No. 24-924

IN THE

Supreme Court of the United States

WINSTON TYLER HENCELY,

Petitioner,

v.

FLUOR CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation ("ALF") is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

SUMMARY OF ARGUMENT

The issue before this Court is whether the Federal Tort Claims Act ("FTCA") combatant activities exception, 28 U.S.C. § 2680(j), can preempt state-law claims against federal government contractors in suits arising out of the combatant activities of the U.S. military. In the frequently cited majority opinion in

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[1] No counsel for a party authored this brief in whole or part, and no party, counsel for a part, or person other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

Saleh v. Titan Corp., 580 F.3d 1, 6 (D.C. Cir. 2009), D.C. Circuit Judge Laurence Silberman explained that "the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield, both to preempt state or foreign regulation of federal wartime conduct and to free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit." *Id.* at 7. As a result, the court in *Saleh* held that "plaintiffs' common law tort claims are controlled by *Boyle* [*v. United Technologies Corp.*, 487 U.S. 500, 504 (1988)]." *Id.* at 5 (holding that state-law tort claims against a military contractor were preempted because they conflicted with "uniquely federal interests.").

In this case, as with other battlefield contractor cases where plaintiffs bring third-party tort suits against civilian support contractors that are embedded in the combatant activities of the U.S. military, there are significant national defense interests at stake. The U.S. military relies on these battlefield contractors to provide mission-critical services in some of the world's most dangerous locations.

Subjecting U.S. military support contractors to the substantial expense and burden of litigating state tort suits for combat-zone injuries allegedly related to their contractual performance would discourage them from participating in such work. *See In re KBR, Inc. Burn Pit Litig.*, 744 F.3d 326, 333 (4th Cir. 2014) (noting the district court's "concern about unleashing the full fury of unlimited discovery on government

contractors operating in war zones") (internal quotation marks omitted); *Martin v. Halliburton*, 618 F.3d 476, 488 (5th Cir. 2010) ("Because the basis for many [battlefield contractor] defenses is a respect for the interests of the Government in military matters, district courts should take care to develop and resolve such defenses at an early stage while avoiding, to the extent possible, any interference with military prerogatives.").

Allowing such litigation to proceed would be particularly unjust where, as here, a petitioner claims that a battlefield contractor failed to adhere to the U.S. military's contractual requirements. Those requirements for war-zone support services, if performed directly by the military, would be insulated from judicial review under well-established laws and doctrines.

Moreover, such state-law tort actions also conflict with Congress' statutory benefits for injured service members. Through the Veterans Benefits Act ("VBA" or "Act"), 38 U.S.C. §§ 1301, *et seq*., Congress has enacted a comprehensive compensation system that provides a no-fault, uniform remedy for injured service members. Permitting state-law tort claims to proceed against battlefield contractors standing in the shoes of the military would disrupt Congress' policy judgments.

ARGUMENT

The Court Should Hold That Federal Law Precludes State-Law Tort Suits Against U.S. Military Support Contractors

A. Uniquely federal interests compel dismissal of third-party tort suits that conflict with the U.S. military's war-zone operations and established government procedures

1. The U.S. military relies heavily on civilian contractors to perform work in dangerous locations. *See* Moshe Schwartz & Jennifer Church, Cong. Research Serv., R43074, *Dep't of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* (2013), https://goo.gl/kizy5C (indicating that contractor personnel accounted for at least half of the U.S. total force in Iraq and Afghanistan following the September 11 terrorist attacks). The U.S. military's reliance on contractors for a broad range of technological, logistical, and other types of services throughout the world is essential in the 21st-Century. *See Filarsky v. Delia,* 566 U.S. 377, 390 (2012) (given the Government's "particular need for specialized knowledge or expertise," the Government must often "look outside its permanent work force to secure the services of private individuals").

As the Fifth Circuit remarked in *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008), a case

which involved an Iraqi insurgent attack on a U.S. military fuel convoy driven by contractor personnel, "the military finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission." Similarly, in the *Al Shimari* Iraqi detainee litigation before the Fourth Circuit, Judge Wilkinson dissented from the en banc majority's denial of collateral order appellate jurisdiction, stating that "[a]part from being necessary, the military's partnership with private enterprise has salutary aspects as well." *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 240 (4th Cir. 2012). "These partnerships . . . allow the military and its contractors to pool their respective expertise . . . to bear on the mission at hand . . . [and] . . . will become only more necessary as warfare becomes more technologically demanding." *Id.*

Military publications also focus on the importance of contractors to military operations. For example, the Joint Chiefs of Staff advise that the "[p]rudent, risk-based use of globally available contracted supplies and services in support of deployed forces can be a significant force multiplier." Joint Chiefs of Staff, Joint Pub. 4-10, Operational Contract Support, at I-1 (4 Mar. 2019), https://perma.cc/ZA53-3938. Specifically, the Joint Chiefs of Staff recognize four essential ways in which civilian contractors support military operations. *Id.* *First*, by relying on contractors to provide logistical support in the places the military is deploying, the military reduces its need to deploy its own troops in logistical or support roles.

