Case No. 09-1335

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Subail Nazim Abdullah AL SHIMARI,
Taha Yaseen Arraq RASHID,
Sa'ad Hamza Handtoosh AL-ZUBA'E,
and Salah Hasan Nusaif Jasim AL-ELJAILI,

Appellees,

v.

CACI INTERNATIONAL INC and CACI PREMIER TECHNOLOGY, INC.,

Appellants.

On Appeal From The United States District Court
For The Eastern District of Virginia, Alexandria Division
Case No. 1:08-cv-00827
The Honorable Gerald Bruce Lee, United States District Judge

AMICUS CURIAE BRIEF OF KELLOGG BROWN & ROOT SERVICES, INC., IN SUPPORT OF APPELLANTS AND REVERSAL

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure and Fourth Circuit LAR 26.1(b), the undersigned counsel certifies as follows:

1. Kellogg Brown & Root Services, Inc., is wholly owned by KBR, Inc.

2. KBR, Inc. has a 10% or greater ownership interest in Kellogg Brown & Root Services, Inc.

3. KBR, Inc. is the parent corporation to Kellogg Brown & Root Services, Inc.

/s/
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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Kellogg Brown & Root Services, Inc. ("KBRSI") is the largest civilian provider of logistical support services to the U.S. Army in the Middle East and Central Asia. Under KBRSI's Logistics Civil Augmentation Program ("LOGCAP") contract, the Department of Defense relies upon tens of thousands of KBRSI personnel to provide a wide range of services to support our nation's overseas military missions. In particular, since September 11, 2001, the Defense Department has extensively relied upon KBRSI to augment the operational strength of the Army in the battlefields of Iraq and Afghanistan. KBRSI's diverse logistical support services, all of which are performed at the U.S. military's direction and under its control, include, for example, transporting military jet fuel and other critical supplies by driving vehicles in U.S. Army planned, commanded, and executed convoy missions; constructing and maintaining U.S. military base camp facilities, including providing electrical utility services and managing dining facilities; and providing waste management services.

KBRSI has a substantial interest in the outcome of this appeal. Like Appellants, KBRSI provides contract services and support to the U.S. military in the Middle East. KBRSI is currently a defendant in multiple state tort law-based claims relating to those services, including an ongoing multi-district litigation ("MDL") in the U.S. District Court for the District of Maryland and an action

recently dismissed by the Eastern District of Virginia.[1] The ongoing MDL proceeding involves 45 separate state tort lawsuits arising out of KBRSI's waste management and disposal services for the military in Iraq and Afghanistan. KBRSI moved to dismiss the cases based on some of the immunities-from-suit at issue here. In opposition, the MDL plaintiffs (who are represented by the same counsel as Appellees) relied on, *inter alia*, the district court's decision at issue here. In addition to these cases within this Circuit, KBRSI has been and continues to be involved in numerous other state tort actions that arise out of its military support services and raise issues identical to those in this appeal.[2]

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[1] *See In re: KBR., Inc., Burn Pit Litigation*, No. 8:09-MD-02083-RWT (D. Md. consolidated Oct. 16, 2009); *Taylor v. Kellogg Brown & Root Services, Inc.*, No. 2:09-cv-00341 (E.D. Va. Apr. 16, 2010) (dismissing negligence claims against KBRSI based on the political question doctrine and the combatant activities exception to the Federal Tort Claims Act). In *Taylor*, Judge Doumar expressly rejected the analysis of the district court below in favor of the D.C. Circuit's rationale in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), which was issued after the district court's decision.

[2] *See Carmichael v. Kellogg Brown & Root Services, Inc.*, 572 F.3d 1271 (11th Cir. 2009), *petition for cert. filed* (U.S. Dec. 9, 2009) (No. 09-683); *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008); *Fisher v. Halliburton*, No. 10-20202 (5th Cir. 2010); *Martin v. Halliburton*, No. 09-20441, 2010 WL 1038565 (5th Cir. Mar. 23, 2010); *Harris v. Kellogg Brown & Root Services, Inc.*, 618 F. Supp. 2d 400 (W.D. Penn. 2009), *appeal docketed*, No. 09-2325 (3d Cir. May 7, 2009); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006); *Aiello v. Kellogg Brown & Root Services, Inc.*, No. 1:09-cv-07908 (S.D.N.Y. filed Sept. 19, 2009).

