No. 24-924

IN THE

Supreme Court of the United States

WINSTON TYLER HENCELY,

Petitioner,

v.

FLUOR CORPORATION, *et al.*,

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* THE CENTER FOR MILITARY LAW AND POLICY, VETERANS LEGAL SERVICES, THE MILITARY-VETERANS ADVOCACY, INC., AND THE JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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UNOPPOSED MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Under Rule 21.2(b), *Amici* respectfully request leave to submit a brief as *amici curiae* in support of Petitioner. Rule 37.2(a) requires providing notice of the intent to file an *amicus* brief in support of a petition for certiorari no less than ten days before the brief is due. Under the same rule, the brief is due "30 days after the case is placed on the docket or a response is called for by the Court, whichever is later." This case was placed on the docket on February 26, and so an amicus brief is due the later of March 28 or 30 days after the Court calls for a response.

Counsel for *Amici* inadvertently notified Respondents' counsel Mr. Mosier on March 19, which is nine days before the first due date. Counsel for *Amici* asked if Respondents would waive the requirement. Respondents declined but represented that they do not oppose this motion for leave.

Rules should generally be enforced, but here the notice was late by a small amount and no prejudice resulted. Respondents have received a 30-day extension for their brief in opposition. And *Amici's* counsel has been suitably educated. If the Court never calls for a response (which would render the brief timely and the motion moot), *Amici* remorsefully request leave to file this amicus brief.

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INTEREST OF *AMICI CURIAE*[1]

The Center for Military Law and Policy is a not-for-profit think tank that strengthens legal protections for servicemembers and veterans. Dr. Dwight Stirling, a law professor and reserve JAG officer, founded and leads the Center. The Center engages in research, educational initiatives, and policy advocacy, including on the *Feres* Doctrine, sexual assault, and reducing the civilian-military gap by educating the civilian population about military life and culture.

Veterans Legal Services (VLS), is a non-profit located in Boston, Massachusetts devoted to helping veterans overcome adversity by providing free civil legal aid that honors their service and responds to their distinctive needs. More than half of VLS's clients have a disability, often caused by their service, and many have experienced homelessness. VLS draws on its experience representing individual veterans in a variety of civil legal matters to inform its legislative, regulatory, and appellate advocacy, promoting policy change to benefit veterans.

The Military-Veterans Advocacy Inc. (MVA) is a nonprofit organization that litigates and advocates for servicemembers and veterans. Established in 2012 in Slidell, Louisiana, MVA educates servicemembers and veterans concerning rights and benefits, represents veterans contesting the improper denial of benefits,

1. Counsel of record received notice of *amici*'s intent to file this brief nine days before filing, giving rise to the motion for leave above. No counsel for a party authored any part of this brief or made any monetary contribution intended to fund its preparation or submission.

and advocates for legislation to protect and expand servicemembers' and veterans' rights and benefits.

The Jewish War Veterans of the United States of America (JWV) organized in 1896 by Jewish veterans of the Civil War, is the oldest active national veterans' service organization in America. Incorporated in 1924, and chartered by an act of Congress in 1984, *see* 36 U.S.C. §110103, JWV's objectives include to "encourage the doctrine of universal liberty, equal rights, and full justice to all men," *id.* §110103(5) and to "preserve the spirit of comradeship by mutual helpfulness to comrades and their families," *id.* §110103(7). The JWV has long advocated that all servicemembers and veterans receive the benefits to which they are entitled.

SUMMARY OF THE ARGUMENT

The combatant activities defense, as fashioned by certain lower courts in reliance on *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), is unmoored from the federal interests that initially justified creating a narrow federal common law defense. This Court has repeatedly instructed that federal common law is disfavored. Where federal courts do fashion common law rules, "caution" is paramount. *Hernandez v. Mesa*, 589 U.S. 93, 101 (2020). Lower courts have dispensed with that caution.

This Court grounded *Boyle* in securing federal control over federal contractors, preempting state law only where state law conflicted with that goal by commanding contractors to deviate from their contract. But under the combatant activities defense, lower courts have jettisoned

both requirements, invoking a generalized federal interest in nullifying tort law for *non-combatant* contractors anywhere near the battlefield, and calling the result field preemption to escape *Boyle*'s requirement of significant conflict.