Id. *Second*, and relatedly, contractors assist in receiving troops into a theater. *Id.* *Third*, by taking on "certain support-related" functions within a combat theater, contractors also free up "military forces for higher-priority missions." *Id.* *Finally*, the availability of contractor support allows the military to meet sudden requirements for large numbers of certain support-related functions such as "translators, explosive ordinance disposal, [or] port operations." *Id.*

2. Third-party tort suits against battlefield contractors jeopardize the U.S. military's ability to obtain essential war-zone support services. As contractors support the U.S. military in many of the world's most dangerous locations, personal injury suits against battlefield contractors are not simply ordinary tort actions by one party against another. *See Saleh*, 580 F.3d at 7 ("[A]ll of the traditional rationales for *tort* law—deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors—are singularly out of place in combat situations, where risk-taking is the rule."); *see also Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1289 (11th Cir. 2009) (personal injury suit involving contractor-driven military supply convoy rollover accident on Iraqi road dismissed where the "circumstances differ dramatically from driving on an interstate highway or county road in the United States . . . The question here is . . . what a reasonable driver in a combat zone, subject to military regulations and orders, would do") (internal quotation marks omitted);

Lane, 529 F.3d at 558 ("acknowledge[ing] that the Plaintiffs' claims are set against the backdrop of United States military action in Iraq").

Several federal courts of appeals have recognized that the U.S. military's ability to attract, manage, and rely upon battlefield contractors to provide essential support services can be obstructed by actual or threatened private-party litigation for personal injuries allegedly arising out of contractors' performance of war-zone missions. For example, in *Saleh*, which like *Al Shimari* alleged U.S. military contractor abuse of Iraqi detainees during Operation Iraqi Freedom, Judge Silberman explained in the majority opinion that "[a]llowance of such suits will surely hamper military flexibility and cost-effectiveness, as contractors may prove reluctant to expose their employees to litigation-prone combat situations." 580 F.3d at 8. If confronted with the threat of tort litigation for working side-by-side with military personnel, support contractors—or their employees—would be reluctant, and possibly unwilling, to accept work in combat-zones.

Even those contractors that are amenable to performing such work under the threat of state-tort liability may stop to question, or decline to implement, military directives, thereby preventing the accomplishment of mission-critical tasks. In Judge Wilkinson's *Al Shimari* dissent, which Circuit Judges Niemeyer and Shedd joined, he expressed concern that "facilitation of tort remedies [in battlefield contractor suits] chills the willingness of both military

contractors and the government to contract." 679 F.3d at 243; *cf. Filarsky v. Delia*, 566 U.S. at 391 (concluding that private contractors that "could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity . . . might think twice before accepting a government assignment"). Civilian contractors could then decide to avoid the risk of "holding the bag." That would then defeat the key purpose of utilizing support contractors that are chosen to "'perform selected services in wartime to augment Army forces' and 'release military units for other missions or fill shortfalls.'" *In re KBR*, 744 F.3d at 332 (quoting Army Regulation 700-137 (Dec. 1985) at 1-1).

3. In several certiorari-stage amicus briefs submitted to this Court, the United States, through the Office of the Solicitor General, has emphasized the detrimental effects of battlefield contractor tort litigation on national defense interests. For example, when KBR sought certiorari following the Fourth Circuit's initial decision in the *Burn Pit* litigation, the Solicitor General, at this Court's invitation, submitted a brief explaining that there are "significant national interests at stake" in state-law tort litigation against war-zone support contractors. Br. for the United States as Amicus Curiae at 14, *KBR, Inc. v. Metzgar*, No. 13-1241 (U.S. Dec. 16, 2014). The Solicitor General explained 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," and that "expanded liability would ultimately be passed on to the United States, as contractors would demand greater compensation in light of their increased liability risks." *Id.* at 14, 21. The Solicitor General also expressed concern that

> allowing state-law claims against battlefield contractors can impose enormous litigation burdens on the armed forces. Plaintiffs who bring claims against military contractors (as well as contractors defending against such lawsuits) are likely to seek to interview, depose, or subpoena for trial testimony senior policymakers, military commanders, contracting officers, and others, and to demand discovery of military records.

Id. at 21. In another Supreme Court amicus brief, the Solicitor General indicated that "[t]he United States has significant interests in ensuring that sensitive military judgments are not subject to judicial second- guessing, in protecting soldiers and civilians from wartime injuries, and in making sure contractors are available and willing to provide the military with vital combat-related services." Br. for the United States as Amicus Curiae at 9, *Carmichael v. Kellogg Brown & Root Servs., Inc.*, No. 09-683 (U.S. May 28, 2010).

In short, there are numerous reasons why private-party personal injury suits against the U.S. military's war-zone contractors significantly undermine the

military's mission, and in turn, national defense interests.