KBRSI has a particular interest in the Court's decision here because this appeal involves issues of first impression for this Circuit. Specifically, the Court will examine whether, and to what extent, contractors are constitutionally and/or statutorily immune from state tort suits arising from their performance of services for the U.S. military in ultra-hazardous locations such as the battlefields of Iraq. These issues transcend traditional state tort law concepts applied by courts in routine, garden-variety tort cases, and instead implicate profound and uniquely federal interests. The Court's resolution of these issues will influence the courts in this Circuit and elsewhere as they address an increasing number of "contractor on the battlefield" lawsuits. These issues are exceptionally important not only to private litigants, but also to the defense, national security, and foreign policy interests of the United States.[3]

KBRSI's *amicus* brief is intended to illuminate the importance of the Court's decision here within the context of the recent proliferation of cases involving state tort claims against U.S. military support contractors. Although the jurisprudence addressing this specific scenario is still developing, the Court should recognize that the panoply of interrelated immunities-from-suit that can apply to preclude these

[3] The Supreme Court has recognized the Government's interest in battlefield contractor tort litigation by requesting that the Solicitor General submit a brief expressing the views of the United States in *Carmichael v. Kellogg Brown & Root Servs., Inc.*, No. 09-683 (Mar. 8, 2010).

state tort claims are not novel theories. Rather, these immunities-from-suit are rooted in well established federal sovereign immunity and separation of powers interests, and they rest on a common set of unassailable core principles.

Here, the district court fundamentally misconstrued these core principles and established an analytical framework that entirely disregards the paramount federal interests at issue in this "battlefield contractor" case. The court's analysis is inconsistent with Supreme Court precedent recognizing the unique federal interests raised by tort claims against federal contractors. The decision also conflicts with recent federal appellate decisions addressing factually indistinguishable circumstances and dismissing state tort claims against military contractors.

This Court should reject the district court's analysis and reaffirm the core principles and vital federal and separation-of-powers interests that underlie and support the immunities-from-suit asserted by Appellants in this "battlefield contractor" case. The Court's resolution of this appeal should recognize that these immunities-from-suit preclude courts faced with "battlefield contractor" cases from scrutinizing or second-guessing sensitive U.S. military policies, judgments, and decisions relating to the conduct of an ongoing war.

ARGUMENT

I. THIS APPEAL INVOLVES THREE INTERRELATED CONSTITUTIONAL AND/OR STATUTORY IMMUNITIES-FROM-SUIT APPLICABLE TO CIVILIAN CONTRACTORS THAT SUPPORT THE U.S. MILITARY'S COMBAT-RELATED MISSIONS

Appellants seek dismissal of Appellees' state tort law claims based on three related constitutional and statutory legal doctrines: (1) the political question doctrine, *see Baker v. Carr*, 369 U.S. 186 (1962); (2) the combatant activities exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(j), *see Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *rehearing en banc denied*, No. 08-7001 (Jan. 24, 2010); and (3) derivative sovereign immunity, *see Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (4th Cir. 1996).[4]

Although these are separate and distinct legal doctrines, they are bound together by certain core principles. Three recent federal appellate decisions illustrate that the immunities-from-suit at issue here rest on a common legal foundation. *See Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271 (11th Cir. 2009) (holding that the political question doctrine bars adjudication of a personal injury suit involving a U.S. military convoy "rollover" accident in Iraq); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (dismissing state tort law

[4] Appellants also raise defenses based on the law of military occupation and failure to allege well-pleaded facts. This *amicus* brief does not address those two defenses.

claims against two military contractors, including Appellants, based on the combatant activities exception to the FTCA); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196 (5th Cir. 2009) (dismissing state tort suit against contractor performing "public works" functions under derivative sovereign immunity principles).