The result is doctrinal disarray. Lower courts have diverged on which contracts and which activities count as "combatant" or "integrated" enough to trigger immunity. They have reached contradictory rulings on similar facts even when purportedly applying the same test. Rather than securing fidelity to federal directives, this approach simply bars many claims outright—even in instances of obvious negligence that undisputedly is not required by any federal command.

Nor is there any reason to believe that Congress or the Executive Branch supports blanket battlefield preemption. To the contrary, both have consistently embraced a policy of enhanced accountability for government contractors. The False Claims Act's history and official investigations confirm that private suits play an indispensable role in deterring malfeasance. Congress has repeatedly made clear, in contexts ranging from wartime contracting oversight to whistleblower protections, that private enforcement helps address rampant fraud and mismanagement among contractors in theaters of war. Although lower courts posit that eliminating state tort liability furthers vague federal interests in avoiding battlefield regulation, this contradicts the political branches' longstanding acknowledgment that public resources alone are insufficient to police contractor misconduct. Private suits help.

Finally, the combatant activities defense harms servicemembers, contrary to deeply rooted congressional policy. Erecting broad tort immunities allows injuries caused by negligent or unscrupulous contractors to go uncompensated. It also prolongs and complicates litigation, subjecting servicemembers to multiple appeals over an amorphous immunity, rather than providing a clear avenue for relief. Given Congress's consistent bipartisan efforts to safeguard servicemembers and ensure contractor accountability, there is no basis for the lower courts' supposition that federal policy somehow demands blanket contractor immunity.

Only this Court's review can rein in the profligate expansion of the government contractor defense that has pushed federal common law into a radical new context. The combatant activities defense, as now applied by several circuits, lacks grounding in positive law or even the interests and preemption principles from *Boyle*. More practically, it undermines accountability for contractors and thwarts this Nation's longstanding solicitude for its servicemembers.

ARGUMENT

I. The Combatant Activities Defense Furthers None Of The Federal Interests Identified In *Boyle* And Contradicts This Court's Preemption Doctrine.

A. Federal Common Law Is Disfavored.

This Court has long held that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of

the state. . . . There is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). This principle applies equally to defenses, to causes of action, or to any other rule of decision. After *Erie* closed the "old door" of general law, federal courts fashioned the "*new* door" of "[f]ederal common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 746 (2004) (Scalia, J., concurring). But, each time, before opening this new door, courts must ask "what *authorizes* that peculiar exception from *Erie*'s fundamental holding that a general common law *does not exist*." *Id.* at 744.

Even when applying old precedents that adopted federal common law rules, the Court's "watchword is caution," *Hernandez v. Mesa*, 589 U.S. 93, 101 (2020), declining to expand those rules to new contexts. Rather, it takes the opportunity in each change of context to repeat that "[t]he cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. Fed. Deposit Ins. Corp.*, 589 U.S. 132, 133 (2020).

The lower courts have incautiously expanded the federal common law defense crafted in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). That case ensured adherence to government contracts, but has been stretched to the new context of so-called combatant activities by government contractors. Those new areas lack the federal interests this Court relied upon in *Boyle*.

B. *Boyle* Secures Effective Federal Control Over Federal Contractors.

In *Boyle*, this Court fashioned a federal common law defense based on two particular federal interests. *Id.* at

504. The first interest was the "obligations to and rights of the United States under its contracts," since tort law could impose liability on contractors for performing its contractual duty. *Id.* The second interest was "the civil liability of federal officials for actions taken in the course of their duty." *Id.* at 505. The Court linked this interest to the "discretionary function" exception in the Federal Tort Claims Act, explaining that "the selection of the appropriate design for military equipment" is discretionary because it "involves not merely engineering analysis but judgment . . . [about] the trade-off between greater safety and greater combat effectiveness." *Id.* at 511.

These interests "merely establish[] a necessary, not a sufficient, condition." *Id.* at 507. Preemption follows only if the interests produce a "significant conflict" with state law. *Id.* The Court fashioned a three-part rule to implement the general standard of "significant conflict":

> (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 512.

