No. 24-924

In the Supreme Court of the United States

WINSTON TYLER HENCELY, PETITIONER

v.

FLUOR CORPORATION, ET AL.

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

BRIEF OF RETIRED SENIOR MILITARY OFFICERS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici are retired senior military officers who have dedicated their professional lives to developing and maintaining U.S. military effectiveness. As part of their roles, amici have each had substantial experience working with military contractors in overseas combat zones, including in Afghanistan and Iraq, and possess a unique understanding of the critical role contractors play in fulfilling U.S. national security objectives, working in lockstep with the U.S. military. Amici share an ongoing interest in ensuring continued U.S. military effectiveness, and have a unique perspective on why courts should continue to afford their traditional deference to front-line military decisionmaking.[1]

Lieutenant General (ret.) Ricardo S. Sanchez retired from the U.S. Army in 2006 after 33 years of service, including tours in Korea, Panama, Germany, Kosovo, and the Middle East. Between September 1997 and May 1999, Lieutenant General Sanchez was the Director of Operations for U.S. Southern Command, which is responsible for all U.S. military operations in the Western Hemisphere, where he simultaneously served as Director of Strategy, Policy and Plans beginning in April 1998. From December 1999 to June 2000, General Sanchez served as Commanding General of Task Force Falcon (Multi-

[1] Under Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than amici or their counsel contributed any money to fund the brief's preparation or submission.

National Brigade (East)) at Camp Bondsteel, Kosovo. From June 2000 to June 2001, General Sanchez was the Director of Operations, U.S. Army Europe, and then assumed command of the First Armored Division. In March 2003, he deployed this division to Iraq during Operation Iraqi Freedom. In June 2003, General Sanchez assumed command of V Corps and Combined Joint Task Force 7 in Iraq, where he was responsible for all coalition military operations there after the fall of Saddam Hussein. In 2004, General Sanchez assumed command of the newly formed Multi-National Force – Iraq. An inherent duty in all of General Sanchez's assignments was assuming direct responsibility for the strategic, operational, and tactical supply-chain management and logistical support of the forces assigned.

Lieutenant General (ret.) John Vines served for 35 years in the U.S. Army, including as the Commander of the XVIII Airborne Corps, Combined Joint Task Force – 180 in Afghanistan, and Multi-National Corps – Iraq. In the latter position, Lieutenant General Vines commanded a coalition force of 178,000 soldiers from 27 nations during Operation Iraqi Freedom, and his responsibilities included overseeing the commitment of resources for operations and maintenance and other base support activities, as well as the use of contractors to provide such services. Prior to that, Lieutenant General Vines commanded the 82nd Airborne Division and Coalition Task Force – 82 in Afghanistan. There, he commanded the division's 18,000 soldiers and a force of 10,000 coalition troops.

Lieutenant Colonel (ret.) Damon Walsh retired from the U.S. Army in 2005 after 25 years of service. From 1992 to 2005, Lieutenant Colonel Walsh was a

member of the Army Acquisition Corps, where he served in a wide variety of contract- and program-management assignments, including as Defense Contract Management Agency (DCMA) Commander of Northern Iraq and Deputy Commander of DCMA-Iraq. Prior to his roles in the Acquisition Corps, Colonel Walsh served as an Infantry and Special Forces officer at multiple levels of command. He is a veteran of Operations Desert Shield/Desert Storm, Provide Comfort-I, Provide Comfort-II, Uphold Democracy (Haiti), and Iraqi Freedom.

INTRODUCTION AND SUMMARY OF ARGUMENT

This lawsuit seeks to hold a military contractor in a combat zone subject to state-law tort standards half a world away. If this lawsuit were directed against the United States military or its soldiers, there would be no dispute that the lawsuit should be dismissed as an improper invasion into military affairs. The only question is whether the result should be different when the defendant is a contractor that serves a military function, under military instructions, to advance military-dictated objectives. The answer should be self-evident: haling military contractors into state courts would be just as disruptive and prejudicial to military effectiveness as if the military itself or its personnel were subject to the same treatment. Any contrary result would elevate form over substance at the expense of U.S. national security.

The distinction that this case attempts to draw between the military and its contractors is divorced from reality. Since the end of the Cold War, this Nation's armed forces have been restructured to be heavily reliant on contractors to carry out their mission. Uniformed soldiers have been focused on the core warfighting competencies of the military, including unit warfighting logistics, while many of the higher-echelon support functions necessary to carry out the military's operations—which historically were performed by the military itself—have been outsourced to contractors. In recent protracted conflicts, including in Iraq and Afghanistan, the U.S. military simply could not have waged war without the

support of contractors, who often outnumbered the uniformed troops in theater.