These recent appellate decisions confirm three well settled principles of law that form an analytical starting point for cases involving state tort claims against battlefield contractors. First, these decisions are premised on the axiom that discretionary acts of the United States cannot be challenged by state tort law principles. *See* 28 U.S.C. § 2680(a) (waiver of sovereign immunity does not extend to claims based on exercise of discretionary functions); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). This is particularly true for discretionary acts of the United States that occur during combat-related activities or in active war theaters. *See* 28 U.S.C. § 2680(j) (waiver of sovereign immunity does not extend to claims arising out of combatant activities); *Saleh,* 580 F.3d at 11; *Tozer v. LTV Corp.,* 792 F.2d 403, 406 (4th Cir. 1986).[5]

[5] *See also Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486, 1493 (C.D. Cal. 1993) ("the objectives of tort law -- deterrence, punishment, and providing a remedy to innocent victims -- are inconsistent with the government's interests in combat, and thus tort law cannot be applied to government actions in combat"); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1350 (11th Cir. 2007) ("[a]pplying a [state] tort law standard of care to sensitive military judgments is

(footnote continued on next page)

Second, these cases reinforce the long-standing principle that discretionary decisions of the U.S. military are often implicated in state tort suits brought against military contractors who implement those decisions. *Accord Boyle v. United Technologies Corp.*, 487 U.S. 500, 511 (1988) (finding that state tort suits against defense contractors would lead to inappropriate "second-guessing" of discretionary judgments of the United States military); *McMahon*, 502 F.3d at 1340 ("service-related tort suits against private contractors may sometimes threaten interference with sensitive military decisions"); *Taylor*, No. 2:09-cv-00341 (E.D. Va. Apr. 16, 2010) ("It is simply not possible to view this case in a vacuum, nor is it possible to resolve this case without questioning 'actual, sensitive judgments made by the military.'") (quoting *McMahon*, 502 F.3d at 1362). These cases recognize that such discretionary decisions and federal interests must be protected against the vagaries of state tort law standards, regardless of whether the defendant is the United States or its contractor who acted at the direction of the military. *See Saleh*, 580 F.3d at 8 ("[W]hether the defendant is the military itself or its contractor, the prospect of military personnel being haled into lengthy and distracting court or deposition proceedings is the same . . . requiring extensive judicial probing of the

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problematic" because "courts lack the capacity to determine the proper tradeoff between military effectiveness and the risk of harm to the soldier").

government's wartime policies").[6] By seeking to impose state tort liability on "contractors integrated within military forces on the battlefield," such lawsuits necessarily will "interfere[] with the foreign relations of the United States as well as the President's war making authority." *Saleh,* 580 F.3d at 13, n.8.

Finally, these cases recognize that the paramount federal interest in the orderly and effective disposition of military strategies, tactics, and logistics—whether those efforts are conducted by the military directly or through the efforts of private contractors acting under the direction of the military—supersedes any state interests in applying state tort law standards of care to the conduct of the military and its contractors in the performance of battlefield activities. *See id.*, 580 F.3d at 7 (finding that tort principles have no place on the battlefield and that military commanders and contractors should be free from the "doubts and uncertainty inherent in potential subjection to civil suit"); *see also Tozer,* F.2d at 406 ("there is a danger in transporting the rubric of [state] tort law . . . to a military setting."); *Tiffany v. United States*, 931 F.2d 271, 278 (4th Cir. 1991) ("The

[6] *Cf. Tozer,* 792 F.2d at 406 (dismissing litigation against government contractor in part because trial of the case would "require members of the Armed Services to testify in court as to each other's decisions and actions") (quoting *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977)); *Whitaker v. Kellogg Brown & Root, Inc.,* 444 F. Supp. 2d 1277, 1281 (M.D. Ga. 2006) ("[T]he [military's] use of civilian contractors to accomplish the military objective does not lessen the deference due to the political branches.").

elementary canons of judicial caution are not limited to actions taken during actual wartime, but may extend to many other aspects of military operations.").