Two points are worth noting. First, though *Boyle* referenced the discretionary function exception, it did not hold that a discretionary function by a government officer was sufficient to preempt. Rather, the discretionary

decision had to be reduced to a formal, precise contract term for preemption to apply. Second, at its core, *Boyle* secures informed federal control over federal contractors. Where all three prongs are met, federal officials are effectively overseeing and directing contractors, preempting contrary duties. But where any prong is missing, federal control is too, and state law duties may well *help* induce the federal contractor to act as a faithful agent.

The combatant activities case law imposes federal common law in a wholly new context divorced from these federal interests and the touchstone of effective federal control over federal contractors.

C. Lower Courts Have Applied The Combatant Activities Defense Without Due Caution, And Without Regard To Securing Federal Control Over Federal Contractors.

In extending *Boyle* to cover government contractors in combatant activities, the lower court failed to exercise the caution this Court has required when expanding federal common law. Rather, multiple circuits have plowed ahead into entirely new contexts, based on a different statutory provision, invoking different federal interests, and even applying field preemption rather than conflict preemption. The result is disarray.

The Federal Tort Claims Act waives the United States' sovereign immunity for certain claims, 28 U.S.C. §1346, subject to fourteen exceptions, *see id.* §2680. Federal contractors have no sovereign immunity in the first place. The waiver does not mention them; the

exceptions do not mention them; and a separate provision expressly excludes them, *see id.* §2671. But *Boyle* looked to the discretionary function exception of the FTCA for the contours of one of its federal interests. This Court has never endorsed invoking the other thirteen exceptions in §2680 as preemptive federal interests, but lower courts have done so anyway.[2] Subsection (j) excepts from the waiver of sovereign immunity "[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).

According to courts that have embraced it, the theory of the combatant activities defense is that "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." App. 21 (quoting *In re KBR, Inc.*, 744 F.3d 326, 349 (4th Cir. 2014)). That interest dominates—irrespective of *actual* or *exercised* control over contractors by the government—whenever "a private service contractor is integrated into combatant activities over which the military retains command authority." *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009). As the D.C. Circuit put it, "all of the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations." *Id.* at 7. The federal interest, under this view, "is simply the elimination of tort from the battlefield." *Id.* Federal law, or, really, the

2. Presumably "postal contractor immunity," "quarantine contractor immunity," and "Panama Canal Company contractor immunity" will someday grace the Federal Reporter. *See* 28 U.S.C. §2680(b), (f), (m).

absence of any tort duties whatsoever, "occupies the field when it comes to warfare." *Id.*

Under this theory, the federal interest is *not* (as it was in *Boyle*) to secure effective federal control over contractors. Rather, the interest is to sweep away limits on malfeasance from government contractors on the battlefield, accepting some negligence or other misbehavior, presumably to achieve other government priorities. Those include minimizing "the costs of imposing tort liability on government contractors," which would be "passed through to the American taxpayer." *Id.* at 8. It also includes preventing state law from "interfer[ing] with the federal government's authority to punish and deter misconduct by its own contractors." *Id.* These federal interests depart sharply from *Boyle* in three respects.

First, though *Boyle* required the marriage of a discretionary function reduced to a specific contractual term, some lower courts have upheld preemption based *solely* on the FTCA's combatant activities exception, without any other federal interest. *Boyle* would have been much broader if preemption followed from any governmental discretionary decision, *apart* from the requirement to reduce that decision to a specification in a government contract.

Second, in contrast to *Boyle*, lower courts are claiming that federal interests are furthered by barring tort duties *even when contractors fail to perform under their government contracts*.[3] It is difficult to see how there

3. Recall that if a contractor *were* performing as specified in the contract, *Boyle* would protect them, eliminating any need for

could be any federal interest in a contractor performing negligent electrical maintenance or failing to secure a perimeter. To the extent allowing contractors to perform incompetently might cost less, this seems a thin reed on which to hang preemption.

