litig.*, 893 F.3d 241, 259 (4th Cir. 2018) (quoting *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 533 (4th Cir. 2014)). "[T]he Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief." *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012). "It contemplates no comparable role for the judiciary," and "judicial review of military decisions would stray from the traditional subjects of judicial competence." *Id.*

Given the modern military's reliance on contractors to support its mission, we have recognized that "a military contractor acting under military orders can also invoke the political question doctrine as a shield under certain circumstances." *Burn Pit Litig.*, 893 F.3d at 259. But "acting under orders of the military does not, in and of itself, insulate the claim from judicial review." *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 411 (4th Cir. 2011). We have held that a suit against a military contractor raises a nonjusticiable political question if either (1) the military exercised direct control over

the contractor, or (2) "national defense interests were closely intertwined with military decisions governing the contractor's conduct, such that a decision on the merits of the claim would require the judiciary to question actual, sensitive judgments made by the military." *Al Shimari*, 840 F.3d at 155 (internal quotation marks omitted); *see Taylor*, 658 F.3d at 411.

Under the first prong, "a suit against a military contractor presents a political question if the military exercised direct control over the contractor," meaning the military's control was "plenary" and "actual." *Burn Pit Litig.*, 893 F.3d at 260. The military's control is not plenary if the military "provides the contractor with general guidelines" yet leaves the contractor "discretion to determine the manner in which the contractual duties would be performed." *Id.* (internal quotation marks omitted). Instead, to be plenary, the "military's control over the government contractor must rise to the level of the military's control over the convoy in" *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271 (11th Cir. 2009). *Burn Pit Litig.*, 893 F.3d at 260. In *Carmichael*, a fuel truck driven by a contractor employee as part of a military convoy on a fuel resupply mission rolled over and injured the plaintiff. *See Carmichael*, 572 F.3d at 1278. The Eleventh Circuit "held that the military's control was plenary, because 'the military decided the particular date and time for the convoy's departure; the speed at which the convoy was to travel; the decision to travel along a particular route[;] how much fuel was to be transported; the number of trucks necessary for the task; the speed at which the vehicles would travel;

the distance to be maintained between vehicles; and the security measures that were to be taken.'" *Burn Pit Litig.*, 893 F.3d at 260 (quoting *Carmichael*, 572 F.3d at 1281). Applying that standard in *Burn Pit Litigation*, our Court concluded that the military's control over a contractor's waste management was plenary because the contractor "had little to no discretion in choosing *how* to manage the waste." *Id.* at 261. "The military mandated the use of burn pits" and controlled "where to construct the burn pits, what could or could not be burned, when [the contractor] could operate the burn pits, how high the flames should be, and how large each burn should be." *Id.* In other words, every "'critical determination[] was made exclusively by the military,'" such that the contractor's decisions were "'de facto military decisions.'" *Id.* (first quoting *Carmichael*, 572 F.3d at 1282, then quoting *Taylor*, 658 F.3d at 410).

The record here does not satisfy our rigorous standard for plenary control. Even though the military dictated the security measures for Bagram Airfield, required Fluor to comply with military protocols concerning the supervision and escort of Local Nationals on base, and decided which Local Nationals Fluor could retain, the level of control the military exercised over Fluor's conduct does not to rise to that of the convoy in *Carmichael*. For example, viewing the evidence in the light most favorable to Hencely, the decision to lend Nayeb a multimeter from Fluor's tool room was not "made exclusively by the military" or a "de facto military decision." *Id.* (internal quotation marks omitted). On the current record, therefore, the military's control cannot be considered "plenary," and we need not

separately address whether it was "actual." *See Burn Pit Litig.*, 893 F.3d at 260.

Under the second prong of our Circuit's test, we must dismiss a case as nonjusticiable if "national defense interests were closely intertwined with military decisions governing the contractor's conduct, such that a decision on the merits of the claim would require the judiciary to question actual, sensitive judgments made by the military." *Al Shimari*, 840 F.3d at 155 (internal quotation marks omitted). In making this assessment, we "look beyond the complaint, and consider how [Hencely] might prove his claim *and* how [Fluor] would defend." *Taylor*, 658 F.3d at 409 (internal quotation marks and brackets omitted).

We have held that a contractor's "causation defense"—by which it argues that military decisions, not the contractor's actions, caused the plaintiff's injury—"does not require evaluation of the military's decision making unless (1) the military caused the [plaintiff's] injuries, at least in part, and (2) the [plaintiff] invoke[s] a proportional-liability system that allocates liability based on fault." *In re KBR, Inc.*, 744 F.3d 326, 340–341 (4th Cir. 2014). In other words, a defense that lays the blame for the plaintiff's injuries on military decisions does not raise a political question if it "does not necessarily require the district court to evaluate the propriety of" those military judgments. *Id.* at 340. And a district court is not inevitably required to evaluate the reasonableness of military judgments if the underlying state law (which forms the basis for the negligence claims and defenses) does not

actually require the court to assign fault to the military's actions. *Compare id.* (reasoning that contractor's "proximate causation defense" would not necessarily require court to evaluate the reasonableness of military decisions), *with Taylor*, 658 F.3d at 411 (concluding that contributory negligence defense would "invariably require the Court to decide whether the Marines made a reasonable decision," and therefore raised a political question (internal quotation marks and ellipsis omitted)).

Fluor argues that its "causation defense—i.e., trying the Military as the 'empty chair' and establishing that pivotal Military judgments caused Plaintiff's injuries"—would require the factfinder to evaluate the reasonableness of military decisions. Response Br. 50. Our precedent compels us to conclude otherwise. South Carolina law, which the parties have assumed applies to Hencely's negligence claims and to Fluor's defenses,[4] prohibits a jury from assigning fault to an immune nonparty. *See Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468, 478 (S.C. 2017) ("[A] nonparty may be included in the allocation of fault only where such person or entity is a 'potential tortfeasor,' which, under our law, excludes [a third party] who is immune from suit[.]"). And it is undisputed that the military is an immune nonparty. *See* 28 U.S.C. § 2680(j);

4. On appeal, Fluor faults the district court for "assuming application of South Carolina law *without* conducting a choice-of-law analysis," which it says would "lead to Afghan law" as the law of the place where the injury occurred. Response Br. 52–53. But Fluor itself has invoked South Carolina law throughout this litigation. And Fluor has not provided any indication in its brief how the outcome would be different under Afghan law.

Feres v. United States, 340 U.S. 135, 146, 71 S. Ct. 153, 95 L. Ed. 152 (1950) ("[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."); *Brame v. Garner*, 232 S.C. 157, 101 S.E.2d 292, 294 (S.C. 1957) (acknowledging that the military is immune from suit). Accordingly, although Fluor's defense may require the district court "to decide if the military made decisions" that caused Hencely's injuries, it "does not necessarily require the district court to evaluate the propriety of [those] judgments" because the court cannot assign fault to the military. *KBR, Inc.*, 744 F.3d at 340.

Fluor emphasizes that courts lack standards to evaluate "when it is 'reasonable' to allow a known terrorist inside a secure Military facility," or "what level of supervision or escorting is 'reasonable' given the Military's competing demands, resource limits, and policy objectives." Response Br. 49; *cf., e.g., Taylor*, 658 F.3d at 412 n.13 ("[W]e have no discoverable and manageable standards for evaluating how electric power is supplied to a military base in a combat theatre or who should be authorized to work on the generators supplying that power."); *Tiffany v. United States*, 931 F.2d 271, 279 (4th Cir. 1991) ("Judges have no 'judicially discoverable and manageable standards for resolving' whether necessities of national defense outweigh risks to civilian aircraft." (quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)). While it is certainly true that courts are not equipped or authorized to evaluate the military's "delicate appraisals of relative dangers," *Tiffany*, 931 F.2d

at 278, it does not yet appear that litigating Hencely's negligence claims and Fluor's defenses would "invariably require" the factfinder to judge whether the military's decisions were *reasonable*, as opposed to evaluating only whether those decisions caused Hencely's injuries, *KBR, Inc.*, 744 F.3d at 340 (internal quotation mark omitted). That is where our Court has drawn the line for justiciability under this second prong of our military contractor political question test.

In sum, while the question may be closer than the district court's pre-discovery ruling suggested, we are not convinced that deciding Hencely's case would cause the court to "inevitably be drawn into a reconsideration of military decisions." *Lane v. Halliburton*, 529 F.3d 548, 563 (5th Cir. 2008). The political question doctrine therefore poses no bar to judicial review of the merits of this dispute.

III.

We turn now to the heart of this appeal: federal preemption of Hencely's negligence claims. The district court held that uniquely federal interests represented by the Federal Tort Claims Act's combatant activities exception displaced Hencely's state-law claims for negligent supervision, entrustment, escort, and retention. We review the district court's judgment de novo, applying the same summary judgment standard that court was required to apply. *Calloway v. Lokey*, 948 F.3d 194, 201 (4th Cir. 2020); *see also* Fed. R. Civ. P. 56(a).

Appendix A

A.

In the Federal Tort Claims Act (FTCA), "Congress authorized damages to be recovered against the United States for harm caused by the negligent or wrongful conduct of Government employees, to the extent that a private person would be liable under the law of the place where the conduct occurred." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988); *see* 28 U.S.C. § 1346(b). It exempted from this consent to suit, however, "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). By their terms, these provisions do not apply to government contractors. 28 U.S.C. § 2671. Nevertheless, the combatant activities exception reflects an important federal policy of "foreclos[ing] state regulation of the military's battlefield conduct and decisions." *KBR, Inc.*, 744 F.3d at 348 (internal quotation marks omitted).

As the Supreme Court has explained, in areas involving "uniquely federal interests," an FTCA exception can demonstrate "the potential for, and suggest[] the outlines of, significant conflict between federal interests and state law" sufficient to warrant federal preemption even absent a statutory directive or direct conflict. *Boyle*, 487 U.S. at 504, 511 (internal quotation marks omitted). In *Boyle*, for instance, the Supreme Court held that the policy reflected in the FTCA's discretionary function exception, 28 U.S.C. § 2680(a), preempted and barred a plaintiff's state-law design-defect claim against the manufacturer of a military helicopter built for the United States. 487 U.S. at 512–513.

Recognizing the conflict between federal and state interests in the realm of warfare, several federal circuit courts, including our own, have extended *Boyle*'s logic to the FTCA's combatant activities exception. *See Saleh v. Titan Corp.*, 580 F.3d 1, 9, 388 U.S. App. D.C. 114 (D.C. Cir. 2009); *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 127–128 (2d Cir. 2021); *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 480–481 (3d Cir. 2013); *In re KBR, Inc.*, 744 F.3d 326, 350–351 (4th Cir. 2014); *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992). As our Court has explained, however, the conflict between federal and state interests in this context "is much broader" than the discrete inconsistency between federal and state duties in *Boyle*. *KBR, Inc.*, 744 F.3d at 349 (internal quotation marks omitted). "Instead, when state tort law touches the military's battlefield conduct and decisions, it inevitably conflicts with the combatant activity exception's goal of eliminating such regulation of the military during wartime." *Id.* In other words, when it comes to warfare, "'the federal government occupies the field'" and "'its interest in combat is always precisely contrary to the imposition of a non-federal tort duty.'" *Id.* (quoting *Saleh*, 580 F.3d at 7).

We have adopted the D.C. Circuit's test in *Saleh* to ensure preemption when state tort laws would clash with the federal interest underlying the combatant activities exception. *See KBR, Inc.*, 744 F.3d at 351. Pursuant to this test, "'[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such

activities shall be preempted.'" *Id.* at 349 (quoting *Saleh*, 580 F.3d at 9).

The military "need not maintain 'exclusive operational control' over the contractor for the government to have an interest in immunizing a military operation from suit." *Id.* (quoting *Saleh*, 580 F.3d at 8–9). This test therefore allows "the contractor to exert '*some* limited influence over an operation,' as long as the military 'retain[s] command authority.'"[5] *Id.* (quoting *Saleh*, 580 F.3d at 8–9). At the same time, it leaves open the possibility that a contractor might "supply[] services in such a discrete manner" that those services could be judged by state tort law without touching the military's battlefield conduct and decisions, analogous to a contractor who, in its "sole discretion," chooses specifications for a product it then sells to the Government. *Saleh*, 580 F.3d at 9.

B.

Hencely does not contest that, applying this Court's precedent, Fluor was "integrated into combatant activities" at Bagram Airfield. *KBR, Inc.*, 744 F.3d at 351. We view "combatant activities" through a "broad[] lens" to include "not only physical violence, but activities both necessary to and in direct connection with actual hostilities." *Id.* at 351 (internal quotation marks omitted).

5. The military's ultimate command authority over a combatant activity for purposes of preemption is accordingly distinguished from direct plenary control as envisioned by our political question jurisprudence, under which the contractor's determinations are actual or de facto military decisions.

For example, in *Burn Pit Litigation*, we held that "waste management and water treatment functions to aid military personnel in a combat area [are] undoubtedly" combatant activities. *Id.* We agree with Hencely that Fluor was engaged in combatant activities at Bagram Airfield and that the particular activity at issue in Hencely's lawsuit—supervising Local National employees on a military base in a theater of war—so qualifies.

We also conclude that "the military retained command authority" over Fluor's supervision of Local National employees on the base. *Id.* (internal quotation marks and brackets omitted). To begin, the Army instructed Fluor to hire Local Nationals as part of advancing the military's counterinsurgency strategy in Afghanistan, specifically the Afghan First Program. The military then reserved for itself decisions about containing the security threat posed by hiring Local Nationals to work on the military base. In particular, the Army decided which Local Nationals could access the base for employment and the Army dictated when, where, and how Fluor must escort and supervise each of those Local National employees.

The military, independent of Fluor, screened and approved Local Nationals for employment. The military vetted Nayeb and, knowing his history as a Taliban member, sponsored him for employment and granted him access to Bagram Airfield as a strategic effort at reintegration. The military periodically conducted security screening interviews of Local Nationals to determine whether their base access privileges should be terminated. The military interviewed Nayeb for

security purposes at least seven times before and during his employment and each time decided he should retain base access for continued employment. Those judgments belonged to the military alone.

Like with hiring, the military controlled base security, including entry and exit. Local Nationals could not enter the base without a military-issued badge. The military required physical searches and biometric screening of Local Nationals entering the base at Entry Control Points. Inside the perimeter, the military used bomb-sniffing dogs and performed random searches of Local Nationals and physical areas throughout the base. When Local Nationals arrived back at Entry Control Points after their shifts, the military escorted them off the base. As Hencely's counsel put it, "the military had effective command over security on the base." Oral Argument at 40:10.

As part of its mandate over base security, the military exercised comprehensive command over Fluor's supervision of Local Nationals' on-base movements and activities. Military protocols specified the items Local Nationals were forbidden to possess or use, like two-way radios and cameras. The military dictated whether, when, and how each Local National must be escorted while on base, and the military decided who had escort authority. For red badge holders like Nayeb, the military required an escort to "remain in close proximity and remain in constant view" of the Local National "in all areas" of Bagram Airfield "except [the] work facility." J.A. 2892–2893 (internal quotation marks and emphases omitted). The military's authority over escorting is illustrated by its

rejection of Fluor's proposal, before the bombing, to provide constant escort supervision of Local Nationals, even at their worksites.[6] Fluor could make a proposal, but the Army made the decisions. The military required Fluor to follow its escort protocols, trained Fluor personnel with escort duties, and operated a surveillance system to monitor and enforce Fluor's compliance.

The military's command authority over Local National employment and supervision at Bagram Airfield is further demonstrated by the changes it quickly—and unilaterally—instituted after the bombing. Within weeks of the bombing, the military altered its base security policies to require increased supervision of Local Nationals. Most notably, the new protocols required *all* Local Nationals to be escorted *at all times* while on base, removing the exception for when Local Nationals were at their worksite and entirely eliminating yellow badges (which did not require an escort and had been permitted to escort other Local Nationals). Military authorities also made the decision to greatly reduce the number of Local Nationals on base to around one hundred. As a result, the military sent well over 1,000 Local Nationals packing, ending their employment at Bagram Airfield.

The fact that Fluor possessed some discretion when operating within this framework does not eliminate the

6. Viewing the facts and all reasonable inferences in the light most favorable to Hencely, as we must, *see Ballengee v. CBS Broadcasting, Inc.*, 968 F.3d 344, 349 (4th Cir. 2020), we do not infer from this rejection that the Army forbade Fluor from supervising the work of its Local National employees.

conflict between state tort law and federal interests presented here. Viewing the facts and all reasonable inferences in the light most favorable to Hencely, *see Ballengee*, 968 F.3d at 349, we will infer that (1) Fluor could decline to lend its employees tools it didn't think they needed to complete their jobs, even if the Army didn't forbid Local Nationals from possessing those tools, and (2) Fluor could monitor its employees' work and fire them for poor performance, even if they were Local Nationals sponsored by the military and approved for base access. The military nevertheless retained ultimate command authority over supervision of Local Nationals and the protocols necessary to mitigate the risk posed by their presence on base. *See KBR, Inc.*, 744 F.3d at 349 (explaining that the *Saleh* test "allow[s] the contractor to exert '*some* limited influence over an operation,' as long as the military 'retain[s] command authority'" (quoting *Saleh*, 580 F.3d at 8–9)). Based on the military's assessment of the security threat presented by any given Local National, the military would authorize employment at Bagram Airfield or terminate it, the military dictated when and how the Local National must be supervised, and the military decided what items the Local National should be forbidden to use. Imposing state tort concepts of reasonableness onto Fluor's supervision of Local Nationals pursuant to these military directives would inevitably "touch[] the military's battlefield conduct and decisions" and even invite "'judicial probing of the government's wartime policies.'" *KBR, Inc.*, 744 F.3d at 349 & n.11 (quoting *Saleh*, 580 F.3d at 8); *see also Saleh*, 580 F.3d at 8 ("Such proceedings, no doubt, will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military . . . .").

This is not a situation where Fluor "suppl[ied] services in such a discrete manner" that its "services could be judged separate and apart from" the combatant activities and decisions of the United States military. *Saleh*, 580 F.3d at 9. To the contrary, the Army instructed Fluor to hire Local Nationals, directed where and how Fluor must escort and supervise Local Nationals, and decided whether Local Nationals could continue to access the base for employment. Fluor's exercise of its limited discretion concerning Local Nationals occurred within strictures set by the military based on its priorities and risk assessments. Hencely responds that Fluor could comply with state tort duties *and* the military's directives. For example, Fluor could have denied Nayeb access to a multimeter without violating the military's policy forbidding Local Nationals to use certain items. But that argument overlooks the "more general" nature of "battle-field preemption." *Saleh*, 580 F.3d at 7. "In the context of the combatant activities exception, the relevant question is not so much whether the substance of the federal duty is inconsistent with a hypothetical duty imposed by the state." *Id.* "Rather, it is the imposition *per se* of the state . . . tort law that conflicts" with the federal policy of eliminating such regulation of the military during wartime.[7] *Id.*; *see KBR, Inc.*, 744 F.3d at 349. Our "ultimate military authority" test reflects the

7. As the *Saleh* court observed, the rationales for tort law, like "deterrence of risk-taking behavior," "are singularly out of place in combat situations, where risk-taking is the rule." 580 F.3d at 7. That observation is equally true here, where the military took the calculated risk to bring Local Nationals, including known former insurgents, on base for employment in order to further its counterinsurgency strategy in Afghanistan.

breadth of this displacement of state law. *Saleh*, 580 F.3d at 12; *see also KBR, Inc.*, 744 F.3d at 351 (state tort law is preempted "when it affects activities stemming from military commands"). Because the military retained command authority over the supervision of Local Nationals at Bagram Airfield, a combatant activity into which Fluor was undisputedly integrated, Hencely's tort claims arising out of such activities are preempted.

Hencely raises three additional arguments regarding preemption. First, he contends that Fluor's contract with the Army was a performance-based statement of work and did "not provide any direction to Fluor about how it was to supervise its workers." Opening Br. 34. He likens this case to *Harris*, where the Third Circuit held that a performance-based statement of work defeated preemption because, by defining the contractor's duties for maintaining barracks electrical systems in terms of results rather than processes, the military did not retain command authority over the contractor's performance of the contract. *See* 724 F.3d at 481–482.

As an initial matter, our Court has not treated a performance-based statement of work as fatal to a combatant activities preemption defense. Indeed, we adopted our preemption rule in a case involving a performance-based LOGCAP contract. *See KBR, Inc.*, 744 F.3d at 332 (LOGCAP III); *Burn Pit Litig.*, 893 F.3d at 257 ("LOGCAP III was a performance-based contract").

More to the point, the PWS obligated Fluor to follow the military's base security protocols, which dictated

processes, not merely results. Although the PWS assigned Fluor responsibility for "oversight of . . . personnel . . . to ensure compliance with" and performance of its contract, J.A. 394 ¶ 1.07(b), military protocols for Bagram Airfield—including the badge-and-escort policy—directed Fluor's supervision of Local Nationals in much greater detail. It was the military, as part of its command over base security, that established the requirements for supervising and escorting Local Nationals and was ultimately responsible for ensuring those requirements were followed. Hencely alleges that Fluor didn't keep eyes on Nayeb while he worked, didn't restrict his access to tools used to make the bomb, disregarded an "unreasonably dangerous" risk by retaining him, and failed to follow the military's escort protocols the morning of the attack. J.A. 1661. These are matters of base security over which the military maintained ultimate authority, not judgments about the quality of an employee's work in the non-tactical vehicle yard. The military decided which Local Nationals to permit and which to exclude at Bagram Airfield; how to screen for explosives and other threats at the base; which Local Nationals needed what levels of access and eyes-on escorting; if escorting was needed, the where, when, and how of such supervision; what items Local Nationals were not permitted to handle while on base; and what procedures were necessary to ensure Local Nationals exited the base. Although Fluor retained primary authority over monitoring its employees' contract performance, it did not have discretion to decide the terms of Local National supervision necessary for base security. The military did not give Fluor responsibility for determining how best to protect U.S. personnel from

the risk posed by Fluor's Local National employees; the military commanded how that mission was performed.