In this appeal, the Court's analysis should be guided by these three core principles. Viewing Appellees' claims and Appellants' defenses within this framework will help to readily identify the fundamental errors in the district court's decision (more fully discussed *infra* at Section III) and ensure that the critical interests underlying these immunities-from-suit are not offended.

II. THE IMMUNITIES-FROM-SUIT PRESENTED BY THIS APPEAL ARE EXCEPTIONALLY IMPORTANT TO THE DEFENSE, NATIONAL SECURITY, AND FOREIGN POLICY INTERESTS OF THE UNITED STATES

The Court should take into account the profound and unique interests of the United States in cases like this one, involving state tort claims against battlefield contractors. Whether, and to what extent, military support contractors are constitutionally and/or statutorily immune from state tort suits arising from performance of their support services in ultra-hazardous battlefields in Iraq and Afghanistan is exceptionally important to the United States. That is because the U.S. military has a continuing, and indeed increasing, need for military support contractors in connection with combat, peacekeeping, and reconstruction activities. *See*, *e.g.*, *Lane*, 529 F.3d at 554 ("[T]he military finds the use of civilian contractors in support roles to be an *essential component* of a successful war-time mission.") (emphasis added); *Carmichael*, 572 F.3d at 1276 n.2 ("LOGCAP allows

'civilian contractors to perform selected services in wartime to augment Army forces,' thereby 'releas[ing] military units for other missions or [to] fill shortfalls.'") (quoting U.S. Army Reg. 700-137); Warfighter Support—Continued Actions Needed by DOD to Improve and Institutionalize Contractor Support in Contingency Operations, GAO-10-551T (Mar. 17, 2010).

The Court's decision here will directly affect the military's ability to defend our nation by marshaling available resources to carry out combat operations as it sees fit—*i.e.*, by choosing to rely extensively upon civilian contractor personnel, who work shoulder-to-shoulder with U.S. soldiers in foreign war zones and provide critical logistical support which must be unconstrained by the vagaries of state tort law. Subjecting military support contractors to the financial and other burdens of state tort suits arising from performance of their overseas contractual services very well may deter or otherwise prevent their participation in future (and even ongoing) high-risk ventures with the military.

For example, if suits like this are allowed to proliferate and proceed to trial, the cost of battlefield contractor liability insurance, to the extent such insurance coverage remains available, will skyrocket. And if such litigation is allowed to interfere with the price or availability of liability insurance coverage, the litigation costs passed through to the Federal Government may become prohibitive, potentially impacting the Pentagon's ability to continue its policy of relying upon

military support contractors as "force multipliers." *See* 48 C.F.R. § 52.228-7 (Federal Acquisition Regulation requiring expeditionary, stability, and reconstruction contractors to purchase government-approved liability insurance; requiring the Government to reimburse "reasonable" insurance premiums; and making the Government the contractor's indemnitor under certain circumstances); *see also Boyle*, 487 U.S. at 511-12 ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself . . . ."). Insofar as litigation costs and/or damages awards are contractually passed through to, or indemnified by, the United States, the Government would be burdened with *precisely* the types of costs that it would be immune from incurring were it the named defendant in such liability suits. *Cf. Saleh*, 580 F.3d at 7 ("Indeed, these cases are really indirect challenges to the actions of the U.S. military (direct challenges obviously are precluded by sovereign immunity).").