Third, by moving from conflict preemption to field preemption, lower courts ignore *Boyle*'s command that "conflict there must be." 487 U.S. at 508. The cases are no more consonant with this Court's field preemption precedents, which themselves require "a comprehensive and unified system" of regulation suggesting that Congress intended to occupy the field. *Kansas v. Garcia*, 589 U.S. 191, 210 (2020). Lower courts have not examined whether federal regulations on contractors are "comprehensive and unified"—they of course are not—but have breezily inferred field preemption from the text of §2680(j) which does not apply by its terms. None of this Court's field preemption cases look anything like this.[4]

D. Lower Courts Cannot Apply The Test They Have Invented With Any Consistency.

Because the combatant activities defense is rootless and based on judicially invented federal interests, in

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a combatant activities defense. It is consequently the rule, rather than the exception, that the combatant activities defense applies where contractors were *not* performing under their contract.

4. If the argument is that there should be a uniform rule as in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), there is no explanation for why the uniform federal rule is *a defense* rather than *a tort regime*. After all, *Clearfield* and its progeny set forth federal contract law, not merely a defense to contract claims.

practice it produced an unpredictable morass that demands this Court's correction. The Petition outlines an acknowledged "3-1-1 split," Pet. 3, but, if anything, that undersells the dissonance.

This result is inevitable because the tests on all sides of the split are hopelessly standardless. The D.C. Circuit's test is: "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. What does it mean to be "integrated," and when does the military *not* "retain command authority"? What does it mean for a *contractor* to "engage[]" in combatant activities, when contractors do not fight in American wars?[5] The generalities cash out in lengthy litigation, frequent appeals, and arbitrary results.

The very same location might be a battlefield to one court, but not another. The lower court *here* held that Fluor was entangled in combatant activities in Bagram Airfield in November, 2016, App. 2, but in litigation over the Blackwater 61 crash that took off from Bagram Airfield in November, 2004, the lower courts rejected a combatant

5. The D.C. Circuit spoke of "battle-field preemption," "warfare," and "combat" but never explained how those terms are consistent with contractor's status as non-combatants who are not permitted to engage in combat, a point the United States has noted. *Compare Saleh*, 580 F.3d at 7 *with* DOD, Instruction 3020.41: Contractor Personnel Authorized to Accompany the U.S. Armed Forces ¶ 6.1.1 (Oct. 3, 2005) (contractors are "civilians"); 73 Fed. Reg. 16,765 (2008) ("[T]he Government is not contracting out combat functions.").

activities defense for negligent contractor pilots. *See Mahon v. Presidential Airways, Inc.*, 460 F. Supp. 2d 1315, 1318 (M.D. Fla. 2006) (rejecting the combatant activities defense), *aff'd* 502 F.3d 1331 (11th Cir. 2007); *reconsideration denied*, No. 605CV1002ORL28GJK, 2009 WL 10705563, at *2 (M.D. Fla. Nov. 6, 2009) (on reconsideration after discovery and after *Saleh* was decided, still rejecting the defense).

One court noted that "indoor latrine maintenance may not appear related to combatant activity," *Aiello v. Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 713 (S.D.N.Y. 2011), but concluded it was, holding that a contractor's faulty tiling was covered, *id.* In the process, it "respectfully disagree[d]," *id.* at 712, with another case *involving the same contractor's latrines*. There, the contractor's faulty electrical wiring was not covered by the defense. *Harris v. Kellogg, Brown & Root Servs., Inc.*, 618 F. Supp. 2d 400, 434 (W.D. Pa. 2009). The court later changed its mind about the faulty wiring, entering judgment for the contractor based on the combatant activities defense, *Harris v. Kellogg, Brown & Root Servs., Inc.*, 878 F. Supp. 2d 543, 597 (W.D. Pa. 2012). That ruling, in turn, was reversed on appeal. 724 F.3d 458 (3d Cir. 2013). One contractor, two latrines, three courts, four different opinions.