Hencely next argues that preemption should not apply because he has alleged that Fluor did not follow Army instructions and failed to comply with its contractual obligations. This argument misunderstands the nature of combatant activities preemption. As we have previously explained, "the purpose of the combatant activities exception is not protecting contractors who adhere to the terms of their contracts; the exception aims to foreclose state regulation of the military's battlefield conduct and decisions." *KBR, Inc.*, 744 F.3d at 350 (internal quotation marks omitted). Our preemption rule preserves the field of wartime decisionmaking exclusively for the federal government. *Id.*; *see also Saleh*, 580 F.3d at 6. That remains true in cases of "alleged contractor misconduct." *KBR, Inc.*, 744 F.3d 349 n.11 (internal quotation marks omitted). Indeed, in *Burn Pit Litigation*, we explained that one reason for battlefield preemption is to avoid potential interference "'with the federal government's authority to punish and deter misconduct by its own contractors.'" *Id.* (quoting *Saleh*, 580 F.3d at 8); *see also Saleh*, 580 F.3d at 5 (holding plaintiffs' tort claims preempted, including "allegations that [a contractor] breached its contract").

Finally, Hencely asserts that the Fluor employees and subcontractors who escorted Local Nationals were not "within the Army's chain of command." Opening Br. 32. As Fluor correctly notes, however, under Army regulations, no private services contractor is ever "part of the operational chain of command." Army Reg.

715-9 ¶ 4-1.d (Mar. 2017); *cf. id.* ("Commanders have direct authority over [contractors] working on military facilities for matters of administrative procedures and requirements, force protection, and safety of the force."). And as the *Saleh* test reflects, the pertinent inquiry is whether the military retained command authority over the combatant activities into which the contractor was integrated. *KBR, Inc.*, 744 F.3d at 349. Here, we are satisfied the military did retain such authority. Viewing the evidence in the light most favorable to Hencely, we conclude that the military retained command authority over supervision of Local Nationals at Bagram Airfield, and so Hencely's tort claims against Fluor arising out of that combatant activity are preempted.

IV.

We turn, lastly, to Hencely's breach of contract claim, which is premised on the notion that he is an intended third-party beneficiary of the LOGCAP IV contract between Fluor and the United States. The district court rejected this argument and granted judgment for Fluor on the pleadings. *See* Fed. R. Civ. P. 12(c). Our review is de novo. *See Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014).

Generally, a motion for judgment on the pleadings should be granted only when "it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Id.* (internal quotation marks omitted). In considering such a motion, "we accept as true all well-pleaded allegations and view the complaint in the light most favorable to the plaintiff," but we need not "accept as true the legal conclusions set forth in a

plaintiff's complaint." *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (internal quotation marks omitted); *see Drager*, 741 F.3d at 474. We can consider the LOGCAP IV contract, which Fluor attached to its motion and the parties agree is "integral to the complaint and authentic." *Trimble Navigation*, 484 F.3d at 705. While "the inquiry into third-party beneficiary status is fact sensitive," resolution of the issue on the pleadings is appropriate when, as here, "the relevant documents are properly before this Court" and the pleadings and agreements preclude the plaintiff's claim to third-party beneficiary status. *Id.* at 709.

"The appropriate test under federal common law for third-party beneficiary status is whether the contract reflects the express or implied intention of the parties to benefit the third party."[8] *Id.* at 706 (internal quotation marks omitted). "This intent may be determined by the contract itself, as well as the circumstances surrounding its formation." *Id.* (internal quotation marks omitted). Third-party beneficiary status "is exceptional in the law" and "should not be granted liberally." *Id.* (internal quotation marks omitted).

Our opinion in *Trimble Navigation* illustrates these principles. In that case, the United Kingdom sought

8. The parties agree that federal common law governs Hencely's breach of contract claim. *See* 48 C.F.R. § 52.233-4 ("United States law will apply to resolve any claim of breach of this contract."); J.A. 2291 § I-115 (LOGCAP IV) (incorporating 48 C.F.R. § 52.233-4); *cf. Boyle*, 487 U.S. at 504 ("[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law.").

to purchase auxiliary output chips from an American manufacturer. Given the sensitive nature of the product, federal law prohibited the foreign government from purchasing the chips directly from the American manufacturer and instead required the United Kingdom to contract with the United States, which, in turn, contracted with the manufacturer to purchase the product. When the chips proved less than satisfactory, the U.K. sued the manufacturer in federal court, claiming to be a third-party beneficiary of the contract between the manufacturer and the U.S. We held otherwise. Among other things, we noted the absence of indicia that the U.S. or the manufacturer intended to benefit the U.K. Specifically, we observed that the manufacturer's agreements with the U.S. "d[id] not explicitly mention that they [were] for the benefit of [the] UK." *Id.* at 708. Nor did those agreements "mention . . . any involvement of [the] UK," such as approving the chips, "as a condition to [the manufacturer's] receipt of payment" from the U.S. *Id.* Although the agreement between the U.S. and the manufacturer referenced the U.S.-U.K. contract and stated that ultimate delivery of the chips was to be made to the U.K., we found such facts insufficient to show the intent necessary to create third-party beneficiary status. *See id.* We also found it significant that the U.S.-U.K. contract set forth a comprehensive set of dispute-resolution procedures, which further demonstrated that the U.S. did not intend for the U.K. to be able to sue the American manufacturer directly. *See id.*

Applying those principles here, Hencely has not pleaded facts sufficient to plausibly establish that he is an intended third-party beneficiary of the LOGCAP IV contract. The United States and Fluor did not evidence

intent to benefit Hencely, or U.S. soldiers as a class, in the LOGCAP IV contract or its implementing agreements.

First, the LOGCAP IV contract and implementing agreements do not expressly state that they are for the benefit of servicemen. Further, nothing in those documents purports to confer upon soldiers rights or benefits under the contract. As our precedent reflects, it is not enough that the United States bought Fluor's goods and services with the intent ultimately to provide them to soldiers. *See Trimble Navigation*, 484 F.3d at 708; *cf.* Restatement (Second) of Contracts § 313 cmt. a ("Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested.").

Second, nothing in the LOGCAP IV contract or implementing agreements suggests that individual servicemen can sue to enforce its provisions. Hencely cites a regulation incorporated into LOGCAP IV that mentions the possibility of "liabilities of the Contractor to third parties arising out of performing this contract." 48 C.F.R. § 52.232-7(g)(2). But contemplating that a contractor may face some sort of liability to some variety of third party while performing the contract is a far cry from *intending* to confer contractual benefits, and the right to enforce them, on an identified group of individuals. Moreover, LOGCAP IV and its incorporated regulations provide a detailed set of dispute-resolution procedures, none of which contemplate enforcement by third-party beneficiaries.

Third, no other factual allegations in Hencely's complaint support his conclusory assertion that "U.S.

soldiers . . . were the intended third party beneficiaries of these contracts." J.A. 1666. Hencely quotes some of Fluor's advertising materials, which state in one form or another that Fluor is proud to support the U.S. military and feels a responsibility to individual soldiers. These extra-contractual statements do not reveal an intent by Fluor, during contract formation, to confer benefits on individual soldiers in the LOGCAP IV contract, nor do they say anything about the intent of the United States, the other contracting party.

Finally, Hencely has identified no decision of any court holding that individual servicemen can sue as third-party beneficiaries to enforce the LOGCAP IV contract or any contract between the U.S. Government and a private military contractor. For all these reasons, we affirm the district court's judgment on the pleadings in favor of Fluor on Hencely's breach of contract claim.

V.

The federal government's interest in preventing military policy and base security from being governed by the laws of fifty-one separate sovereigns is "obvious." *Saleh*, 580 F.3d at 11. This significant federal interest preempts Hencely's tort claims against Fluor arising out of its supervision of Local Nationals at Bagram Airfield under the military's ultimate authority. As for Hencely's contract claim, we have seen no indication that individual servicemen are entitled to sue for breach of the contracts between the U.S. Government and Fluor. The judgment of the district court is affirmed.

AFFIRMED

TOBY HEYTENS, Circuit Judge, concurring in part and dissenting in part:

My disagreement is narrow and limited. I agree the political question doctrine does not prevent a court from deciding this case. I agree Hencely was not a third-party beneficiary to Fluor's contract with the government. And I agree Hencely's negligent supervision and negligent control claims are preempted.

I would, however, reverse the district court's grant of summary judgment to Fluor on Hencely's negligent entrustment and negligent retention claims. Here too, I agree the first requirement for preemption is satisfied because Fluor was "integrated into combatant activities" at Bagram Airfield. *In re KBR, Inc.*, 744 F.3d 326, 351 (4th Cir. 2014) (quotation marks removed). But I think there are genuine disputes of fact relevant to the second preemption requirement—whether the military "retained command authority" over certain types of decisions. *Id.* (quotation marks and alterations removed). In particular, I think a reasonable adjudicator could find that Fluor retained "considerable discretion" over whether to allow employees to access tools they did not need or fire employees for poor job performance. *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 481 (3d Cir. 2013). I thus would vacate the district court's judgment in part and remand for further proceedings.

Appendix B — Order of the United States Court of Appeals for the Fourth Circuit (November 26, 2024)

FILED: November 26, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1994
(6:19-cv-00489-BHH)

WINSTON TYLER HENCELY

Plaintiff-Appellant,

v.

FLUOR CORPORATION; FLUOR ENTERPRISES, INC.; FLUOR INTERCONTINENTAL, INC.; FLUOR GOVERNMENT GROUP INTERNATIONAL, INC.

Defendants-Appellees.

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Rushing, and Judge Heytens.

Appendix C — Opinion and Order of the United States District Court for the District of South Carolina (August 11, 2021)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Civil Action No. 6:19-00489-BHH

WINSTON TYLER HENCELY,

Plaintiff,

v.

FLUOR CORPORATION; FLUOR ENTERPRISES, INC.; FLUOR INTERCONTINENTAL, INC.; FLUOR GOVERNMENT GROUP INTERNATIONAL, INC.,

Defendants.

OPINION AND ORDER

This matter is before the Court on Defendants Fluor Corporation, Fluor Enterprises, Inc., Fluor Intercontinental, Inc., and Fluor Government Group International, Inc.'s (collectively "Defendants" or "Fluor") motion for summary judgment based on the Federal Tort Claims Act's "combatant activities" exception. (ECF No. 128.) For the reasons set forth in this Order, the motion is granted.

Appendix C

This is an extraordinary lawsuit that arises out of an attack by a foreign enemy—a Taliban operative—on a U.S. Military ("Military") base at Bagram Airfield ("BAF") in the Parwan Province of Afghanistan. The attack occurred during Operation Freedom's Sentinel ("OFS"), which began on January 1, 2015 and is part of the NATO-led Resolute Support Mission.[1] On November 12, 2016, Ahmad Nayeb ("Nayeb") deliberately detonated a suicide bomb inside BAF's secure perimeter. The attack killed five Americans and wounded 17 others. At the time, Plaintiff Winston Tyler Hencely was serving as an active duty soldier in the U.S. Army ("Army") at BAF. Plaintiff contends he was wounded after he physically confronted Nayeb shortly before the bomb exploded. The Taliban attack was both an unquestionable tragedy and an unfortunate reality of asymmetric warfare. As Plaintiff emphasizes: "This was a war zone." (ECF No. 20 at 11.)

In light of the war zone context in which this suit arises, Plaintiff correctly notes that he has asserted "uniquely federal claims." (*See* ECF No. 65 at 19.)[2] Yet Plaintiff seeks to pursue his "uniquely federal claims" under *state* law. Prior to reaching the merits of the

1. *See*, *e.g.*, https://www.army.mil/article/156517/operation_freedoms_sentinel_and_our_continued_security_investment_in_afghanistan.

2. Plaintiff describes his claims as "uniquely federal" because "Plaintiff 's claims involve the civil liability *of a federal government contractor* arising out of the performance *of a federal government contract* that resulted in serious and permanent injuries *to a federal government employee*—Mr. Hencely." (ECF No. 65 at 19 (emphasis in original).)

claims, the Court is asked through the present motion to first resolve a separate—and necessarily antecedent—issue: Under the "combatant activities" exception to the Federal Tort Claims Act ("FTCA"), can *state* tort law be used to regulate the Army's and Fluor's performance of mission-critical services inside an active overseas war zone, or would application of state-law duties conflict with paramount and uniquely *federal* interests?

This is the fundamental question embedded in the Fourth Circuit's combatant activities preemption test, which states: "'During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted.'" *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 349 (4th Cir. 2014) ("*Burn Pit III*")[3] (quoting *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009)). Plaintiff alleges that Fluor's escorting, supervision, and retention of Nayeb were negligent. As explained herein, the Military retained authority over those challenged activities and the activities stemmed from Military directives. Among other things, the Military decided to bring Nayeb onto the base for employment in the first instance, despite the Military's exclusive awareness of Nayeb's Taliban ties, and the Military did so as part of a calculated risk in furtherance of a larger political objective. The Military conducted seven security

3. For ease of reference, the Court uses the case name abbreviations employed by the Fourth Circuit to distinguish between the various district court and appellate court opinions in the history of the *In re KBR, Inc., Burn Pit Litigation.*

screening interviews of Nayeb during his employment and repeatedly decided not to terminate his access to BAF based on the Military's assessment of Nayeb's security risk. (*See* Wilson Decl. ¶¶ 58-59, ECF No. 128-7.) The Military also established the requirements and parameters for the oversight of Local Nationals ("LNs") at BAF, including decisions regarding *who* needed to be escorted; *when* they needed to be escorted and *not* escorted; who was authorized to be an escort; and the details of the escorting protocols, such as how many LNs could be escorted at a given time. Further, the Military had in place a surveillance system to ensure Military protocols were followed each time there was movement of LNs at the base.

As a result, allowing state tort law to regulate Fluor's conduct would necessarily "touch" numerous Military decisions, and thus inevitably conflict with the uniquely federal interests underlying the FTCA's combatant activities exception.[4] For reasons set forth below, the Court concludes that undisputed facts trigger combatant activities preemption and Fluor is entitled to summary judgment.

BACKGROUND

In its motion, Fluor set forth facts establishing two overarching points: (1) Fluor was integrated into

4. *See Burn Pit III*, 744 F.3d at 349 (4th Cir. 2014) ("[W]hen state tort law touches the military's battlefield conduct and decisions, it inevitably conflicts with the combatant activity exception's goal of eliminating such regulation of the military during wartime.").

the Military's operations at BAF; and (2) the Military exercised and maintained command authority over Fluor's challenged conduct. (*See* ECF No. 128-1 at 9-26.) Plaintiff submitted his own statement of facts along with his opposition. (*See* ECF No. 138-1.) Although Plaintiff purports to dispute some facts mentioned in Fluor's motion, Plaintiff does not cite facts in his opposition, nor in his list of facts, that create a genuine dispute regarding the following material facts.

A. This Case Arises Out of "Combatant Activities"

Plaintiff alleges injuries resulting from an enemy attack on the U.S. Military that occurred inside the perimeter of BAF, a secure military installation inside the Afghanistan theater of war. (*See*, *e.g.*, Am. Compl. ¶ 234, ECF No. 83 ("[T]he bomber[] ***attacked the Army*** on November 12, 2016." (emphasis in original)).) At the time, Fluor was providing essential support services for the Army. (*See*, *e.g.*, Weindruch Decl. ¶ 3, ECF No. 128-2; Wilson Decl. ¶ 5; *see also* Riley Decl. ¶ 28, ECF No. 128-5.) Thus, as Plaintiff concedes, this case arises out of Fluor's performance of combatant activities. (*See* ECF No. 138 at 20 n.36.)

B. The Supervision and Escorting of Nayeb Stemmed From Military Decisions

The Military alone established and decided the protocols and requirements for the oversight of Local Nationals at BAF. (*See*, *e.g.*, Jones Decl. ¶ 18, ECF No. 128-3; BAF Badge, Screening, and Access Policy ("BAF

Access Policy"), ECF No. 10-4;[5] Wilson Decl. ¶ 33.) Fluor did not have sole discretion to decide how to carry out such oversight. For example, the Military alone decided whether and when LNs needed to be escorted. (*See* Wilson Decl. ¶ 34; Jones Decl. ¶ 19; Jones Dep. 69:19-70:22, ECF No. 157-1 ("[T]he military makes the decision over whether or not that individual passed or failed that particular screening requirement; and then if everything was good, then the military would tell the contractor issue that badge in that particular color."); Weindruch Dep. 34:9-35:14, ECF No. 158-1 ("Is this interaction . . . whereby the Army vetted and decided to approve the issuance of badges and then gave direction to Fluor to issue the badges, is that an example of Fluor being integrated within the military's operations? A. Yes.").)

In addition to establishing the requirements for escorting LNs, the Military also established a surveillance system for ensuring that Fluor and others at the base complied with the Military's requirements. In fact, "[t]he Army had a surveillance system for every [Performance Work Statement ("PWS")] requirement" under the LOGCAP IV Contract, including the requirement to escort certain LNs from their work site to the entry

5. The BAF Access Policy was issued by the Bagram Support Group Commander. (*See* ECF No. 10-4 at 22.) The authority over such base access matters, and base force protection measures in general, is vested within the Executive Branch and ultimately derives from Article II, Section 2 of the U.S. Constitution. *See* U.S. Const. art. II, § 2 ("The President shall be commander in chief of the Army . . . when called into the actual Service of the United States. . . .").

control point ("ECP") for a "hand off to the military," after which the Military was responsible for getting them "off the base." (Jones Dep. 80:22-81:21; *see also* Bednarek Dep. 114:8-115:21, ECF No. 165 ("the military takes [LNs] and takes responsibility at that dismount point location very close to the [ECP], where they are then escorted . . . to that pedestrian turnstile for exit off of [BAF]").) The Military assigned a government quality assurance representative to "mak[e] sure that any time there was a movement of LN personnel," the Military's escorting requirements were followed. (*See* Jones Dep. 61:6-62:24.)[6]

Fluor did not have discretion to alter the Military's protocols or policies, nor to provide enhanced oversight of LNs above and beyond that which was dictated by the Military. Record evidence demonstrates that prior to the November 2016 Taliban attack, Fluor proposed to expand the amount of oversight of LNs at BAF—including a proposal to provide constant 24/7 escorting of all LNs—but the Military, in its discretion, declined to authorize this work. (*See* Jones Decl. ¶¶ 18-20; Jones Dep. 66:13-21 ("The contract . . . did not require[] 24-7, eyes-on surveillance

6. Plaintiff asserts that Fluor has not "produced any evidence that the Army conducted audits or monitoring of any kind of Fluor's supervision and escort of Local Nationals." (ECF No. 138 at 15.) And Plaintiff argues: "Nor is there any evidence that the Army did anything more than direct Fluor to supervise and escort its Local National workers and then leave it up to Fluor to accomplish those tasks." (*Id.* at 10.) The assertions are conclusory. Unrebutted testimony established that the Army monitored all movements of LNs from worksites to ECPs where they were handed off to the Military. (*See* Jones Dep. 80:22-81:21; Bednarek Dep. 114:8-115:21.)

once the LN employee got to the workplace. There were a couple of . . . occasions where Fluor had approached our [Army] office with this 24-7 concept for every LN employee, but the price tag was going to be excessive. And we presented it to the garrison, and it was never funded. Therefore, never implemented."), 63:16-64:3 ("There were many more times where Fluor had approached the . . . Government with a . . . potential mod to the PWS, the requirement to expand the escort services. . . .").) Because the Army did not authorize Fluor to provide expanded escort services, Fluor could not expand its services to include that work. (Jones Dep. 67:20-68:18 ("So unless and until the Army gives a direction to Fluor to do that work, Fluor is prohibited from doing that additional work; is that fair? A. Correct."); *see also* BAF Access Policy § 11.a(1) ("Red badge personnel require an escort in all areas except work facility."); Wilson Decl. ¶ 33 (describing restrictions on the duty to monitor or "escort" LNs for security purposes imposed by the Military through its BAF Access Policy).)

C. The Retention of Nayeb Stemmed From Military Decisions

Prior to November 2016, consistent with the NATO "Afghan First Program," the Military required that Fluor maximize hiring of LNs. (*See* PWS § 01.07.b., ECF No. 128-19 ("The Contractor shall hire [Host Nation] personnel and Subcontractors to the maximum extent possible in performance of this contract when such recruitment

practices meet legal requirements.").)[7] The Military identified Nayeb and sponsored him for employment. (*See* ECF No. 128-20.) The Military vetted and approved Nayeb for employment. (*See* ECF No. 128-16; Jones Dep. 72:12-25 ("[I]s it true that the Government was solely responsible for vetting Nayeb to ensure he did not have Taliban connections? A. . . . That was the Government's bailiwick. . . . Q. In other words, . . . the Government was responsible for vetting Nayeb. Fluor was not responsible for vetting Nayeb; is that true? A. Correct.").)

The Military decided to grant Nayeb access to the base despite its knowledge of Nayeb's Taliban history;[8]

7. The "Afghan First Program" was part of the Counterinsurgency ("COIN") strategy, under which the Military embarked on a long-term mission to win the hearts and minds of the Afghan people through socio-economic development, while recognizing the risks and inefficiencies in the short term. (*See* ECF No. 128-1 at 19.) In furtherance of the policy, at the time of the attack the Military had authorized over 1,000 LNs to be on BAF. The number of LNs at the base went from around 1,547 prior to November 2016 down to about one hundred afterward. (Jones Dep. 82:5-83:8.) The decision to drastically reduce LN presence at the base was made "by somebody with authority"—*i.e.*, by a senior Military commander, and "[a]bsolutely not" by Fluor. (*Id.*)

8. The details regarding Nayeb's Taliban ties are classified, as are other core facts that would be central to litigating this suit. In a separate motion for judgment on the pleadings (ECF No. 101), Fluor sought a ruling that this suit cannot be fairly litigated because the United States has refused to release classified information that is central to the parties' dispute, and in particular central to Fluor's proximate cause defense. The Court's instant Order regarding "combatant activities" preemption renders the motion for judgment on the pleadings for lack of access to classified

prior to the attack, the Military never warned Fluor of Nayeb's Taliban ties. (*See*, *e.g.*, ECF No. 128-16; Wilson Decl. ¶¶ 49-57.)

Throughout Nayeb's employment, the Military conducted at least seven security screening interviews. The purpose of the security interviews was for the Military to decide whether Nayeb should continue to retain base access privileges or whether those privileges should be revoked due to security concerns; and, each time, the Military decided Nayeb should retain his access to the base. (*See* Wilson Decl. ¶¶ 58-59; Fluor Ans. to 15-6 Questions, ECF 11-3 at 4.) During a March 2016 interview, just months before the bombing, the Military observed that Nayeb provided "trained and coached" answers to security screening questions, but the Military did not terminate Nayeb's base access and again did not warn Fluor. (*See* Wilson Decl. ¶ 59.)