The Government also would have to incur an additional type of potentially prohibitive cost if military support contractors can be sued in connection with carrying out their contractual obligations in support of the nation's defense, national security, and foreign policy interests. At trial, regardless of plaintiffs' attempts to prosecute battlefield contractor litigation as if they were garden-variety tort suits, military support contractors would be forced to *defend* against state-law

liability by: (1) establishing the Government's sole, concurrent, or supervening culpability for plaintiffs' injuries and deaths; (2) questioning the wisdom and highlighting the consequences of the very types of sensitive military policies, judgments, and decisions that Appellants contend, and other circuits have held, are insulated from judicial scrutiny, *see Carmichael*, 572 F.3d at 1286; and, (3) haling current and former Defense Department officials and military officers into courts around the country and requiring them to testify against each other.

III. THIS COURT SHOULD RESOLVE THIS APPEAL IN A WAY THAT PRESERVES THE SEPARATION OF POWERS AND PROTECTS THE INTERESTS OF THE UNITED STATES IN THIS AND OTHER LITIGATION AGAINST MILITARY SUPPORT CONTRACTORS

The district court fundamentally mischaracterized and disregarded the important federal interests described above. As a result, the district court's formulation and analysis of the asserted immunities-from-suit rested on unsound basic principles. In rejecting the district court's analysis of the political question doctrine, the combatant activities exception to the FTCA, and derivative sovereign immunity, this Court should reaffirm the core principles and federal interests underlying these defenses and clarify their application to cases involving state tort claims against battlefield contractors.

A. The Court Should Confirm That the Political Question Doctrine Bars State Tort Suits Against Military Support Contractors Where Adjudication Would Require Judicial Reexamination of Military Polices, Judgments, or Decisions

The district court's analysis of the political question doctrine rests on the plainly erroneous assertion that "civil tort claims against private actors for damages do not interfere with separation of powers between the executive branch and the judiciary." *Al Shimari v. CACI Int'l Inc.*, No. 1:08-cv-827, 2009 U.S. Dist. LEXIS 29995, at *3 (E.D. Va. Mar. 18, 2009). The court's broad holding is simply wrong, and it has been expressly rejected by numerous courts. *See*, *e.g.*, *Carmichael*, 572 F.3d at 1282-83 ("Because the circumstances under which the accident took place were so thoroughly pervaded by military judgments and decisions, it would be impossible to make any determination regarding [KBRSI's] negligence without bringing those essential military judgments and decisions under searching judicial scrutiny. Yet it is precisely this kind of scrutiny that the political question doctrine forbids."); *Taylor*, No. 2:09-cv-00341 (Apr. 16, 2010) ("If the tort suit 'would require reexamination of many sensitive judgments and decisions entrusted to the military in a time of war,' it must be dismissed on political question grounds.") (quoting *Carmichael*, 572 F.3d at 1281); *see also Saleh*, 580 F.3d at 11 (explaining "the Constitution specifically commits the Nation's war powers to the federal government").

The district court compounded this fundamental mischaracterization of the political question doctrine with numerous other errors in the application of the doctrine. For example, the district court erroneously focused solely on Appellees' *claims* and failed to recognize the implications of potential *defenses* that would require judicial scrutiny of military policies and decisions. *Compare Al Shimari*, 2009 U.S. Dist. LEXIS 29995, at *18 ("The Amended Complaint does not attack government policies.") *with Lane*, 529 F.3d at 565 ("We must look beyond the complaint, considering how the Plaintiffs might prove their claims *and* how KBR would defend.") *and Carmichael* (explaining that political question doctrine bars suit because, *inter alia*, calling into question "military actions and decisions . . . would be part of KBR's defense if the case were to go forward").

As numerous courts have recognized, consideration of likely defenses is particularly important when evaluating whether the political question doctrine applies because it is the issue of *causation*—and, in particular, the potential need to analyze whether military decisions were contributing causal factors—that frequently renders these types of claims nonjusticiable. *See Carmichael*, 572 F.3d at 1286 ("[I]n litigating the suit KBR would inevitably (and not without a substantial evidential foundation) try to show that unsound military judgments and policies surrounding every aspect of the May 22 convoy were either supervening or concurrent causes of the accident. Litigation involving these issues is un-

deniably foreclosed by the political question doctrine"); *Lane*, 529 F.3d at 561 ("If we must examine the Army's contribution to causation, 'political question' will loom large."). Here, the district court readily acknowledged that Appellees "may have" suffered "from the negligence of the U.S. military forces," but the court failed to consider whether such "negligence" by the military would become an issue in the case, and whether judicial review of this wartime conduct *by the military* would violate the political question doctrine. *See Al Shimari*, 2009 U.S. Dist. LEXIS 29995, at *62-63.