Simply put, when American soldiers walk into battle, they are supported by contractors who carry out indispensable logistics functions on and off of the battlefield. Contractors build and maintain soldiers' bases, feed them, sanitize their drinking water, transport their fuel and ammo, dispose of their trash, and guard their barracks—to name just a few mission-critical support functions. As one logistics officer put it, "[a] day without contractors is like a day without food, fuel, water, ammo, clean latrines . . . well, suffice it to say, it's a lousy day." SFC Nicholas J. Conner, *Army Logistics Contractors on Combat Logistics Patrols*, Army Logistician, Sept.-Oct. 2007, at 21.

Because of the importance of contractors to sustaining operations and projecting military power, they have been integrated contractually and operationally within the military. Contractors' activities are performed pursuant to detailed military requirements, whether expressly detailed in their contracts or pursuant to military orders. Allowing state-law tort claims would upend that entire system. Contractors would need to make decisions not based on military instructions or orders, but based on what dozens of potentially applicable state (or even foreign) legal regimes might require. Given the stakes, contractors should not pause or hesitate to comply with military directives out of fear that they will run afoul of state law. And the specter of liability and large damages awards would inevitably lead to a blame game between contractors and the military. In military theaters, legal uncertainty and finger-pointing are an invitation to ruin.

Amici are in no way discounting or downplaying the harm suffered by Specialist Hencely, who by all indications has served honorably in defense of his country. But there are avenues for injured service members like Specialist Hencely to obtain rehabilitation and compensation without upending the critical relationship between the military and its contractors. As former leaders within the military, amici are deeply concerned about actions that would create logistical failures, which would in turn lead to increased casualties and reduced effectiveness in combat operations for over two million uniformed active-duty and reserve service members. With that objective in mind, amici respectfully urge the Court to affirm the decision below, and confirm that state civil courts have no place second-guessing the combat-zone decisions of the military or its contractors.

ARGUMENT

I. SUSTAINED MILITARY OPERATIONS IN OVERSEAS WAR ZONES ARE IMPOSSIBLE WITHOUT THE SUPPORT OF MILITARY CONTRACTORS.

At its core, this lawsuit seeks to draw a distinction between the conduct of the military and its contractors, in order to allow a lawsuit against the latter that would be categorically barred against the former. That distinction is illusory. As amici have experienced in their decades of service, contractors are an integral component of the U.S. Armed Forces,

without whom the military would be unable to carry out sustained overseas contingency operations.[2]

A. As A Result Of Decades Of U.S. National Security Policy, The U.S. Military Relies On Contractors To Perform Essential Noncombat Support Functions.

Private military contractors have been integral to U.S. national security since the Founding.[3] The power to enlist civilian contractors was included in the Constitution, which authorizes Congress to "grant letters of marque"—*i.e.*, to hire privateers. U.S. Const. art. I, § 8, cl. 11. Congress exercised this power to achieve the early Republic's military objectives, including during the War of 1812, when Congress licensed hundreds of privateers to supplement the U.S. Navy's twenty-two cruisers. Nicholas R. Parillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 Yale J.L. & Hum. 1, 3-4 (2007).

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[2] A "contingency operation" is a military operation in which members of the armed forces are involved in hostilities with an adversary. *See* 10 U.S.C. § 101(a)(13). A formal declaration of a "contingency operation" by the Secretary of Defense authorizes the use of many of the contracting relationships at issue in this case.

[3] *See* Janet A. McDonnell, *A History of Defense Contract Administration*, Defense Contract Management Agency (Mar. 5, 2020), https://www.dcma.mil/News/Article-View/Article/2100501/a-history-of-defense-contract-administration/ (providing an overview of defense contracting since the Revolutionary War); Charles R. Shrader, *Contractors on the Battlefield* 1-2 (1999) ("Since 1775, American armies have always been accompanied on the battlefield, both at home and abroad, by civilian contractors.").

While private contractors have been essential in nearly every major U.S. military conflict, that trend has accelerated significantly in the post-Cold War era. As one illustration, during World War II, there was one military contractor for every seven U.S. uniformed soldiers, and that ratio ticked up only slightly to 1:5 during the Vietnam War. *See* Kristine A. Huskey, *The American Way: Private Military Contractors & U.S. Law After 9/11* 6 (2010). In more recent conflicts, however, the ratio has equalized—and then reversed. By 2010, the ratio of contractors to uniformed soldiers was about 1:1 in Iraq and 1.42:1 in Afghanistan. *Id.* at 5-6. More recently, in 2020, that ratio soared to 3.7 contractors for every uniformed soldier in Afghanistan, Iraq, and Syria. *See* Mark F. Cancian, *U.S. Military Forces in FY 2021: The Last Year of Growth?* 113 (2021).