STANDARD OF REVIEW

To prevail on a motion for summary judgment, the movant must demonstrate that: (1) there is no genuine

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information moot. However, suffice it to say that, were this case to continue in the absence of preemption, the withholding of classified information central to material questions of causation would present a major hurdle, if not a prohibitive event, to the resolution of this matter on the merits. (*See* ECF No. 162 (denying without prejudice Plaintiff 's motion in limine to admit the redacted Army Regulation 15-6 Report and declining to speculate about the contents and import of information removed from the Report and its exhibits due its classified nature).)

issue as to any material fact; and (2) that he is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The facts and any inferences drawn from the facts must be viewed in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

Although the moving party bears the initial burden of demonstrating that there is no genuine issue of material fact, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. To survive at the summary judgment stage, a non-movant must offer more than a mere "scintilla of evidence" in support of his position; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505. "[C]onclusory allegations, mere speculation, [or] the building of one inference upon another," without more, do not suffice to satisfy the non-moving party's burden of proof. *Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013); *Stone v. Liberty Mut. Ins. Co.*, 105 F.3d 188, 191 (4th Cir. 1997). Rather, a party opposing summary judgment must demonstrate that specific, material facts exist which give rise to a genuine issue. *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. 2548; *Dash*, 731 F.3d at 311; *see, e.g.*, *Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 324 (4th Cir. 2017) (affirming partial summary judgment award where plaintiff "woefully failed to meet

her burden of production in opposition to summary judgment" where she cited "*zero* evidence" to establish a triable issue of fact (emphasis in original)).

DISCUSSION

The undisputed facts establish that Fluor was integrated into combatant activities at BAF, and any attempt to litigate and try this case—including the presentation of Plaintiff's claims and Fluor's defenses—would result in state-tort law impermissibly "touching" military judgments. *See Burn Pit III*, 744 F.3d at 349. As explained below, the elements of the Fourth Circuit's broad preemption test are met.

A. The Fourth Circuit's Broad Combatant Activities Preemption Test

In *Boyle v. United Technologies Corp.*, the Supreme Court established the federal common law principle that state tort claims against government contractors are impliedly preempted when they would create a significant conflict with uniquely federal interests or policies. *See* 487 U.S. 500, 504-08, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). Because *Boyle* was a product liability suit involving an alleged design defect in a U.S. Marine Corps helicopter escape hatch built according to government specifications, the Court pointed to the FTCA's discretionary function exception, 28 U.S.C. § 2680(a), as the "statutory provision that demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law in the context of Government procurement." *Id.* at 511, 108 S.Ct. 2510.

Appendix C

In *Saleh v. Titan Corp.*, the D.C. Circuit adapted and applied *Boyle*'s conflict preemption principle to state tort claims against war zone logistical support contractors. The *Saleh* contractors had been hired by the Military to provide translation and interrogation services at Abu Ghraib prison in Iraq. The *Saleh* court held that the uniquely federal interests and policies underlying the FTCA's combatant activities exception preempted state tort claims brought by Iraqi nationals who alleged that they had been abused by the contractors. 580 F.3d at 5-11. In reaching this conclusion, the court articulated the following "battle-field preemption" formulation:

> During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted.

Id. at 9. The court explained that "the federal government occupies the field when it comes to warfare, and its interest in combat is always 'precisely contrary' to the imposition of a non-federal tort duty." *Id.* at 7 (quoting *Boyle*, 487 U.S. at 500, 108 S.Ct. 2510); *see also Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 710 (S.D.N.Y. 2011) ("[T]he combatant activities exception demonstrates the potential for, and suggests the outlines of, significant conflict between federal interests and state law in the context of military activity.").

In *Burn Pit III*, the Fourth Circuit adopted the *Saleh* combatant activities preemption test. *See Norat v.*

Fluor Intercontinental, Inc., No. 6:14-CV-04902-BHH, 2018 WL 1382666, at *12-*13 (D.S.C. Mar. 19, 2018) (citing *Burn Pit III*, 744 F.3d at 349-51). Under that test, combatant activities preemption is a broad "field" preemption doctrine. As the Fourth Circuit has explained, "in the combatant activities exception realm, the conflict between federal and state interests is much broader" than the discrete conflict presented in *Boyle*, because "when state tort law touches the military's battlefield conduct and decisions, it inevitably conflicts with the combatant activity exception's goal of eliminating such regulation of the military during wartime." *Burn Pit III*, 744 F.3d at 349-50; *see also Saleh*, 580 F.3d at 7 ("[T]he instant case presents us with a more general conflict preemption, to coin a term, 'battlefield preemption'. . . ."). Thus, state tort law is preempted "when it affects activities stemming from military commands." *Burn Pit III*, 744 F.3d at 351. "[T]he military need not maintain exclusive operational control over the contractor for [combatant activities] preemption to apply; rather, the government's interest in immunizing a military operation from suit is present when the military retained command authority, even if the contractor exerted some limited influence over an operation." *Norat*, 2018 WL 1382666, at *6, *12 (citing *Burn Pit III*, 744 F.3d at 349; quotations omitted).

This Court previously denied Fluor's motion to dismiss based on the political question doctrine. (*See* ECF No. 52.) However, the Fourth Circuit's preemption rule "creates a type of field preemption, broader than the political question doctrine." *Aiello*, 751 F. Supp. 2d at 711. As a result, it is entirely possible for a plaintiff's

state tort claims challenging a military contractor's war zone conduct to present a justiciable controversy, which is nonetheless preempted. *See id.* at 706, 715 (holding claims were justiciable, but barred by combatant activities preemption); *see also In re KBR, Inc., Burn Pit Litig.*, 268 F. Supp. 3d 778, 820 (D. Md. 2017) ("*Burn Pit IV*") (stating "[p]laintiffs' claims are preempted, even if they are not nonjusticiable political questions"), *vacated in part as moot*, 893 F.3d 241, 264 (4th Cir. 2018) ("*Burn Pit V*") (affirming district court's ruling that the controversy was justiciable and vacating as moot accompanying ruling that plaintiffs' claims were preempted under combatant activities exception).

B. Plaintiff's Claims Arise Out of Combatant Activities

Plaintiff concedes that this suit arises out of "combatant activities" (*see* ECF No. 138 at 20 n.36.), and for good reason. The Fourth Circuit's preemption rule incorporates the broad definition of "combatant activities" set forth in *Johnson v. United States*, 170 F.2d 767, 769-70 (9th Cir. 1948), under which combatant activities "include not only physical violence, but [also] activities both necessary to and in direct connection with actual hostilities." *Burn Pit III*, 744 F.3d at 351 ("It therefore makes sense for combatant activities to extend beyond engagement in physical force."). Applying this definition, the activities at issue here are a quintessential example of "combatant activities."

Here, Plaintiff alleges injuries that resulted from *actual combat* with an enemy combatant. According to the

Amended Complaint, "the bomber[] ***attacked the Army*** on November 12, 2016." (Am. Compl. ¶ 234 (emphasis in original).) That core allegation of "physical violence"—an enemy attack inside the perimeter of a base inside a war zone—establishes that Plaintiff's claims arise out of "combatant activities" under the Fourth Circuit's broad definition. *See Taylor v. Kellogg Brown & Root Servs., Inc.*, No. 2:09-CV-341, 2010 WL 1707530, at *10 (E.D. Va. Apr. 16, 2010) ("If shelling and receiving shelling is not combat, then combat has no meaning."), *vacated in part as moot*, 658 F.3d 402, 412 (4th Cir. 2011) (affirming ruling that negligence claim was nonjusticiable under the political question doctrine and vacating as moot accompanying ruling that claim was preempted by the FTCA combatant activities exception).[9]

Furthermore, the undisputed facts also show that Fluor performed "essential sustainment support services for the U.S. Army" at BAF. (*See* Weindruch Decl. ¶ 3; *see also* Bednarek Decl. ¶ 18, ECF No. 128-4 ("[T]he military cannot successfully carry out its responsibilities,

9. Beyond Plaintiff's concession that this was a war zone, and his allegation that the suit arises out of an enemy attack, soldiers involved in the attack—and many others who served in Afghanistan over the past two decades—were awarded Bronze Star Medals and other decorations specifically for their heroic actions in a "combat" zone. *See*, *e.g.*, Army Reg. 600-8-22 (Mar. 2019) at 3-16.e. ("the [Bronze Star Medal] is a combat related award and service or achievement under combat conditions is inherent to the medal"). Several soldiers injured in Nayeb's attack received Purple Hearts, which they were rightly entitled to, because they were wounded in "any action against an enemy of the United States." *See id.* at 2-8.b.(1).

including its force protection responsibilities, without the support provided by contractors such as Fluor.").) Thus, while "physical violence" alone is sufficient to meet the definition, the challenged conduct at issue included *both* "physical violence" *and* activities "necessary to and in direct connection with actual hostilities." *See Johnson*, 170 F.2d at 768-70.

Moreover, numerous courts have held that support services provided by contractors inside war zones "undoubtedly" constitute "combatant activities" for purposes of the defense, even in the absence of direct violence and where the allegations centered on relatively mundane, though essential, support functions. *See*, *e.g.*, *Burn Pit III*, 744 F.3d at 351 (stating "waste management and water treatment functions" were "undoubtedly" combatant activities); *Norat*, 2018 WL 1382666, at *13 ("There is little doubt that Fluor's installation and maintenance of electrical systems at Bagram Airfield qualifies as engaging in combatant activities."); *Aiello*, 751 F. Supp. 2d at 713-14 ("indoor latrine maintenance" constituted combatant activities); *Harris v. Kellogg Brown & Root Srvs., Inc.*, 724 F.3d 458, 481 (3d Cir. 2013) (maintenance of electrical systems constituted combatant activities).

C. Plaintiff Challenges Supervision and Escorting Activities Stemming From Military Decisions

Plaintiff alleges that Fluor's performance of supervision and escorting was negligent. (*See*, *e.g.*, Am. Compl. ¶ 110.) Plaintiff does not dispute that the Military,

not Fluor, established the requirements for supervising and escorting LNs through Fluor's contract and the BAF Access Policy. (*See* ECF No. 128-1 at 19-21; Jones Decl. ¶ 18 ("[T]he military also established protocols and requirements for the escorting and supervision of the many Local Nationals who were authorized by the military to work on the base.").) Among other things, the Military, not Fluor, made the following decisions: (1) the Military decided who was permitted on base, including which LNs could gain access and which were barred; (2) the Military decided which LNs required escorts once on the base; (3) the Military decided when LNs required escorts, and when no escorts were required (such as at the work place); (4) the Military decided who was qualified to serve as an escort; (5) the Military decided how many LNs could be escorted at one time. (*See* BAF Access Policy, ECF No. 10-4.)

Having established these requirements for oversight of LNs on the base, the Military also established a surveillance system to monitor Fluor's performance and to ensure the escorting policy was followed. In particular, Army personnel were "assigned to mak[e] sure that any time there was a movement of LN personnel," the Military's escorting requirements were followed. (*See* Jones Dep. 61:6-62:24.)

Based on these undisputed facts, it is clear that this lawsuit challenges "activities stemming from military commands." (*See Burn Pit III*, 744 F.3d at 349-51.) Rather than dispute these facts, Plaintiff instead argues that Fluor should have done a better job supervising and

escorting the Taliban bomber. Such arguments concern the merits of the claims, and do not alter the preemption analysis. For purposes of preemption, it is apparent that whether, when, and how to supervise and escort Nayeb—an individual who the Military alone knew had Taliban ties—was ***not*** left to Fluor's "sole discretion," and thus the claims are preempted. *See Saleh*, 580 F.3d at 9; *Burn Pit III*, 744 F.3d at 349; *see also Norat*, 2018 WL 1382666, at *12 (stating contractor may exert "*some* limited influence over an operation" and "[t]he military need not maintain exclusive operational control over the contractor for preemption to apply" (emphasis in original; quotation marks and citations omitted)); *Burn Pit IV*, 268 F. Supp. 3d at 823 (stating "[t]he evidence does not support the notion that KBR was operating in such a discrete manner that Plaintiffs are challenging its sole discretion" (quotation marks and citations omitted)).[10]

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10. Plaintiff argues: "Fluor bases nearly its entire argument on the false claim that the Army ***prohibited*** Fluor from supervising Local Nationals while they were at their workplace." (ECF No. 138 at 5 (emphasis in original)); *see also id.* at 7 ("Jones' testimony proves that Fluor's entire motion hinges on a deliberate misrepresentation to the Court."). But Fluor's preemption defense does not hinge on a showing that the Army prohibited Fluor from supervising LNs while they were at their workplace. As explained *supra*, preemption would apply even if the Army had not rejected Fluor's request to provide enhanced oversight because it is undisputed that the Army prescribed the level of oversight that Fluor was directed to perform; thus, the challenged conduct stemmed from military directives and was not left to Fluor's sole discretion.

D. Plaintiff Challenges Retention Activities Stemming From Military Decisions

Plaintiff alleges that Fluor's retention of Nayeb was negligent. (*See*, *e.g.*, Am. Compl. ¶ 199.) Plaintiff does not dispute that the Military: (1) sponsored Nayeb for employment in furtherance of the Afghan First Program; (2) vetted Nayeb prior to employment; and (3) conducted security screening interviews of Nayeb throughout his employment to decide whether to terminate him for security reasons. (*See* ECF No. 128-1 at 34-35.) Plaintiff does not dispute that the Military alone knew of the threat posed by Nayeb, including that he was a Taliban associate and acted suspiciously during a security screening interview. (*See id.*) Plaintiff does not dispute that the Military could have terminated Nayeb by barring him from the base, but chose not to. (*See id.*) Plaintiff does not dispute that the Military did not warn Fluor of the extraordinary risks posed by Nayeb. (*See id.*; *see also* ECF No. 120 at 6 n.14 (indicating Plaintiff's view that these facts irrelevant because "Fluor, and only Fluor, enabled Nayeb to build the bomb and to be there to explode it").)

Again, based on these undisputed facts, it is clear that this lawsuit seeks to impose state tort law on "activities stemming from military commands." *See Burn Pit III*, 744 F.3d at 349-51. In particular, the Military made the critical decision that Nayeb should be employed at BAF in the first instance. The Military's decision to bring Nayeb, a known Taliban associate, onto the base was a quintessential military judgment; it was a calculated risk

taken in furtherance of a long-term political goal. *See supra* at n.7. There is no evidence that the Military ever warned Fluor of the unique risks posed by Nayeb. Fluor's subsequent decision to retain Nayeb was inexorably linked to these Military decisions. As a result, whether to retain Nayeb was plainly not left to Fluor's "sole discretion," and the claims are preempted. *See Saleh*, 580 F.3d at 9; *Burn Pit III*, 744 F.3d at 349; *see also Norat*, 2018 WL 1382666, at *12; *Burn Pit IV*, 268 F. Supp. 3d at 823. There can be no question that injecting state tort law into this arena would "touch" Military decisions, and preemption is invoked.

This case is distinguishable from *Norat*, where the undersigned found that the plaintiffs' negligence claims, as to injuries they suffered when they drove an all-terrain vehicle into an uncovered excavation ditch associated with the installation and maintenance of electrical systems at BAF, were not preempted by the combatant activities exception. *See* 2018 WL 1382666, at *12-*13. The Military's involvement in, and authority over, the activities at issue here extended far beyond "general oversight of Fluor's project and periodic compliance inspections." *See id.* at *1, *13. Among other reasons, as noted *supra*, this case arises out of an attack on the Army carried out by an enemy operative who the Military allowed to work on the base, without warning Fluor, to further a political objective—namely, to win the hearts and minds of the Afghan population as part of the COIN strategy. The Military made judgments regarding the requisite level of oversight for LNs, balancing security risks with scarcity of resources. The Military had a surveillance system to ensure its escort policies were followed any time there

was a movement of LN personnel. The federal interests involved in *Norat* pale in comparison to the profound federal interests implicated in this extraordinary suit.

E. Plaintiff's Arguments Against Preemption Are Unavailing

Plaintiff repeatedly argues that "Fluor's employees were not within the Army's chain of command." (*See* ECF No. 138 at 22; *see also id.* at 8 ("Fluor also failed to tell this Court this crucial fact: *contractors are expressly excluded from the Army's chain of command by Federal Regulations.*" (emphasis in original)); *id.* at 14 ("Fluor has never presented any evidence that any Army personnel was in the chain of command over Fluor employees and subcontractors at the NTV Yard."); *id.* at 21 ("The official views of the Department of Defense also make it clear that contractors are not in the chain of command."); *id.* ("Army Regulations about contractors also establish that contractor personnel are not part of the Army chain of command and are not supervised by the Army."); *id.* ("Fluor's supervision and escort duties were not within the military's chain of command."); *id.* at 22 (citing deposition testimony that "contractor personnel are not part of the operational chain of command"); *id.* at 23 ("Fluor has never produced any evidence of any Army personnel in the chain of command over Fluor employees and subcontractors working as escorts in the NTV Yard."); *id.* at 26 ("Fluor employees did not report to the Army chain of command and the Army was expressly precluded from supervising Fluor's personnel.").)

These facts are legally irrelevant. As Plaintiff rightly notes, no private services contractor is *ever* a part of the military operational chain of command. (ECF No. 138 at 8.) But that did not stop the Fourth Circuit from creating a preemption test for claims against "private service[s] contractor[s]." *See Burn Pit III*, 744 F.3d at 349. The Fourth Circuit explained: "the *Saleh* test does not require private actors to be combatants; it simply requires them to be 'integrated into combatant activities.'" *Id.* at 350 (quoting *Saleh*, 580 F.3d at 9). Thus, the same argument raised by Plaintiff here was addressed and rejected in *Burn Pit IV*: "Plaintiffs' argument that [the contractor] was not part of the formal military chain of command is irrelevant to the *Saleh* preemption analysis, as military contractors are never part of the military chain of command." *Burn Pit IV*, 268 F. Supp. 3d at 822; *see also Saleh*, 580 F.3d at 7 (noting contractors "were subject to military direction, even if not subject to normal military discipline").[11]

Plaintiff also argues that "the very nature of Fluor's contract with the military directs that Plaintiff's suit

11. To be clear, the Military has direct authority over contractors—and can issue binding directives—particularly in matters of safety and security. The regulation that Plaintiff cites confirms this, as it states: "Commanders have direct authority over [contractor personnel] working on military facilities for matters of administrative procedures and requirements, force protection, and safety of the force." (*See* Army Reg. 715-9 at § 4-1.d., (ECF No. 138-16 at 15)); *accord* Army Reg. 700-137 at § 6-4.e. (Mar. 23, 2017) ("Commanders have authority over contractor personnel working on military facilities in matters of safety, security, environmental, health, and welfare.").

cannot be preempted" because the LOGCAP contract includes a "performance-based statement of work." (*See* ECF No. 138 at 23.) This argument too has been rejected by the Fourth Circuit, as the *Burn Pit III* court adopted a broad preemption rule in a case involving a LOGCAP contract. *See Burn Pit III*, 744 F.3d at 332, 351 (remanding for discovery in order to determine whether the military retained command authority of contractor's waste management and water treatment activities and "the extent to which [the contractor] was integrated into the military chain of command"[12]).

Plaintiff devotes much of his brief to allegations that Fluor was negligent. (*See*, *e.g.*, ECF No. 138 at 13 ("Fluor has never even sought to offer any explanation for its failure to notice that its employee Nayeb had left his work station on the morning of the bombing and was wandering freely around the base wearing a bomb vest intended to kill American soldiers.").) These assertions, however, put the cart before the horse. The Court cannot address whether conduct was negligent under state tort law in order to decide whether state tort law can be applied to the conduct.

For example, in *Saleh*, the plaintiffs alleged that contractors providing interrogation and interpretation

12. The lesson that emerges from the case law surrounding combatant activities preemption, and the Fourth Circuit's treatment of this subject, is that private service contractors can be "integrated" into the military chain of command for purposes of the preemption rule, without ever being part of the chain of command as a formal matter.

services committed serious abuse of prisoners. *See* 580 F.3d at 2. The *Saleh* court assumed the allegations of tortious conduct were true, but held the claims were preempted under the "battlefield preemption" rule later adopted by the Fourth Circuit. *See id.* at 3, 7 ("for purpose of this appeal, we must credit plaintiffs' allegations of detainee abuse"); *id.* at 11 ("plaintiffs rely on general claims of abuse which include assault and battery, negligence, and the intentional infliction of emotional distress"). The D.C. Circuit even noted "the executive branch ha[d] broadly condemned the shameful behavior" at issue, but the court stated that such a "disavowal does not . . . bear upon the issue presented." *Id.* at 10.

The same rationale applies here. In assessing the preemption defense, whether Fluor acted negligently with respect to supervision, escorting, or retention of Nayeb is irrelevant because merits issues are not part of the Fourth Circuit's test.[13] In fact, allowing "battle-field preemption" to rise and fall based on whether a defendant acted "appropriately" or "reasonably" would undermine the Fourth Circuit's broad preemption rule, which is designed to ensure "the federal government occupies the

13. For example, Plaintiff argues: "Building a bomb vest to kill American soldiers while on the job for Fluor is clearly not an appropriate work activity." (*See* ECF No. 138 at 18.) The same argument could have been made in *Saleh*, as no one would claim that serious abuse of prisoners is an "appropriate work activity" for an interrogator/interpreter. However, the credibility of the allegations in that case were collateral to the preemption rationale and did not undermine the reasoning supporting application of the combatant activities exception.

field when it comes to warfare." *Burn Pit III*, 744 F.3d at 349-50.

Finally, as Plaintiff has repeatedly emphasized, the Court is well aware that the Army conducted an investigation into the attack and issued a report stating "the primary contributing factor to the 12 November 2016 attack was Fluor's complacency and its lack of reasonable supervision of its personnel." (*See* ECF No. 1-1 at 4.) The statements in the Army's unclassified report do not alter the preemption analysis, nor do they affect the material facts triggering preemption. Under the Fourth Circuit's preemption test, it is clear that the Military retained authority over Fluor's conduct; Fluor did not have sole discretion over the challenged activities; and, the injection of state tort law into this setting to regulate Fluor's conduct would "touch" numerous Military decisions.