The reasons that seem dispositive for one court will hardly matter for another. The Third Circuit found it critical that "the relevant contracts and work orders did not prescribe how KBR was to perform the work," but rather "provided for general requirements or objectives and then gave KBR considerable discretion in deciding how to satisfy them." *Harris*, 724 F.3d at 481. From that,

it concluded that "[t]he military did not retain command authority over KBR's installation and maintenance of the pump." *Id.* In the *Aiello* case, however, the court agreed that "there is no proffered evidence that the challenged discretion exercised here, designing the urinals and maintaining the toilet facility, was exercised by the government." 751 F. Supp. 2d at 708 n.2. Nevertheless, it concluded that the claim "arises from combatant activity of the military, and K[BR] was integrated into activities over which the military retained command authority," which was enough. *Id.* at 715. Another court also held that the same contractor's negligent maintenance of an electrical generator in Camp Fallujah (causing another electrocution) was combatant activities, but this opinion had no discussion of the military's requirements or commands. *Taylor v. Kellogg Brown & Root Servs., Inc.*, No. CIV. 2:09CV341, 2010 WL 1707530, at *11 (E.D. Va. Apr. 16, 2010), *as amended* (Apr. 19, 2010), *aff'd in part, vacated in part*, 658 F.3d 402 (4th Cir. 2011).[6] Notably, all three courts claimed to be applying the D.C. Circuit's *Saleh* test.

II. The Political Branches Have Consistently Identified An Interest In Enhancing Control Over Government Contractors, Not Immunizing Them.

The combatant activities exception is not only inconsistent with *Boyle* and unprincipled in application but also at odds with Congress and the Executive Branch's

6. The panel splintered, with Judge Niemeyer joining both opinions (one affirming on lack of jurisdiction, and another on the combatant activities defense). 658 F.3d at 413. He believed this "provid[ed] alternative grounds for the judgment." *Id.*

longstanding policy goals for federal contractors. The net result of the defense is that government contractors get immunity for misconduct and injured servicemembers bear the costs.

The lower court's supposed federal interest in giving contractors' free rein contradicts more than a century of lessons from the False Claims Act and more recent investigations of oversight failures during the War on Terror. The political branches have consistently expressed a strong federal policy in favor of accountability for contractors and solicitude for servicemembers, the precise opposite of the supposed federal interest identified by the lower courts.

A. The History Of The False Claims Act Illustrates The Need For Private Suits To Deter Misconduct.

Under the lower court's rule, if a contractor sold shoddy equipment that injured soldiers, a private party—even one who discovered it in the field—could file a *qui tam* suit and recover 30% of the claim, but a vital federal interest in banishing legal duties from the battlefield would block any civil suits from the *soldiers* harmed by the equipment. That cannot be right.

The False Claims Act traces back to President Lincoln's effort to deter unscrupulous suppliers during the Civil War. *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 424 (2023). The law empowers "private parties" called "relators" to bring "*qui tam* actions" seeking to prove fraud against the United States and gain a bounty of up to 30% for doing so. *Id.* at 424–25.

Since the 1980s, Congress has periodically amended the False Claims Act, sometimes "increas[ing] the Act's civil penalties," *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 182 (2016), sometimes broadening its definitions, and sometimes rationalizing procedural requirements.

Congress has never provided a False Claims Act defense based on combatant activities or felt the need to keep private suits away from the battlefield. Rather, it "has let loose a posse of *ad hoc* deputies to uncover and prosecute frauds." *U.S. ex rel. Milam v. Univ. of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992). The False Claims Act illustrates that there is no federal interest in abolishing private litigation against contractors—even those in a theater of war.

It is illuminating to contrast Senator Grassley's view of private litigation with the *Saleh* majority's. The D.C. Circuit argued that because the government had "numerous criminal and contractual enforcement options available" but did not prosecute, that demonstrated that "allowance of these claims will potentially interfere with the federal government's authority to punish and deter misconduct by its own contractors." *Saleh*, 580 F.3d at 8. Senator Grassley has explained that the United States needs private citizen False Claims Act suits because "[t]hey get results. Without whistleblowers, the government simply does not have the capability to identify and prosecute the ever-expanding and creative schemes to bilk the taxpayers. That is not rhetoric. That is history." *Oversight of the False Claims Act*, 114th Cong. 11 H. No. 114-72 (Apr. 28, 2016) (statement of Sen. Grassley).