The increasing reliance on contractors in U.S. military operations is no accident, but instead reflects decades of deliberate policy choices. These policies have their roots in the transition of the military to an all-volunteer force following the Vietnam War. Though the U.S. Army relied on conscription to meet force requirements during and after World War II, that solution became increasingly infeasible by the 1970s. The unpopularity of the draft during the Vietnam War, combined with the military's diminishing confidence in conscript recruits, led the nation's political leaders to commit to an all-volunteer force. *See* Bernard Rostker, *I Want You! The Evolution of the All-Volunteer Force* 4 (2006).

After the last Americans were drafted in 1973, the military faced the challenge of how to achieve the objectives set by political leaders with diminished troop levels. This challenge grew significantly in the

post-Cold War era, when political leadership sought to capitalize on the "peace dividend" by significantly reducing the size and budget of the U.S. military. For example, between 1989 and 2000, the active duty force and budget declined by 40%, while national guard and reserve units were halved. Gordon L. Campbell, *Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend on Them* 2 (2000). All the while, demands on the U.S. military remained substantial. Between 1989 and 2000, the U.S. Army deployed troops 36 times, as compared to only 10 deployments during the entire Cold War. *Ibid.*

The solution to achieving U.S. military objectives with a smaller force was, in substantial part, using contractors to step into noncombat support roles. In a 1997 report, Secretary of Defense William S. Cohen explained that a "critical part" of the plan to reduce military headcount and spending was to "consider far more non-warfighting DoD support functions as candidates for outsourcing—inviting commercial companies to compete with the public sector to undertake certain support functions." William S. Cohen, *Report of the Quadrennial Defense Review* 54 (1997).

As a result of these policy changes, the military increasingly focused its uniformed personnel on core warfighting competencies, while outsourcing to contractors noncombat support functions. The amount of that outsourcing is extensive, given the high proportion of noncombat support functions required to engage in military operations. For example, during Operation Desert Storm, noncombat forces consisted of over 70% of American forces in theater. John J. McGrath, *The Other End of the*

Spear: The Tooth-to-Tail Ratio (T3R) in Modern Military Operations 67 (2007). At the time, policymakers envisioned that the government could enjoy the cost savings of a smaller military in peacetime, while relying on the surge capacity of private contractors to enable deployments if and when needed. *See* Marion E. Bowman, *Privatizing While Transforming*, Defense Horizons, July 2007, at 1, 2-3.

Whatever one's views on the desirability of outsourcing to contractors, the current reality is that contractors are thoroughly integrated within the infrastructure of the military, performing functions essential to deploying the military overseas. Indeed, during the peaks of the wars in Afghanistan and Iraq, for the military to have performed the tasks that were handled by contractors, it would have required enlisting between half to three-quarters of a million additional soldiers—increasing the size of the active-duty force at that time by over 50%—not to mention costing the taxpayer about 90% more for the same tasks.[4] Simply put, the U.S. military would be "unable to effectively execute many operations, particularly those that are large-scale and long-term in nature,

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[4] *See* Mark F. Cancian, *Contractors: The New Element of Military Force Structure*, Parameters, Autumn 2008, at 61, 72-73 (explaining that active-duty forces require a "rotation base" of one to two soldiers at home for every soldier deployed in the field); Heidi M. Peters, Cong. Rsch. Serv., R44116, *Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007-2020* 6-7, 12-13 (2021) (estimating peak deployments of around 280,000 DoD-funded contractors in Iraq and Afghanistan); Defense Manpower Data Center, *Active Duty Military Strength by Service: Historical Reports – FY 1994-2012*, https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports (last visited Sept. 16, 2025), (calculating 1,424,317 active-duty soldiers as of 2011).

without extensive operational contract support." Moshe Schwartz & Jennifer Church, Cong. Rsch. Serv., R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* 2 (2013).

Reflecting this reality, the Department of Defense now counts contractors part of the "total force," alongside uniformed active duty, reserve, and national guard personnel, and Defense Department civil servants. *See* U.S. Dep't of Def., DoD Instruction 3020.41, *Operational Contract Support Outside the United States* 5, 69 (2024). That is not just a statistic—it is operational practice. In Iraq and Afghanistan, contractors were "embedded with military logistics operations at every operating base 24 hours a day, 7 days a week," operating "side by side with [uniformed] personnel on each of those bases."[5] It was typical for contractors to be apprised of operational issues at every level of the chain of command.[6] As one logistics officer put it, consistent with amici's own experience: "Contractors are part of our formation. They live, eat, work, pray, sweat, and sacrifice side-by-side with our Soldiers everyday." Conner, Army Logistician, Sept.-Oct. 2007 at 21.

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[5] MAJ Walter Llamas, *Contingency Contracting and LOGCAP Support in MND-B, Iraq*, Army Logistician, Sept.-Oct. 2007, at 28.

[6] *E.g.*, CPT George Plys, *Contracted Transportation*, Army Logistician, Sept.-Oct. 2007, at 20 (describing twice-daily meetings between battalion command and contractor leaders "to discuss the mission requirements for the next 24 to 96 hours").