F. Allowing This Suit to Proceed Would Cause Other Significant Harms to Federal Interests

Beyond meeting the Fourth Circuit's preemption test, which alone warrants dismissal, the Court concludes that this litigation should be dismissed because it would cause additional harms to federal interests if it were to proceed through any further discovery and trial.

Allowing this litigation to proceed would create perverse incentives for contractors to interfere with Military investigations into attacks by foreign enemies on overseas military bases. Here, the Army conducted a classified investigation into Nayeb's attack and has deemed

the vast majority of its investigation and report classified and thus unavailable to the litigants. Fluor was plainly not allowed to conduct its own parallel investigation, as any attempt by a contractor to carry out an investigation of an enemy attack inside a war zone "would pose a significant risk of interfering with the military's combat mission." *Aiello*, 751 F. Supp. 2d at 711. That the Military precluded Fluor from carrying out a post-accident investigation is perfectly understandable. However, "if claims against a contractor arising out of combatant activities were not preempted, then there would be a legitimate need for the contractor's lawyers, engineers and/or investigators to inspect the condition of the scene of the allegedly tortuous act and interview witnesses, including military personnel." *Id.* Such a result would hamper military investigations, disrupt military operations, and increase costs that will ultimately be passed on, whether directly or indirectly, to the government.

Allowing this litigation to proceed would also undermine military discipline, as soldiers would inevitably be haled into court proceedings to testify and to implicate and critique the conduct of other soldiers and senior officers. The recent depositions of Army personnel offer a preview of such "military versus military" testimony. For example, Lieutenant General (Ret.) Mick Bednarek testified that Lieutenant General Thomas James, the Investigating Officer in charge of the Army's 15-6 investigation, "just got it wrong." (*See* ECF No. 153 at 10 (citing Bednarek Dep. 43:19-24).) Such proceedings, in which Military commanders, officers, and their subordinates are pointing the finger at one another, cause

great harm to military discipline and offend separation-of-powers principles. The inevitability of such testimony provides further reason why this suit should be dismissed. *See Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986) (dismissing case against contractor where trial of the case would "'require members of the Armed Services to testify in court as to each other's decisions and actions'" (quoting *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 673, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977))); *Saleh*, 580 F.3d at 8 (noting "the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings" that "will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government's wartime policies," which "will surely hamper military flexibility and cost-effectiveness").

Finally, allowing this suit to proceed would impose significant litigation burdens on the armed forces, as both parties would seek access to a large number of witnesses and documents to obtain testimony and information that are central to core issues, such as proximate cause. The United States has argued, as amicus curiae, that such litigation burdens are further reason why suits like this should be dismissed. *See*, *e.g.*, Br. for the United States as Amicus Curiae, *KBR, Inc. v. Metzgar*, No. 13-1241, 2014 WL 7185601, at *21-22 (U.S. Dec. 16, 2014) (explaining that "allowing state-law claims against battlefield contractors can impose enormous litigation burdens on the armed forces," and advocating for broad preemption rule).

Appendix C

CONCLUSION

For the reasons set forth above, Plaintiff's state law tort claims are preempted and Fluor's motion for summary judgment based on the FTCA's combatant activities exception (ECF No. 128) is GRANTED.

IT IS SO ORDERED.

/s/ Bruce Howe Hendricks
United States District Judge

August 11, 2021
Greenville, South Carolina

Appendix D — Amended Complaint for Damages, D.Ct. Doc. 83 (August 25, 2020)

IN THE DISTRICT COURT OF SOUTH CAROLINA
GREENVILLE DIVISION

CIVIL ACTION FILE NO. 6:19-cv-00489-BHH

WINSTON TYLER HENCELY,

Plaintiff,

v.

FLUOR CORPORATION; FLUOR ENTERPRISES, INC.; FLUOR INTERCONTINENTAL, INC.; FLUOR GOVERNMENT GROUP INTERNATIONAL, INC.,

Defendants.

Filed August 25, 2020

AMENDED COMPLAINT FOR DAMAGES[1]

Winston Tyler Hencely ("Hencely") files this, his Amended Complaint for Damages against Fluor Corporation, Fluor Enterprises, Inc., Fluor Intercontinental, Inc., and Fluor Government Group International, Inc. (collectively, "Fluor"). Plaintiff shows the Court the following:

1. Plaintiff files his Amended Complaint for Damages pursuant to Fed. R. Civ. P. 15(a)(2) and Fluor's written consent. Ex. A, 8/24/20 email from Barger to Snyder.

Appendix D

I. INTRODUCTION

1.

Plaintiff Winston Hencely is a United States Army soldier, designated a "Specialist" (E-4). Hencely is from Effingham County, Georgia, near Savannah. He enlisted in the U.S. Army on November 27, 2013.

2.

At the time of the incident referenced in this Amended Complaint, November 12, 2016, Hencely was stationed at Bagram Airfield in Afghanistan.

3.

Defendant Fluor is a "private military contractor." It signed a contract with the U.S. Department of Defense ("DOD") to provide certain specified services and base support at military installations in Afghanistan, including Bagram Airfield (the "Base").

4.

Fluor's contract with the DOD imposed very specific duties and responsibilities upon Fluor. Included among those duties was management of the Base's "Non-Tactical Vehicle Yard" and all personnel working there.

5.

By contract with the DOD Fluor accepted legal responsibility for all actions of all of Fluor's employees, subcontractors, and subcontractor's employees at Bagram Airfield (Fluor's "LOGCAP personnel").[2]

6.

Fluor is liable for any and all negligence committed by its LOGCAP personnel, including the negligence of any other personnel at the Base under Fluor's direct or indirect supervision.

7.

On Saturday morning of November 12, 2016 more than 200 personnel residing at the Base were gathering for a Veterans Day 5k race set to begin at 6:15 a.m.

8.

Also on the Base was a Fluor employee named Ahmad Nayeb.

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2. The term "LOGCAP personnel" refers to all Fluor's employees, subcontractors, and subcontractor employees on Bagram Airfield. As the prime contractor with the U.S. government, "Fluor is responsible for all of its employees, subcontractors, and subcontractor employee actions." Army Report at 10.

9.

Nayeb worked at Fluor's HAZMAT work center within Fluor's Non-Tactical Vehicle Yard at the Base.

10.

Fluor knew that Nayeb was a former member of the Taliban.

11.

Fluor knew that Nayeb was not supposed to be on the Base on the morning of November 12, 2016.

12.

Fluor was required by its contract to ensure that Afghan nationals like Nayeb, and including Nayeb, were physically escorted off the Base by Fluor's LOGCAP personnel.[3]Nayeb was supposed to have been escorted off the Base by bus without fail at 4:45 a.m. that morning.

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3. *See* Ex. 1, Army Report at 13-14: "Various Fluor Non-Tactical Vehicle Yard employees – U.S. Civilians, Other Country Nationals, and Local Nationals – served as escorts for Local Nationals who worked in the Non-Tactical Vehicle Yard. These *Fluor escorts* were responsible for supervising the transport of Local Nationals from the Entry Control Point *to* the Non-Tactical Vehicle Yard, *and from* the Non-Tactical Vehicle Yard back to the Entry Control Point, at shift change." (citations omitted) (emphasis added).

13.

Fluor knew Nayeb was not escorted off the Base.

14.

Fluor knew almost an hour before the attack Nayeb did not check in to be escorted off the Base.

15.

Fluor did nothing as a result of Nayeb's failure to check in to be escorted off the Base.

16.

Fluor was obligated by its contract to provide Fluor escorts to remain in close proximity to and maintain constant sight of the individuals they were escorting.

17.

Fluor failed in its duty, but warned no one of its failure.

18.

Nayeb was a suicide bomber.

19.

Nayeb had constructed an explosive vest bomb at Fluor's facility on the Base—a facility Fluor had the contractual and legal duty to supervise and manage.

20.

Nayeb used materials owned by Fluor and tools owned by Fluor to construct the explosive vest bomb at Fluor's own facility on Base.

21.

Instead of being escorted off the Base by bus, Nayeb walked, totally unsupervised by Fluor, toward the assembly point for the Veterans Day 5k race.

22.

Three hundred meters from the assembly point, U.S. Army Specialist Winston Hencely noticed Nayeb and thought he looked suspicious and out of place. Hencely was then 20 years old.

23.

When his questions were ignored, Hencely grabbed Nayeb's shoulder and felt the bulky explosive vest bomb under Nayeb's robe. Nayeb, the suicide bomber, exploded the vest.

24.

Six were killed in the attack: three U.S. soldiers, two Fluor employees, and the bomber. Seventeen were injured, including Hencely and fifteen other U.S. soldiers.

25.

Hencely's vigilance saved the lives of, and prevented grievous injuries to, many more who were assembling for the Veterans Day 5k race. Hencely's intervention stopped the bomber from reaching the densely-packed starting point.

26.

The Taliban subsequently boasted it was responsible for the bombing at Bagram Airfield. The Taliban stated that "[t]he planning of attack took 4 months[.]" Ex. 2, *Over 67 US invaders killed and wounded amid Bagram martyrdom attack*, Islamic Emirate of Afghanistan (Nov. 12, 2016),http://alemerah- english.com/?p=7065 (last visited Dec. 5, 2018).

27.

The U.S. Army's Investigation found credible the Taliban's assertion that the bombing had been planned for four months.

28.

Hencely was grievously injured. The projectiles in the bomb fractured Hencely's skull and tore through the tissue of his brain. Shrapnel went in the front of Hencely's forehead; eight bone fragments were lodged in Hencely's frontal lobe. The head injury was so severe that a large section of Hencely's skull was removed and

left open for more than six months. Shrapnel remains in Hencely's occipital lobes. The projectiles in the bomb also penetrated Hencely's chest, resulting in a massive hemothorax and pneumothorax. Hencely's lungs filled with fluid and blood and his chest was split open between the ribs for a pulmonary tractotomy.

29.

The projectiles that penetrated Hencely's brain and chest were the property of Fluor—pieces of nuts and bolts the bomber obtained from Fluor.

30.

Hencely suffers from numbness and inability to fully use his left arm and hand, left leg, and left side of his face and mouth. He suffers from abnormal EEGs and has suffered seizures. He has neuropathic pain, cognitive disorder, chronic post- traumatic stress disorder, and anxiety due to traumatic brain injury. Hencely is subject to developing several afflictions associated with traumatic brain injury, including progressive brain atrophy and increased vulnerability to neurodegenerative disorders including chronic traumatic encephalopathy and other diseases such as Alzheimer's disease, Parkinson's disease, and Amyotrophic lateral sclerosis (ALS, a/k/a Lou Gehrig's disease).

31.

Hencely's short-term memory loss will never improve. He likely will never be able to cook for himself because

he would forget that he put food on the stove. He likely will never be able to live alone and may require full-time live-in care for the rest of his life.

32.

Hencely is permanently disabled. He is now 22 years old.

33.

The Army conducted an AR 15-6[4]Investigation of the bombing (the "Army Investigation"). The factual findings and conclusions of the Army Investigation were reported in an Army Report dated December 31, 2016, issued by a Major General of the U.S. Army. The Army Report is attached hereto as Exhibit 1[5].

34.

The Army Investigation established that Fluor was negligent in four separate ways, each of which violated Fluor's contractual obligations to the U.S. government:

a) Fluor negligently failed to supervise Nayeb at the HAZMAT work center;

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4. Army Regulation 15-6 sets forth the procedures investigating officers must follow when conducting formal and informal investigations.

5. Page numbers cited in the Army Report are the numbers printed on the Army Report page, which do not necessarily coincide with the pdf page numbers due to multiple page redactions.

b) Fluor negligently entrusted Nayeb with tools he used to construct the vest bomb;

c) Fluor negligently supervised Nayeb's escort on and off the Base; and

d) Fluor negligently retained Nayeb after known poor job performance.

35.

The Army Investigation established that Fluor was responsible for the bomber Nayeb and for his actions.

36.

The Army Investigation established, among other things, that:

a) The bomber worked alone and unsupervised during the night shift at the HAZMAT work center where his job was to dispose of automotive materials such as motor oil.

b) Three different Fluor supervisors could have and should have supervised the bomber's work at the HAZMAT work center.

c) Each of the three Fluor supervisors told Army investigators he did not supervise the bomber at the HAZMAT work center.

d) Each of the three Fluor supervisors either denied responsibility or blamed one another for leaving the bomber completely unsupervised while he worked alone at his worksite constructing the vest bomb.

e) The Army Investigation concluded "[t]his ambiguity on supervisory responsibility demonstrates an unreasonable complacency by Fluor to ensure Local National employees were properly supervised at all times, as required by their contract and non-contractual, generally recognized supervisor responsibility." Army Report at 12.

f) The bomber's job at the HAZMAT work center did not require tools at all; yet Fluor allowed the bomber to frequently check out unnecessary and suspicious tools from the Fluor tool room.

g) The bomber used Fluor's tools to construct the bomb at his worksite.

h) Among the tools the bomber got from Fluor was a "multimeter," which is a tool used to measure electrical voltage, current, and resistance, useful to build a bomb.

i) The bomber used Fluor materials from the Non-Tactical Vehicle Yard as the components and projectiles of the vest bomb.

j) There was no reason for the bomber to have access to the Fluor materials and to the Fluor tools he used to construct the vest bomb; none of those were required for him to do his job at the HAZMAT work center.

k) The Army Investigation concluded the "lack of reasonable supervision facilitated Nayeb's ability to freely acquire most of the components necessary for the construction of the suicide vest and the freedom of movement to complete its construction." Army Report at 12.

l) The Bagram Airfield Badging and Screening Policy required Fluor escorts to "remain in close proximity and remain in constant view of the individuals they are escorting." Army Report at 14.

m) In practice, Fluor ignored the Bagram escort policies.

n) Fluor did nothing when the bomber did not show up for escort off the Base the morning of the attack.

o) "Fluor's systematic lack of reasonable supervision enabled Nayeb to go undetected from 0445 until 0538 on 12 November 2016, which coincides with the average walking time of 53 minutes from the Non-Tactical Vehicle Yard to the blast site." Army Report at 15.

p) The bomber's work performance warranted disciplinary action or termination well before the bombing occurred.

1) Fluor had caught the bomber sleeping in a sleeping bag at his worksite.

2) Fluor had caught the bomber reading the Quran when he should have been working.

3) Fluor knew the bomber was often inexplicably absent from his worksite.

q) Fluor's "failure to enforce a work-related standard of performance and the unjustified retention of Nayeb amounts to a lack of reasonable supervision[.]" Army Report at 12.

37.

The entirety of the Army Report is admissible in evidence for all purposes under Federal Rule of Evidence 803(8).

II. JURISDICTION, PARTIES, AND VENUE

38.

The Court has jurisdiction over this lawsuit under 28 U.S.C. § 1332(a)(1) because Plaintiff and Defendants are citizens of different states and the amount in controversy exceeds $75,000, excluding interest and costs.

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39.

Hencely is a citizen of the United States of America and a resident of the State of Georgia.

40.

Defendant Fluor Corporation ("FC") is a domestic for-profit engineering and construction corporation that provides services around the world, including services to the United States government in the Islamic Republic of Afghanistan and other places. Although at times FC presents itself as a holding company that does business through subsidiaries, in reality it operates as a single business enterprise.

a) Fluor presents itself as a single business enterprise:

> "Fluor is Fluor wherever it goes. The company imparts its core values in its professional and inter-cultural interactions abroad. People who provide services for Fluor outside the U.S.—local workforces in every type of society—are kept safe on the job and given opportunities to advance. They also adhere to Fluor's core values once they enter the company's capacious tent."
>
> *See* Ex. 3, A Passion to Build: The Story of Fluor Corporation's First 100 Years 105 (2012).

b) FC states that it has "more than 60,000 employees." *See* Ex. 4, Fluor Corporate Profile at pdf page 2.

c) That number—"60,000"—includes all employees of all subsidiaries.

d) When in another case filed in California Fluor Intercontinental sought transfer to South Carolina, Fluor Intercontinental designated FC employees as its 'representatives' and claimed the actions of those 'representatives' were the actions of Fluor Intercontinental.[6]

e) FC has acknowledged that it is the proper defendant in cases against Fluor subsidiaries in Afghanistan. FC defends without objection overtime pay cases brought by employees of its subsidiaries operating in Afghanistan.[7]

f) FC and its subsidiaries are properly regarded as a single enterprise because Fluor's conduct shows

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6. *See* Ex. 5, 4/29/2013 Appellant's Brief, *Int'l Sec. & Def. Mgmt., LLC v. Fluor Intercontinental, Inc.*, No. B243384, 2013 WL 2148005 (Cal. App. 2 Dist.); *Int'l Sec. & Def. Mgmt., LLC v. Fluor Intercontinental, Inc.*, No. B243384, 2013 WL 4761107, at *2 (Cal. Ct. App. Sept. 5, 2013).

7. *See, e.g.,* Ex. 6, Fluor's 8/02/2016 Motion to Dismiss, *Allen v. Fluor Corp.*, No. 3:16-cv-01219-D (N.D. Tex.) (FC never argued it was an improper party to the case despite the fact that "[t]he entity that actually employed Plaintiffs was Fluor Federal Global Projects, Inc.").

> "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 651 (2018), *reh'g denied* (Aug. 16, 2018).[8]

41.

Fluor has thousands of employees in Afghanistan, including at Bagram Airfield.[9]

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8. For example, Fluor claims it has an "unincorporated umbrella group" that Fluor calls "Fluor Government Group" and that Fluor claims "handles all of Fluor Corporation's business with the United States government." 4/29/2013 Fluor's Brief, *Int'l Sec. & Def. Mgmt., LLC v. Fluor Intercontinental, Inc.*, No. B243384, 2013 WL 2148005 at *4 (Cal. App. 2 Dist.) (footnote omitted). But Fluor also has a subsidiary corporation going by the name "Fluor Government Group International, Inc." In that same brief, Fluor represented to the California court that it was merely a "holding company" with "no independent business operations." *Id.* at n. 2. That is belied both by other public representations Fluor has made—and by the statements of Fluor's own employees. *See, e.g.,* Ex.7, LinkedIn page for Steven M. Anderson: "Afghanistan Country Manager - Fluor Corporation April 2016 - March 2018."

9. *See* Ex. 7, LinkedIn page for Steven M. Anderson: "Afghanistan Country Manager - Fluor Corporation April 2016 - March 2018 • 2 years – Afghanistan - Project Manager for LOGCAP contract for Fluor in Afghanistan; 6300 employees, 8 different locations." *See* Ex. 8, LinkedIn page for Erick Henderson, "HR [Human Resources] Senior Generalist at Fluor . . . in Afghanistan," whose job was to "[p]rovide Human Resource support to 5,070 Fluor employees throughout Afghanistan" and to "support the transition of 1,360 Ecolog personnel to Fluor"

42.

FC is subject to the jurisdiction of this Court because FC regularly conducts business in South Carolina, contracts to supply services in South Carolina, possesses real property in Greenville, South Carolina, and performed significant parts of the contracts at issue in this case in South Carolina.

43.

Venue is proper as to FC under 28 U.S.C. § 1391 and assignable to the Greenville Division under Local Civil Rule 3.01 DSC.

44.

FC acted at all times relevant to this action individually and through its agents and employees, who are subsumed within the terms "FC" and "Fluor."

45.

Defendant Fluor Enterprises, Inc. ("FE") is a domestic for-profit corporation that provides services to the United States government in the Islamic Republic of Afghanistan and other places.

(Ecolog was a Fluor subcontractor accused in 2014 of charging illegal recruitment fees to applicants in order for them to secure jobs in Afghanistan.).

46.

FE is a subsidiary of FC and has its principal place of business in Greenville, South Carolina.

47.

FE is subject to the jurisdiction of this Court because FE's principal place of business is in Greenville, South Carolina, and FE regularly conducts business in South Carolina, contracts to supply services in South Carolina, possesses real property in Greenville, South Carolina, resides in Greenville, South Carolina, and performed significant parts of the contracts at issue in this case in Greenville, South Carolina.

48.

Venue is proper as to FE under 28 U.S.C. § 1391 and assignable to the Greenville Division under Local Civil Rule 3.01 DSC.

49.

FE itself enters into contracts stating FE has the legal ability to contractually bind all related Fluor entities, *including parents and subsidiaries.*

50.

To evade responsibility in litigation FE has variously represented to courts that its "principal place of

business" was in California (representation in 2005), and in Texas (representation in 2007), and in South Carolina (representation in 2010), and then back to Texas (representation in 2017).[10]

51.

FE acted at all times relevant to this action individually and through its agents and employees, who are subsumed within the terms "FE" and "Fluor."

52.

Defendant Fluor Intercontinental, Inc. ("FI") is a domestic for-profit corporation that provides services to

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10. *As to California*, see 6/21/2005 Notice of Removal filed in a Florida case, *Odum v. Allis-Chalmers*, Case No. 3:05-cv-273-MCR/MD, 2005 WL 5998924 (N.D. Fla.) ("Defendant Fluor [Enterprises] is not a citizen of the State of Florida since it is incorporated under the laws of California and its principal place of business is in California."). As to Texas, see 1/17/2007 Notice of Removal filed in a Louisiana case, *Victoriana v. Fluor Constructors Int'l, Inc.*, Case No. 07-0335, 2007 WL 4541771 (E.D. La.) ("Defendant, Fluor Enterprises, Inc., was incorporated in the state of California, and has its principal place of business in the state of Texas."). *As to South Carolina*, see Ex. 9, 1/5/2010 Notice of Removal filed in a Massachusetts case, *Paul Mueller Co. v. Fluor Enterprises, Inc.*, Case No. 4:10-cv- 40002, 2010 WL 2150812 (D. Mass.) ("Defendant Fluor is a corporation organized under the laws of California with its principal place of business in Greenville, South Carolina."). *As to Texas again*, see Ex. 10, 9/13/2017 Complaint filed in a Virginia case, *Fluor Enterprises, Inc. v. Mitsubishi Hitachi Power System Americas, Inc.*, Case No. 3:17-cv-00622 (E.D. Va.) ("Fluor Enterprises, Inc. ("Fluor") is a California corporation with its principal place of business in Irving, Texas").

the United States government in the Islamic Republic of Afghanistan and other places.

53.

FI is a subsidiary of FE and has its principal place of business in Greenville, South Carolina.

54.

FI is party to the contracts at issue in this case with the United States government.

55.