The lower courts' federal interests analysis relies upon the unsupported assumption that government enforcement and oversight mechanisms for government contractors are optimal *without* private enforcement, and that additional litigation would upset that balance. That assumption is contradicted by a century of False Claims Act history, and decades of more recent investigations into the wars in Iraq and Afghanistan.

B. Congress And The Executive Branch Have Repeatedly Remarked Upon Lax Oversight Of Government Contractors.

Far from embracing a policy of balancing government-contractor malfeasance against other goals, Congress and the Executive Branch have consistently expressed grave concerns about the government's difficulty in overseeing military contractors effectively. Official reports, hearings, and statements from the Department of Defense, the Department of Justice, and bipartisan commissions all confirm systemic shortcomings—ranging from understaffed oversight offices to inadequate enforcement mechanisms—that lead to negligence and pervasive waste, fraud, and abuse. That is why Congress has consistently invited private parties to assist in rooting out fraud and holding contractors accountable. There is no federal interest in giving contractors *greater* leeway to fail to perform their contract, which is what the combatant activities defense does.

1. The Government Struggles To Supervise Contractors.

The Government Accountability Office has warned of ineffective contractor oversight for decades, intensifying

during the War on Terror. "Too often, requirements are not clearly defined . . . and contractors are not adequately overseen."[7] The GAO deemed "DOD's contract management as a high-risk area." *Id.* GAO's findings were much the same in 2006.[8] In 2008, GAO investigations found that "the Army lacked an adequate acquisition workforce in Iraq to oversee billions of dollars for which they were responsible."[9] "Contractor employees were stationed in various locations around Iraq, with no assigned representative on site to monitor their work." *Id.* at 13. On some bases, "senior military commanders . . . had no source to draw upon to determine *how many* contractors were on each installation." *Id.* at 15 (emphasis added). GAO doubted the military's ability to ensure "that contractors are meeting their contract requirements." *Id.* at 17.

Following this drumbeat, in 2008, Congress authorized a multi-year, comprehensive examination of military contracting by the bipartisan Commission on Wartime

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7. U.S. Gen. Accounting Office, GAO-03-98, Performance and Accountability Series: Major Management Challenges and Program Risks: Dep't of Def. 62 (2003), https://www.gao.gov/assets/gao-03-98.pdf.

8. *E.g.*, U.S. Gen. Accounting Office, GAO-07-145, Military Operations: High-Level DOD Action Needed to Address Long-standing Problems with Management and Oversight of Contractors Supporting Deployed Forces (2006), https://www.gao.gov/assets/gao-07-145.pdf.

9. *Defense Management: DOD Needs to Reexamine Its Extensive Reliance on Contractors and Continue to Improve Management and Oversight: Hearing Before the Subcomm. on Readiness of the H. Comm. on Armed Services*, 110th Cong., at 12 (2008) (statement of David M. Walker, Comptroller General of the United States), https://www.gao.gov/assets/gao-08-572t.pdf.

Contracting in Iraq and Afghanistan.[10] Its unanimous final report revealed "[n]umerous . . . serious incidents of waste at every phase of the contingency acquisition process, from project selection and requirements definition, through solicitation and vetting, to management and oversight. Problems are widespread and endemic."[11] It called for "nothing less than sweeping reform." *Id.* at 13.

The Commission found that the military branches had "demonstrated their inability to manage large numbers of contractors effectively." *Id.* at 19; *see also id.* at 2 ("[T]he government also lacks the acquisition personnel and structures needed to manage and oversee an unprecedentedly large contractor force that at times has outnumbered troops in the field."). The "heavy reliance on contractors has overwhelmed the government's ability to conduct proper planning, management, and oversight of the contingency-contracting function." *Id.* at 3. "Without sufficient management and oversight, officials have been late to identify and correct poor contractor performance. Key deficiencies include . . . inadequate protection of property and personnel." *Id.* at 6.[12] The Commission's overall "conservative estimate of waste and fraud rang[ed] from **$31 billion** to **$60 billion**" between 2002 and 2011. *Id*. at 5 (emphasis added).

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10. *See* National Defense Authorization Act For Fiscal Year 2008, PL 110–181, January 28, 2008, 122 Stat 3 §841.