B. Contractors Provide Support Services That Are Indispensable To The Military's Overseas Contingency Operations.

To enable U.S. combat operations overseas, contractors fulfill many key support functions, as illustrated by the services they provided during the wars in Iraq and Afghanistan. During those conflicts, at their peaks, over 117,000 DoD-funded contractors supported U.S. military operations in Afghanistan, and over 160,000 DoD-funded contractors were on the ground supporting the U.S. military in Iraq.[7]

Logistics and Base Support. During the conflicts in Iraq and Afghanistan, a majority of contractors were engaged in essential base-support and logistics functions.[8] In performing those roles, contractors work with the military to construct, operate, and sustain bases, from large complexes hosting thousands of personnel to small forward operating bases and outposts. Depending on the size and purpose of the base, contractors provide and maintain billeting and facilities management, dining facilities and food service, electrical power generation and distribution, water production and purification, wastewater removal and sanitation, showers and laundry, solid-waste disposal, passenger and cargo transportation, and amenities like gyms.

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[7] Peters 6-7, 12-13. These numbers do not account for contractors funded by other U.S. agencies (including the State Department and USAID), or contractors that supported the deployments from the United States.

[8] Moshe Schwartz & Joyprada Swain, Cong. Rsch. Serv., R40764, *Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis* 15 (2011); Cancian, *U.S. Military Forces in FY 2021* 114.

Providing these services is no simple task. The largest U.S. military bases in Iraq and Afghanistan housed upwards of 30,000 to 40,000 personnel, meaning that a contractor "essentially builds a small town from scratch." Kelly Haertjens, Army Sustainment Command Public Affairs, *LOGCAP: The No Fail Mission Lending Support Globally*, U.S. Army (June 2, 2023), https://www.army.mil/article/267262/logcap_the_no_fail_mission_lending_support_globally. And the sheer scale of the services provided was breathtaking. Under the program in place between 2001 to 2011, contractors in Iraq cleaned 78.9 million bags of laundry, prepared 1.1 billion meals, and handled 449.2 million pounds of mail.[9] Further, keeping these bases supplied required a constant stream of contractor-operated convoys. These convoys, conducted alongside military personnel, were the lifeblood of all military operations in the country. Simply put, the size and scale of U.S. military deployments in Iraq and Afghanistan would have been impossible without contractor support.

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[9] Army Sustainment Command Public Affairs, *LOGCAP III Task Order Continues Support in Iraq,* U.S. Army (May 5, 2020), https://www.army.mil/article/38607/logcap_iii_task_order_continues_support_in_iraq; *see* LTC Tommie J. Lucius & LTC Mike Riley, *The LOGCAP III to LOGCAP IV Transition in Northern Afghanistan: Contract Services Phase-in and Phase-Out on a Grand Scale*, Defense AT&L, Jan.-Feb. 2011, at 21, 22 ("In the northern half of Afghanistan, LOGCAP provides operations and maintenance to over 1,500 non-tactical vehicles, 1,800 generators, 7,500 facilities, and over 40 dining facilities providing over 4 million meals per month. Additionally, LOGCAP provides, on a monthly basis, over 42 million gallons of water and 19 million gallons of fuel, and processes over 150,000 bags of laundry.").

Security. The next most common support function that contractors provide is security. In Iraq and Afghanistan, about 16% of contractors fell into this category. Moshe Schwartz & Joyprada Swain, Cong. Rsch. Serv., R40764, *Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis* 15 (2011); Cancian, *U.S. Military Forces in FY 2021* 114 (2021). Most security contractors are guards at bases, responsible for screening personnel who enter and exit the facilities and protecting against external threats. The remaining proportion of security contractors provide protective services outside of bases, such as escorting high-value individuals or convoys.

Interpreters. Depending on the location of a deployment, interpreters can be critical to operations. Particularly in conflicts like the ones in Iraq and Afghanistan, the military requires substantial numbers of individuals with expertise in the local language to be able to communicate with the populace. While the military has expanded its linguistic capabilities in recent years, any deployment in a non-English or non-Spanish-speaking country is likely to require substantial interpreter support, as was the case in Iraq and Afghanistan.

Other. The lion's share of contractors fall into the categories discussed above, but they also fulfill a range of other functions, including communications and IT support, training, and medical, dental, and social services. Schwartz & Swain 15; Cancian, *U.S. Military Forces in FY 2021* 114. Although each of these subcategories involves smaller numbers of contractors, they are no less crucial to U.S. military operations.