FI uses its relationships to other Fluor entities and 'representatives' to blur the legal distinctions between Fluor entities.

56.

FI is subject to the jurisdiction of this Court because FI's principal place of business is in Greenville, South Carolina; FI regularly conducts business in South Carolina; contracts to supply services in South Carolina; possesses real property in Greenville, South Carolina; administered and performed significant parts of the contracts at issue in this case in Greenville, South Carolina; resides in Greenville, South Carolina; and because FI's 'employees' and 'representatives' committed the acts and omissions giving rise to this Amended Complaint.

57.

Venue is proper as to FI under 28 U.S.C. § 1391 and assignable to the Greenville Division under Local Civil Rule 3.01 DSC.

58.

FI acted at all times relevant to this action individually and through its agents and employees, who are subsumed within the terms "FI" and "Fluor."

59.

Defendant Fluor Government Group International, Inc. ("FGG") is a domestic for-profit corporation that provides services to the United States government in the Islamic Republic of Afghanistan and other places.

60.

FGG is a subsidiary of FE and has its principal place of business in Greenville, South Carolina.

61.

FGG uses its relationships to other Fluor entities and its 'representatives' and 'employees' to blur the legal distinctions between Fluor entities.

62.

Though FI is the party to the contracts at issue in this case, FGG is the 'employer' of some of the personnel or 'representatives' carrying out Fluor's contractual obligations in the Islamic Republic of Afghanistan.

63.

FGG is subject to the jurisdiction of this Court because FGG has its principal place of business in Greenville, South Carolina; regularly conducts business in South Carolina; contracts to supply services in South Carolina; possesses real property in Greenville, South Carolina; performed significant parts of the contracts at issue in this case in Greenville, South Carolina; resides in Greenville, South Carolina; and because FGG's employees committed the acts and omissions giving rise to this Amended Complaint.

64.

Venue is proper as to FGG under 28 U.S.C. § 1391 and assignable to the Greenville Division under Local Civil Rule 3.01 DSC.

65.

FGG acted at all times relevant to this action individually and through its agents and employees, who are subsumed within the terms "FGG" and "Fluor."

Appendix D

III. BACKGROUND FACTS

A. The Bombing

66.

On November 12, 2016, around 4:45 a.m, at the end of his shift at the HAZMAT work center, the bomber Nayeb began walking, totally unsupervised by Fluor, to the starting point of the Veterans Day 5K run to detonate his vest bomb, a walk that took nearly an hour.

67.

By 5:38 a.m., more than 200 personnel residing at Bagram Airfield were converging on the starting point of the run.

68.

The Base Commander, Lieutenant General John C. Thomson, was en route to the starting point to make the opening remarks.

69.

The 5K was scheduled to begin at 6:15 a.m. The densely-packed starting point was less than three hundred meters from the blast site.

70.

Hencely prevented the bomber from reaching the starting point of the race.

71.

Hencely questioned the bomber about his purpose and destination.

72.

The bomber ignored Hencely's questions.

73.

Hencely grabbed the bomber.

74.

The bomber detonated the vest bomb beside Hencely.

B. LOGCAP IV

75.

Fluor voluntarily participates in a government contracting program known as the Logistics Civil Augmentation Program (LOGCAP).[11]

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11. "The LOGCAP program is built on the premise that unless war is formally declared by the Congress, contractor

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76.

LOGCAP was created in 1985 by Army Regulation 700–137 that anticipated the use of civilian contractors in wartime situations.

77.

The object of LOGCAP is to retain civilian contractors to handle logistical support tasks in conflict areas.

78.

In April 2008, the DOD awarded the fourth generation of support contracts, known as LOGCAP IV, to three contractors, including Fluor.

79.

Fluor was awarded contract number W52P1J-07-D-0008.

80.

The LOGCAP IV contracts are indefinite quantity/indefinite delivery contracts.

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performance (with rare exceptions which cannot be the basis for planning) must be voluntary." Army Reg. 700–137, 2–4 "Risk" (a).

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81.

In exchange for billions of dollars, Fluor agreed to abide by the terms of LOGCAP IV (including the Statements of Work, Performance Work Statements, Task Orders, and Letters of Technical Direction issued under LOGCAP IV) and the Bagram Airfield Base Policies (collectively referred to as the "LOGCAP Materials").

82.

The LOGCAP Materials constitute the contracts with the U.S. government, and set forth the parameters within which Fluor was required to perform.

83.

In July 2009, Fluor was awarded Task Order 005, a cost-plus-award-fee contract.

84.

Fluor estimated Task Order 005 was potentially worth more than $7 billion over five years. Ex. 11, 7/8/2009 Fluor Press Release, U.S. Army Awards Fluor LOGCAP IV Task Order for Afghanistan (July 8, 2009).

85.

Task Order 005 was "the fourth and most significant task order to date in terms of scope granted to Fluor under the LOGCAP IV program." 7/8/2009 Fluor Press Release.

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86.

Task Order 005 encompassed services and base life support for the eastern and northern sections of the Islamic Republic of Afghanistan.

87.

Task Order 005 included in Fluor's scope of work the Non-Tactical Vehicle Yard where the bomber worked.

88.

As the prime contractor under the LOGCAP Materials, Fluor controlled and was responsible for the Non-Tactical Vehicle Yard and the personnel working there.

89.

As the prime contractor with oversight of the Non-Tactical Vehicle Yard, Fluor was responsible for the actions of its LOGCAP personnel at the Non-Tactical Vehicle Yard.

90.

Fluor's April 1, 2013 Performance Work Statement, paragraph 01.07a, states "[Fluor] is responsible for ensuring all personnel supporting [LOGCAP IV 005] comply with the standards of conduct, and all terms/

conditions set forth in [the] PWS[12] and the Basic Contract. [Fluor] shall provide the necessary supervision for personnel required to perform this contract." Army Report at 10 (alterations in original).

91.

Fluor's April 1, 2013 Performance Work Statement, paragraph 01.07b, states "[Fluor] shall hire HN[13] personnel and Subcontractors to the maximum extent possible in performance of this contract when such recruitment practices meet legal requirements. [Fluor] is responsible for oversight of such personnel or Subcontractors to ensure compliance with all terms of the Basic Contract and this PWS." Army Report at 10 (alteration in original).

C. Fluor was Totally Responsible for the Bomber.

92.

The bomber was a local national, a citizen of the Islamic Republic of Afghanistan.

93.

Fluor hired the bomber through a labor broker, Alliance Project Services, Inc. ("APS").[14] APS has an

12. Performance work statement.

13. Host nation.

14. *See* Army Report at 10: "Nayeb was hired by Alliance Project Services, Inc. a subcontractor of Fluor (Exhibits 5D,

office in Leesburg, Virginia, but has only three employees listed on its website, one of whom works remotely from his home in Miami Florida.[15]

94.

APS, the labor broker who found the bomber for Fluor, administered payroll, time, and attendance for the bomber but the bomber's work activities were supervised by Fluor.[16]

5F, 5C). Alliance Project Services, Inc. is a U.S. veteran owned business in Alexandria, Virginia, which specializes in hiring host nation personnel in a labor broker capacity. . . . As the prime contractor with the U.S. Government, and as the contractor with oversight of the Bagram Airfield Non-Tactical Vehicle Yard, Fluor is responsible for all of its employees, subcontractors, and subcontractor employee actions."

15. *See* Ex. 12, Alliance Project Services website. The listed employees are Tod Nickles, President and CEO, Simon Forrester-Wood, VP of Logistics, Eric Hoeny, VP of Supply Chain. Forrester-Wood is APS's registered agent in Florida; his listed address as such is a condominium in Miami. Those same employees are also listed as employees of another corporation, "Alliance Professional Services International, Inc.," which is also apparently a labor broker for outfits like Fluor.

16. *See* Army Report at 10: "Although Alliance Project Services, Inc. was responsible for administration of Nayeb (payroll, time and attendance, etc.), Nayeb's work performance was supervised by Fluor while he was employed at the Bagram Airfield Non-Tactical Vehicle Yard." *See also* Ex. 7, LinkedIn page for Steven M. Anderson.

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95.

Fluor's own "Afghanistan Country Manager" was in charge of all operations pursuant to Fluor's LOGCAP contract with the DOD.[17]

96.

Fluor claims that its foreign workers are its own employees. Fluor has stated that its work in foreign countries "requires a virtual city of personnel, many of whom are local people Fluor trains to serve as craft employees." A Passion to Build at 9.

97.

In order to meet its contractual obligations, Fluor had the right and ability to control the bomber as Fluor's employee.

98.

Fluor did in fact control the bomber as an employee.

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17. *See* Ex. 7, LinkedIn page for Steven M. Anderson: "Afghanistan Country Manager - Fluor Corporation April 2016 - March 2018 • 2 years – Afghanistan - Project Manager for LOGCAP contract for Fluor in Afghanistan; 6300 employees, 8 different locations. Executing all significant logistics operations in support of military operations, to include food, fuel, water, waste management, transportation, air operations, laundry, vector control and MWR support."

Appendix D

99.

Fluor furnished the equipment and tools the bomber used to construct the vest bomb.

100.

Fluor set the bomber's work hours.

101.

Fluor set the duties of the bomber's job.

102.

Fluor dictated the terms of the bomber's job.

103.

Fluor had the right and ability to fire the bomber.

104.

Fluor controlled the method of payment to the bomber.

105.

Fluor was contractually obligated to supervise and control the Non-Tactical Vehicle Yard.

106.

The bomber's work performance was supposed to be supervised by Fluor while he was employed at the Non-Tactical Vehicle Yard.

D. Fluor's Negligent Supervision of the Bomber

107.

Under the LOGCAP Materials, Fluor agreed that Fluor "shall provide the necessary supervision for personnel required to perform this contract." Army Report at 10.

108.

Under the LOGCAP Materials, Fluor was "responsible for oversight of [local nationals and subcontractor personnel] to ensure compliance with all terms of the [LOGCAP Materials]." Army Report at 10.

109.

The Army Investigation concluded "Fluor did not reasonably supervise Nayeb at the work facility[.]" Army Report at 10.

110.

Fluor did not reasonably supervise the bomber at the Non-Tactical Vehicle Yard because no Fluor supervisor

actually supervised Nayeb at his worksite and because no Fluor supervisor was ever told by Fluor that he had a responsibility to supervise the HAZMAT work center, where Nayeb worked alone, constructing the bomb.

111.

At the time of the bombing, the Non-Tactical Vehicle Yard was divided into three separate work centers:

a) the Light Non-Tactical Vehicle work center;

b) the Heavy Non-Tactical Vehicle work center; and

c) the HAZMAT work center.

112.

The HAZMAT work center was a row of adjacent containers with two poorly- lit work areas that could not be monitored from either the Heavy or Light work centers, each about 75 feet away. The HAZMAT work center was even further away from the Non-Tactical Vehicle Yard office.

113.

From August 6, 2016 until November 12, 2016, the bomber worked the night shift (6:00 p.m. to 6:00 a.m.) at the HAZMAT work center.

114.

While on the night shift, including the shift ending on November 12, 2016, the bomber worked alone at the HAZMAT work center.

115.

While on the night shift, including the shift ending on November 12, 2016, the bomber worked unsupervised at the HAZMAT work center.

116.

The bomber was often absent from the HAZMAT work center during his work hours; he had wandered away. Army Report at 12.

117.

A Fluor employee who worked in the Light Non-Tactical Vehicle Yard told Army investigators "it was normal for [Nayeb] not to be in the work area." Army Report at 12 (alteration in original).

118.

Allowing the bomber to wander away, wholly unsupervised, from his designated work area was negligent supervision.

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119.

Three Fluor employees were supposed to supervise LOGCAP personnel, including the bomber, at the Non-Tactical Vehicle Yard:

a) the Heavy Non-Tactical Vehicle Lead Senior Mechanic;

b) the Light Non-Tactical Vehicle Lead Senior Mechanic; and

c) the Non-Tactical Vehicle Yard General Foreman.

120.

Each of the three Non-Tactical Vehicle Yard supervisors denied supervising the bomber at the HAZMAT work center.

121.

Fluor's Heavy Non-Tactical Vehicle Lead Senior Mechanic for the night shift on November 12, 2016 denied responsibility for supervising the bomber at the HAZMAT work center and blamed "the light vehicle maintenance bay employees [who] were responsible for ensuring [the bomber] was supervised and employed." Army Report at 11.

122.

Fluor's Light Non-Tactical Vehicle Lead Senior Mechanic for the night shift on November 12, 2016 denied responsibility for supervising the bomber at the HAZMAT work center and stated he was "only accountable for local national employees when they worked for him in the light vehicle bay" Army Report at 11–12.

123.

Rexhep Rexhepi, Fluor's own Logistics Supervisor with responsibilities over[18] the Non-Tactical Vehicle Yard on November 12, 2016, denied responsibility for supervising the bomber at the HAZMAT work center. Army Report at 12.

124.

Rexhepi blamed both the Heavy Non-Tactical Vehicle Lead Senior Mechanic and the Light Non-Tactical Vehicle Lead Senior Mechanic for failing to supervise the bomber.

125.

The truth is that no one supervised the bomber when the bomber worked at the HAZMAT work center.

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18. *See* Ex. 13, LinkedIn page for Rexhep Rexhepi: "MHE SME Logistics Supervisor ***FLUOR*** – Present – Country MHE-SME Supervisor – Fluor Government Group – September 2011 – Present . . . Bagram Air Field, Afghanistan"

126.

The truth is that no one supervised the bomber at the HAZMAT work center during his shift that ended on November 12, 2016.

127.

Fluor's negligent supervision of the bomber enabled the bomber's attack against the Army and caused Hencely's injuries.

E. Fluor's Negligent Entrustment of Tools and Bomb-Building Materials to the Bomber

128.

Only Fluor LOGCAP personnel were authorized to check out tools from Fluor's tool room at the Non-Tactical Vehicle Yard.

129.

Fluor gave Army investigators contradictory statements in response to questions regarding how and why the bomber was able to check out tools at all, including tools totally unnecessary for and unrelated to his work at the HAZMAT work center.

130.

Fluor employees from the Non-Tactical Vehicle Yard told Army investigators "only certain individuals could

check out specific tools within the Non-Tactical Vehicle Yard." Army Report at 13.

131.

Other Fluor employees told Army investigators "any employee was able to check out any tool, regardless of where that employee worked." Army Report at 13.

132.

Both the statements in the two preceding paragraphs cannot be true; one or the other is false. The fact that Fluor employees would not know which is true and which is false is proof of sloppy procedures contrary to Fluor's contracts and the mandates of Base security.

133.

A Fluor employee told Army investigators "only the person who needed the tool could sign the tool in or out from the tool room." Army Report at 13.

134.

A Fluor employee told Army investigators "HAZMAT workers do not require any tools in the performance of their job." Army Report at 13.

135.

A Fluor employee told Army investigators the bomber "did not require the use of any special tools to complete his HAZMAT job." Army Report at 13.

136.

A Fluor employee told Army investigators he "did not think it was normal for the HAZMAT worker to sign out tools." Army Report at 13.

137.

A Fluor employee told Army investigators "HAZMAT workers would only check out tools if one of the maintenance guys requested help." Army Report at 13.

138.

A Fluor employee told Army investigators HAZMAT workers would tell the Fluor employee the name of the mechanic that needed the tool when checking out tools from the tool room. Army Report at 13.

139.

The bomber did not tell Fluor employees the name of a mechanic that needed a tool when the bomber checked out tools from the tool room.

140.

The bomber did not require any tools from the Fluor tool room to perform his job at the HAZMAT work center.

141.

Fluor's tool room logs show that between August 10, 2016 and November 10, 2016, the bomber checked out

tools not associated with his duties at the HAZMAT work center. Army Report at 12.

142.

Fluor's tool room logs show the bomber checked out a ***multimeter*** nine times between August 10, 2016 and November 10, 2016 for up to six hours at a time. Army Report at 12.

143.

A multimeter is a tool used to measure electrical voltage, current, and resistance.

144.

Nothing about the bomber's job required that he use a multimeter.

145.

A multimeter is used to build a bomb.

146.

Fluor negligently failed to apprehend the obvious significance of a known former member of the Taliban (whom Fluor knew was unsupervised and was repeatedly wandering away from his job site) checking out a device useful to build a bomb from Fluor's tool room.

147.

Twice, Fluor's tool room supervisor asked the bomber why he needed a multimeter during work.

a) The bomber once replied he needed a multimeter to fix a radio.

b) The bomber once replied he needed a multimeter to fix hair clippers.

148.

Neither of the bomber's stated reasons for checking out the multimeter were related to his job at the HAZMAT work center.

149.

Fluor did nothing to determine whether the bomber's two stated reasons for checking out a multimeter were true.

150.

Fluor did nothing in response to a known former member of the Taliban checking a tool out of the Fluor tool room which the bomber indisputably and admittedly did not need to perform his job duties but which could be used to build a bomb.

Appendix D

151.

Fluor's failure to reasonably supervise the use of tools by its LOGCAP personnel, including the bomber, allowed the bomber to construct the vest bomb while working for Fluor at Fluor's HAZMAT work center.

152.

The Army Investigation concluded the "evidence supports complacency and a lack of reasonable supervision by Fluor supervisors over Nayeb and other Local Nationals at the Non-Tactical Vehicle Yard work facility that enabled Nayeb's nefarious plan." Army Report at 13.

153.

The bomber's vest bomb was assembled on Bagram Airfield by the bomber at his Fluor-controlled workplace inside the Non-Tactical Vehicle Yard and was not preassembled prior to entering Bagram Airfield.

154.

Army investigators suspect the bomber smuggled "small quantities of homemade explosives onto Bagram Airfield over approximately four months." Army Report at 49.

155.

The string used to assemble the bomber's vest bomb was a forensic match to string found at the bomber's worksite.

Appendix D

156.

Fluor owned the string the bomber used to assemble the vest bomb.

157.

Fluor owned the components used as projectiles in the vest bomb.

158.

The bomber got the projectiles used in the vest bomb from Fluor.

159.

Army investigators found components (nuts and bolts) similar to the components the bomber used as projectiles in the vest bomb at the bomber's worksite.

160.

Those nuts and bolts were not necessary for any job duties the bomber had at the HAZMAT work center.

161.

Such nuts and bolts are commonly used as projectiles in self-made bombs.

162.

As a result of Fluor's complete failure to supervise and monitor the bomber, Fluor failed to detect his suspicious use of tools and nuts and bolts unnecessary to his job duties at the HAZMAT work center.

163.

The switch used to trigger the vest bomb was similar to switches that were readily available and unaccounted for in a trash container at the bomber's worksite.

164.

Fluor owned the switch used to trigger the vest bomb.

165.

Fluor's negligent entrustment of tools and bomb-building materials to the bomber enabled the bomber's attack against the Army and directly caused Hencely's injuries.

F. Fluor's Negligent Supervision in Failing to Escort the Bomber Off the Base.

166.

Fluor's local national employees required a Bagram Airfield access badge to enter the Base.

Appendix D

167.

Verifiable employment on Bagram Airfield was a precondition for a local national to receive a Bagram Airfield access badge.

168.

Under the LOGCAP Materials, Fluor was responsible for providing the "transportation and supervision" for its local national employees, including the bomber. Army Report at 13.

169.

Fluor's transportation and supervision responsibilities included the transportation and supervision of its local national employees, including the bomber, from the Entry Control Point to the Non-Tactical Vehicle Yard at the beginning of each shift and from the Non-Tactical Vehicle Yard to the Entry Control Point at the end of each shift.

170.

Fluor was required to provide employees to serve as escorts for local nationals who worked in the Non-Tactical Vehicle Yard, including the bomber.

171.

Fluor admitted it was obligated to supervise the Non-Tactical Vehicle Yard in accordance with the base access

control policy, but Fluor failed to do so. For example, Fluor did not escort the bomber off the Base on November 12, 2016.

172.

Fluor also did not supervise the Non-Tactical Vehicle Yard "in accordance with the base access control policy" because Fluor's escort practices violated the policy that required escorts to "remain in close proximity and remain in constant view of the individuals they are escorting." Army Report at 14.

173.

Fluor's escorts did not remain in close proximity or remain in constant view of the individuals they were escorting, including the bomber.

174.

Instead, Fluor used a sign in/sign out sheet filled out by the night shift Local Team Lead.

175.

The Local Team Lead did not visually ensure that every local national employee got on the bus to leave the Base, as was required.

176.

Instead, the Local Team Lead merely observed which employees had signed the sheet claiming to have boarded the bus to leave the Base.

177.

Fluor employees thus relied on the local nationals themselves, including the bomber, to ensure that local nationals were accounted for and on the bus at the end of each shift. That compromised and violated the entire purpose of the mandatory security procedures.

178.

Fluor changed its Non-Tactical Vehicle Yard escorts every week.

179.

As a result, Fluor escorts did not know the names of the Fluor local national employees they were supposed to be escorting.

180.

Fluor's negligent escort practices were ripe for abuse.

181.

On November 11, 2016, the bomber told another local national Fluor employee he would miss the bus

on November 12, 2016 because of a HAZMAT class requirement. Army Report at 14.

182.

Fluor did nothing to attempt to ascertain the truth of that statement, or to supervise or monitor the whereabouts of the bomber thereafter.

183.

In fact, the bomber did not have a HAZMAT class requirement to attend on November 12, 2016.

184.

The bomber had taken the class only a month before on October 2, 2016 and did not require the class for another year.

185.

On November 12, 2016, the bomber did not show up to be escorted off the Base.

186.

Fluor did nothing in response to the bomber's failure to appear for escort off the Base on the morning of the bombing.

187.

Fluor did nothing prior to the detonation of the vest bomb to alert the Army or Base officials to the bomber's absence from the escort bus on November 12, 2016.

188.

The Army Investigation concluded "[t]he preponderance of evidence shows a lack of reasonable supervision by Fluor while escorting Local Nationals to and from the Non-Tactical Vehicle Yard." Army Report at 15.

189.

Fluor's negligent supervision of the bomber's escort off the Base enabled the bomber's attack against the Army and caused Hencely's injuries.

G. Fluor's Negligent Retention of the Bomber

190.

Retaining an Afghan national—a known former member of the Taliban—who was known to wander away from his designated work area contrary to contractually-required security imperatives, was negligent retention.

191.

The Light Non-Tactical Vehicle Lead Senior Mechanic had caught the bomber sleeping in the HAZMAT work center area in a sleeping bag.