11. Comm'n on Wartime Contracting in Iraq and Afg., Transforming Wartime Contracting: Controlling Costs, Reducing Risks 6 (2011), https://apps.dtic.mil/sti/tr/pdf/ADA549381.pdf.

12. Notably, "in Iraq and Afghanistan . . . 66 percent of contract spending is for services," *id.* at 7, and Fluor—Respondent here—was the fifth largest contractor, *id.* at 25.

2. Congress And The Executive Have Agreed That Civil Suits Would Help.

The Commission recognized the challenge of "fostering a culture of contractor accountability," and suggested one cure was the "[e]nforcement of laws, regulations, and contract terms," which "serves two purposes: it addresses wasteful and fraudulent behavior, and it sets a standard for future performance." *Id.* at 10. The government needed "[m]ore aggressive use of enforcement techniques for contracting" and "[e]xpansion of investigative authority and jurisdiction" to "facilitate imposing effective accountability on contractors, especially foreign contractors and subcontractors who are difficult or impossible to subject to U.S. law." *Id.* at 11.

Though "[d]eterrence is especially critical," *id.* at 158, "[f]ew cases of wartime-contracting fraud are actually prosecuted" for reasons including "the difficulty of investigating them, and the cost of prosecution," *id.* at 92. Noting that under-enforcement, the Commission bemoaned that suits by "private parties to recover on tort claims arising out of conduct related to government contracts, are protracted and expensive for all parties involved," *id.* at 158, and sometimes claims "have gone unaddressed because the U.S. courts lack personal jurisdiction over the foreign [contractor] defendants," *id.*[13] It therefore suggested requiring that contractors consent to be sued in the United States, under state law. *Id.* at 160.

13. This issue was inspired by the facts of *Baragona v. Kuwait Gulf Link Transport Co.*, in which a Kuwaiti contractor negligently killed a soldier while driving a truck in Iraq, but defeated a suit based on lack of personal jurisdiction. 594 F.3d 852, 854 (11th Cir. 2010).

The Commission recognized that contractor oversight is about more than money: "lives will be lost because of waste and mismanagement." *Id.* at 13.

The Executive Branch embraced these findings. A representative of the DOJ told Congress while the Commission's Report was being drafted that it did not oppose a law requiring "contractors to consent to personal jurisdiction, thereby allowing U.S. courts to hear civil suits alleging . . . serious bodily injury to members of the U.S. armed forces, U.S. civilian employees, or U.S. citizens employed by contractors working under government contracts performed abroad," and that "the Department of Justice supports protecting the rights of individuals and their families to recover appropriate damages for injuries caused by the negligent acts of foreign contractors."[14] A DOD representative also agreed because "[t]he U.S. Government should not do business with companies that are not accountable for their actions."[15] In a hearing two years later (after the final report was issued) a procurement official again agreed, because "[a]ll contractors, including foreign contractors, that perform under U.S. Government contracts should be held legally accountable for wrongdoing in connection with their performance that results in injuries to U.S. military,

14. *Accountability for Foreign Contractors: Hearing Before the Ad Hoc Subcomm. on Contracting Oversight of the S. Comm. on Homeland Sec. & Governmental Affs.*, 111th Cong. 19, 20 (2009) (statement of Tony West, Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice), https://www.govinfo.gov/content/pkg/CHRG-111shrg56144/pdf/CHRG-111shrg56144.pdf

15. *Id.* at 21 (statement of Richard T. Ginman, Deputy Dir. for Program Acquisition and Contingency Contracting, Dep't of Def.).

civilian, and Government contractor personnel."[16] The Congressional Budget Office estimated that requiring consent to suit in U.S. Courts "would not have a significant cost."[17]

The contrast between these consistent findings and cases like *Saleh* and the opinion below is striking. No one suggested—either in the Commission Report or in the hearings—that tort law has no role on the battlefield, or that government contractors would be over-deterred by tort duties. While the D.C. Circuit inferred from the fact of no prosecution that any civil suit would "interfere" with the government's decision not to prosecute, *Saleh*, 580 F.3d at 8, the reality is that prosecution is costly, and the government is under-resourced. Those constraints are why Congress is eager for private plaintiffs to fill the gap when they can.