In addition, while amici are primarily focused on contractors that operate in theater specifically to enable military operations, the categories discussed above do not encompass the entire field of contractor support services. For example, tens of thousands of contractors were employed in Iraq and Afghanistan by USAID or the State Department to work on reconstruction projects, ranging from rebuilding roads to schools to oil fields, which was an important part of the U.S. military's counter-insurgency strategy. Mark F. Cancian, *Contractors: The New Element of Military Force Structure*, Parameters, Autumn 2008, at 61, 62-63. And back in the United States, contractors have at times supplied nearly half of the headcount in the intelligence community, performing tasks that include military-intelligence collection, analysis, and IT functions. Huskey 11-12.

None of this is to say that the delivery of services by contractors has been perfect. As with the military itself, contractors are not immune to inefficiency and waste. The military must act as a responsible steward of the public purse when awarding contracts, and be vigilant to ensure that services are being provided as promised. Amici applaud many of the steps the U.S. military has taken to implement reforms in contingency operations contracting, although there remains much room for improvement. *See, e.g.*, U.S. Gov't Accountability Off., GAO-21-344, *Contingency Contracting: DOD Has Taken Steps to Address Commission Recommendations, but Should Better Document Progress and Improve Contract Data* (2021). But as we prepare for the next conflict, there is no question that contractors have been, and will continue to be, an indispensable part of the U.S. military response.

C. The Military Exerts Both Contractual And Operational Control Over Contractor Activities, But Contractors Must Also Exercise Discretion To Achieve Military Objectives.

The overarching framework governing the military-contractor relationship is grounded in contract. In performing their day-to-day duties, contractors are governed by well-defined parameters set by the military, carefully calibrated to balance costs, risks, and military objectives. Moreover, although they are not formally part of the military chain of command, contractors are obligated under their contracts to follow the military's instructions. For example, in Iraq and Afghanistan, the relevant contracts required contractors to follow direction from military commanders or their representatives. Operating under military instructions, however, does not mean hand-holding. While contractors and military personnel plan and execute in close coordination, contractors are trained professionals that are expected to exercise discretion and initiative to fill in gaps in military orders and instructions to achieve military objectives.

Functionally, the primary mechanism for establishing the contractual relationship between contractors and the Army in overseas contingency operations is the Logistics Civil Augmentation Program (LOGCAP).[10] Under LOGCAP, depending

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[10] The Air Force and Navy have comparable programs called the Air Force Contract Augmentation Program (AFCAP), and the Navy Global Contingency Construction Contract (GCCC) and Global Contingency Services Contract (GCSC). The Army also

on the exact time period, Army Sustainment Command awards a contract to one or more contractors to be the "go-to" service provider for the Army during wartime. During the time amici served in uniform in Iraq and Afghanistan, the service provider under LOGCAP III (2001-2011) was Kellogg, Brown & Root (KBR).[11] Later, under LOGCAP IV (2007-present),[12] there were three contractors: KBR, DynCorp, and respondent Fluor Corporation.[13]

The exact process for LOGCAP contracting has evolved over time and differs by location, including based on the urgency of the contractor services required. But by way of example, the process for engaging contractor services under LOGCAP generally involves the following steps. A military "customer" will first make a request to contractors typically through a team of LOGCAP planners from Army Materiel Command. Those planners then work

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engages with contractors through various mechanisms beyond LOGCAP, but LOGCAP was by far the most significant vehicle for Army logistics contracting in Iraq and Afghanistan.

[11] Valerie Bailey Grasso, Cong. Rsch. Serv., RL33834, *Defense Logistical Support Contracts in Iraq and Afghanistan: Issues for Congress* 8 (2010).

[12] LOGCAP IV was originally intended to expire in 2018 but has been extended. The Army has also stood up LOGCAP V as a replacement to LOGCAP IV. *See* Army Sustainment Command Public Affairs, *LOGCAP V Performance Contractors Selected*, U.S. Army (Apr. 15, 2019), https://www.army.mil/article/220353/logcap_v_performance_contractors_selected#:~:text=The%20regional%20task%20order%20is,TOP%20STORIES.

[13] Army Sustainment Command Public Affairs, *ASC Selects LOGCAP IV Contractors*, U.S. Army (June 28, 2007), https://www.army.mil/article/3836/asc_selects_logcap_iv_contractors; Grasso 9-10.

collaboratively with the LOGCAP contractor to draft a Statement of Work (SOW) for the relevant "task order," specifying the methods of performance the contractor is authorized to use—which are themselves developed and refined through collaboration with the contractor. The draft SOW then undergoes review by multiple government entities that ultimately sign off on the directives given to the contractor.

Following agreement on a draft SOW, the contractor prepares a Rough Order of Magnitude (ROM), which sets out in detail the methods and costs for achieving the task order. Military logistics experts work iteratively with the contractor on a ROM, modifying it as necessary to adhere to the military's instructions. Once the ROM is approved, contracting officers prepare and approve a Letter of Technical Direction (LOTD) to the contractor, both to ensure adequate funds are available under the contract, and to ensure the work called for under the LOTD is within the scope of the contract and in compliance with its terms and conditions.