192.

The Light Non-Tactical Vehicle Lead Senior Mechanic had caught the bomber reading the Quran during work hours.

193.

The LOGCAP IV Afghanistan HCN[19] Labor Support Statement of Work provides that sleeping while at work or unsatisfactory job performance are "cause for disciplinary action up to and including termination." Army Report at 12.

194.

Fluor knew of the bomber's poor job performance at the HAZMAT work center.

195.

Fluor never took any disciplinary action against the bomber.

196.

The Army Investigation concluded the evidence of the bomber's poor work performance constituted "evidence to support failings by Fluor in the continued employment of Nayeb." Army Report at 15.

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19. Host country national.

197.

The Army Investigation concluded the "failure to enforce a work-related standard of performance and the unjustified retention of Nayeb amounts to a lack of reasonable supervision on behalf of Fluor." Army Report at 12.

198.

Fluor's retention of the bomber—a known former Taliban member—after his poor performance, was unreasonably dangerous.

199.

Fluor's negligent retention of the bomber enabled the bomber's attack against the Army and caused Hencely's injuries.

H. Fluor's Breach of Contract

200.

Under the LOGCAP Materials, Fluor was "responsible for ensuring all personnel supporting [LOGCAP IV 005] comply with the standards of conduct, and all terms/conditions set forth in [the Performance Work Statement] and the Basic Contract." Army Report at 10.

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201.

Fluor did not ensure the bomber complied with the standards of conduct or the terms and conditions of the LOGCAP Materials.

202.

The bomber did not comply with the standards of conduct or the terms and conditions of the LOGCAP Materials.

203.

The bomber's construction of the vest bomb at Fluor's HAZMAT work center did not comply with the standards of conduct or the terms and conditions set forth in the LOGCAP Materials.

204.

The bomber's attack against the Army on November 12, 2016 did not comply with the standards of conduct or the terms and conditions set forth in the LOGCAP Materials.

205.

Allowing the bomber to wander away, wholly unsupervised, from his designated work area was a breach of contract.

206.

Fluor employees admitted no one supervised the bomber at the HAZMAT work center. Army Report at 12–13. That was a breach of contract.

207.

Fluor did not meet its contractual obligations to reasonably supervise the bomber when Fluor allowed the bomber to check out tools from the tool room, including tools unnecessary to the bomber's job, that the bomber used to construct the vest bomb.

208.

Fluor did not meet its contractual obligations to reasonably supervise the bomber when Fluor allowed the bomber to use Fluor property as components in the vest bomb.

209.

Fluor did not meet its contractual obligations when it violated the base access control policy by failing to escort the bomber off the Base on November 12, 2016 and by failing to have Fluor escorts remain in close proximity to and in constant view of the bomber when escorting the bomber.

210.

Fluor's breach of these and other contractual obligations enabled the bomber's attack against the Army and caused Hencely's injuries.

I. The Significance of Fluor's Neglect

211.

The entire reason Fluor was contractually obligated to continually monitor Afghan nationals like Nayeb while they were on Base and ensure they were escorted on to the Base to their work site and then off the Base—in sight of a Fluor escort at all times—was because security was an imperative concern.

212.

Fluor well knew that in Afghanistan, and on American military bases in particular, suicide bombers were a constant and dire threat.

213.

There were at least 1,137 total suicide attacks in Afghanistan from 2006 to October 31, 2016. These suicide attacks killed 5,359 people. Ex. 14, University of Chicago Project on Security and Terrorism, Suicide Attack Database, results of Afghanistan search from 2006–2016, *available at* http://cpostdata.uchicago.edu/search_new.php ("Suicide Attack Database"). Afghanistan

is approximately the size of Texas. In that same time period there was *one* (1) suicide attack in the State of Texas. Ex. 15 Suicide Attack Database, results of United States search from 2006–2016.

214.

Of the 1,137 total suicide attacks, the Taliban is known to have executed 745, or 65.52% of all suicide attacks in Afghanistan from 2006 to October 31, 2016. Suicide Attack Database.

215.

Of the 1,137 total suicide attacks, 381, or 33.51%, were committed by unknown groups. Suicide Attack Database. Many of the suicide attacks committed by unknown groups were likely committed by the Taliban as well.

216.

From 2006 to October 31, 2016, the Taliban executed an average of 67.72 suicide attacks per year. Suicide Attack Database.

217.

In 2014, the Taliban executed 78 suicide attacks in Afghanistan. Suicide Attack Database.

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218.

In 2015, the Taliban executed 57 suicide attacks in Afghanistan. Suicide Attack Database.

219.

Because of increasing violence in the country, the reintegration program[20] under which the bomber had been hired as a former Taliban member was shut down in March 2016—eight months *before* the deadly attack on November 12, 2016.

220.

The reintegration program was shut down because "armed violence and insecurity in [Afghanistan] . . . largely increased" during the program and there was a lack of evidence that "reintegrees sustainably reintegrated back into community life and transformed into productive members of society." SIGAR Quarterly Report, October 2016 at 161.[21]

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20. The "reintegration" program was part of the "Afghanistan Peace and Reintegration Program" adopted pursuant to the FY2010 National Defense Authorization Act. Army Report at 9. The United States participated and funded the program until it was shut down in on March 31, 2016. SIGAR Quarterly Report, October 2016 at 161.

21. The acronym "SIGAR" stands for "Special Inspector General for Afghanistan Reconstruction. That person, appointed by the President of the United States, provides independent and objective reports quarterly to the United States Congress

221.

Fluor knew that the reintegration program had been shut down and Fluor knew the reason it had failed was precisely because former Taliban members like Nayeb posed a significant risk of ***not*** reintegrating, but of remaining loyal members of, and insurgents for, the Taliban.

222.

Fluor did nothing to change its conduct and ensure Base security by complying with its contractual obligations, despite knowledge of the continuing proliferation of suicide attacks, despite knowledge the reintegration program under which Nayeb had been hired had been shut down, and despite continuing knowledge that Nayeb was a former member of the Taliban.

223.

It was foreseeable that the Taliban would execute and attempt to execute a large number of suicide attacks each year in Afghanistan.

224.

It was foreseeable that a former member of the Taliban would in fact remain loyal to the Taliban.

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on congressionally-mandated topics. SIGAR Quarterly Report, October 2016.

225.

It was foreseeable that a former member of the Taliban would execute a suicide attack against the Army if given the opportunity. The bomber's poor performance at work and his documented use of suspicious and unnecessary tools only made the attack more foreseeable.

226.

Fluor's negligent supervision, negligent entrustment, and negligent retention of the bomber made the attack on November 12, 2016 possible.

IV. JUSTICIABILITY AND IMMUNITY

227.

Fluor has argued in past cases that its activities at Bagram Airfield present nonjusticiable "*political questions*"; and/or that tort claims against Fluor for activities at Bagram Airfield are preempted by the "*combatant activities exception*" to the federal government's waiver of immunity in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j); and/or that Fluor is entitled to "*derivative sovereign immunity*" based on the "discretionary function exception" to the FTCA, 28 U.S.C. § 2680(a).

228.

Those arguments do not apply to private military contractors such as Fluor in circumstances such as these,

where the bomber, Fluor's employee, ***attacked*** the U.S. Army on November 12, 2016. *See, e.g.*, *Norat v. Fluor Intercontinental, Inc.*, No. 6:14-CV-04902-BHH, 2018 WL 1382666, at *2 (D.S.C. Mar. 19, 2018).

A. Hencely's Actions

229.

Hencely's actions related to the bomber on November 12, 2016 were reasonable.

230.

Hencely's actions related to the bomber on November 12, 2016 were prudent.

231.

Hencely's actions related to the bomber on November 12, 2016 were brave.

232.

Hencely's actions related to the bomber on November 12, 2016 were heroic.

B. Political Question Doctrine

233.

The Army did not have complete, direct, *or* actual control over the supervision of the bomber.

234.

The Army did not have complete, direct, *or* actual control over Fluor when Fluor's employee, the bomber, ***attacked the Army*** on November 12, 2016.

235.

The Army did not have complete, direct, *or* actual control over Fluor's employee, the bomber, when he constructed the vest bomb at the worksite that Fluor controlled, using Fluor tools and materials, during the work hours of his Fluor job.

236.

Fluor itself had complete, direct, *and* actual control over the bomber.[22]

237.

The LOGCAP Materials unequivocally state

(a) "*[Fluor] is responsible for oversight of such personnel or Subcontractors to ensure compliance with all terms of the Basic Contract and this PWS*." Army Report at 10 (alteration in original) (emphasis added).

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22. *See, e.g., Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 155, 158 (4th Cir. 2016) (distinguishing between formal and actual control) (quoting *Taylor v. Kellogg Brown & Root Servs. ices, Inc.*, 658 F.3d 402 (4th Cir. 2011)).

> "[Fluor] is responsible for ensuring all personnel supporting [LOGCAP IV 005] comply with the standards of conduct, and all terms/conditions set forth in [the Performance Work Statement] and the Basic Contract." Army Report at 10.

238.

Fluor should have had complete, direct, *and* actual control over the bomber at all times the bomber was on Base.

239.

Fluor was obligated as a matter of contract to have complete, direct, *and* actual control over the bomber at all times the bomber was on Base.

240.

Fluor's obligation to provide Base security meant Fluor should have had complete, direct, *and* actual control over the bomber at all times the bomber was on Base.

241.

Fluor itself had complete, direct, *and* actual control over the Non-Tactical Vehicle Yard.

242.

Fluor itself had complete, direct, *and* actual control over Fluor's HAZMAT work center.

Appendix D

243.

The Army did not have complete, direct, *or* actual control over Fluor's Non- Tactical Vehicle Yard or Fluor's HAZMAT work center.

244.

The Army did not "direct" Fluor to

(a) So fail to supervise the bomber that he was able to construct the bomb vest while on the job for Fluor, at Fluor's facility, using Fluor's tools and materials;

(b) So fail to supervise the bomber that he worked alone at Fluor's facility and wandered about the Base unsupervised;

(c) So fail to supervise the bomber that he used Fluor's tools, including a multimeter for which he had no need except to build a bomb, to construct a bomb intended to kill American servicemen and women;

(d) So fail to supervise the bomber that he was not escorted off the base when Fluor's contractual obligations and duty to preserve Base security both required that he be escorted off the base;

(e) Completely fail to ensure that Fluor's escorts remained "in close proximity and remain in

constant view" of the bomber, as required by Fluor's contractual obligations and security duties;

(f) So fail to supervise the bomber that he was able to attack the U. S. Army on November 12, 2016.

245.

Fluor's actual ability to disregard and violate Army policies and the LOGCAP Materials is itself evidence that the military did not exert complete, direct, *or* actual control over Fluor.

246.

A decision on the merits of Hencely's claims does not require the Court to "question sensitive judgments made by the military" because to the extent the Army made any decisions that *should have* guided Fluor's conduct, Fluor violated, ignored, and disobeyed those decisions.[23]

247.

No military decisions supposedly governing Fluor's conduct required that Fluor commit the actions and derelictions of duty referenced herein.

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23. *See, e.g., Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 155 (4th Cir. 2016) (quoting *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011)).

248.

Fluor's conduct was not governed by military decisions when Fluor violated specific decisions, policies, and provisions of the LOGCAP Materials and Base policies.

249.

Fluor's actual ability to disregard Fluor's obligations under the LOGCAP Materials is itself evidence that military decisions did not govern Fluor's conduct.

C. The Combatant Activities Exception Does Not Apply

250.

When private military contractors like Fluor work pursuant to a "statement of work," as Fluor was doing, the Army has expressly disclaimed the type of control required to invoke the combatant activities exception under *Boyle v. United Techs. Corp.*, 487 U.S. 500, 500 (1988).

251.

Fluor's supervision of the *Non-Tactical* Vehicle Yard was not a combat activity.

252.

Fluor's supervision of the HAZMAT center, the disposal of motor oil from servicing non-tactical vehicles, was not a combat activity.

253.

Fluor was not integrated into the military's chain of command such that the military retained command authority over Fluor's supervision of the Non-Tactical Vehicle Yard and Fluor's LOGCAP personnel, including the bomber.

254.

Fluor's actual ability to violate the terms of the LOGCAP Materials show Fluor was not integrated into the military's chain of command such that the military retained command authority over Fluor's supervision of the Non-Tactical Vehicle Yard and Fluor's LOGCAP personnel, including the bomber.

255.

Fluor's negligence was the result of discretionary decisions by Fluor alone.

D. Derivative Sovereign Immunity

256.

A private military contractor cannot seek derivative sovereign immunity unless the "government authorized the contractor's action." *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 342 (4th Cir. 2014).

257.

The government, in this instance the U. S. Army, did not "authorize" the Fluor actions at issue in this case.

258.

The Army did not "authorize" Fluor's actions and Fluor was not "carrying out [the Army's] will" when Fluor:

(a) So failed to supervise the bomber that he was able to construct the bomb vest while on the job for Fluor, at Fluor's facility, using Fluor's tools and materials;

(b) So failed to supervise the bomber that he worked alone at Fluor's facility and wandered about the Base unsupervised;

(c) So failed to supervise the bomber that he used Fluor's tools, including a multimeter for which he had no need except to build a bomb, to construct a bomb intended to kill American servicemen and women;

(d) So failed to supervise the bomber that he was not escorted off the base when Fluor's contractual obligations and duty to preserve Base security both required that he be escorted off the base;

(e) Completely failed to ensure that Fluor's escorts remained "in close proximity and remain in

constant view" of the bomber, as required by Fluor's contractual obligations and security duties;

(f) So failed to supervise the bomber that he was able to attack the U. S. Army on November 12, 2016.

259.

Because Fluor's acts and omissions in this case transgressed the will of the Army at every turn and because the Army did not authorize Fluor's negligence or the bomber's attack on U.S. soldiers, Fluor is not entitled to derivative sovereign immunity in this case.

V. SOUTH CAROLINA LAW APPLIES

260.

South Carolina has an overwhelming interest in regulating the conduct of its corporate citizens, in this case, Fluor.

261.

The laws of the Islamic Republic of Afghanistan cannot apply in this case because they violate the public policy of the state of South Carolina and of the United States.

262.

The laws of the Islamic Republic of Afghanistan do not recognize the freedom of religion that is a bedrock principle in all courts of the United States.

263.

Article 1 of the Civil Code of the Republic of Afghanistan states "In cases no provision of law exists, courts shall decide in accordance with general principles of Hanafi Jurisprudence of Islamic Sharia in order to secure justice in the best possible way." Ex. 16, Civil Code of the Republic of Afghanistan at pdf page 2. This means if there were not a specific code provision answering a legal question in this case, the Court would be required to look to the general principles of Sharia law. If *that* did not answer the question, Article 2 directs the Court to turn to the "common custom" of the Islamic Republic of Afghanistan.

264.

Turning to the "general principles of Hanafi Jurisprudence of Islamic Sharia" for every unanswered point of law violates the fundamental right to freedom of religion in the United States and violates the public policy of the United States and every state in the nation.

VI. CLAIMS

Amalgamation of Interests

265.

Plaintiff incorporates herein the preceding paragraphs 1 through 264.

266.

Fluor constitutes a single business enterprise under South Carolina law.

267.

Fluor is "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 651 (2018), *reh'g denied* (Aug. 16, 2018).

268.

Fluor uses its subsidiaries and its subsidiaries' subsidiaries to play shell games regarding venue, jurisdiction, employment, and liability in courts around the country. Fluor's intentional and public blurring of all Fluor entities into one, Fluor's manipulation of the corporate form, and Fluor's manipulation of the status of its 'employees' and 'representatives,' constitutes bad faith, abuse, fraud, wrongdoing, and injustice.

269.

As a result, each Fluor Defendant in this case is liable for the conduct and obligations of every other Fluor Defendant in this case.

Appendix D

Count 1

Negligent Supervision

270.

Plaintiff incorporates herein the preceding paragraphs 1 through 269.

271.

The bomber intentionally constructed the vest bomb and intentionally attacked U.S. soldiers, including Hencely, when he detonated the vest bomb.

272.

The bomber was on premises in the possession of Fluor at the Non-Tactical Vehicle Yard.

273.

The bomber was only able to enter Bagram Airfield because he was a Fluor employee.

274.

The bomber used Fluor's property to construct the vest bomb.

275.

The bomber used Fluor's property as components and projectiles of the vest bomb.

276.

Fluor knew or had reason to know it had the ability to control the bomber. Fluor acknowledged its ability to control the bomber when it entered into the LOGCAP Materials and agreed to control the bomber's conduct and ensure the bomber complied with the LOGCAP Materials and Base policies.

277.

Fluor knew or had reason to know of the necessity of and opportunity to control the bomber, whom Fluor knew to be a former member of the Taliban. Fluor acknowledged the necessity of and opportunity to control the bomber when it contractually obligated itself to control the bomber's conduct in the LOGCAP Materials.

278.

Fluor understood the importance and necessity of controlling the bomber as part of its work in Afghanistan under LOGCAP IV. Fluor acknowledged that in Afghanistan "there can be no mission failure." A Passion to Build at 178.

279.

Fluor did not exercise reasonable care to control the bomber.

280.

Fluor's negligent supervision of the bomber proximately caused Hencely's injuries.

281.

But for Fluor's negligent supervision, Hencely would not have been injured.

Count 2.

Negligent Entrustment

282.

Plaintiff incorporates herein the preceding paragraphs 1 through 281.

283.

Negligent entrustment includes "entrusting [an] employee with a tool that created an unreasonable risk of harm to the public." *James v. Kelly Trucking Co.*, 377 S.C. 628, 631 (2008).

284.

Fluor knew the bomber did not require tools from the tool room to perform his job at the HAZMAT work center.

285.

Fluor knew the bomber did not require a multimeter to perform his job at the HAZMAT work center.

286.

Fluor knew there was no legitimate reason for the bomber to check out a multimeter nine times for up to six hours at a time in the three months before the attack.

287.

Fluor knew hiring a former member of the Taliban carried a greater risk of harm precisely because of the increased risk that a former Taliban member would attack the Army. This heightened risk required heightened supervision.

288.

Fluor knew its government projects had "strict compliance regulations" and required even greater supervision and oversight than its other engineering and construction work. A Passion to Build at 131.

289.

The president of Fluor Government Group said, "While Fluor's commercial projects have challenging requirements, government projects are distinguished by their strict compliance regulations. We must understand

the rules and deliver projects in such a way that they can withstand federal and public scrutiny long after the work is complete. [Fluor's Government Group employees are] the custodians of the American people's tax dollars, and therefore correctly held to a high level of oversight." A Passion to Build at 131.

290.

Entrusting the bomber with tools from the tool room created an unreasonable risk of harm that the tools would be used in an attack.

291.

Entrusting the bomber with a multimeter created an unreasonable risk of harm that the multimeter would be used in an attack.

292.

Fluor's negligent entrustment of tools to the bomber proximately caused Hencely's injuries.

293.

But for Fluor's negligent entrustment of tools to the bomber, Hencely would not have been injured.

Appendix D

Count 3.

Negligent Retention

294.

Plaintiff incorporates herein the preceding paragraphs 1 through 293.

295.

Fluor knew the bomber was a former member of the Taliban.

296.

Fluor knew the bomber slept on the job.

297.

Fluor knew the bomber read the Quran on the job.

298.

Fluor knew the bomber frequently wandered away from his designated job site at the HAZMAT work center, totally without any supervision by Fluor.

299.

Fluor knew the bomber checked out tools he did not need, including the multimeter, from the Fluor tool room.

300.

Fluor knew the bomber was not present to be escorted off the Base on the morning of November 12, 2016.

301.

In the setting of a military base in the Islamic Republic of Afghanistan, Fluor's negligent retention of a former member of the Taliban was unreasonably dangerous to others, including Hencely.

302.

Fluor's negligent retention of the bomber proximately caused Hencely's injuries.

303.

But for Fluor's negligent retention of the bomber, Hencely would not have been injured.

Count 4.

Vicarious Liability

304.

Plaintiff incorporates herein the preceding paragraphs 1 through 303.

305.

The failures of supervision, entrustment, and retention alleged in this Amended Complaint proximately caused Hencely's injuries.

306.

But for the failures of supervision, entrustment, and retention alleged in this Amended Complaint, Hencely would not have been injured.

307.

Regardless of whether Nayeb or other LOGCAP personnel were direct employees of Fluor or were direct employees of a Fluor subcontractor, Fluor assumed a nondelegable duty to supervise the bomber.

308.

Fluor contractually obligated itself to ensure "all personnel supporting [LOGCAP IV 005] comply with the standards of conduct, and all terms/conditions set forth in [the] PWS and the Basic Contract. [Fluor] shall provide the necessary supervision for personnel required to perform this contract." Army Report at 10 (alterations in original).

309.

Fluor contractually obligated itself to supervise its employees, local nationals, and its subcontractors'

personnel "to ensure compliance with all terms of the [LOGCAP Materials]." Army Report at 10.

310.

Even if Fluor's subcontractors' direct employees were immediately responsible for the failures of supervision, entrustment, and retention alleged in this Amended Complaint, Fluor is vicariously liable for Hencely's injuries, "regardless of any fault on the part of [Fluor]." *Simmons v. Tuomey Reg'l Med. Ctr.*, 330 S.C. 115, 123 (Ct. App. 1998), *aff'd as modified*, 341 S.C. 32 (2000).

Count 5.

Negligent Control

311.

Plaintiff incorporates herein the preceding paragraphs 1 through 310.

312.

Regardless of whether Nayeb or other supervisory personnel were direct employees of Fluor or were direct employees of Fluor subcontractors, Fluor supervised the Non-Tactical Vehicle Yard and all its subcontractors' employees on the Base.

313.

Fluor failed in its duty to prevent its employees or its subcontractors' employees from doing their jobs in a

way that was unreasonably dangerous to others, including Hencely.

314.

Fluor knew or should have known its employees or subcontractors' employees failed to supervise the bomber, negligently entrusted the bomber with tools and materials, negligently failed to escort the bomber off the Base, and negligently retained the bomber after poor work performance.

315.

Fluor knew or should have known about the dangerous conditions created by its employees or subcontractors' employees.

316.

Fluor failed to exercise reasonable care to remedy the dangerous conditions created by its employees or subcontractors' employees.

317.

Fluor had the opportunity to prevent the widespread and dangerous lack of supervision, entrustment, escort, and retention by exercising the power of control Fluor was obligated to retain—and did retain—as stated in the LOGCAP Materials.