Finally, to the extent the district court's decision relies on the proposition that actions seeking only monetary damages do not raise political questions, that reliance is misplaced. Although a request for damages versus a claim for injunctive relief may affect the political question analysis, there are numerous decisions from courts across the country finding political questions and dismissing cases for money damages against private party defendants. *See*, *e.g.*, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (damages suit implicating the political branches' decision to grant military aid to Israel); *Whitaker v. Kellogg Brown & Root, Inc.*, 444 F. Supp. 2d 1277 (M.D. Ga. 2006) (damages suit involving U.S. soldier killed in vehicular accident while providing armed escort to contractor-driven military supply convoy in Iraq); *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006) (damages suit involving

contractor employee killed by suicide bomber who attacked contractor-operated military dining facility in Iraq); *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993) (damages suit involving military personnel killed in "friendly fire" accident during Operation Desert Storm in Iraq); *Zuckerbraun v. Gen. Dynamics Corp.*, 755 F. Supp. 1134 (D. Conn. 1990), *aff'd*, 935 F.2d 544 (2d Cir. 1991) (affirmed on other grounds without reaching political question issue) (damages suit involving U.S. Navy sailors killed by Iraqi attack); *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989) (damages suit involving Iranian civilians killed in shoot down of airplane in Persian Gulf).

B. The Court Should Acknowledge the Unique Federal Interest in Eliminating the Concept of State Tort Law From Foreign Battlefields

The district court's analysis of the combatant activities exception to the FTCA disregards the "unique federal interest" involved when military support contractors are sued under state tort theories. As an initial matter, the court erroneously framed the issue as whether there is a federal interest in "the enforcement of laws against torture." *Al Shimari*, 2009 U.S. Dist. LEXIS 29995, at *57. This mischaracterization directly conflicts with the Supreme Court's decision in *Boyle*, which explains that it is the *imposition of liability* on government contractors *alone* that gives rise to a "unique federal interest"—not whether the United States condones illegal conduct. 487 U.S. at 505, n.1 (explaining "the

liability of independent contractors performing work for the Federal Government . . . is an area of uniquely federal interest").

The district court adopted an overly narrow interpretation of the combatant activities exception that directly conflicts with the text of the provision and the D.C. Circuit's subsequent decision in *Saleh*, decided on identical facts. As the D.C. Circuit explained, the combatant activities exception embodies a broad, "general conflict preemption," akin to field preemption. *Saleh,* 580 F.3d at 6-7 ("it casts an immunity net over any claim that *arises* out of combat activities" (emphasis in original)). Thus, in order to find a "significant conflict with a unique federal interest," a court need not identify a "discrete conflict" between state and federal duties; rather, a conflict arises *simply from the imposition of tort law itself*. *Id.* at 7. As the D.C. Circuit held, "it is the imposition *per se* of the state or foreign tort law that conflicts with the FTCA's policy of eliminating tort concepts from the battlefield." *Id*.

In direct conflict with *Saleh*, the district court adopted "a more limited definition" of "combatant activities" that erroneously requires "actual physical force." *See Al Shimari*, 2009 U.S. Dist. LEXIS 29995, at *50-51. This Court should reject this overly narrow definition for reasons set forth by the D.C. Circuit in *Saleh*. Moreover, other courts that have interpreted the combatant activities exception have confirmed that "combatant activities" include "not only physical

violence, but activities both necessary to and in direct connection with actual hostilities." *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948); *accord Koohi v. United States*, 976 F.2d 1328, 1333 n.5 (9th Cir. 1992).