Once a LOGCAP task order is in place, it is primarily administered on a day-to-day basis through the Defense Contract Management Agency (DCMA). The DCMA's military staff are trained government-contracts professionals, responsible for monitoring and evaluating contract performance, auditing contract compliance, and interpreting contracts on behalf of the government. As part of their duties, DCMA officers are on-site (or travel to) every base to ensure that contractors are complying with the military's requirements, their contractual commitments, and the mission's needs. DCMA officers have the authority to investigate any alleged noncompliance, and to direct contractors to correct

any identified issues. Depending on the nature of the issues identified, issues could be escalated through the DCMA command structure all the way through leadership at Army Sustainment Command. In addition to overseeing contractor compliance, contracting officers are charged with ensuring that the government adheres to its own obligations under the contract, including that real-time instructions to the contractor may not exceed the scope of the contract or violate its terms and conditions.

Aside from their contractual mandates, contractors are also subject to the military's operational and tactical control. Contractors are subject to a wide variety of orders from the military, ranging from general standing orders issued to all personnel in theater, to tactical commands. As one example, during overseas contingency operations, the military exerts total operational and physical control over physical bases and sites. The military dictates the layout of the camp to meet its tactical, operational, and security needs, including where and how contractors perform their functions. The military also maintains surveillance of camps to ensure operational awareness of what soldiers and contractors are doing.

The operational collaboration between contractors and the military is not a one-way street; contractors are also important partners in the military's operational planning. When contractors perform their responsibilities under task orders, they communicate with military officers on a daily basis to ensure that contractors are aligned with military objectives. Contractors are also frequently briefed on the military's operational and tactical plans at the highest levels of military command, including in update meetings, movement-control meetings, and

prioritization meetings. And depending on the nature of the operation and the contractor's involvement, contractors routinely provide information and advice that shapes the military's decisionmaking on the ground.

Although contractors and the military stay closely aligned by detailing methods and objectives in contracts and orders, it is impracticable to micromanage every action and every contingency—particularly in a combat zone. When a specific course of action is not spelled out, contractors, like uniformed soliders, must exercise judgment and discretion to fulfill the commander's intent. The facts here are a case in point. At Bagram Airfield, respondent Fluor Corporation operated "within strictures set by the military based on its priorities and risk assessments," including rules on the hiring of Afghan nationals to advance the military's counterinsurgency strategy. Pet. App. 27. But as a matter of necessity, Fluor "possessed some discretion when operating within this framework," such as overseeing access to tools and managing its employees' performance. *Id.* at 25-26. This type of relationship, where a contractor is counted on to exercise discretion within a framework set by the U.S. military, is foundational in every military combat zone.

II. STATE TORT LAWS SHOULD NOT APPLY TO MILITARY CONTRACTOR ACTIVITIES IN WAR ZONES.

As the Court has recognized, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national

security affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988). That hesitation applies doubly to state courts, given "the supremacy of federal power in the area of military affairs." *Perpich* v. *Department of Def.*, 496 U.S. 334, 351 (1990). Even where Congress has opened the door to lawsuits against the federal government, it has taken care to ensure that the waiver of sovereign immunity does not apply to core military affairs, including "any claim arising out of combatant activities." 28 U.S.C. § 2680(j). "The purpose underlying" this exception "is to foreclose state regulation of the military's battlefield conduct and decisions," *Harris* v. *Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 480 (3d Cir. 2013), "free[ing] military commanders from the doubts and uncertainty inherent in potential subjection to civil suit," *Saleh* v. *Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009).

The question here is whether the rules against interference in military affairs on the battlefield should be set aside when a contractor is involved. They should not. As respondents explain (at 13-33), the laws and traditions of this country place contractors within the ambit of military forces that are immune from second-guessing under state tort laws. Although that is enough to resolve the case, amici wish to ensure that the Court is apprised of the negative impact on military effectiveness that would follow from accepting petitioner's position. Carving contractors out of the immunities historically enjoyed by the military would create unacceptable risks in the execution and effectiveness of military operations, which is not a gamble worth taking when the stakes are this high.

A. Applying State Law Tort Liability To Contractors Would Undermine Military Effectiveness.

As explained earlier, trying to draw a distinction between the military and its contractors would be an artificial exercise. Contractors perform historically military functions, at the direction of the military, in pursuit of military objectives. From a practical perspective, holding contractors liable under state law makes no more sense than allowing military logistics officers to be the targets of lawsuits. "Indeed, these cases are really indirect challenges to the actions of the U.S. military." *Saleh*, 580 F.3d at 7.