318.

Fluor's negligent control of its employees or subcontractors' employees proximately caused Hencely's injuries.

319.

But for Fluor's negligent control of its employees or subcontractors' employees, Hencely would not have been injured.

Count 6.

Breach of Contract

320.

Plaintiff incorporates herein the preceding paragraphs 1 through 319.

321.

Fluor entered into contracts, including the LOGCAP Materials, with the U.S. government.

322.

Fluor had a duty under the contracts to supervise Fluor employees and the employees of Fluor subcontractors.

323.

Fluor had a duty to ensure that all personnel supporting Fluor's work under the LOGCAP Materials complied with the standards of conduct and all the terms and conditions of the contracts.

324.

The LOGCAP Materials were intended to directly benefit U.S. soldiers at Bagram Airfield, including Hencely.

325.

U.S. soldiers, including Hencely, were the intended third party beneficiaries of these contracts.

326.

Fluor intended the LOGCAP Materials to benefit individual U.S. soldiers. Fluor's executive director of sales and account manager for LOGCAP IV stated what makes LOGCAP IV unique "is our critical responsibility to the individual soldier. With this project you feel the dependency of the soldier and it makes it more personal." A Passion to Build at 178.

327.

Fluor breached the contracts by violating the specific provisions noted in this Amended Complaint, among others.

328.

Fluor's breaches of the contracts proximately caused the deaths of five innocent people and the injuries to seventeen innocent people, including Hencely.

329.

Fluor's breaches of the contracts proximately caused Hencely's injuries.

330.

But for Fluor's breaches of the contracts, Hencely would not have been injured.

VII. DAMAGES

331.

Plaintiff incorporates herein the preceding paragraphs 1 through 330.

332.

Hencely seeks to recover all damages to which he is legally entitled.

333.

The damages claimed by Hencely were proximately caused by the breaches of contracts and the negligent

and tortious acts and omissions of Fluor, for which Fluor is liable.

Compensatory Damages

334.

As a direct result of Fluor's misconduct, Hencely has suffered, and continues to suffer from, injuries to his body and mind. These injuries are permanent.

335.

Hencely seeks to recover general and compensatory damages for all components of mental and physical pain and suffering, past, present, and future, as allowed by South Carolina law.

336.

Hencely seeks to recover special damages for the reasonable value of his past and future medical and rehabilitative treatment.

337.

Hencely seeks to recover special damages for the reasonable value of his past and future lost wages and income, as well as his lost or diminished capacity to earn.

Appendix D

Punitive Damages

338.

Fluor's misconduct described in this Amended Complaint was so wanton and reckless it warrants *and demands* the imposition of substantial punitive damages against Fluor pursuant to S.C. Code Ann. § 15-32-530.

339.

Fluor's failure to properly supervise the bomber was intentional and was motivated primarily by financial gain.

340.

Fluor could have hired and trained supervisors capable of fulfilling its legal and contractual duties. Fluor could have executed reasonable supervision of the bomber. Fluor did not commit additional resources to meet its legal and contractual duties to properly supervise its operations at Bagram Airfield and to properly supervise the bomber because doing so would have lessened Fluor's profits from the LOGCAP IV program.

341.

Fluor's decision to allow the bomber to wander freely about Bagram Airfield was unreasonably dangerous.

342.

Fluor's entrustment of unnecessary tools to the bomber was unreasonably dangerous.

Appendix D

343.

Fluor's entrustment of a multimeter to the bomber was unreasonably dangerous.

344.

Fluor's failure to supervise the escorting of Fluor local national employees, including the bomber, off the Base was unreasonably dangerous.

345.

In the setting of a military base in the Islamic Republic of Afghanistan, failing to supervise a former member of the Taliban was unreasonably dangerous.

346.

Failing to supervise a former member of the Taliban on a military base in the Islamic Republic of Afghanistan created a high likelihood of injury.

347.

Fluor's decision to retain and promote the bomber after known poor performance was unreasonably dangerous.

348.

Fluor's decision not to take disciplinary action against the bomber, including termination, for his poor job performance was unreasonably dangerous.

349.

The unreasonably dangerous decisions regarding supervision and staffing of the Non-Tactical Vehicle Yard were made, known, and approved by the persons responsible for making such policy decisions on behalf of Fluor.

350.

The bomber had an intent to harm U.S. soldiers by detonating the vest bomb and did in fact harm Hencely by detonating the vest bomb.

351.

Fluor contractually agreed to control the bomber's actions and ensure the bomber complied "with the standards of conduct, and all terms/conditions set forth in" the LOGCAP Materials. The intentional acts of the bomber are imputable to Fluor.

352.

South Carolina's caps on punitive damages under S.C. Code Ann. § 15-32-530 violate the U.S. constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for judgment as follows:

(a) That the Court award Plaintiff damages on all counts in an amount (greater than $75,0000, 28 U.S.C. § 1332) to be proven at trial together with interest and costs and such further relief as is just and proper; and

(b) That Plaintiff recovers punitive damages.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Respectfully submitted this 25th day of August, 2020.

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Appendix D

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ATTORNEYS FOR PLAINTIFF

Appendix E — Excerpt of Army 15-6 Report, Exhibit 1 to the Complaint, D.Ct. Doc. 1-1 (December 31, 2016)

EXHIBIT 1

AR 15-6 Memo Final Signed

DEPARTMENT OF THE ARMY
HEADQUARTERS, 7TH INFANTRY DIVISION
BOX 339500, MAIL STOP 59
JOINT BASE LEWIS-MCCHORD, WA 98433-9500

AFZC-CG 31 December 2016

MEMORANDUM FOR Commander, United States Forces – Afghanistan, Kabul, Afghanistan, APO, AE 09356

SUBJECT: Army Regulation 15-6 Investigation on the 12 November 2016 Attack on Bagram Airfield, Afghanistan

1. (U/~~FOUO~~) The purpose of this memorandum and its enclosures is to enumerate relevant facts, findings, and recommendations pertaining to the circumstances and events surrounding the suicide vest attack that occurred on Bagram Airfield on 12 November 2016. Based upon the appointment orders dated 25 November 2016, the undersigned and nine other personnel from 7th Infantry Division deployed to Afghanistan and – with the addition of two in-country personnel with theater expertise in force protection and contracting – conducted an administrative investigation from 07 December 2016 to 30 December

2016 in accordance with Chapter 5 of Army Regulation 15-6. The scope of the investigation included six formal site visits and 53 formal interviews reduced to sworn statements utilizing Department of the Army Form 2823, among other informal inquiries and background research, to weigh considerations pertinent to force protection, intelligence, contracting, and combat operations.

2. (U/~~FOUO~~) The suicide attack on Bagram Airfield on 12 November 2016 resulted in the death of six personnel – three U.S. Soldiers, two civilian Fluor employees, and the suicide bomber (a Fluor subcontractor employee) – and the wounding of sixteen U.S. Army Soldiers and one Polish Soldier. At 0538 hours, several hundred personnel residing on the base were preparing for a Veteran's Day five kilometer run, many of them already assembling in the vicinity of the landmark known as the "Disney Clamshell" on Disney Avenue for a 0615 hours start time. The explosion, initiated by a local national employed on the base for over five years and that passed a counterintelligence screening earlier this year, occurred approximately 300 meters southwest of the start point and less than 300 meters northeast of the base headquarters. Though the ultimate target for the attack remains indeterminable, the group of Soldiers and Fluor employees unwittingly induced the assailant to detonate his suicide vest, likely preventing a far greater tragedy at the Disney Clamshell.

3. (U/~~FOUO~~) Close to 2,000 personnel secure Bagram Airfield, the largest international military base in Afghanistan. Though upwards of 15,000 personnel operate from this base – many of them armed as well –

the majority of occupants contribute to Base Life Support and sustainment operations or enable operations beyond the Bagram Ground Defense Area. The 1st Cavalry Division Commander, who also serves as 1) the Deputy Commanding General (Support) for United States Forces-Afghanistan, 2) the Commander of the United States National Security Element, 3) the Commander of Bagram Airfield, and 4) the Commander of Joint Task Force 1, has both local and theater-wide responsibilities. While his staff oversees Bagram Airfield security, the day-to-day security inside and outside of the Bagram Ground Defense Area is principally orchestrated by 1st Squadron, 3rd Cavalry Regiment's "Task Force Tiger." Also under the Commander of Bagram Airfield, the Area Support Group – which has responsibility for base life support on Bagram Airfield and six other major Forward Operating Bases throughout Afghanistan – manages the installation's emergency services.

4. (U/~~FOUO~~) The leadership at Bagram Airfield orchestrates an assortment of multinational security providers and dozens of military units and contracted agencies that operate on the installation. Initiatives that began at Bagram Airfield prior to the 12 November 2016 attack and accelerated thereafter have already mitigated many of the force protection gaps and seams that enabled the assailant to conduct the attack. Yet, the inherent risks associated with operating in the midst of force protection threats coupled with evolving capabilities remains, requiring further analysis and the inculcation of lessons learned from this particular attack.

5. (U/~~FOUO~~) Beyond pursuing understanding of the contributing conditions that enabled the attack, the scope of this investigation includes analysis on the actions taken by the chain of command to prevent future attacks. The responses that follow answer the specific questions within the appointment memorandum to present facts and commensurate findings and recommendations pertinent to security operations at Bagram Airfield. Specifically, they highlight the presence or absence of 1) published standards, 2) the resources and individual and collective training required, and 3) the engaged and disciplined leadership empowered to attain those standards. Inspired by the sacrifice of those lost or forever impacted by the attack on 12 November 2016, this investigation seeks to provide value to the ongoing efforts in Afghanistan, with hopes that it can contribute to the understanding required to keep Service member and civilians as safe as possible.

6. (U/~~FOUO~~) The investigation determined that the primary contributing factor to the 12 November 2016 attack was Fluor's complacency and its lack of reasonable supervision of its personnel. These conditions enabled the suicide bomber to construct and employ a suicide vest inside the Bagram Airfield perimeter.

7. (U/~~FOUO~~) There are eight major findings within the investigation that enabled the primary contributing factor to present risk that was not sufficiently mitigated before the attack:

a. (U/~~FOUO~~) Local National access and supervision was not properly enforced;

b. (U/~~FOUO~~) Unity of effort, unity of command, and interoperability challenges were compounded by multi-national and contracted security providers;

c. (U/~~FOUO~~) The Bagram Airfield security forces' span of control is too broad and lacks adequate forces;

d. (U/~~FOUO~~) Counterintelligence shortages impaired Coalition Forces' capability to screen Local National employees and to identify Nayeb's threat indicators;

e. (U/~~FOUO~~) Complexity of intelligence and force protection mission command and interoperability of networks, architecture, and analytical tools impaired intelligence fusion;

f. (U/~~FOUO~~) Disjointed antiterrorism and force protection efforts increased susceptibility to attacks;

g. (U/~~FOUO~~) Contracting Officer's Representatives were not aligned by location, duties, or experience; and

h. (U/~~FOUO~~) Commanders and supervisors of Contracting Officer's Representatives were not appropriately engaged in contract formation, administration, and oversight.

8. (U/~~FOUO~~) Based upon these key findings, the below recommendations may best apply lessons learned from the 12 November 2016 attack to neutralize future force protection threats:

Appendix E

(b)(5)

9. (U/~~FOUO~~) In summary, the investigation finds that the current leadership at Bagram Airfield, has pushed since assuming command on 13 September 2016 to reverse a pervasive "culture of complacency" and indiscipline – specifically within the civilian portions of the base – that permeated the forward operating base. Addressing the key findings delineated above consistent with the corresponding key recommendations will prevent another local national subcontractor employee – with poorly vetted access and unreasonable supervision – from operating with impunity and conducting a similar attack on Bagram Airfield.

10. (~~S//NF~~) **(8a)** Identify the names, ages, country of origin, and status/employer of those killed in action (KIA) and wounded in action (WIA) from the 12 November 2016 incident.

a. (~~S//NF~~) Identify the names, ages, country of origin, and status/employer of those killed in action (KIA).

(1) (U/~~FOUO~~) Sergeant First Class Brown, Allan Eric; 46 years old; Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(2) (U/~~FOUO~~) Staff Sergeant Perry, John William; 30 years old; Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(3) (U/~~FOUO~~) Private First Class Iubelt, Tyler Ray; 20 years old; Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Anny

(4) (U/~~FOUO~~) (b)(6) U.S. Fluor Government Group International, Inc.

(5) (U/~~FOUO~~) (b)(6) U.S. Fluor Government Group International, Inc.

b. (~~S//NF~~) Identify the names, ages, country of origin, and status/employer of those wounded in action (WIA).

(1) (U/~~FOUO~~) (b)(3), (b)(6) Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(2) (U/~~FOUO~~) (b)(3), (b)(6) Headquarters and Headquarters Battalion, 1st Cavalry Division; U.S. Army

(3) (U/~~FOUO~~) (b)(3), (b)(6) 412th Contracting Support Brigade; U.S. Army

(4) (U/~~FOUO~~) (b)(3), (b)(6) Headquarters and Headquarters Battalion, 1st Cavalry Division; U.S. Army

(5) (U/~~FOUO~~) (b)(3), (b)(6) years old; Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(6) (U/~~FOUO~~) (b)(3), (b)(6) 36 years old; Headquarters and Headquarters Battalion, 1st Cavalry Division; U.S. Army

(7) (U/~~FOUO~~) (b)(3), (b)(6) Detachment 19, 3rd Medical Command Deployment Support; U.S. Army Reserve

(8) (U/~~FOUO~~) (b)(3), (b)(6) Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(9) (U/~~FOUO~~) (b)(3), (b)(6) 607th Contracting Team; 412th Contracting Support Brigade; U.S. Army

(10) (U/~~FOUO~~) (b)(3), (b)(6) 901st Contracting Battalion; 418th Contracting Support Brigade; U.S. Army

(11) (U/~~FOUO~~) (b)(3), (b)(6) Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(12) (U/~~FOUO~~) (b)(3), (b)(6) Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(13) (U/~~FOUO~~) (b)(3), (b)(6) Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(14) (U/~~FOUO~~) (b)(3), (b)(6) Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(15) (U/~~FOUO~~) (b)(3), (b)(6) Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(16) (U/~~FOUO~~) (b)(3), (b)(6) Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(17) (U/~~FOUO~~) (b)(3), (b)(6) Headquarters and Headquarters Company, 1st Cavalry Division Sustainment Brigade; U.S. Army

(18) (U//FOUO) (b)(6)

c. (U/~~FOUO~~) Line of duty actions are complete and all service members were found in the line of duty (Exhibits 1E, 1F).

11. (~~S//NF~~) **(8b)** Identify any/all Local Nationals (LNs) involved in the incident. Were any LNs connected to the Taliban or any other group(s)? Is so, describe the connection.

a. (~~S//NF~~) Identify any/all Local Nationals (LNs) involved in the incident.

(1) (U/~~FOUO~~) The only evidence of Local National involvement in the incident concerns the suicide bomber, Ahmad Nayeb (variant: Qari Nayab, Ahmad Naib Hafzi, Hafezi Nieb, Abdul Zuhoor), herein referred to as Nayeb, matched using DNA evidence (Exhibits 2Q, 3P, 4P, 4W, and 4AQ).

(2) (U/~~FOUO~~) At this time, no evidence suggests other Bagram Airfield Local National, including Nayeb's cousins, were co-conspirators. Nayeb had familial ties to three cousins who worked on base (Exhibits 2Q, 4AF, 4CV, and 5A). (b)(6) was a cousin of Nayeb and was employed on Bagram Airfield as a day shift worker at the Morale, Welfare, and Recreation Center (Exhibits 4AA, 4AF, 4CV, and 5A). (b)(6) was a cousin of Nayeb and was employed on Bagram Airfield as a night shift worker at the Warrior Gym (Exhibits 4AA, 4AF, 4CV, and 5B at 16). (b)(6) was a cousin of Nayeb and was employed on Bagram Airfield as a Dining Facility worker (Exhibits 4AA, 4AF, 4CV, and 5A).

(3) (~~S//NF~~) (b)(1)1.4d

(b)(1)1.4d

(b)(1)1.4d (Exhibits 4CJ, 4BY, 4AK, and 4AL).

b. (~~S//NF~~) Were any LNs connected to the Taliban or any other group(s)? Is so, describe the connection.

(1) (~~S//NF~~) (b)(1)1.4c

(b)(1)1.4c

(b)(1)1.4c (Exhibits 4BW, 4BZ, 4CA, 4CC, 4CD, 4CG, 4CH, 4CQ, 4CM, 4CR, and 4CV).

(2) (~~S//NF~~) (b)(1)1.4c

Appendix E

(b)(1)1.4c

12. (~~S//NF~~) **(8c)** Describe the Local Nationals' connection(s) to any US/Coalition Forces (CF). Were they employed on Bagram Airfield? If so, by whom and for what position? When were they hired? What were the work days/hours of the involved Local Nationals on Bagram Airfield? Were the Local Nationals hired and supervised by Fluor Corporation or a subcontractor? Were there any failings by Fluor Corporation or another company in the hiring or continued employment of the Local Nationals involved in this incident? You will make recommendations as appropriate given your findings, on the hiring and supervision of Local Nationals by Fluor Corporation or involved companies.

a. (~~S//NF~~) (b)(1)1.4a, (b)(1)1.4c (~~S//NF~~) (b)(1)1.4a, (b)(1)1.4c

(b)(1)1.4a, (b)(1)1.4c

b. (~~S//NF~~) Were they employed on Bagram Airfield? If so, by whom and for what position? When were they hired? What were the work days/hours of the involved Local Nationals on Bagram Airfield?

(1) (U/~~FOUO~~) Nayeb was employed by Alliance Project Services, Inc. (APS), a subcontractor to Fluor, on Bagram Airfield in the Non-Tactical Vehicle Yard. At the time of the bombing, he was working the 1800-0600 shift and was responsible for managing the hazardous material in the HAZMAT section of the Non-Tactical Vehicle Yard, which Fluor supervises (Exhibits 5D at 8, 5D at 2).

(2) (U/~~FOUO~~) On 01 April 2011, Nayeb entered the Provincial Reconstruction Team – Parwan (Republic Of Korea) Vocational Training Center on Bagram Airfield as a construction trainee (Exhibit 5H). Nayeb was a transitioning Taliban member who went through reintegration as part of the Afghanistan Peace and Reintegration Program efforts funded by the Commander's Emergency Response Program pursuant to the FY2010 National Defense Authorization Act (Exhibits 5K at 331, 5AB). Nayeb was sponsored by Task Force Red Bulls in a memorandum dated 25 March 2011, which accompanied his request for a Ba gram Airfield access badge (Exhibit 5H).

(3) (~~S//NF~~) (b)(1)1.4a, (b)(1)1.4c

(b)(1)1.4a, (b)(1)1.4c

(b)(1)1.4a, (b)(1)1.4c (Exhibits 5D, 5A, and 5H).

(4) (U/~~FOUO~~) During his five years of employment, Nayeb worked varying shifts under numerous and diverse Fluor supervisors – shift changes are not uncommon among Local National employees. His first day of work in the Fluor Non-Tactical Vehicle Yard was 11 December 2011, initially on night shift (Exhibits 5D, 5O). Nayeb briefly worked the day shift from 24 July 2012 until 14 November 2012, then changed back to the night shift (Exhibit 5O). Nayeb stayed on the night shift until 28 April 2014, then changed to day shift for almost one full year, transitioning back to night shift on 14 April 2015 (Exhibit 5O). Nayeb then worked the night shift until 05 June 2016,

when he transferred to the day shift from 05 June 2016 until 06 August 2016 (Exhibit 5O). From 06 August 2016 until 12 November 2016, Nayeb worked the night shift (Exhibit 5O).

c. (~~S//NF~~) Were the Local Nationals hired and supervised by Fluor Corporation or a subcontractor?

(1) (U/~~FOUO~~) Nayeb was hired by Alliance Project Services, Inc. a subcontractor of Fluor (Exhibits 5D, 5F, 5C). Alliance Project Services, Inc. is a U.S. veteran owned business in Alexandria, Virginia, which specializes in hiring host nation personnel in a labor broker capacity. Although Alliance Project Services, Inc. was responsible for administration of Nayeb (payroll, time and attendance, etc.), Nayeb's work performance was supervised by Fluor while he was employed at the Bagram Airfield Non-Tactical Vehicle Yard. The paragraphs below will show that Fluor did not reasonably supervise Nayeb at the work facility, nor reasonably supervise the transport of Nayeb or other employees between the Entry Control Point and the work facility.

(2) (U/~~FOUO~~) Fluor is the prime contractor for LOGCAP IV (Task Order 005), which encompasses services and base life support for the eastern and northern portions of Afghanistan. In support of the Afghanistan First Policy – a U.S. Government policy encouraging Afghan employment (Exhibit 5I) – Local Nationals are hired by Fluor through a subcontract with Alliance Project Services, Inc. which specializes in labor broker services (Exhibits 5D at 6, 5C at 4, 5E para 01.07). As the

prime contractor with the U.S. Government, and as the contractor with oversight of the Bagram Airfield Non-Tactical Vehicle Yard, Fluor is responsible for all of its employees, subcontractors, and subcontractor employee actions (Exhibit 5E para 01.07). Specific to the Non-Tactical Vehicle Yard, Fluor states that "site supervision was accomplished by Fluor Other Country Nationals and Fluor U.S. National supervisors and foremen in accordance with the base access control policy" (Exhibit 5D). This supervisory responsibility is also clearly stated in the Performance Work Statement, paragraphs 01.07a and 01.07b, dated 01 April 2013:

(a) (U/~~FOUO~~) 01.07a. "[Fluor] is responsible for ensuring all personnel supporting [LOGCAP IV 005] comply with the standards of conduct, and all terms/conditions set forth in [the] PWS and the Basic Contract. [Fluor] shall provide the necessary supervision for personnel required to perform this contract" (5E para 01.07).

(b) (U/~~FOUO~~) 01.07b. "[Fluor] shall hire HN personnel and Subcontractors to the maximum extent possible in performance of this contract when such recruitment practices meet legal requirements. [Fluor] is responsible for oversight of such personnel or Subcontractors to ensure compliance with all terms of the Basic Contract and this PWS." (5E para 01.07).