In fact, the Eastern District of Virginia's opinion in *Taylor*, decided after *Saleh*, expressly rejected the district court's overly narrow definition of "combatant activities" in favor of the D.C. Circuit's broader construction. *See Taylor*, No. 2:09-cv-00341 (E.D. Va. Apr. 16, 2010) (holding that the district court's "narrow reading[] conflict[s] with the D.C. Circuit's recent opinion in *Saleh* and with the text of § 2680(j)"). In *Taylor*, the district court correctly held that "restricting the combatant activities exception to actual combat would require an unduly narrow reading of the scope of Section 2680(j) of the FTCA." *Id.*[7]

Finally, contrary to the implication in the district court's decision, the broad policy goals underlying the combatant activities exception are not contingent upon whether the alleged injuries were suffered by enemy forces. *See Al Shimari*, 2009 U.S. Dist. LEXIS 29995, at *51-52. Rather, the policies of the combatant activities

[7] The broad construction of "combatant activities" applied in *Johnson*, *Koohi*, and *Taylor* is consistent with the federal government's War Powers, which without question are not limited to actual physical violence. *See Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (quoting Charles E. Hughes, War Powers Under the Constitution, 42 A.B.A. Rep. 232, 238 (1917)) (internal citations omitted) ("The war power of the national government is 'the power to wage war successfully.' It extends to every matter and activity so related to war as substantially to affect its conduct and progress.").

exception are designed to result in "*the elimination of tort from the battlefield*." *Saleh*, 580 F.3d at 7 (emphasis added); *see also Bentzlin*, 833 F. Supp. at 1494 ("Where a deliberate choice has been made to tolerate tragedy for some higher purpose, civilian state law standards cannot be applied to those who suffer the tragedies contemplated in war."). The identify of a particular plaintiff or defendant has no bearing on this broad policy goal. *See Saleh*, 480 F.3d at 7 (explaining policies underlying statute "are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control"); *Bentzlin*, 833 F. Supp. at 1494 (explaining "the federal interest in maintaining the military dignity of casualties suffered by soldiers fighting a war on behalf of the United States would be harmed by allowing soldiers killed or injured in war to bring suits against military contractors").

C. The Court Should Reaffirm That Derivative Sovereign Immunity Extends To Military Support Contractors

The district court erroneously constructed the legal framework applicable to a claim of derivative sovereign immunity. Specifically, the court held that Appellants' claim of derivative sovereign immunity somehow hinged on the truth of Appellees' allegations of contractual noncompliance. *Al Shimari*, 2009 U.S. Dist. LEXIS 29995, at *41 ("If these allegations are true, then Defendants are not entitled to dismissal on derivative absolute immunity grounds because Defendants'

alleged abuse of Plaintiffs was not within the scope of their contract."). But this construction ignores the basic principle that immunity protects "a particular governmental *function*, no matter how many times or to what level that *function* is delegated." *Mangold*, 77 F.3d at 1447 (emphasis added). As such, a court's inquiry should focus on the *function* at issue and whether that *function* is one deserving of immunity.

By focusing on allegations of wrongdoing rather than the function performed by the support contractor, the district court's analysis—like its analysis of the other immunities-from-suit—departs from established precedent and disregards the unique and paramount federal interests at issue in this "battlefield contractor" suit. This Court should resolve this appeal in a manner that reaffirms these paramount federal interests and rejects the district court's fundamentally flawed analysis.

CONCLUSION

The Court should reverse the district court's Order.

Respectfully submitted,

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April 23, 2010

CERTIFICATE OF COMPLIANCE

I certify that the foregoing *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,635 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/
Lawrence S. Ebner

April 23, 2010

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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OR, I, _____, AM NOT PARTICIPATING IN THIS CASE.
(Name)

APPELLATE COUNSEL IS: _____.
(Name) (Phone)

CERTIFICATE OF SERVICE

I certify that on April 23, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Signature

4/23/10
Date