The principal problem with imposing tort law liability against contractors is that it interferes with the chain of command on the battlefield. Contractors are subject to detailed and deliberate sets of rules that govern their conduct on the battlefield, ranging from their initial contracts, task orders, and SOWs, to general orders and on-the-ground instructions from the military. These clear sets of expectations ensure that contractors are aligned with the military on precisely how tactical, operational, and strategic objectives are to be achieved. Faced with the specter of tort liability, however, a contractor would have to balance battlefield needs as dictated by military command against what a judge or jury might say years after the fact.

Add to that the uncertainty of applying 50 different competing sets of state laws. This case is a perfect example. Petitioner is suing under South Carolina tort law, but respondent Fluor Corporation would have had no way of knowing that at the time it was managing personnel on Bagram Airfield, let alone at

the time it bid to participate in LOGCAP IV. If petitioner were to prevail, the military chain of command would not be competing only with South Carolina law—it would be competing with the laws of every State, and perhaps even the laws of foreign nations. *See, e.g.*, *Al-Quraishi* v. *Nakhla*, 728 F. Supp. 2d 702, 763 (D. Md. 2010) (finding that "Iraqi law applies to all of Plaintiffs' state law claims" against military contractor). That is a recipe for chaos.

To make matters worse, even if a contractor could guess what jurisdiction's laws might apply, it is far from clear that would provide any real insight into the applicable standards of conduct. Tort claims often turn on the "reasonableness" of a defendant's conduct, or the "foreseeability" of a plaintiff's injury, which are capacious terms that are developed through case law. *See* Restatement (Second) of Torts § 285 cmts. d & e (Am. L. Inst. 1965); Restatement (Third) of Torts: Liability for Phys. & Emot. Harm § 29 cmt. j (Am. L. Inst. 2010). Unsurprisingly, cases are few and far between assessing the reasonableness of conduct in a combat zone from a tort-law perspective, making it even more challenging to guess how a civilian judge or jury might review battlefield decisions. Given all of the resulting uncertainty, it is not difficult to predict how contractors would respond.

Fewer contractors likely would be willing to absorb the risk that they would be subject to potentially devastating judgments from civil courts sitting in review years after the fact. There are already a relatively small number of specialized firms able to provide the services required under LOGCAP and similar programs, and so any measures that further reduce the roster of willing contractors would have a

substantial impact on operational capacity. But at a minimum, even if contractors were willing to take on the risk of tort exposure, they would invariably pass on that cost to their military customers.

Amici are deeply familiar with the resource constraints in a war zone, which require tradeoffs between cost and the safety, effectiveness, and welfare of soldiers. Anything that drives up the cost for contractors—and in turn the military—could mean one fewer guard protecting a barracks, one fewer supply convoy to a remote forward operating base, or one fewer repair to an armored vehicle. Commanders in the field are required to operate with significant resource constraints, and amici are sensitive to not making their jobs even harder, potentially depriving them of the full scope of services needed to carry out their missions. Simply put, petitioner's position will impose sizeable costs, maybe even massive ones, and those costs will be borne by this Nation's military and fighting men and women.

Even setting aside costs, the risk of tort liability would skew contractor behavior in a way that has no place on the battlefield. Military operations, especially in combat zones, are inherently risky. Every day in combat zones, commanders make decisions on the basis of incomplete and imperfect information that put their units and their missions at risk. If contractors begin weighing military directives against the risk of civil liability, it is inevitable that in some situations they will prioritize avoiding the latter over carrying out the former. The last thing a commander needs is for a contractor performing a mission-essential function to decline to follow the commander's guidance because of concern over facing tort liability in civil court after the fact.

For example, one of the most essential functions performed by contractors is building up and sustaining combat power through the transportation of fuel and ammunition to forward logistics areas. In Iraq and Afghanistan, moving fuel and ammunition to combat forces required constant convoy missions, which were heavily reliant on contractors. If this function were disrupted for any reason, the military's ability to generate and sustain combat power in theater would be severely degraded. This function is also inherently risky for a number of reasons, including the threat of enemy action.[14] If contractors were to push back against or refuse to perform military guidance based on their own internal litigation-risk assessments, the result would be disruption and delay in the ability to conduct combat operations, placing soldiers at higher risk. Such disruption would be inevitable when, as this case shows, plaintiffs' injuries can be tragic and the threat of liability will be severe. In short, the prospect of tort liability would degrade the ability of the military to build and sustain combat power, and military effectiveness would suffer.