(3) (U/~~FOUO~~) Interviews with employees of the Non-Tactical Vehicle Yard conducted by Counterintelligence Agents from Task Force Odin and Task Force Crimson

following the suicide blast illustrate that Fluor employees (Other Country Nationals, U.S. Nationals, and specific Local Nationals) were responsible for the supervision of Local National employees (Exhibits 5A, 5B).

(4) (U/~~FOUO~~) There were at least three areas where Fluor did not reasonably supervise its employees, to include Nayeb, at the Non-Tactical Vehicle Yard. The lack of reasonable supervision includes, but is not limited to: 1) lack of direct supervision over the HAZMAT area, 2) lack of supervising employee performance, and 3) failure to supervise use of tools by employees.

(a) (U/~~FOUO~~) The Non-Tactical Vehicle Yard where Nayeb worked consisted of a Light Non-Tactical Vehicle work center, a Heavy Non-Tactical Vehicle work center, and a HAZMAT work center (Exhibit 5A at 67). All three areas are disassociated sites occupying a larger work area known as the Non-Tactical Vehicle Yard. Both the Heavy and Light Non-Tactical Vehicle work centers are enclosed "clamshell" tents to provide protection from the elements and are separated by approximately 75 feet (Exhibit 5A at 67). The HAZMAT work center is a row of containers placed adjacent to one another and built up with carpentry which adds a stable walking area, some overhead cover, and two work areas with minimal lighting or visibility from other work sites (Exhibit 5A at 67). The HAZMAT area is toward the south side of the Non-Tactical Vehicle Yard – approximately 75 feet from the Heavy Non-Tactical Vehicle center and Light Non-Tactical Vehicle center – and otherwise outside and exposed to the elements and

approximately 200 feet from the Non-Tactical Vehicle Yard office (Exhibit 5A at 67).

(b) (U/~~FOUO~~) As the only HAZMAT employee on night shift, Nayeb worked at the HAZMAT work center alone and with sporadic supervision (Exhibit 5B at 30-31). There was also confusion by Fluor supervisors as to who was responsible for Nayeb and the HAZMAT work center (Exhibit 5B at 29). (b)(6) was the Fluor Other Country National Heavy Non-Tactical Vehicle Lead Senior Mechanic for the night shift on 12 November 2016, and when questioned about Nayeb informed Counterintelligence personnel that he had little interaction with Nayeb and insisted that "the light vehicle maintenance bay employees were responsible for ensuring Nayeb was supervised and employed" (Exhibit 5B at 27-29). When interviewed by Counterintelligence Agents, (b)(6) recognized Nayeb as the HAZMAT worker but could not recall his name (Exhibit 5B, para 2.18).

(c) (U/~~FOUO~~) When HAZMAT responsibilities were reduced, or when Non-Tactical Vehicle maintenance operations were high, Nayeb would occasionally help out in either the Heavy Non-Tactical Vehicle Yard or Light Non-Tactical Vehicle Yard as workload dictated (Exhibit 5C, page 15). (b)(3), (b)(6) was the Fluor Other Country National Light Non-Tactical Vehicle Lead Senior Mechanic for the night shift on 12 November 2016, and – when questioned about Nayeb – informed Counterintelligence Agents that he "was only accountable for local national employees when they worked for him in the light vehicle bay" (Exhibit 5B at 27-29). Rexhep Rexhepi, the Fluor

Other Country National Non-Tactical Vehicle Yard General Foreman, reported to Counterintelligence Agents that once Nayeb's work at HAZMAT was complete, he would work in the light vehicle bay (Exhibit 5B at 27-29). At a later interview, Rexhep Rexhepi stated that (b)(6) the Heavy Non-Tactical Vehicle Lead, was responsible for Nayeb.

(d) (U/~~FOUO~~) The statements of Fluor employees obtained by Counterintelligence Agents, coupled with the statements provided by Fluor, reveals a poor understanding by Fluor supervisors as to who was responsible for Nayeb's supervision (Exhibits 5A, 5B at 28). This ambiguity on supervisory responsibility demonstrates an unreasonable complacency by Fluor to ensure Local National employees were properly supervised at all times, as required by their contract and non-contractual, generally recognized supervisor responsibility. This lack of reasonable supervision facilitated Nayeb's ability to freely acquire most of the components necessary for the construction of the suicide vest and the freedom of movement to complete its construction (Exhibit 1 B, 5B at 28).

(e) (U/~~FOUO~~) According to Alliance Project Services, Inc. Performance and Disciplinary Policy and the LOGCAP IV Afghanistan HCN Labor Support Statement of Work, sleeping while at work or unsatisfactory job performance are "cause for disciplinary action up to and including termination" (Exhibit 5F, Exhibit 5G). (b)(3), (b)(6) Fluor Other Country National Light Non-Tactical Vehicle Lead Senior Mechanic, states that he had caught Nayeb sleeping in the HAZMAT area in a sleeping

bag (Exhibit 5B, pages 27-29). In addition, on separate occasions, he caught Nayeb reading the Quran during work hours (Exhibit 5B, pages 27-29). Interviews collected by Counterintelligence Agents show that Nayeb was often not present at the HAZMAT area when workers would go there to drop off oils (Exhibit 5A, para 2.62). (b)(6) a Local National who worked in the Light Non-Tactical Vehicle Yard, stated that "it was normal for [Nayeb] not to be in the work area" (Exhibit 5A, para 2.65). No formal counseling or disciplinary action can be found for Nayeb despite reported instances of sleeping at work and absences without authority. This failure to enforce a work-related standard of performance and the unjustified retention of Nayeb amounts to a lack of reasonable supervision on behalf of Fluor.

(f) (U/~~FOUO~~) Following the suicide bombing, Counterintelligence Agents collected the tool room logs from the Non-Tactical Vehicle Yard. Those logs revealed that between 10 August 2016 and 10 November 2016, Nayeb checked out multiple tools not associated with his duty as the HAZMAT employee, to include checking out a multimeter nine times for up to six hours at a time (a multimeter is a tool used to measure voltage, current, and resistance) (Exhibit 5A at 49-50, at 129-213). Fluor employees confirmed that there were no tools identified as restricted use, or controlled use, by force protection or base policy (Exhibit 5C). Fluor employees also provided that any employee was able to check out any tool, regardless of where that employee worked. However, interviews of Non-Tactical Vehicle Yard personnel suggest that only certain individuals could check out specific tools within

the Non-Tactical Vehicle Yard (Exhibit 5A para 2.49, 2.56, 2.57, 2.62, 2.66).

(g) (U/~~FOUO~~) An interview of Other Country National (b)(6) stated that "HAZMAT workers would only check out tools if one of the maintenance guys requested help" and that the HAZMAT worker would tell him the name of the mechanic that needed the tool (Exhibit 5A para 2.56). (b)(6) further stated that "HAZMAT workers do not require any tools in the performance of their job" (Exhibit 5A para 2.56). (b)(3), (b)(6) a Fluor U.S. National employee stated in an interview with Counterintelligence Agents that "he did not think it was normal for the HAZMAT worker to sign out tools" (Exhibit 5A para 2.57). Another Fluor employee, Local National (b)(6) stated to Counterintelligence Agents that "only the person who needed the tool could sign the tool in or out from the tool room" (Exhibit 5A para 2.62). A further Fluor employee, Local National (b)(6) stated that Nayeb "did not require the use of any special tools to complete his HAZMAT job" (Exhibit 5A para 2.66). Fluor Local National (b)(6) who ran the Non-Tactical Vehicle Yard tool room at night, asked Nayeb why he needed a multimeter tool during work, to which Nayeb replied that he needed it because he was fixing a radio on one occasion and hair clippers on another occasion (Exhibit 5A para 2.49). This apathy demonstrates that there was general knowledge of who was properly able to check out tools associated with job performance, but that the standard was poorly enforced. It also demonstrates Nayeb was not gainfully employed without the issue being raised to a supervisor's attention. Lastly, it illustrates a work culture of minimal

supervision. This evidence supports complacency and a lack of reasonable supervision by Fluor supervisors over Nayeb and other Local Nationals at the Non-Tactical Vehicle Yard work facility that enabled Nayeb's nefarious plan.

(h) (U/~~FOUO~~) Fluor was also deficient in their performance of executing and supervising escort duties during the transportation of employees, to include Nayeb, between the Entry Control Point and the Non-Tactical Vehicle Yard. The lack of reasonable supervision is evidenced by, but is not limited to, a 1) lack of accountability over employees getting on the bus at the end of each shift, and a 2) lack of positive control while escorting Local National employees to and from the Entry Control Point. As the contractor responsible for the Non-Tactical Vehicle Yard, Fluor is responsible to provide "transportation and supervision" necessary for its employees to accomplish their work (Exhibit 5E paras 03.03 and 05.00). This includes the supervision and transportation of Local Nationals to and from the work facility. Various Fluor Non-Tactical Vehicle Yard employees – U.S. Civilians, Other Country Nationals, and Local Nationals – served as escorts for Local Nationals who worked in the Non-Tactical Vehicle Yard (Exhibits 5B at 28, 5D at 5). These Fluor escorts were responsible for supervising the transport of Local Nationals from the Entry Control Point to the Non-Tactical Vehicle Yard, and from the Non-Tactical Vehicle Yard back to the Entry Control Point, at shift change (Exhibit 5C). The Bagram Airfield Badging and Screening Policy requires that escorts remain in close proximity and remain in constant

view of the individuals they are escorting (Exhibits 2AB, 5J).

(i) (U/~~FOUO~~) The mechanism Fluor used to ensure that Local National employees were on the bus at the end of each shift consisted of a sign in/sign out sheet filled out by the night shift Local National Team Lead, (b)(6) (Exhibit 5A para 2.47). In lieu of a physical or visual inspection to ensure every Local National employee was on the bus, he would attest to the same by observing that all the employees had signed out on the sheet (Exhibit 5A para 2.47). The bus would then move to the Entry Control Point without additional supervisory accountability. The Fluor U.S. National and Other Country National supervisors relied upon the Local Nationals to ensure everyone was accounted for and actually on the bus at the end of shift (Exhibit 5C at 7). On 11 November 2016, Nayeb informed (b)(6) – his Local National co-worker – that he would miss the bus on 12 November 2016 because of a HAZMAT class requirement, despite having taken the class on 02 October 2016 and not requiring the class for another year (Exhibits 5A at 3 at 215, 5D at 17) and evidence supports that Nayeb never got on the bus (Exhibits 5A at 3, 17, 27, 37 42, 43 47, 51, 55, 58, 80 and 5B at 31).

(j) (U/~~FOUO~~) Fluor Other Country National escorts did not know who they were responsible for escorting, as evidenced by both (b)(6) an Other Country National escort on the Heavy Non-Tactical Vehicle night shift, and (b)(6) an Other Country National escort for the Light Non-Tactical Vehicle night shift, admitting that they did not know the names of those they escorted (Exhibits 5A paras 2.25 and

2.26, 5B). Two Local National employees, (b)(6) and (b)(6) provided that if a night shift worker missed a ride to Entry Control Point 1 at the end of shift, a day shift escort would take them at a later time after the shift change (Exhibit 5A paras 2.52 and 2.54). (b)(6) a Local National working in the Light Non-Tactical Vehicle Yard and authorized unescorted access and escort privileges (yellow badge), provided a specific example when he shared that there were two Heavy Alliance Project Services, Inc. Local Nationals – (b)(6) and (b)(6) – left behind by the vehicle that transports Heavy Non-Tactical Vehicle Yard employees to the Entry Control Point on the morning of 12 November 2016 (Exhibit 5A para 2.45). Both men, (b)(6) and (b)(6) got on the light bus instead, unbeknownst to (b)(6) (Exhibit 5A para 2.45). Separate statements from (b)(6) and by (b)(6) both from the Fluor Non-Tactical Vehicle Yard, confirm that the Fluor Non-Tactical Vehicle Yard changed escorts out every week (Exhibit 5A para 2.47 and Exhibit 5C).

(k) (U/~~FOUO~~) The preponderance of evidence shows a lack of reasonable supervision by Fluor while escorting Local Nationals to and from the Non-Tactical Vehicle Yard. Fluor's systemic lack of reasonable supervision enabled Nayeb to go undetected from 0445 until 0538 on 12 November 2016, which coincides with the average walking time of 53 minutes from the Non-Tactical Vehicle Yard to the blast site (Exhibits 2Q, 4CE and Naismith's Rule).

d. (~~S//NF~~) Were there any failings by Fluor Corporation or another company in the hiring or continued employment of the Local Nationals involved in this incident?

Appendix E

(1) (U/~~FOUO~~) There were no failings by Fluor in the hiring of local nationals. Fluor complied with the Afghan First Program and the Afghan Peace and Reintegration Program in the hiring of Nayeb through a subcontracted labor broker, Alliance Project Services, Inc. (Exhibit 5D at 4). Fluor performed the Biometrics Automated Toolset Services in March 2011, when Fluor subcontractor employee, (b)(6) nput Nayeb into the database along with the Reintegration Memorandum identifying Nayeb's previous Taliban affiliation (Exhibit 5P Line 5399 of PERSTAT Tab). The Biometrics Automated Toolset Services entry form has the Fluor employee's signature for processing (Exhibit 5H).

(2) (U/~~FOUO~~) There is evidence to support failings by Fluor in the continued employment of Nayeb. See previous analysis concerning Fluor's lack of supervision of employee performance and unreasonable employee retention of Nayeb. Fluor did not provide any information concerning disciplinary action taken against Nayeb. In fact, Nayeb received a promotion from Skilled Laborer II to Skilled Laborer III on 05 July 2016 after known poor performance (Exhibit 4AN).

e. (~~S//NF~~) Make recommendations as appropriate given your findings, on the hiring and supervision of Local Nationals by Fluor Corporation or involved companies.

25. (U/~~FOUO~~) The point of contact for this memorandum is the undersigned at (b)(6) or thomas.s.james3.mil@mail.mil.

Appendix E

(b)(6)

THOMAS S. JAMES. JR.
Major General, USA
Investigating Officer

Appendix F — Army Show Cause Notice, Exhibit I to Plaintiff's Opposition to Fluor's Motion for Summary Judgment, D.Ct. Doc. 138-11 (November 28, 2017)

EXHIBIT I

DEPARTMENT OF THE ARMY
ARMY CONTRACTING COMMAND –
ROCK ISLAND
3055 RODMAN AVENUE
ROCK ISLAND, IL 61299-8000

November 28, 2017

SUBJECT: Show Cause Notice -- Task Order (TO) 0005 of Contract W52P1J-07-D-0008

Ms. Eleanor Spector
Vice President, Contracts and Supply Chain Management
Fluor Intercontinental, Inc.
100 Fluor Daniel Drive
Greenville, SC 29607

Dear Ms. Spector:

As you are aware, on November 12, 2016, a Local National (LN) employee of Alliant Project Services, Inc., acting as a subcontractor to Fluor Intercontinental, Inc. (Fluor), performing under the subject contract perpetrated a suicide vest (s-vest) attack on Bagram Airfield (BAF), Afghanistan. Based on the information available regarding the bombing incident and the circumstances and events leading up to the incident, I have concluded that Fluor has failed to perform in

accordance with the terms and conditions of the contract. As such, the Government is considering terminating TO 0005 for default under the provision(s) of FAR Clause 52.249-6, Termination Cost Reimbursement (May 2004).

Specifically, Fluor failed to comply with the operational requirements of TO 0005's Performance Work Statement (PWS), as evidenced by its complacency and negligence in the supervision and control of the LN in question, both while on the job and during transport to and from the Entry Control Point to his job site. Multiple instances, including Fluor's own self-disclosure and a Nonconformance Report (NCR) subsequent to the bombing (ECC-A-L3-16-0013), substantiate Fluor's inability to provide continuous oversight of LN activities within the BAF perimeter even after the bombing, and indicate a systemic and continued failure to comply with PWS (dated August 2, 2012), paragraphs 01.01 Introduction/General Information, 01.05 Hours of Operation, and 01.07 Personnel, 01.13 Contractor Security Requirements, as well as Fluor's basic contract, paragraph 3.4 Quality Control, and BAF Badging and Screening Policy (dated December 5, 2015).

The Army's investigation of the incident identified a number of factors that contributed to the attack; however, investigators cited the inadequate supervision and control of the LN by Fluor as the primary contributing factor to conditions that enabled him to construct and employ an s-vest inside the BAF perimeter (details of the findings are contained in the enclosure). The NCR and self-disclosure issued after the attack imply the perpetuation of an environment of complacency that could foster

similar incidents in the future. Pending a final decision in this matter, it will be necessary to determine whether Fluor's failure to perform arose from causes beyond its control and without fault or negligence on Fluor's part.

Accordingly, you are given the opportunity to respond in writing to the undersigned, providing any facts relevant to these conclusions within 30 calendar days of receiving this letter. Your failure to present any valid facts to the Government for consideration may be considered a statement that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate TO 0005 for default. In addition to providing the aforementioned written response, you are afforded an opportunity to present information in person. If you elect to do so, please contact [redacted] at 309-782-[redacted] to assist with scheduling.

Any assistance given to you on this contract or any acceptance by the Government of services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract and/or task order.

The Government reserves any rights to demand correction of non-compliant work under FAR Clause 52.246-5 Inspection of Services – Cost Reimbursement (April 1984).

Appendix F

If you have any questions or concerns, please contact the undersigned at 309-782-1999 or jay.t.carr.civ@mail.mil.

Sincerely,

CARR.JAY.THOM
AS.1137572326

Jay T. Carr
Principal Assistant Responsible
for Contracting

Enclosures (15)

Appendix G — Army Show Cause Decision, Exhibit F to Plaintiff's Opposition to Fluor's Motion for Summary Judgment, D.Ct. Doc. 138-8 (February 14, 2018)

EXHIBIT F

UNCLASSIFIED

DEPARTMENT OF THE ARMY
ARMY CONTRACTING COMMAND – ROCK ISLAND
3055 RODMAN AVENUE
ROCK ISLAND, IL 61299-8000

REPLY TO ATTENTION OF:

CCRC-VF February 14, 2018

SUBJECT: Show Cause Notice Decision – Task Order (TO) 0005 of Contract W52P1J-07-D-0008

Ms. Eleanor Spector
Vice President, Contracts and Supply Chain Management
Fluor Intercontinental, Inc.
100 Fluor Daniel Drive
Greenville, SC 29607

Dear Ms. Spector:

I have reviewed Fluor's Show Cause response which was submitted on December 27, 2017, as well as the additional materials submitted by Fluor on January 22, 2018, and have decided not to terminate TO 0005 of Contract W52P1J-07-D-0008. My decision is strictly

based upon the factors the Government must consider in accordance with Federal Acquisition Regulation (FAR) 49.402-3(f). In no way should my decision be construed as contradicting the findings and recommendations in US Forces Afghanistan's Army Regulation (AR) 15-6 Investigation of the Bagram suicide bombing incident, or agreement with Fluor's assertions in its response to the Show Cause Notice. To the contrary, I fundamentally disagree with numerous statements, implications, and conclusions included in Fluor's response.

The evidence indicates that Fluor failed to perform material requirements under this TO, and those failures contributed to the tragic outcome on November 16, 2016.

TO 0005 of Contract W52P1J-07-D-0008 requires that Fluor comply with the Performance Work Statement (PWS). Particularly pertinent are the paragraphs:

> 01.01 Introduction/General Information, which requires the contractor at a minimum, meet the standards set forth in the ARs for the type of work performed;
>
> 01.05 Hours of Operation, which requires the contractor perform all services under the contract 24 hours a day, 7 days a week, including holidays unless otherwise stated in the PWS, applicable regulations, or directed by the Administrative Contracting Officer;
>
> 01.07 Personnel, which states that the contractor is responsible for ensuring all

personnel supporting the TO comply with the standards of conduct, and all terms/conditions set forth in this PWS and the Basic Contract. It goes on to require the contractor provide necessary supervision for personnel required to perform this contract; hire host nation personnel and subcontractors to the maximum extent possible in performance of this contract when such recruitment practices meet legal requirements; and identifies the contractor to be responsible for oversight of such personnel or subcontractors to ensure compliance with all terms of the Basic Contract and the PWS; and,

01.13 Contractor Security Requirements, which requires the contractor to comply with Central Command directed vetting/badging policies for all personnel.

Additionally, Fluor's basic contract, paragraph 3.4, Quality Control, clearly identifies the contractor to be responsible for the quality, technical, logistical and financial accuracy, and the coordination of all aspects of performance.

Finally, the contractor is required to comply with the Bagram Airforce Badging and Screening Policy (dated December 5, 2015), which states that the escorts are responsible for the conduct and safety of the personnel they are escorting. Escorts must remain in close proximity and remain in constant view of the individuals they

> are escorting. Escorts will continuously monitor all escorted personnel and direct them during any base security operations. Per the policy, red badges for escorted access, which applied to the perpetrator under the subject TO, require escorting in all areas except the work facility. The policy specifically states in the contractor compliance paragraph that the contractor will ensure all employees adhere to all rules and regulations, security and badging regulations … and that ignorance of policies is not an excuse for contracted employee transgressions.

Notwithstanding Fluor's response to the Show Cause Notice, it is indisputable that Fluor did not comply with the key contractual requirements of TO 0005's PWS, namely in the areas of supervision of local national (LN) labor and adherence to escort requirements. Although Fluor contends it satisfied these contractual requirements by reasonably supervising employees, on the day of the bombing, Fluor failed to ensure the LN employee was properly escorted. The LN employee was scheduled to work until 0600, but at 0538 the LN employee detonated his suicide vest and was determined to have walked 53 minutes unescorted to the bombing site. Therefore, even in Fluor's own assertion that it reasonably supervised LNs, the suicide bomber managed to leave the work facility unescorted, which violated policy and is evidence that there were not measures in place to keep LNs from leaving the work area without escorts.

However, based upon the factors considered pursuant to FAR 49.402-3(f), I have determined that terminating this TO for default is not currently in the Government's best interest. Fluor should not misconstrue my decision as concurrence with its assertion that the Government, not Fluor, was responsible for the outcome. It should also be noted that Fluor's failure to comply with the terms of the contract and the result of those actions will be documented appropriately in the Contractor Performance Assessment Rating System.

If you have any questions or concerns, please contact the undersigned at 309-782-1999 or jay.t.carr.civ@mail.mil.

Sincerely,

/s/_____
Jay T. Carr
Principal Assistant Responsible
for Contracting