4. The Department of Defense ("DoD") has well-established procedures for evaluating battlefield contractors' performance, and when necessary, has the ability to take remedial action. Third-party allegations of contractor noncompliance do not permit a tort plaintiff to bypass the exclusive relationship between the federal government and its contractors. Where

> contractors did depart from the military's instructions, that would allow the *government* to pursue a *breach of contract* claim . . . *the plaintiffs were in no sense a party to the* [contract]. . . *any breach of contract does not begin to confer a cause of action in tort* on the part of [plaintiffs] in a theatre of armed conflict.

Al Shimari, 679 F.3d at 227 (en banc) (Wilkinson, J., dissenting) (emphasis added).

Specifically, there is a well-defined process under the Contract Disputes Act ("CDA"), 41 U.S.C. § 7101 *et. seq.*, to address any contractual issues or disputes arising between the Federal Government and its contractors. *See Cecile Indus., Inc. v. Cheney*, 995 F.2d 1052, 1055 (Fed. Cir. 1993) ("The CDA clearly and comprehensively defines the procedures for all contractual disputes between the United States and private contractors.").

The CDA and the Federal Acquisition Regulation, particularly 48 C.F.R. § 33.2 (Disputes and Appeals), establish the procedures for how contractual disputes between contractors and the federal government are adjudicated. The government can assert a monetary claim against the contractor for breach of contract and proceed through the CDA process. *See, e.g., Raytheon Co. v. United States*, 747 F.3d 1341, 1354 (Fed. Cir. 2014). The government also can terminate the contractor for default for failure to comply with the contract. *See* 48 C.F.R. § 49.402-1(b); *see, e.g., Johnson & Gordon Sec., Inc. v. General Servs. Admin.*, 857 F.2d 1435, 1437 (Fed. Cir. 1988). Here, as acknowledged by petitioner, the government did not terminate Fluor's contract. Pet. Br. at 9. For noncompliant work, the government also has the ability to withhold or recoup payments. *See, e.g., Allied Signal v. United States*, 941 F.2d 1194, 1198 (Fed. Cir. 1991) (government's withholding of progress payments on multi-year fixed price contract was an act of contract administration).

This Court should not allow personal injury plaintiffs—who are not parties to DoD contracts—to usurp Executive Branch prerogatives by alleging that battlefield contractors have violated contractual duties. Doing so would render these well-established systems meaningless.

B. State-law tort suits brought by or on behalf of injured service members against U.S. military contractors conflict with federal statutes and well-established doctrines

1. The U.S. military cannot be sued in matters like this, as it would violate a host of long-standing laws and doctrines designed to prevent interference with federal interests on the battlefield. *See, e.g.,* 28 U.S.C. § 2680(j); 38 U.S.C. §§ 1301, *et seq*.; *Feres v. United States*, 340 U.S. 135 (1950). These principles focus on preventing judicial intervention into military affairs and providing uniform compensation to service members. It is critical that they apply not only to the military, but also to contractors performing support services for the U.S. military on the battlefield. Exposing contractors to tort liability, while the U.S. military is immune from suit, would deter contractors from participating in battlefield work or otherwise increase costs for the military to perform such missions.

Permitting state tort claims against a government contractor for combat-zone injuries would amount to an end-run around these well-established laws and doctrines. The military offers "generous statutory disability and death benefits," which are meant to preempt the need to litigate tort claims. *United States v. Johnson,* 481 U.S. 681, 689 (1987). A state-law tort claim "necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." *Id.* at 691.

Subjecting the military's tactical decisions to judicial review is necessarily prejudicial to military morale, good order, and discipline. *Id.*

Each of these three rationales counsels against permitting state tort claims by service members against contractors performing or supporting combatant activities. Instead of offering service members and surviving families a streamlined system to provide uniform compensation for injuries or deaths, petitioner here seeks compensation that would be anything but uniform and predictable. There are many scenarios where allowing state-law tort suits against battlefield contractors to proceed could leave similarly situated service members with vastly different outcomes. Consider an incident where two convoy vehicles are attacked by insurgents in a combat zone and the only difference between the two vehicles is that one vehicle had a military driver and the other vehicle was driven by a civilian contractor. The injured service members in the first vehicle would be barred from suit regardless of any allegations of driver error, whereas service members in the same unit could sue the civilian driver of vehicle two for negligence. Such a result demonstrates that these principles require dismissal of third-party tort suits against private contractors standing in the shoes of the U.S. military.

2. These state-law tort actions also conflict with Congress' statutory benefits for injured service members under the VBA. *See* 38 U.S.C. §§ 1301, *et seq*. Congress designed the VBA as a uniform,

exclusive no-fault compensation system for service-connected injuries. As this Court has noted, Congress adopted this "statutory 'no fault' compensation system which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government." *Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671 (1977). This system is "a substitute for tort liability." *Id.*

Allowing such tort claims to proceed against military contractors would circumvent that policy judgment and disrupt this carefully chosen construct. It would also allow for large damages awards for some service members, undermining uniformity, and create inconsistent rules across the battlefield.

CONCLUSION

The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

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