It would suffer the most in situations where, in carrying out the instructions in their contracts, third parties must exercise any judgment or discretion. At that point, plaintiffs will always be able to claim that the complained-of action was not "the military's *own* conduct or decision." Pet. Br. 48 (quoting *Badilla* v. *Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 128 (2d Cir. 2021)). As amici well know, timidity does

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[14] *See, e.g.*, Conner, Army Logistician, Sept.-Oct. 2007 at 21 (discussing IED attack on contractor logistics convoy).

not usually result in successful military operations. Faced with the substantial risk of tort liability, contractors will be dissuaded from exercising exactly the type of judgment and discretion that may be necessary to achieve valid military objectives. For example, in Iraq, LOGCAP contractors dispatched small teams of specialized maintenance personnel to repair mission-critical equipment where front-line units lacked the relevant expertise. MAJ Walter Llamas, *Contingency Contracting and LOGCAP Support in MND-B, Iraq*, Army Logistician, Sept.-Oct. 2007, at 28, 29. In that situation, the military personnel receiving contractor support rely on the contractor's subject-matter expertise and judgment to undertake the necessary repairs, and are in no position to dictate their every action. Any standard that exposes contractors to liability unless their every action is "specifically authorized or directed" by the military, *Badilla*, 8 F.4th at 128, would render this arrangement unworkable.

That is all bad enough before an incident occurs. But once something happens and a contractor faces potential liability, it would have an incentive to protect its own interests, potentially at odds with the military and the mission. For example, a contractor might inspect and gather evidence from "the scene of the allegedly tortuous act" (which may not be feasible in a war zone), or conduct witness interviews, including of "military personnel." *Aiello* v. *Kellogg, Brown & Root Servs., Inc.*, 751 F. Supp. 2d 698, 711 (S.D.N.Y. 2011). To put it mildly, "these activities would pose a significant risk of interfering with the military's combat mission." *Ibid.*

Ultimately, this lawsuit seeks to introduce "a wholly novel element into military decisionmaking,

one that has never before in our country's history been deployed so pervasively in a theatre of armed combat"—namely, the consideration "of the costs and consequences of protracted tort litigation." *Al Shimari* v. *CACI Int'l, Inc.*, 679 F.3d 205, 226 (4th Cir. 2012) (Wilkinson J., dissenting). Contractors would be confronted with potentially massive liability, which would necessarily change the cost calculus in the military-contractor relationship, leading to a real impact on military effectiveness. Given the stakes, the United States has itself consistently taken the position that "[t]he military's effectiveness would be degraded if its contractors were subject to the tort law of multiple States for actions occurring in the course of performing their contractual duties arising out of combat operations."[15] Based on amici's experience, those concerns are well founded and counsel against the legal sea change that petitioner seeks.

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[15] Brief for the United States as Amicus Curiae at 1-2, *KBR* v. *Metzgar*, 574 U.S. 1120 (2015) (No. 13-1241); Brief for the United States as Amicus Curiae at 13-14, *Kellogg Brown & Root Services* v. *Harris*, 574 U.S. 1120 (2015) (No. 13-817) (same); *see* Brief for the United States as Amicus Curiae at 13, *Carmichael* v. *Kellogg, Brown & Root Service, Inc.*, 561 U.S. 1025 (2010) (No. 09-683) ("Whatever the defense asserted, the decisions addressing them—and the various statutes and doctrines in this area more generally—reflect an understandable discomfort with readily subjecting the actions of government contractors who provide services to the U.S. military in war zones to private civil suits under state tort law.").

B. Federal Law Provides Oversight Of Military Contractors And Redress For Wounded Soldiers Without The Need To Insert State Tort Laws.

Amici want to be clear that contractors are not above the law, and wounded warriors like Specialist Hencely deserve redress for their injuries. But there are already avenues to accomplish those ends.

As to contractor liability, the military can and does enforce its contractual rights to remedy contractor wrongdoing. As explained earlier, *see* pp. 18-19, *supra*, it is a routine aspect of military contract management to assess and audit contractor performance, and to raise issues of noncompliance at the appropriate levels. In the case of unremedied substantial violations, the military can also seek redress in court, as provided for in the relevant contracts.

Moreover, for serious malfeasance, individual contractors are subject to liability under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802(a)(10), and the Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. § 3261(a)(1). Under the UCMJ, Congress has given military commanders ample tools to directly address criminality and other wrongdoing by contractors in combat zones. And in addition to military law, under the MEJA, contractors can be subjected to civilian criminal law for any "conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 3261(a)(1). Those dual mechanisms

provide both military commanders and civilian authorities with the means to respond to serious wrongdoing by contractors, without improperly interfering with the ability of the Armed Forces to conduct combat operations.

As to Specialist Hencely, military service members harmed by contractor wrongdoing do not lack recourse for their injuries. Service members are entitled to disability benefits through the Department of Veterans Affairs for "personal injury suffered or disease contracted in line of duty." 38 U.S.C. § 1131. And the Defense Base Act provides workers' compensation benefits to contractors injured while supporting American combatant activities overseas. 42 U.S.C. § 1651. To be sure, the delivery of benefits for veterans is far from perfect, but structurally this arrangement protects the strong federal interest in keeping tort law out of the realm of military affairs, while offering medical care and compensation for wounded soldiers. Simply put, this scheme leaves no vacuum for state tort law to fill.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted.

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