16. *The Final Report of the Comm'n on Wartime Contracting in Iraq and Afghanistan, Hearing Before the Subcommittee on Readiness and Management Support*, 112 Cong. 71 (2011) (statement of Frank Kendall, Acting Under Secretary of Defense for Acquisition, Technology, and Logistics), https://www.govinfo.gov/content/pkg/CHRG-112shrg72564/pdf/CHRG-112shrg72564.pdf.

17. Cong. Budget Off., Cost Estimate, S. 2782, 111th Cong. (2009–2010), https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/s27820.pdf.

III. The Combatant Activities Defense Harms Servicemembers, While The Political Branches Strongly Favor Them.

A. The Combatant Activities Defense Harms Servicemembers.

This case illustrates the most obvious way the combatant activities defense harms servicemembers—it defeats their claims, even where the government contractor was negligent according to a governmental investigation. Servicemembers are prepared to risk life and limb to fight for the nation, but we should not ask them to suffer without compensation from injuries caused by a contractor's defective missile,[18] negligent electrical repair,[19] or dozens of other injuries that courts have excused.

The combatant activities defense can greatly complicate and lengthen a servicemember's lawsuit whether he wins or loses. Defendants routinely raise it, and then often attempt interlocutory appeals if it fails. It took five years and two appeals to resolve the combatant activities defense in *Harris v. Kellogg Brown & Root Servs., Inc.*, 618 F.3d 398, 400 (3d Cir. 2010) (dismissing appeal); 724 F.3d 458 (3d Cir. 2013) (vacating and remanding). The *Al Shimari* case was appealed five times, with most of the appeals dismissed (after substantial

18. *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1487 (C.D. Cal. 1993).

19. *Taylor v. Kellogg Brown & Root Servs., Inc.*, No. CIV. 2:09CV341, 2010 WL 1707530, at *1 (E.D. Va. Apr. 16, 2010), as amended (Apr. 19, 2010).

delay) for lack of jurisdiction. *E.g.*, *Al Shimari v. CACI Premier Tech.*, Inc., 775 F. App'x 758, 760 (4th Cir. 2019).

Defendants can invoke the combatant activities defense in tandem with federal officer removal to yank cases out of state court—and earn an appeal of a remand order—even if there is no other basis for federal jurisdiction. *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 120 (2d Cir. 2021) (affirming denial of motion to remand based on the federal defense, even though it found the defense did not succeed on the merits); *Leli v. V2X, Inc.*, No. 122CV02427TWPTAB, 2023 WL 3476057, at *4 (S.D. Ind. May 16, 2023) ("combatant activities defense is colorable").

The upshot is delayed, expensive litigation for years on non-merits issues, solely benefiting contractors over servicemembers. This is unlike any system Congress would have set up.

B. Congress Consistently Favors Servicemembers, Which Should Inform The Federal Interests At Issue.

When identifying federal interests sufficient to ground federal common law, the interests Congress itself values are instructive. "The solicitude of Congress for veterans is of long standing." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (quoting *United States v. Oregon*, 366 U.S. 643, 647 (1961)). Few priorities are higher than favoring "those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

So consistent and longstanding is this principle that the Court has formalized it into a "rule that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). This canon is a sound means of divining congressional intent because of the bipartisan consensus in favor of servicemembers. Our Nation's laws "must be read with an eye friendly to those who dropped their affairs to answer their country's call." *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948).

Lower courts have based the combatant activities defense on the FTCA, but would be hard pressed to say that their interpretation of the statute is free of doubt. The plain text simply does not require (or even suggest) a combatant activities defense *for contractors*. On the text alone, the lower court's rule is indefensible. Once in the realm of uncertainty and policy, courts construe statutes to favor servicemembers because that furthers congressional intent.

This principle applies even more strongly in the treacherous waters of federal common law. The federal policy favoring servicemembers is no weaker merely because courts are *fashioning* the law in a common law manner, rather than *interpreting* the law. Or, at least, if courts ignore this precept, they should admit that they are defying Congress's consistent policy goal in favor of their own.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari.

Respectfully submitted,

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